TC07707

Discovery assessments – section 29 Taxes Management Act 1970 - Best Judgement VAT assessments – section 73 Value Added Tax Act 1994 – penalties – Schedule 24 Finance Act 2007

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/05266

BETWEEN

Mr Nazrul Miah T/A The Spice **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE RACHEL MAINWARING-TAYLOR
MR MICHAEL BELL ACA CTA

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 29 November 2018

Mr Monir Ahmed of Rauf & Co for the Appellant

Mr Dermot Ryder of HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against:

(1) Discovery assessments issued on 7 November 2014, under section 29 Taxes Management Act 1970, for the years 2009/10 to 2012/13 in the amount of £21,956.37 ("**the Discovery Assessments**");

(2) Best Judgement VAT assessments made under section 73 of the Value Added Tax Act 1994 and totalling £22,490 for the period 08/10 to 11/13 in respect of undeclared sales and for the period 02/11 to 11/13 in respect of non-standard rated sales ("**the VAT Assessments**"); and

(3) Penalty assessments issued on 28 August 2014 in respect of indirect taxes totalling £7,649.88 and on 10 November 2014 in respect of direct taxes totalling £9,221.65 ("**the Penalties**").

BACKGROUND

2. The Appellant is the sole proprietor of an Indian restaurant and takeaway known as The Spice ("**The Spice**"), which provides eat-in facilities, a takeaway service and delivery service. He is also a partner in another business, the Sagor Tandoori Indian restaurant ("**The Sagor**").

3. The Appellant has been registered for VAT since 1 October 2006.

4. The Appellant's business was selected for review as part of a routine VAT assurance activity.

5. On Friday 1 February 2013 Officers Mark Bishop (MB) and Duncan Foulkes (DF) made an observation of The Spice from 17.35 to 23.29, during which time: 44 individuals were observed entering the premises and remaining for a period of time consistent with consuming a meal; eleven groups of individuals were observed entering and leaving again after a brief time with takeaway bags; a cool box was driven away in a Mercedes car (not in the direction of the Sagor).

6. On Friday 22 February 2013 MB and DF made a further observation of The Spice from 17.45 to 23.24, during which time: 24 individuals were recorded leaving the premises after consuming a meal (observed through the window doing so); nine to ten groups of individuals were recorded entering and leaving again after a brief time with takeaway bags; one individual was recorded leaving and driving away with a cool box.

7. On 20 May 2013 MB and DF visited the Spice (by prior arrangement) and met the Appellant there. MB and DF inspected the premises and discussed liability of supplies and declared sales with the Appellant. MB undertook a comparison of the information recorded from the observations and the Appellant's business records. The following discrepancies were noted:

(1) On 1 February 2013, 33 covers and 8 takeaway customers were recorded in the sales records, compared with 44 individual diners and 11 takeaway customers observed by MB and DF;

(2) On 22 February 2013, 19 covers and 8 takeaway customers were recorded in the sales records, compared with 24 individual diners and 9 takeaway customers observed by MB and DF.

8. MB explained to the Appellant that he would be given an opportunity to explain the discrepancies, gave the Appellant a copy of HMRC Fact Sheet CC/FS9 "The Human Rights

Act and Penalties", discussed its content in detail with him and gave him a copy of HMRC Fact Sheet FS7a "Penalties for inaccuracies in returns and documents".

9. MB discussed the discrepancies with the Appellant, giving him the chance to comment on them and disclose any irregularities in his VAT returns. The Appellant felt that the business records accurately reflected his business activities, commenting "accidents do happen, and some diners may have been missed from the end of day takings, but that this would not be a common problem", that he had been "unfortunate" to have had mistakes occur on the nights of the observations and that "he was trying to be as honest as possible" and noted that his business was struggling.

10. DF asked if the Appellant would provide access to his personal bank statements which would show personal expenditure and capital introduced to the business and the Appellant confirmed he was happy to do so.

11. MB noted from examination of the records provided to him that no records were retained of cash drawings by the Appellant, no till was available for examination and meal tickets were routinely not numbered.

12. MB took from the visit: the Appellant's takings books for the periods 1 February 2013 to 28 February 2013, 1 March 2008 to 26 December 2008, 3 January 2010 to 29 October 2011 and 6 November 2011 to 18 May 2013; meal tickets for the period 1 February 2013 to 28 February 2013; and Just Eat slips and an informal receipt previously issued.

13. Following the visit, MB wrote to the Appellant on 19 June 2013:

(1) requesting personal bank statements he had agreed to provide, an explanation for the zero-rating of certain supplies made (salads, poppadoms, chutneys);

(2) outlining his concerns about the discrepancies noted at the visit between the observations and the business records;

(3) inviting the Appellant to make a full and open declaration of any irregularities in his VAT returns for all periods since 1 October 2006;

(4) warning that if full disclosure and explanations were not forthcoming he intended to proceed to issue Best Judgment assessments based on the information currently available to him;

(5) requesting response within 30 days; and

(6) enclosing copies of HMRC Fact Sheet CC/FS9 "The Human Rights Act and Penalties", HMRC Fact Sheet FS7a "Penalties for inaccuracies in returns and documents" and HMRC Fact Sheet CC/FS13 "Publishing details of deliberate defaulters".

14. The deadline for responding was extended to allow the Appellant time to seek advice. The Appellant replied on 20 August 2013 but did not address the issues raised in MB's letter of 19 June. MB wrote to the Appellant on 20 September 2013 repeating the points raised in his letter of 19 June and offering a meeting to discuss the unresolved matters.

15. Not having received a response from the Appellant, HMRC wrote to him on 23 October 2013 requesting the outstanding bank statements within 14 days and outlining next actions to be taken.

16. On 13 November 2013 the Appellant provided the bank statements.

17. HMRC officers undertook test purchases (takeaways) on 15 November 2013 and test eat exercises at the Spice on 23 November 2013.

18. HMRC wrote to the Appellant on 6 December 2013 suggesting a further meeting on 13 January 2014 to resolve the issues. There followed an exchange of communications during which a meeting was arranged for 13 March 2014.

19. At the meeting on 13 March 2014, MB and DF undertook a comparison between the information gathered during the test exercises on 15 and 23 November 2013 and the Appellant's business records:

> (1) On 15 November 2013 four test purchases were made, all in cash, for: £20.95, £18.65, £9.70 and £12.75. The largest (£20.95) was missing from the Appellant's business records;
>
> (2) On 23 November 2013 three test eats were made, all in cash, for £43.80, £40.45 and £36.15. All were missing from the Appellant's business records.

20. The Appellant was taken aback by these discrepancies, could not understand why the sales were missing and requested time to review and investigate.

21. On 4 April 2014 MB wrote to the Appellant setting out HMRC's findings, enclosing proposed VAT and Income Tax assessments reflecting the tax it deemed due, together with penalty implications of the proposed adjustments.

22. There followed an exchange of correspondence between HMRC and the Appellant, but the issues were not resolved.

23. On 15 July 2014 HMRC sent the Appellant a VAT pre-assessment letter. A corrected letter was sent on 21 July 2014 as errors including the wrong rate of VAT had been identified in the first letter.

24. On 6 August 2014 HMRC issued a VAT assessment in the sum of £22,490.

25. On 7 November 2014 HMRC issued an income tax assessment in the sum of £21,956.37.

26. After correspondence with the Appellant and his representative, HMRC undertook an independent review which ultimately confirmed the assessments and penalties on 13 May 2015 but recommended suspending the penalty attributable to the incorrect zero rating of sales (£636) and this suspension was made and communicated to the Appellant on 18 June 2015.

27. The Appellant appealed to the First-tier Tribunal on 16 September 2015, after which the parties went through an alternative dispute resolution process (ADR) after which the Appellant made further representations to HMRC and HMRC confirmed that their view remained unchanged and the assessments and penalties stood.

RELEVANT LEGISLATION

Value Added Tax Act 1994 ("VATA 1994")

28. Section 73 – failure to make returns etc, provides that:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him…
>
> (4) Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment…

(9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3)[, (7), (7A) or (7B)] above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

29. Section 77 – Assessments: time limits and supplementary assessments, provides that:

"(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than [4 years] after the end of the prescribed accounting period…"

30. Section 83 – Appeals, provides that:

"[(1)] Subject to [sections 83G and 84], an appeal shall lie to [the tribunal] with respect to any of the following matters—

… (p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

or the amount of such an assessment…"

31. Schedule 8, Part Two, The Groups: Group 1 – Food is reproduced in the Appendix to this decision.

32. The relevant provisions of Schedule 36 Finance Act 2008 – Part 1 Powers to Obtain Information and Documents and Part 2 Powers to Inspect [Premises and Other Property] are reproduced in the Appendix to this decision and contain the framework under which HMRC carried out its observations and test exercises.

33. Section 29 Taxes Management Act 1970, provides that:

"[(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made [(or, where the error or mistake is in an end of period statement forming part of the return, if that statement was provided on the basis of or in accordance with the practice generally prevailing at the time when it was provided)].

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) . . .in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

[(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,]

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

[(aa) it is contained in any information provided by the taxpayer to HMRC under regulations under paragraph 7 of Schedule A1 (periodic updates);]

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer. . .; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; . . .

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made."

34. Section 34 TMA 1970 provides that:

"(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, [an assessment to income tax or capital gains tax may be made at any time [not more than 4 years after the end of] the year of assessment to which it relates.]…

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

[(3) In this section "assessment" does not include a self-assessment.]"

35. Section 36 TMA 1970 provides that:

"[[(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax —

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, . . .

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), [or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,]

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.]

[(2) [Where the person mentioned in subsection (1) or (1A) ("the person in default")] carried on a trade, profession or business with one or more other persons at any time in the period for which the assessment is made, an assessment in respect of the profits or gains of the trade, profession or business [in a case] mentioned in [subsection (1A) or (1B)] may be made not only on the person in default but also on his partner or any of his partners.]

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made [in a case] mentioned in subsection (1) [or (1A)] above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

[(3A) In subsection (3) above, "claim or application" does not include an election under . . . [. . . any of sections 47 to 49 of ITA 2007] [(tax reductions for married couples and civil partners: elections to transfer relief)] [. . .].]

[(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the purposes of [subsections (1) and (1A)] above to be the act or omission of each member of the grouping.]]"

36. Section 50 TMA 1970 provides that:

"[(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that, . . ., the appellant is overcharged by a self-assessment;

(b) that, . . ., any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment . . .;

(b) that any amounts contained in a partnership statement . . . are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.]

[(7A) [If, on an appeal notified to the tribunal, the tribunal decides] that a claim or election [which was the subject of a decision contained in a closure notice under section 28A] of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that [the tribunal decides is] appropriate, but otherwise the decision in the notice shall stand good.]

[(8) Where, on an appeal [notified to the tribunal] against an assessment [(other than a self-assessment)] which—

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

[the tribunal decides] as mentioned in subsection (6) or (7) above, [the tribunal may], unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal [notified to the tribunal] is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.]

[(9) Where any amounts contained in a partnership statement are reduced under subsection (6) above or increased under subsection (7) above, an officer of the Board shall by notice to each of the relevant partners amend—

[(a) the partner's return under section 8 or 8A of this Act, or]

(b) the partner's company tax return,

so as to give effect to the reductions or increases of those amounts.]

[(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

(11) But subsection (10) is subject to—

(a) sections 9 to 14 of the TCEA 2007,

(b) Tribunal Procedure Rules, and

(c) the Taxes Acts.]"

37. Schedule 24 Finance Act 2007 ("**Sch 24 FA 2007**") Part 1 Liability for Penalty, provides that:

"1 Error in taxpayer's document

(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of P's liability to tax,

(b) a false or inflated statement of a loss by P, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

38. The Table includes "Return under section 8 of TMA 1970 (personal return)…VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994".

39. Sch 24 FA 2007, Part 1 para 3 Degrees of culpability, provides that:

"(1) Inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC."

40. Sch 24 FA 2007, Part 2 Amount of Penalty, provides that:

"4 *Standard amount*

(1) The penalty payable under paragraph 1 is—

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

(2) The penalty payable under paragraph 2 is 30% of the potential lost revenue.

(3) Paragraphs 5 to 8 define "potential lost revenue".

5 Potential lost revenue: normal rule

(1) "The potential lost revenue" in respect of an inaccuracy in a document or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

9 *Reductions for disclosure*

(1) A person discloses an inaccuracy or a failure to disclose an under- assessment by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

(2) Disclosure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

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(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.

(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

(5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.

(6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.

11 *Special reduction*

(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1 or 2.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty."

EVIDENCE

41. We heard evidence from MB and DF and from the Appellant and we considered the documents provided in the bundles.

AGREED FACTS

42. It is agreed by the parties that there were discrepancies in the Appellant's business records which came to light through the investigations carried out by HMRC (though the quantum was not agreed).

43. It is agreed that the Appellant made a mistake in the rate of VAT charged on certain foods.

ISSUES

44. The issues before the Tribunal are:

(1) whether the Discovery Assessments, the VAT Assessments and the Penalties were correctly raised; and

(2) whether, taking into account the Appellant's arguments, they should stand.

SUBMISSIONS

Appellant's case

45. Mr Ahmed sought to question the credibility of the results of the observations and exercises on the basis that the only evidence was the officers' contemporaneous notes and no corroborating evidence such as photographs or transactions records were available.

46. Mr Ahmed also queried the accuracy of the Discovery Assessments and VAT Assessments, based as they were on an assumed under-declaration of 20% of sales, which by HMRC's admission was essentially an estimate. He and the Appellant believed any under-declaration to have been less than 20%. The Appellant said he was simply not making that much money and cited as evidence the fact that he had fallen behind on VAT payments, salary payments, business expenses, mortgages and accountancy fees.

47. Mr Ahmed pointed out that the Appellant did not live a lavish or extravagant lifestyle, driving a modest car and not having taken holidays since 2007. He submitted that the Appellant did not have the means to pay the sums levied under the assessments and penalties.

48. Mr Ahmed submitted that the VAT system was unfair and should be modernised. One of the grounds given in the Notice of Appeal was the missing sales did not mean avoidance of tax but necessary requirement to stay in business. Particularly unjust was the imposition of an estimate of 20% omissions. HMRC should have to prove the precise amount under-declared rather than charging tax based on estimated, inaccurate figures. He submitted that tax should only be recoverable for the specific meals proven to have been omitted from the business records.

49. Mr Ahmed said that the Appellant was often not present at the Spice and suggested that bills could possibly have gone missing without his knowledge. When the Appellant was at the restaurant everything was recorded properly but when he was not things may have gone missing. He has taken responsibility for this and addressed issues with members of staff.

50. Mr Ahmed explained that the Appellant was struggling to keep his business afloat, pay salaries and expenses and that the imposition of such large and unfair assessments and penalties would put him out of business and he would not be able to pay.

HMRC's case

51. Based on the findings of the VAT assurance activity (the observations, test purchase and test eat exercises), HMRC estimates that a minimum of 20% of cash sales were omitted from the Appellant's business records.

Income tax (the Discovery Assessments)

52. Based on the evidence and conclusions of the VAT enquiry HMRC believe they have discovered that amounts of income that should have been assessed to income tax have not been.

53. HMRC believe the submission of incorrect returns has been brought about by the deliberate behaviour of the Appellant and that section 29(4) TMA is therefore satisfied.

54. HMRC believe the method they have used to calculate the profit is reasonable and it is therefore for the Appellant to provide evidence to displace the amounts assessed.

55. HMRC believe they are entitled to review earlier years in accordance with *Jonas v Bamford* [1973] STC 519 under which the presumption of continuity applies i.e. the situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.

56. HMRC believe that by submitting incorrect returns the Appellant has put himself in a penalty position within Schedule 24 FA 2007.

VAT (the VAT Assessments)

57. Section 73(1) provides that "where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him".

58. The Decision Maker has met the principles of Best Judgment by basing the assessment on:

(1) The findings of two observation exercises undertaken on 1 and 22 February 2103;

(2) Test purchase undertaken on 15 November 2013 and test eat exercises undertaken on 22 November 2013

59. The only explanation offered by the Appellant for the discrepancies in his business records was to blame his staff and HMRC do not accept this explanation as credible as in his role as front of house manager the Appellant should have been aware that at least 20% of his sales were missing and on the date of the test eats the most popular table in the restaurant showed no sales.

60. The Appellant was present throughout the test eat exercise and it is inconceivable that he would not notice three meals totalling £120.40 were missing from the business records.

61. Not only were the sales missing, the meal tickets were also missing and no satisfactory explanation was given for this.

62. The observations and test exercises suggest 20% of sales were omitted from the business records. The observations and exercises support the view that business takings have been under declared or suppressed and calls into question the veracity of the business records.

63. Given that omissions occurred during every observation and exercise it is not unreasonable to assume that the Appellant has omitted cash income from his business records on a regular basis.

64. HMRC acknowledges that all exercises were undertaken on Fridays, but when arriving at their assessments they have taken a percentage of the sales on those days as the basis of their recalculations.

65. The Appellant has been afforded opportunities at every stage to provide a credible explanation for the discrepancies and has failed to do so. The onus is on the Appellant to show that the assessments are incorrect.

Penalty assessments (the Penalties)

66. HMRC recited the provisions of Schedule 24 FA 2007.

67. HMRC believe the understatement of profits for the years/periods in respect of which assessments have been raised to have been the result of deliberate behaviour by the Appellant.

68. HMRC have considered the Special Reduction in accordance with Schedule 24 (11) but found that the facts of the case would not allow for a reduction under this provision.

FINDINGS OF FACT

69. On Friday 1 February 2013 MB and DF observed:

(1) 44 individuals who most likely dined at The Spice;

(2) 11 groups who most likely ordered takeaways from The Spice; and

(3) one car which may have been driving away a Just Eat order.

70. The Appellant's business records for Friday 1 February 2013 showed:

(1) 33 individual diners;

(2) 8 takeaway customers; and

(3) No other orders.

71. On Friday 22 February 2013 MB and DF observed:

(1) 24 individuals who most likely dined at The Spice;

(2) 9 or 10 groups who most likely ordered takeaways from The Spice; and

(3) one car which may have been driving away a Just Eat order.

72. The Appellant's business records for Friday 22 February 2013 showed:

(1) 19 individual diners;

(2) 8 takeaway customers; and

(3) No other orders.

73. On 15 November 2013 HMRC undertook a test purchase exercise, buying four takeaways in cash for £20.95, £18.65, £9.70 and £12.75. The order for £20.95 was missing from the Appellant's business records.

74. On 23 November 2013 HMRC undertook a test eat exercise, buying 'eat in' three meals at The Spice for £43.80, £40.45 and £36.15. All were missing from the Appellant's business records.

DISCUSSION

75. We have concluded from the evidence before us that there were omissions in the Appellant's business records which resulted in him making under-declarations of both income and VAT.

76. We must consider whether the Discovery Assessments, VAT Assessments and Penalties were correctly raised and charged by HMRC, in accordance with their powers under the relevant legislation.

77. We must then consider, again within the framework of the legislation, whether there are any other factors which should or may be brought into account in considering the Appellant's appeal.

Mistake as to rate of VAT

78. It was agreed between the parties that the Appellant had made a mistake in the rate of tax on certain food items. The correctness of the VAT Assessment for the period 02/11 to 11/13 in respect of non-standard sales is not in dispute.

79. The Appellant's main argument against this Assessment, therefore, was his inability to pay, which we will discuss below in the context of the other assessments and penalties.

Under-declaration of VAT

80. We have found that there was an under-declaration of VAT.

81. Section 73 VATA 1994 permits HMRC, "where a person has failed to make any returns required…or to keep any documents and afford the facilities necessary to verify such returns or where it appears to [HMRC] that such returns are incomplete or incorrect" to "assess the amount of VAT due from him to the best of their judgment and notify it to him".

82. In this case, HMRC identified the under-declaration and raised the best judgement assessment. They acted within the terms of section 73 in doing so. Under appeal, the onus is on the Appellant to show that the assessment is not correct and he has been overcharged.

83. The Appellant asserted that the omissions identified by HMRC were 'one off' occurrences but has not provided any evidence to support this. The fact that omissions were identified at each exercise indicates a likely pattern of omissions.

84. The Appellant argued that HMRC should only be able to assess amounts proven to have been under-declared i.e. only those amounts identified in the observations and exercises. It is the taxpayer's legal duty to maintain accurate business records and correctly declare and pay the tax legally due. In this case, through a random check HMRC discovered that the Appellant was not keeping accurate records and correctly reporting the tax due. HMRC undertook four separate checks and discussed the matter with the Appellant and requested further information from him. Only when the matter was not resolved through these efforts did HMRC raise assessments under section 73.

85. Looking at the evidence from the checks: 25% of diners were under-declared for 1 February 2013 and 28% of takeaways; 21% of diners were under-declared for 22 February 2013 and 12-20% of takeaways; 25% of the test purchases on 15 November 2013 were under-declared and 100% of the test eats on 23 November 2013. Looking at these figures, HMRC's estimate that 20% of sales were under-declared does not appear unreasonable.

86. We accept, of course, that this is an estimate, not the actual figure. However, the legislation specifically provides for a best judgement estimate to be used in circumstances where HMRC cannot access the information needed to calculate the accurate figure. In this

case, for example, had business records such as meal tickets been kept properly it would have been possible to properly assess the under-declaration, but this was not the case.

87. The Appellant's assertion that the under-declarations shown by the observations and exercises are the only ones made, in the absence of any corroborating evidence provided by him to back this up, does not alter the fact that HMRC raised the assessments correctly in accordance with their statutory powers.

88. Under section 50, if the tribunal decides that the appellant is overcharged by an assessment the assessment or amounts shall be reduced accordingly.

89. In this case the Appellant has not presented evidence to us demonstrating that the result of the Discovery Assessments and the VAT Assessments is that he has been over-charged.

Penalties

90. Under para 1, Sch 24 FA 2007 a taxpayer is liable for a penalty where he files a personal self-assessment return under section 8 TMA 1970 or a VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994 and conditions 1 and 2 are satisfied.

91. Condition 1 is that the return contains an inaccuracy which amounts to or leads to an understatement of the tax liability.

92. Condition 2 is that the inaccuracy was careless or deliberate.

93. For these purposes an inaccuracy is "careless" if it was due to the taxpayer's failure to take reasonable care, "deliberate but not concealed" if it was "deliberate but [the taxpayer] does not make arrangements to conceal it" and "deliberate and concealed" if it was "deliberate and [the taxpayer] makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)" (para 3(1), Sch 24 FA 2007).

94. The amounts of the penalties are also set out in the legislation: a penalty payable for careless action is 30% of the potential lost revenue, for deliberate but not concealed action it is 70% of the potential lost revenue and for deliberate and concealed action it is 100% of the potential lost revenue (para 4, Sch 24 FA 2007).

95. The "potential lost revenue" for these purposes is the amount of tax due as a result of the inaccuracy (para 5(1), Sch 24 FA 2007).

96. Reductions to the percentage rate charged as a penalty may be made where the taxpayer makes disclosures either alerting HMRC to the error in the first place or to help HMRC quantify the error and ensure that the inaccuracy is corrected (para 9 and 10, Sch 24 FA 2007). Under these rules, where a person who would otherwise be liable to a 70% penalty (for deliberate but not concealed inaccuracies) has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure (para 10(4), Sch 24 FA 2007).

97. Further, if HMRC think it right because of special circumstances, they may further reduce a penalty and under this rule, "special circumstances" does not include ability or otherwise to pay (para 11, Sch 24 FA 2007).

98. In this case, HMRC raised penalties for deliberate but not concealed inaccuracies in relation to the suppressed sales of £7,649.88 and in relation to the mistake as to the rate of VAT of £636. Following the statutory review, the latter penalty of £636 was suspended, so only the former is under appeal here. That penalty has been calculated at the rate of 42%.

99. In addition, HMRC raised penalties for deliberate but not concealed inaccuracies in relation to the Appellant's income as stated on his self-assessment returns in the sum of £21,956.37, again at a rate of 42% of the potential lost revenue.

100. We have found that there were inaccuracies in the Appellants returns so the penalty regime contained in Sch 24 FA 2007 applies.

101. HMRC have explained that they believe the Appellant was aware of the discrepancies because he was present at The Spice on all four occasions when they undertook observations or exercises and could not have been unaware of the correct position or that records were not being properly kept. The Appellant has not sought to demonstrate that he was not aware of the errors. We find that HMRC's assertions are not unreasonable based on the circumstances described and, absent any counter-argument from the Appellant, conclude that the rate of penalty charged is within the scope of the legislation.

102. The special reduction under paragraph 11 is given at HMRC's discretion. In this case, the Appellant has not advanced an argument of special circumstances. Inability to pay, which the Appellant has raised, is expressly excluded from the definition of special circumstances.

103. On an appeal against a decision by HMRC that a penalty is payable, the tribunal may affirm or cancel HMRC's decision. In this case, having found that there had been an under-declaration by the Appellant in his returns, we must conclude that a penalty is payable under Sch 24 FA 2007.

104. On an appeal against the amount of a penalty imposed by HMRC, the tribunal may affirm HMRC's decision or substitute it with another decision that HMRC had power to make and in doing so may rely on the special reduction provisions under para 11 but in doing so may rely on them to a different extent than HMRC if the tribunal believes HMRC's decision in relation to para 11 was flawed. For these purposes for a decision to be flawed it must be one which could not reasonably have been reached. In this case HMRC have demonstrated that the penalties were raised in accordance with the provisions of Sch 24 FA 2007 and we are unable to find that their decision is flawed.

105. On an appeal against a decision by HMRC not to suspend a penalty, the tribunal may order HMRC to suspend the penalty only if it thinks HMRC's decision not to suspend it was flawed.

106. We have considered the Appellant's arguments which can be summarised as follows:

(1) He is unable to pay the amount of the penalty; and

(2) The VAT system is unfair to small businesses.

107. The inability of a taxpayer to pay does not mean a penalty has been incorrectly raised and it is expressly excluded as a special circumstance under para 11 Sch 24 FA 2007.

108. This Tribunal can only decide cases applying the law as it stands and has no power to divert from that law on the basis that it is unfair.

109. Neither of these points give us justification to find that HMRC's decision not to suspend the penalties is flawed.

CONCLUSION

110. For the reasons set out above, the Appellant's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

111. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The

application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

Release date: 14 May 2020

Appendix

VATA 1994, Schedule 8, Part Two, The Groups: Group 1—Food

"The supply of anything comprised in the general items set out below, except—

(a) a supply in the course of catering; and

(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.

General items

Item No

1 Food of a kind used for human consumption…

Excepted items

Item No

1 Ice cream, ice lollies, frozen yogurt, water ices and similar frozen products, and prepared mixes and powders for making such products.

2 Confectionery, not including cakes or biscuits other than biscuits wholly or partly covered with chocolate or some product similar in taste and appearance.

3 Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made-wine and preparations thereof.

4 Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages.

[4A Sports drinks that are advertised or marketed as products designed to enhance physical performance, accelerate recovery after exercise or build bulk, and other similar drinks, including (in either case) syrups, concentrates, essences, powders, crystals or other products for the preparation of such drinks.]

5 Any of the following when packaged for human consumption without further preparation, namely, potato crisps, potato sticks, potato puffs, and similar products made from the potato, or from potato flour, or from potato starch, and savoury food products obtained by the swelling of cereals or cereal products; and salted or roasted nuts other than nuts in shell.

6 Pet foods, canned, packaged or prepared; packaged foods (not being pet foods) for birds other than poultry or game; and biscuits and meal for cats and dogs.

7 Goods described in items 1, 2 and 3 of the general items which are canned, bottled, packaged or prepared for use—

(a) in the domestic brewing of any beer;

(b) in the domestic making of any cider or perry;

(c) in the domestic production of any wine or made-wine.

Items overriding the exceptions

Item No

1 Yoghurt unsuitable for immediate consumption when frozen.

2 Drained cherries.

3 Candied peels.

4 Tea, maté, herbal teas and similar products, and preparations and extracts thereof.

5 Cocoa, coffee and chicory and other roasted coffee substitutes, and preparations and extracts thereof.

6 Milk and preparations and extracts thereof.

7 Preparations and extracts of meat, yeast or egg.

Notes:

(1) "Food" includes drink…

(3) A supply of anything in the course of catering includes—

(a) any supply of it for consumption on the premises on which it is supplied; and

(b) any supply of hot food for consumption off those premises;

. . ..

[(3A) For the purposes of Note (3), in the case of any supplier, the premises on which food is supplied include any area set aside for the consumption of food by that supplier's customers, whether or not the area may also be used by the customers of other suppliers.

(3B) "Hot food" means food which (or any part of which) is hot at the time it is provided to the customer and—

(a) has been heated for the purposes of enabling it to be consumed hot,

(b) has been heated to order,

(c) has been kept hot after being heated,

(d) is provided to a customer in packaging that retains heat (whether or not the packaging was primarily designed for that purpose) or in any other packaging that is specifically designed for hot food, or

(e) is advertised or marketed in a way that indicates that it is supplied hot.

(3C) For the purposes of Note (3B)—

(a) something is "hot" if it is at a temperature above the ambient air temperature, and

(b) something is "kept hot" after being heated if the supplier stores it in an environment which provides, applies or retains heat, or takes other steps to ensure it remains hot or to slow down the natural cooling process.

(3D) In Notes (3B) and (3C), references to food being heated include references to it being cooked or reheated.]

(4) Item 1 of the items overriding the exceptions relates to item 1 of the excepted items.

(5) Items 2 and 3 of the items overriding the exceptions relate to item 2 of the excepted items; and for the purposes of item 2 of the excepted items "confectionery" includes chocolates, sweets and biscuits; drained, glacé or crystallised fruits; and any item of sweetened prepared food which is normally eaten with the fingers.

(6) [Items 4 to 7] of the items overriding the exceptions relate to item 4 of the excepted items.

(7) Any supply described in this Group shall include a supply of services described in paragraph 1(1) of Schedule 4."

Schedule 36 Finance Act 2008 – Part 1 Powers to Obtain Information and Documents:

"*1 Power to obtain information and documents from taxpayer*

(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—

(a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

(2) In this Schedule, "taxpayer notice" means a notice under this paragraph…

6 Notices
(1) In this Schedule, "information notice" means a notice under paragraph 1, 2[, 5 or 5A].

(2) An information notice may specify or describe the information or documents to be provided or produced.

(3) If an information notice is given with the approval of the [tribunal], it must state that it is given with that approval.

[(4) A decision of the tribunal under paragraph 3, 4 or 5 is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).]

7 Complying with notices

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

(2) Where an information notice requires a person to produce a document, it must be produced for inspection—

(a) at a place agreed to by that person and an officer of Revenue and Customs, or

(b) at such place as an officer of Revenue and Customs may reasonably specify.

(3) An officer of Revenue and Customs must not specify a place that is used solely as a dwelling.

(4) The production of a document in compliance with an information notice is not to be regarded as breaking any lien claimed on the document."

Schedule 36 Finance Act 2008 – Part 2 Powers to Inspect [Premises and Other Property]

"*10 Power to inspect business premises etc*

(1) An officer of Revenue and Customs may enter a person's business premises and inspect—

(a) the premises,

(b) business assets that are on the premises, and

(c) business documents that are on the premises,

if the inspection is reasonably required for the purpose of checking that person's tax position.

(2) The powers under this paragraph do not include power to enter or inspect any part of the premises that is used solely as a dwelling.

(3) In this Schedule—

"business assets" means assets that an officer of Revenue and Customs has reason to believe are owned, leased or used in connection with the carrying on of a business by any person [(but see sub-paragraph (4))],

"business documents" means documents (or copies of documents)—

(a) that relate to the carrying on of a business by any person, and

(b) that form part of any person's statutory records, and

"business premises", in relation to a person, means premises (or any part of premises) that an officer of Revenue and Customs has reason to believe are (or is) used in connection with the carrying on of a business by or on behalf of the person.

[(4) For the purposes of this Schedule, "business assets" does not include documents, other than—

(a) documents that are trading stock for the purposes of Chapter 11A of Part 2 of ITTOIA 2005 (see section 172A of that Act), and
(b) documents that are plant for the purposes of Part 2 of CAA 2001.]
[(5) In sub-paragraph (1), the reference to a person's tax position does not include a reference to a person's position as regards soft drinks industry levy.]

11 Power to inspect premises used in connection with taxable supplies etc

(1) This paragraph applies where an officer of Revenue and Customs has reason to believe that—

(a) premises are used in connection with the supply of goods under taxable supplies and goods to be so supplied [or documents relating to such goods] are on those premises,

(b) *premises are used in connection with the acquisition of goods from other member States under taxable acquisitions and goods to be so acquired* [*or documents relating to such goods*] *are on those premises,* or

(c) premises are used as [or in connection with] a fiscal warehouse.

(2) An officer of Revenue and Customs may enter the premises and inspect—

(a) the premises,

(b) any goods that are on the premises, and

(c) any documents on the premises that appear to the officer to relate to [the supply of goods under taxable supplies, *the acquisition of goods from other member States under taxable acquisitions* or fiscal warehousing].

(3) The powers under this paragraph do not include power to enter or inspect any part of the premises that is used solely as a dwelling.

(4) Terms used both in [this paragraph] and in VATA 1994 have the same meaning [here] as they have in that Act.

12 Carrying out inspections [under paragraph 10, 10A or 11]

(1) An inspection under [paragraph 10, 10A or 11] may be carried out only—

(a) at a time agreed to by the occupier of the premises, or

(b) if sub-paragraph (2) is satisfied, at any reasonable time.

(2) This sub-paragraph is satisfied if—

(a) the occupier of the premises has been given at least 7 days' notice of the time of the inspection (whether in writing or otherwise), or

(b) the inspection is carried out by, or with the agreement of, an authorised officer of Revenue and Customs.

(3) An officer of Revenue and Customs seeking to carry out an inspection under sub-paragraph (2)(b) must provide a notice in writing as follows—

(a) if the occupier of the premises is present at the time the inspection is to begin, the notice must be provided to the occupier,

(b) if the occupier of the premises is not present but a person who appears to the officer to be in charge of the premises is present, the notice must be provided to that person, and

(c) in any other case, the notice must be left in a prominent place on the premises.

(4) The notice referred to in sub-paragraph (3) must state the possible consequences of obstructing the officer in the exercise of the power.

(5) If a notice referred to in sub-paragraph (3) is given [in respect of an inspection approved by] the [tribunal] (see paragraph 13), it must state that [the inspection has been so approved].”