[2021] UKFTT 0100 (TC)

TC08083

VAT – whether deliberate and concealed understatement of VAT liabilities – held, yes – assessments for earlier years made outside the statutory time limit – appeal against those assessments allowed – remaining assessments upheld with minor reductions – penalty issued to company and personal liability notice issued to director – whether penalty to be reduced because assessments for earlier periods set aside – held, no – penalty and personal liability notice upheld with minor reductions

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06802
TC/2018/01121

BETWEEN

ALBANY FISH BAR LIMITED
WASEEM AKHTAR **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MS PATRICIA GORDON

The hearing took place on 12 and 13 November 2020 using the Tribunal's video platform. It was not in the interests of justice to hold a face-to-face hearing because of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, together with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Mr Tim Brown of Counsel, instructed by Fred Cowgill VAT and Customs Consultancy Ltd, for the Appellants

Mrs Sharon Spence, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Summary

1. Albany Fish Bar Limited ("the Company") runs a fish and chip shop in Cardiff. Mr Waseem Akhtar is the Company's director and shareholder.

2. On 9 August 2017, HM Revenue & Customs ("HMRC") issued "best judgement" assessments under Value Added Taxes Act 1994 ("VATA"), s 73(1), charging the Company VAT of £109,670.00 for VAT quarters 08/10 to 04/17, because in HMRC's view the Company had been systematically excluding lunchtime sales from its VAT returns.

3. On 14 November 2017, HMRC issued the Company with a penalty of £87,736 under Finance Act 2007, Schedule 24 ("Sch 24") on the basis that the behaviour had been deliberate and concealed. On 11 January 2018, HMRC issued a personal liability notice ("PLN") under Sch 24, para 19 making Mr Akhtar liable for 100% of the penalty on the basis that the inaccuracies were attributable to him.

4. The Company appealed the assessments and the penalty, and Mr Akhtar appealed the PLN. The appeals were joined by the Tribunal on 18 March 2018.

5. We decided that the Company had been deliberately suppressing its lunchtime sales for VAT periods 08/10 to 04/17; that this behaviour was deliberate and concealed, and that the inaccuracies were attributable to Mr Akhtar. However, there were two other issues: whether some of the assessments were out of time, and if so, whether the penalties should also be reduced.

Assessment time limits

6. Assessments under VATA s 73(1) "shall not be made later than" the time limits set out in VATA s 73(6), namely:

> "(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."

7. In relation to VAT periods 10/15 to 04/17, the assessments were within the time limit in s 73(1)(a) above. However, the assessments for periods 08/10 through to 07/15 were made more than one year after evidence of facts, sufficient in HMRC's opinion to justify the making of that assessment, had come to their knowledge. As a result, those assessments were out of time.

8. We therefore allowed the appeal against the assessments for periods 08/10 through to 07/15. We reduced the assessments for periods 10/15 to 04/17 to take into account zero rated sales, and inflation. The parties have permission to revert to the Tribunal if they are unable to agree the quantum of the reduced assessments by applying those principles.

The penalty and the PLN

9. Mr Brown submitted that the penalty should be reduced to reflect the fact that the assessments for earlier periods had been set aside. In deciding that issue, we considered the following points:

(1) A penalty is payable under Sch 24 if a person gives HMRC a VAT return which "contains an inaccuracy which amounts to, or leads to…an understatement of a liability to tax". The Company was liable to a penalty under Sch 24 because it had deliberately submitted VAT returns which contained inaccuracies for all periods from 08/10 through to 04/17.

(2) It is well-established that "liability does not depend on assessment", see *Whitney v IRC* [1926] AC 37 at 52 *per* Lord Dunedin, so the fact that some of those correcting assessments had been set aside did not change the Company's liability to a penalty;.

(3) Sch 24 did not provide that a penalty could only be levied if there had been a valid corrective assessment.

(4) In *Ali (t/a Vakas Balti) v HMRC* [2006] EWCA Civ 1572 ("*Vakas Balti*"), the Court of Appeal considered a similar VAT case under the earlier provisions, and decided that the penalties were not dependent on HMRC having made a valid assessment for underpaid VAT.

(5) There is nothing to indicate that by introducing Sch 24, Parliament intended to move away from that position. There is, in particular, no reference to such a radical change in the related Notes on Clauses.

(6) Those Notes instead show that the amount of the penalty was to be linked to the difference between (a) what was included on the VAT returns, and (b) what should have been included on those returns.

10. We decided that the penalty was 80% of the VAT which the Company should have paid to HMRC for all the VAT periods from 08/10 to 04/17, namely 80% of the amounts originally assessed by HMRC but with those figures reduced for zero-rated sales and inflation. The parties have permission to revert to the Tribunal if they are unable to agree the quantum of the reduced penalty.

11. We found that Mr Akhtar was responsible for the related inaccuracies and that 100% of the penalty so calculated was payable by him.

The evidence

12. The Tribunal had both documents and oral evidence.

The documents

13. HMRC supplied a main bundle of documents and a supplementary bundle, which included the following:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) notes of the meetings between HMRC, Mr Akhtar and Hodge Bakshi, the firm of Chartered Accountants which acted for the Company;

(3) copies of the Company's till rolls, on which HMRC had relied in making the assessments.

(4) various calculation schedules prepared by HMRC in relation to the assessments;

(5) a copy of HMRC's handwritten notes in relation to a meeting on 2 December 2015; and

(6) a schedule setting out dates on which Mr Akhtar said he had been overseas ("Mr Akhtar's schedule of dates").

14. The day before the hearing, the Tribunal was provided with:

(1) copies of pages from Mr Akhtar's passport and pages containing entry and exit stamps, mostly for the UAE and Pakistan;

(2) the Company's current menu; and

(3) a copy of revised calculations provided by Mr Passey of Hodge Bakshi.

15. Neither party objected to the late submission of this evidence and we admitted it.

The witnesses who attended the hearing

16. The following individuals gave witness evidence:

(1) Mr David Morgan, a Higher Officer of HMRC who has worked in the "Cross Tax Evasion Team" based in Cardiff for twelve years. He has undertaken specific training in the interrogation and analysis of cash registers and was "authorised" for that purpose by HMRC. He provided a witness statement, gave oral evidence-in-chief led by Mrs Spence and was cross-examined by Mr Brown. We found him to be an entirely credible and honest witness.

(2) Ms Marianne Rogers, an officer of HMRC who worked in the same team as Mr Morgan at the relevant time. She has also undergone specialist training to allow her to interrogate different types of cash tills and run related reports. Ms Rogers provided a witness statement, gave oral evidence-in-chief led by Mrs Spence, and was cross-examined by Mr Brown. She too was entirely honest and credible.

(3) Mr Akhtar provided a witness statement, gave evidence in chief led by Mr Brown, and was cross-examined by Mrs Spence. We found him to be an unreliable witness. In particular:

(a) for the reasons given at §71-86 it was not credible that he was unaware that part of the Company's turnover was being suppressed for VAT purposes;

(b) HMRC's meeting minutes in terms record that the business was controlled by Mr Akhtar, and he accepted that those minutes were accurate. However, he twice changed his evidence after that meeting:

(i) in his witness statement he stated that in January 2015 he had handed over the business to his sister; and

(ii) the day before the hearing he filed a supplementary "Statement" in which he said that his involvement in the business "was very limited" for "the majority of 2014 and 2015".

(c) As explained in the main body of this decision, we reject this later evidence as inconsistent with that given previously;

(d) Mr Akhtar's schedule of dates set out when he said he said he was overseas; he added he was also away from the business on additional dates. However, the non-UK dates on that schedule totalled 244 days in 2014. If Mr Akhtar had spent over two-thirds of that year in the UAE and Pakistan, it is not credible that he would:

(i) have failed to mention this when he met with HMRC in 2016; instead he said only that he had he had taken time away from the business for "holidays etc"; and

(ii) have omitted any reference to these prolonged and frequent alleged absences in his own witness statement.

(4) Mr Passey, a senior VAT and tax manager at Hodge Bakshi, who provided a witness statement about the methodology used by HMRC in calculating the assessments, gave oral evidence led by Mr Brown, and was cross examined by Mrs Spence. We found him to be an entirely honest and credible witness, although for the reasons explained at §102, we did not agree with all of his challenges to HMRC's figures.

The witnesses who did not attend the hearing

17. In addition to the above, the Appellants also filed and served witness statements for three other individuals: Mr Akhtar's sister, Ms Tasneem Akhtar; Mr Tariq Siddique, one of the Company's employees; and Mr Trevor Laidlaw, an employee of a firm called BCR Cash Registers Ltd.

18. As the hearing was to take place by video, both parties had been directed by Judge Kempster on 24 August 2020 to provide the name, role, telephone number and email addresses of each person participating in the hearing on behalf of that party, and confirmation that they each possessed the IT equipment necessary to participate. However, the Appellants did not supply the Tribunal with participant details for Ms Akhtar, Mr Siddique or Mr Laidlaw,

19. The parties were also told that there would be a test hearing before the main hearing. In accordance with the Tribunal's normal practice, the purpose of the test hearing was to check that all participants were able to access the video hearing platform. That test took place on 5 November 2020, and none of these three witnesses was present.

20. The Tribunal's directions for this appeal *inter alia* required that:

> "any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

21. The Tribunal asked Mr Brown to clarify the position, and he responded by asking HMRC whether the evidence of these three witnesses was in dispute. The following day, Mrs Spence confirmed in writing that this was the case.

22. At the test hearing, I had said that the hearing could proceed as listed if these three individuals attended the same location as those who had participated in the test. Otherwise, the hearing would need to be postponed to allow for a new test hearing with all participants.

23. On Monday 9 November 2020, the Tribunal received an email from Mr Cowgill, of Fred Cowgill VAT and Customs Consultancy Ltd, the Appellants' agent in relation to this appeal He said that the Appellants would not be calling any other witnesses "due to logistical problems and the impact of the Covid restrictions". Later the same day, HMRC applied to the Tribunal for a direction that the Appellants either withdraw these three witness statements, or that the Tribunal disregard them.

24. At the beginning of the substantive hearing, none of the three missing witnesses were present. I asked Mr Brown whether the position remained as stated in Mr Cowgill's letter, namely that the Appellants were not calling these three witnesses. I reiterated that the hearing

could be postponed and relisted if Mr Akhtar or his advisers now wanted to change their minds and call these other witnesses.

25. Mr Brown said that the witnesses would not be called, but that their witness statements were not formally withdrawn. However, as the witnesses had not been made available for cross-examination, he accepted that the Tribunal would place no weight on the evidence contained in those statements. The Tribunal confirmed to the parties that we would not consider the evidence in those statements in coming to our decision, and we have not done so.

Findings of fact

26. We made our findings of fact based on the evidence summarised above and taking into account our findings on credibility.

Mr Akhtar and the Company

27. Mr Akhtar is the sole director and a shareholder of the Company. His mother is also a shareholder, but Mr Akhtar could not recall any dividends having been paid by the company to either him or his mother and we find this to be a fact. Mr Akhtar's mother and sister sometimes work for the Company and are paid a salary of around £5,000 per annum for that work.

28. The Company operates a fish and chip shop located in an area of Cardiff close to the University. There are other fast food shops in the immediate vicinity but no others which sell fish and chips. The shop's advertised opening hours were 11am to 2pm and 5pm to 11pm from Monday to Saturday. However, the shop was open for longer than these advertised hours, see §34-35. On Sunday the shop was open in the evening but not at lunchtime.

29. Mr Akhtar also owns a second company, Penylan Fishbar Ltd ("Penylan"), which sells fish and chips from a different premises but also in Cardiff. Before Mr Akhtar set up the Company in 2010, he operated as a sole trader.

The compliance visit

30. On 18 November 2015, Ms Joshi of HMRC called Mr Akhtar to say that HMRC would be carrying out VAT compliance visit. Mr Akhtar agreed to a visit date of 2 December 2015 at the Company's premises, and afterwards at the offices of Hodge Bakshi. The visit was confirmed in writing on the same day. HMRC's confirmation letter specified that the purpose of the visit was to check the Company's VAT returns and records, and that the Company's systems accurately record all VAT transactions.

31. On 2 December 2015, two HMRC Officers, Ms Julia Hooper-McIlquham and Mr Morgan, attended at the Company's premises. Towards the end of the visit, Mr Morgan asked if he could look at the till, and Mr Akhtar agreed. The till was set up to run two separate paper rolls, one of which was used to issue receipts and to produce a financial report, and the other, commonly called an audit roll, records all transactions passing through the till.

32. There is a transparent window in the till through which it is possible to see a small part of the audit roll, and Mr Morgan could see that it was unreadable because the words and numbers had been overwritten. Mr Akhtar said that the Company's practice was to reuse the audit rolls. Mr Morgan told him that he was required to keep a record of his transactions and that he must use a fresh audit roll and not reuse old rolls. Mr Akhtar removed the current audit roll and replaced it with a new clean roll. Mr Morgan looked at the audit roll which had been removed, and noted that a small portion of the reverse of that roll had not been overwritten: the

clear period was from 26 October 2015 to 29 October 2015. Mr Morgan retained that roll, and he, Ms Hooper-McIlquham and Mr Akhtar went to Hodge Bakshi's offices, where they also advised Mr Passey that the Company was required to use clean audit rolls and not overwrite them.

The suppressed lunchtime sales

33. Tills have a function called "Z readings" which give the total number of transactions since the previous Z reading and the value of those transactions, divided between standard and zero rated items. The time of the Z reading is also shown, as are the number of times the till was opened without there being a sale. Once a Z reading has been taken, the clock restarts, with previous transactions having being cleared. At the meeting with Hodge Bakshi on 2 December 2015, Mr Akhtar told Mr Morgan and Ms Hooper-McIlquham that only a single Z reading was carried out each day.

34. After that meeting, HMRC examined the legible portion of the audit roll, and saw that it had itemised all the sales made during the period from 26 October 2015 to 29 October 2015, and that Z readings were taken twice a day, once at around midnight and once at around 5.30pm. For example:

(1) On 26 October 2015, a Z reading was taken at 11.40pm, showing 444 transactions with a total value of £1,011.19, of which £964.90 was for the sale of standard rated items and the balance was for zero-rated items. Those figures were the total sales since the previous Z reading, which was not visible on the roll.

(2) Sales continued to be made after the 11.40pm Z reading, with a further 11 transactions taking place before the shop closed for the night. The last sale is timed at a minute after midnight. This was an hour after the shop's advertised closing time.

(3) Another Z reading was taken at 5.26pm on 27 October 2015. This showed 109 transactions with a total value of £254.64, of which all but £9.46 arose from standard-rated sales. These sales had therefore been made between 11.40pm the previous night, and 5.26pm on 27 October 2015, just after the shop re-opened for the evening. In other words, they were made up of the 11 sales made just before the shop closed and the lunchtime sales.

(4) Another Z reading was taken just after midnight, at 00.19am. The numbers on that Z reading therefore comprised all the sales since the reading taken at 5.26pm, so included all the evening sales from when the shop opened until 00.19am, well over an hour after the advertised closing time.

35. The same pattern continued for the other days. Thus, although Mr Akhtar had told HMRC that he only carried out one Z reading each day, this evidence showed that there were two readings.

HMRC's further visits

36. Ms Hooper-McIlquham and Ms Rogers made an unannounced visit to the shop on 14 April 2016 at 2.00pm. The man behind the counter identified himself as Mr Siddique and said he was the manager. He called Mr Akhtar but was unable to make contact. Mr Siddique said he could not authorise Ms Hooper-McIlquham and Ms Rogers to check the till. Ms Hooper-McIlquham left a letter for Mr Akhtar explaining that they had visited and the purpose of the visit.

37. Ms Hooper-McIlquham and Ms Rogers made contact with Mr Akhtar later that day, and arranged for Ms Rogers to visit the premises the following day. During that visit, Mr Akhtar told Ms Rogers that "there are only ever minor differences between the cash and the Z-read", and these came about because the Company did not always track small change. Mr Akhtar also said that he trained his staff on the till by letting them watch what he did; that there was only a single Z-read per day, and that the totals from each daily Z reading were entered into the cash book.

38. Before Ms Rogers could check the till, she had first to adjust the print settings, as the till was not set to print certain information. Her witness evidence was that Mr Akhtar gave her permission to check the till and that she did not alter the programming, but only the print settings. Mr Akhtar's witness statement said that he "questioned what she was doing and stated that I only agreed to her observing the till and not to alter the programming", that the till was then "cleared of all memory due to HMRC tampering with the till" and that afterwards he called a till engineer from BCR.

39. We accept that Mr Akhtar called BCR after HMRC's visit, and that on 18 April 2016 Mr Laidlaw came to the premises and subsequently issued an invoice for a service called "reset programme". However as to what happened during the visit, we prefer Ms Rogers's evidence, which is supported by her contemporaneous meeting notes, and find that she had permission to check the till and to adjust the print settings, and that she did not wipe out the memory on the till.

40. Having adjusted the print settings, Ms Rogers ran two "end of day" sales reports. Ms Rogers also noted that Mr Akhtar had continued to overwrite the audit roll, and she again told him that the audit rolls were not to be overwritten, and that used audit rolls were to be retained.

Further visit and correspondence

41. On 18 May 2016, Ms Hooper-McIlquham again attended the Company's premises, and noted that the audit rolls were still being overwritten and were not being retained.

42. On 24 May 2016, Ms Hooper-McIlquham wrote to Mr Passey, specifying that Mr Akhtar must keep copies of his audit rolls and not overwrite them. She also sent formal letters to Mr Akhtar in relation to both the Company and Penylan, stating that he was legally required to keep the audit rolls, and requiring him to sign and return a copy of those letters. Mr Akhtar did so on 1 June 2016.

43. On 29 June 2016, she wrote to Mr Passey asking to see VAT accounts, Z reads, purchase invoices, sales records and bank statements from 1st August 2014 to 31st July 2015 and from 1st August 2015 to 31st October 2015, for both the Company and Penylan, together with all till rolls for both Penylan and the Company, noting that these "should have been kept since 1 June 2016 to date". On 6 July 2016 Mr Passey said that he was working on providing what had been requested, but nothing was sent to HMRC.

44. On 26 July 2016, HMRC issued the Company with a Notice under Finance Act 2008, Sch 36, para 1 (a "Sch 36 Notice"), specifying the same information. Before the end of that month, the Company provided the documents used to support the VAT returns made for the specified periods but did not supply the till rolls for dates after 1 June 2016.

The uplifted audit roll and the VAT returns

45. Mr Morgan had retained the audit roll which had been uplifted from the Company's premises by Ms Rogers in December 2015, and as noted above, it showed that there were two Z readings each day. HMRC had now been provided with the documents underpinning the VAT return for the relevant quarter. When that return was checked by HMRC, it included only the sales recorded by the Z readings which had been taken around midnight. The Z readings which totalled the sales after those midnight readings until around 5.30 the next afternoon, had all been omitted from the Company's VAT returns. In this decision, we have used the shorthand "lunchtime sales" for these missing transactions, although they also included some sales from the night before.

46. HMRC had also been provided with till rolls and other underlying documents, and Mr Morgan and Ms Hooper-McIlquham now turned their attention to the rest of that evidence.

The daily Z readings used for VAT purposes

47. The VAT returns were based on Z readings taken from the other paper till roll, ie not the audit roll. For each day, the Company recorded a single Z reading for VAT purposes, and these readings were collected together on a weekly basis, copied and attached to a manuscript list of daily cash received for that week. Each of these summaries was signed by Mr Akhtar, and they were passed to Hodge Bakshi to prepare the VAT returns.

The default setting on cash registers

48. The default setting on cash registers is that each Z reading has a unique number, which increases incrementally each time a reading is taken. This makes it possible to see if a listing contains all the Z readings taken from a till, or whether some have been omitted. However, none of the Z readings provided to support the Company's VAT returns had a sequential Z number.

49. It was Mr Morgan's unchallenged evidence, given on the basis of his training and experience with cash registers, plus his reading of the handbook for the particular till used by the Company, that the till's default setting must have been deliberately altered so as to prevent these sequential Z readings from appearing on the printed out till record.

50. The default setting of the Company's cash register also assigned a unique incremental transaction value for each sale recorded, and like the incremental Z number, this transaction number would normally be present on the Z readings. However, the transaction numbers were also missing from the majority of till rolls provided by the Company. Mr Morgan's evidence, again unchallenged, was that this too can only have happened as the result of the settings of the till having been deliberately altered, to prevent the printing of these numbers.

The till reverts to its default setting for a period

51. Although the default setting for incremental transaction numbers had therefore been disabled generally, Mr Morgan and Ms Hooper-McIlquham identified a period between 17 August 2015 and 24 January 2016 when the print setting had reverted to the default, with the result that transaction numbers were printed on the Z readings.

52. Mr Morgan and Ms Hooper-McIlquham examined each of those readings and noted that there was a gap in the sequence of numbers for Monday to Saturday each week, and no gap on Sundays. They concluded that the gap in the numbering reflected the systematic suppression of lunchtime sales, but that there was no gap in the numbering on Sundays; this was consistent with the shop being closed at lunchtime that day. Mr Morgan and Ms Hooper-McIlquham

totalled the number of missing transactions over the period, and found that on average there were 450 suppressed sales each week.

Using that evidence together with the audit roll evidence

53. Mr Morgan and Ms Hooper-McIlquham realised they could extrapolate from the three days of sales made in December 2015 to work out a value for the missing sales. They calculated that the average value of each lunchtime sale during the lunchtime period in December 2015 was £4.07. Multiplying that figure by the 450 suppressed weekly sales gave a weekly value for suppressed lunchtime sales of £1,829.73, and a VAT figure of £304.96. On that basis, the figure for underpaid VAT was £3,964 each quarter.

Meeting at Hodge Bakshi's offices

54. On 25 August 2016, Ms Hooper-McIlquham emailed Mr Passey to say:

> "Following my review of records relating to Albany Fish Bar Ltd and Penylan Fish Bar Ltd, I would like to arrange a meeting with you and your client, Mr W Akhtar, on the 20th September 2016 at 10:30."

55. The meeting in fact took place at Hodge Bakshi's offices on 28 September 2016. Ms Hooper-McIlquham and Mr Morgan attended for HMRC, and Mr Akhtar was accompanied by Mr Passey and Mr Bakshi. The meeting notes, which Mr Akhtar accepted were accurate, say that Ms Hooper-McIlquham opened by saying that the meeting's purpose was to "discuss the findings of HMRC's review of the documents and information supplied in respect of the recent VAT compliance check".

56. She went on to say that the result of that review "suggests that there were errors in all VAT returns submitted, for which HMRC will need to consider if a penalty is due". She set out the taxpayer's rights in relation to a penalty assessment, and Mr Akhtar said he was content to continue with the meeting. She gave Mr Akhtar a copy of Factsheet 7a, which explains how a penalty is calculated, and how HMRC might mitigate a penalty charged; Factsheet 13, which contains information about publishing details of deliberate defaulters, and Factsheet 14, entitled "managing serious defaulters". She told Mr Akhtar that the publication of his details could be prevented if he made "a full and complete disclosure at this stage". She asked Mr Akhtar if he wanted to disclose any errors or irregularities, but he did not do so.

57. In answer to HMRC's questions, Mr Akhtar then said that:

(1) he decides whether to work at the Company's premises, or at Penylan, and when to work in each shop, depending on "business needs";

(2) all staff members operate the till;

(3) staff members take Z readings and leave them for him to collect when he attends the premises, and he "balances the till", by which he meant counting the cash in the till;

(4) he reconciles the Z reads to the cash takings;

(5) when he was unavailable, his sister would perform the cashing up duties "in the same manner", and she would also balance the cash to the Z reads.

58. He added that he had taken time away from the business for holidays etc but "was unable to provide specific dates but would be able to do so following the meeting".

59. He also said that only one Z reading was taken each day and that "there are no circumstances in which more than one is taken", and that all Z readings were passed to his accountant for the purposes of the VAT returns.

60. HMRC again asked Mr Akhtar if he wanted to make any disclosures, and he once more declined. Mr Morgan then presented "some of the findings with respect to analysis of transaction numbers on Z rolls" and gave Mr Akhtar, Mr Passey and Mr Bashir a copy of sample calculations for the two days 26 and 27 August 2015. Mr Morgan told Mr Akhtar that there were no missing transaction numbers on Sundays, and that "HMRC believe that two Z reads are being taken each day, which works out at an average of £400 p/w not being declared". The meeting note ends by saying:

> "no further information was provided by [Mr Akhtar] or [Mr Passey] and the meeting was concluded until such time as [Mr Akhtar] was able to provide the information that was required by HMRC. It was agree that this would be provided after written request accompanying the notes of meeting."

After the meeting

61. On 1 November 2016, Ms Hooper-McIlquham emailed Mr Passey, saying:

> "Please find attached the notes of our meeting on 28th September 2016. Please let me know if you believe any corrections/amendments need to be made as soon as possible.
>
> If I do not receive any amendments by 16th November 2016, I will take it that you and your client accept the notes accurately reflect what was discussed in the meeting."

62. On 16 November 2016, Mr Passey emailed Ms Hooper-McIlquham asking for more time to consider those notes, and on 21 November 2016, Ms Hooper-McIlquham replied, giving an extension until 5 December 2016, and adding that Mr Morgan would be responsible for the case going forwards, and that Mr Passey should email any comments to him. No comments were provided at any time. However, as recorded earlier in this decision, under cross-examination Mr Akhtar confirmed that the notes were accurate.

The assessments

63. On 9 August 2017 Mr Morgan issued the Company with the VAT assessments. These were for periods 08/10 (the Company's first VAT quarter), through to 04/17 and totalled £109,670.

64. The Tribunal was not provided with any explanation for the time gap between the delivery to HMRC of the till rolls and other information at the end of July 2016, and the issuance of the assessments. Mr Morgan's covering letter began by saying that the assessments had been issued:

> "because as detailed in our last meeting, HMRC have serious concerns that the correct amount of sales have not been declared by your business. As we discussed HMRC have analysed the Z readings that you have provided in support of the sales declared on your VAT returns."

65. His letter continued:

> "As demonstrated in the meeting with HMRC these Z readings presented in your records bear a unique Transaction Number. This number incrementally

> increases with each use of your cash register that results in the cash register draw opening, e.g. a sale being made, an X or Z report being taken, etc.
>
> The result of the analysis demonstrates that for a consistent and sustained period of time there are a large number of transactions missing from the sales record that you have presented as your full and complete record of sales for your business."

66. Attached to the letter was a schedule showing "the results of the extended examination of the Z readings" for the period from Monday 17 August 2015 to Sunday 24 January 2016, a period of 146 days. The schedule was in reverse date order, and by way of exemplar, the first two weeks were shown like this:

Day	Date	Time (pm)	Z read total £	Transaction No	No. of Transactions on Z read	Expected Trans No	Difference
Sun	24/01/16	10:47	1,217.82	986	245	245	0
Sat	23/01/16	11:23	1,408.35	741	256	360	104
Fri	22/01/16	11:14	1,922.62	381	345	397	52
Thurs	21/01/16	10:38	1,323.81	9983	245	324	79
Wed	20/01/16	10:15	1,081.82	9659	208	279	71
Tues	19/01/16	10:17	989.94	9380	190	279	89
Mon	18/01/16	10:12	849.83	9101	177	234	57
Sun	17/01/16	10:48	1,310.44	8867	257	257	0
Sat	16/01/16	11:40	1,429.84	8610	263	348	85
Fri	15/01/16	11:09	1,784.82	8262	316	395	79
Thurs	14/01/16	11:13	1,235.87	7867	232	305	73
Wed	13/01/16	10:30	985.35	7562	193	276	83
Tues	12/01/16	10:11	1,032.45	7286	185	252	67
Mon	11/01/16	10:10	834.62	7034	169	221	52
Sun	10/01/16	10:52	1,109.55	6813	228	228	0

67. In carrying out that exercise, Mr Morgan had adjusted the figures to take into account the fact that the transaction counter reset itself to zero after 10,000 transactions. In the above extract this had happened between the reading taken on 21 January 2016 of 9983 and that taken on 22 January of 381. Mr Morgan added an extra column to the schedule to show this (which we have not thought necessary to reproduce above), and he also added an explanation at the bottom of the page.

68. His letter also attached a second schedule showing "details of the Z readings on the audit roll", namely the roll which had been uplifted by Ms Rogers on 2 December 2015. That schedule set out the assessments and explained how the figures used had been calculated, based on the missing transactions and the lunchtime sales values taken from the audit roll. The total assessed was £109,670. Mr Morgan concluded by saying that a penalty would also be issued on the basis that the behaviour was deliberate and concealed.

The penalties and the PLN

69. On 14 November 2017, Mr Morgan issued a notice of intention to issue penalties of £87,736, on the basis that the behaviour had been deliberate and concealed, and that disclosure was prompted. This gave a starting point of between 50% and 100% of the VAT underpaid,

so there was a 50% band within which the penalty could be mitigated. Mr Morgan said that mitigation would be 40% on the basis of 20% each for "helping [HMRC] understand it" and 20% for giving access to records, and nil for telling HMRC about it.

70. That notice was followed on 9 January 2018 with a penalty assessment for £87,736, calculated on the basis set out above. On 11 January 2018, HMRC issued Mr Akhtar with the PLN for 100% of the penalty charged on the Company.

Further findings of fact

71. We make the following findings of fact in relation to a number of issues on which Mr Akhtar's evidence changed over time, and/or was inconsistent with other evidence.

Whether Mr Akhtar, or his mother and/or sister, were running the business.

72. Mr Akhtar is the sole director and a shareholder of the Company. Apart from the earnings of £5,000 pa paid to his mother and sister, all the Company's profits are retained by him. On 15 April 2016 he told HMRC that he trained his staff on the till by letting them watch what he did. At the meeting on 28 September 2016 he told HMRC that when a staff member carries out a Z reading, that staff member leaves the Z reading for Mr Akhtar to collect, and it is Mr Akhtar who "balances the till", by which he meant counting the cash in the till, and it was he who reconciled the Z reads to the cash takings. It was only if he was unavailable that his sister carried out the cashing up duties "in the same manner", and she would also balance the cash to the Z reads. Mr Akhtar's signature is on each week's list of Z readings. At no point during these meetings with HMRC did Mr Akhtar say he was not running the business. It was he, and not his mother and/or his sister, who attended those meetings and who provided the records to Hodge Bakshi for the VAT returns.

73. However, Mr Akhtar's witness statement, which was dated 18 August 2018 (nearly two years later), said that "since January 2015 I had made a decision to enlist the help of my sister as a bookkeeper and administrator as I am away a lot of the time" and that his mother and sister had taken over the running of the business from that date.

74. We do not accept that evidence, because if Mr Akhtar's mother and/or sister had been running the business:

(1) Mr Akhtar would have said so on one or more of the occasions when he met with HMRC. He did not make any such statement until after he was issued with the PLN, the validity of which depends on him being responsible for the Company's actions;

(2) the evidence is in marked contrast to that which he gave at the meetings with HMRC as set out above; and

(3) there would be some independent third-party evidence of Mr Akhtar's mother and/or sister managing of the business, such as their involvement in meetings, in correspondence with the bank, with staff, and with the Company's accountants. No such evidence was provided.

75. We prefer the original evidence as given by Mr Akhtar to HMRC and find as a fact that he was running the Company's business and his mother and sister were simply helping out on occasion and doing so under his direction.

76. That conclusion is not changed by Mr Akhtar's very late submission of a second "Statement" attaching what pages of his passport showing his picture and other details, and pages showing entry and exit stamps, mostly for the UAE and Pakistan. This evidence was

provided at 14.56 on the day before the hearing to support Mr Akhtar's schedule of dates, which had been filed and served previously.

77. We decided we were unable to place any weight on the statement, the schedule of dates or the photocopied pages, because:

(1) The new Statement does not contain a statement of truth and so is not a formal witness statement.

(2) The passport pages are not certified copies.

(3) No originals of those pages have been seen by either HMRC or the Tribunal.

(4) The pages were provided so late that there was no reasonable chance for HMRC properly to consider them.

(5) Neither the pages nor Mr Akhtar's schedule of dates were referred to in Mr Akhtar's own witness statement, or in the skeleton argument filed on behalf of the Appellants.

(6) Mr Akhtar's case as set out in his witness statement is that he handed over the running of his business to his sister and/or mother in 2015, but according to the new statement his "involvement was very limited" for both "the majority of 2014 and 2015". The Statement therefore marks a significant change not only from his evidence as given to HMRC, but also from his own witness statement.

(7) According to Mr Akhtar's schedule of dates, he would have spent 244 days between 14 January 2014 and 2 January 2015 overseas, for between three and six weeks at a time. In addition, according to his new statement, "the duration [he] was away from the business is not limited to the days that [he] was absent from the UK only".

(8) It is not credible that Mr Akhtar could have spent 244 days overseas during 2014 (plus extra time when he was "away from the business" while still in the UK), given that:

(a) at the meeting on 28 September 2016 he said he was sometimes away "for holidays etc"; not that he was absent for two thirds of an entire year;

(b) it is not remotely credible that Mr Akhtar would have omitted to mention these extensive absences had they in fact occurred; and

(c) his own witness statement said he was actively running both the Company and Penylan in 2014, and that cannot sensibly be reconciled with him having spent two thirds of that same year in the UAE and Pakistan.

78. In coming to our finding that Mr Akhtar was in control of the business, we also considered his oral evidence about the documents underlying the VAT returns. Mr Akhtar had previously told HMRC at the meeting on 28 September 2016 that he balanced the till and reconciled the Z reads to the cash takings, see §57. His signature was on each of the weekly schedules of daily takings, to which copies of the Z readings were attached. However, in his oral evidence Mr Akhtar said, for the first time, that:

(1) the handwriting on these schedules "is not my handwriting";

(2) he was merely checking the cash paid into the bank account and that was "the only reason for the signature on these pages"; and

(3) he signed *all* the pages *at the end of each quarter* just before submission to his accountants.

79. We did not accept this new evidence, because:

(1) it contradicted his earlier statements to HMRC;

(2) by saying it was not his handwriting but that he had signed the pages, the evidence appears also to be internally contradictory;

(3) it was not credible that Mr Akhtar would have printed out the Z numbers and also listed the cash figures, but only checked the latter; and

(4) it was not also credible that he only carried that check at the end of each quarter rather than making sure, on a daily basis, that the correct amounts of cash had been banked.

The Z readings at lunchtime

80. Mr Akhtar's witness statement sought to explain the missing Z readings by saying:

> "Once I was able to speak fully with my sister and mother, they explained to me that some time back they wanted to balance the till after lunchtime trade due to suspicion of a lunchtime staff member stealing cash. To do this, they decided to take a z reading at the end of lunch trading, balance the till, then enter the whole amount as a sale figure back into the till to avoid having two Z reading tickets for each day."

81. No supporting documentation was provided for that statement, showing the lunchtime sales being entered as a single lump sum figure. Having received Mr Akhtar's witness statement, Mr Morgan reviewed the till rolls, and confirmed that there was no such entry for any of the days for which evidence has been provided. In HMRC's submission, the only reasonable explanation for the missing Z readings was that Mr Akhtar had been consistently suppressing those readings. We agree.

82. It is clear from HMRC's painstaking work identifying the missing figures in the numerical sequences, that there is a regular and consistent pattern here. This is not the sort of manipulation which could be carried out by a member of staff without the knowledge of management, because it happened on six days of every week, for the entire period for which evidence was available. Instead, it can only have been carried out by Mr Akhtar, and/or at his direction.

The till rolls

83. On 18 May 2016, Mr Akhtar told Ms Hooper-McIlquham that the reason the audit rolls were used repeatedly so as to make them illegible, was because a portion of the till roll could be viewed through the small window on the top of the till and he did not want his staff looking at how much his takings are throughout the day. Ms Hooper-McIlquham referred to this in her subsequent email to Mr Passey on 24 May 2016, and Mr Akhtar expanded this in his witness statement to cover customers as well as staff, saying he had told her that it was "a privacy issue as it was in full view of staff and customers who would see my turnover figures". He made a similar statement during the hearing.

84. This evidence was challenged by Mrs Spence, and we also do not find it credible. We agree with HMRC that the Company's staff would have a reasonable idea of the shop's turnover from working there, and that customers would not obtain any useful information about the Company's business by a casual glance through a tiny window on a till.

85. Mr Akhtar also said in his witness statement that the reason for the overwriting was caused by "the journal roll mechanism being faulty [so that] it was unable to continuously turn around on the stool mechanism". We reject that evidence, which is entirely inconsistent with his repeated statements, including those made during the hearing itself, that the overwriting was a conscious choice made by him for "privacy reasons". Moreover, he also signed letters on 1 June 2016 saying he would change his practice in the future, with no reference to there being any mechanical problem with the till mechanism.

86. We find as a fact that Mr Akhtar overprinted the audit rolls in a deliberate attempt to destroy contemporaneous evidence that he was suppressing the Company's sales.

Penylan

87. HMRC had also made one or more visits to Penylan, but did not issue that company with a VAT assessment or with a penalty. Mr Akhtar put this forward in his witness statement as a relevant fact in his support, saying that:

> "no accusations were made regarding my other business Penylan Fish Bar, which is exactly the same set up and trade, even the same till system."

88. Mr Morgan said that the reason HMRC did not take any action in relation to Penylan was because that company's audit rolls had been overwritten to such an extent that HMRC had been unable to locate any roll with legible information.

89. Penylan's position therefore does not assist Mr Akhtar, but for completeness we record that we have not taken any information about that company into account when coming to our decision in this appeal.

Findings about the suppression of sales and the VAT returns

90. On the basis of the foregoing, we summarise our key findings of fact as follows:

(1) Two daily Z readings were taken every day except on Sundays.

(2) One Z reading was taken late at night, around midnight, was used as the basis for the VAT returns.

(3) A second Z reading was taken before the shop opened in the evening. This captured all sales after the midnight reading, plus the lunchtime sales. These second Z readings were not provided to the Company's accountants for the purposes of the VAT returns.

(4) Mr Akhtar sought to ensure that the Z readings could not be used to identify the suppression, by deliberately overwriting the audit rolls.

(5) The normal functioning of the tills had deliberately been changed by or at the direction of Mr Akhtar, so that the sequential Z readings did not appear and the sequential transaction numbers were also suppressed, other than for the period from Monday 17 August 2015 to Sunday 24 January 2016, which we find to have been an accidental oversight.

(6) The suppression occurred systematically for every day in the period Monday 17 August 2015 to Sunday 24 January 2016. These were the only dates for which HMRC were provided with till rolls which had not been entirely overwritten and made illegible. We find on the balance of probabilities that the same suppression occurred for all periods from 08/10 to 04/17.

(7) HMRC accurately calculated the number of missing sales for the period Monday 17 August 2015 to Sunday 24 January 2016 and the value of the lunchtime sales between 26 October 2015 to 29 October 2015.

(8) Mr Akhtar was in control of the business and was responsible for the suppression.

The assessments and best judgement

91. On 9 August 2017, Mr Morgan issued the Company with a letter headed "Notice of VAT assessment", and the text of that letter said he had "made an assessment of the additional VAT due per quarter…this letter is our notice of that assessment".

92. Neither party sought to argue that this was a single global assessment; instead, they both accepted that HMRC had made separate assessments for each of the VAT periods from 08/10 to 04/17. The Tribunal notes that the position was similar in *Temple Finance and Temple Retail v HMRC* [2016] UKFTT 041 (TC) at [282], where Judge Richards decided that, although HMRC had issued a single document, they had made a series of separate assessments because:

> "The Notice of Assessment contains separate figures for separate VAT periods and, while the total amount is shown, the clear inference is that, by doing so, [the HMRC Officer] was making separate assessments for different VAT periods."

93. The assessments in this case were made on the Company under VATA s 73, which is headed "Failure to make returns etc". Subsection (1) provides as follows (emphasis added):

> "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."

The case law on best judgement

94. The correct approach to a "best judgment" assessment under section 73(1) VATA was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) ("*Fio*") (Judge Scott and Ms Gable), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) (Judges Herrington and Scott):

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC) (Judge Sir Steven Oliver QC).
>
> 15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):
>
> > 'In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or

there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary.'

16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

'…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment.'

17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):

'The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.'"

95. The case of *Van Boekel v HMRC* [1981] STC 390 also provides guidance on the approach to best judgment assessments. The headnote summarises the issues in the case:

"The taxpayer, a licensee of a public house, relied on a manager to run the establishment and based his value added tax returns on the takings handed to him by the manager. Officers of the Commissioners of Customs and Excise visited the taxpayer's premises and inspected the relevant documents.

As a result of the inspection it appeared to them that the taxpayer's value added tax returns for the period 1 August 1973 to 31 July 1976 were incorrect in that he had failed to declare and account for tax accurately on the full value of supplies made by him.

When questioned, the taxpayer suggested pilferage as a possible cause of the deficiency. The officers did not interview the manager or visit the premises during opening hours. They noted the takings of the public house during a test period of five weeks, and on that basis…assessed the amount of tax due. The taxpayer appealed to a value added tax tribunal contending that the commissioners had taken insufficient steps to ascertain the amount of tax due, that five weeks was too short a period on which to base an assessment covering three years and that no account had been taken of pilferage.

The tribunal held that on balance the assessment had been made by the commissioners to the best of their judgment within the requirement of s 31(1) of the Act, but reduced the amount of the assessment to take account of pilferage.

The taxpayer appealed against the tribunal's decision contending that in making the assessment the commissioners had failed to act 'to the best of their

> judgment' within s 31(1) of the 1972 Act, and, that if, in the view of the tribunal, the commissioners should have taken account of pilferage, then the assessment was invalidly made and should be set aside."

96. At the High Court, Woolf J (as he then was) refused the appeal. He said:

> "What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

97. Woolf J went on to say that the fact that the VAT Tribunal had reduced the assessment to take into account pilferage did not mean that it had not been made to best judgement. Instead, the Tribunal had come to that conclusion on the evidence, as they were entitled to do.

The submissions

98. Mrs Spence submitted that Mr Morgan had made the assessment to the best of his judgment, taking into account the evidence with which he had been provided. He had carefully analysed the till rolls to identify the missing sales and the value of those sales. Having considered that evidence, he relied on the presumption of continuity to make the assessment for previous VAT periods.

99. Mr Brown submitted that the assessments should be reduced, taking into account the various factors put forward by Mr Passey, which we consider below. As noted earlier in this decision, there was no wider challenge to the presumption of continuity; for example on the basis that there had been no suppression in earlier periods.

Discussion and decision

100. It is clear from the case law cited above that to meet the best judgement requirement, an officer must "fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary". Mr Morgan worked carefully and intelligently through the material with which he had been provided. We have found as facts that HMRC accurately calculated the number of missing sales for the period Monday 17 August 2015 to Sunday 24 January 2016 and the value of the lunchtime sales between 26 October 2015 to 29 October 2015; the assessments were made by applying the value of the lunchtime sales to the total of the missing sales. This was entirely reasonable. We have no hesitation in finding that the assessment was made to his best judgment, including his reliance on the principle of continuity.

101. That is, however not the end of the matter. As the FTT said in *Fio,* the next stage is for us to decide whether the amount assessed is correct, taking into account all available evidence, including material not available to HMRC at the time when the assessment was made, and substituting our own judgment as to the correct amount of the assessment.

102. The following amendments were put forward by Mr Passey on behalf of the Company:

(1) The assessments should be reduced to take into account zero rated sales. Mr Passey had calculated that this was 5.62% of total sales. HMRC did not resist that submission, and we agree.

(2) The assessments should take into account inflation over the period. Mr Passey put forward a reduction of 4% per annum, based on Mr Akhtar's annual price increases. Again, HMRC did not resist that suggestion, and we also agree.

(3) Mr Morgan's underlying calculations would mean that the business had a gross profit percentage of between 67% and 69%. Mr Passey's own researches indicate that chip shops in roughly the same area have a gross profit percentage of between 52% to 70%. Mrs Spence pointed out that Mr Passey's witness statement had no attached exhibits, and that in any event, his figures showed that the Company's gross profit was within the range of other chip shops. We agree with Mrs Spence.

(4) The detailed figures used by Mr Morgan for one of the three days, 29 October 2015, were in Mr Passey's submission "extraordinary" because they indicated that people were being served on average within 2 minutes and 24 seconds, and this did not match his "personal experience of fish and chip shops". Mrs Spence submitted that Mr Morgan had simply used the timed information for sales shown on the Company's own Z rolls, and these were a better source of evidence than Mr Passey's broad-brush personal experience. Moreover Mr Passey had not taken into account the fact that the shop was open for longer than the advertised hours, so the time period was longer than that used in his calculations. We again agree with Mrs Spence, for the reasons she gave.

(5) One of the three dates used as the basis for the calculations was 25 October 2015, and the clocks went back on that day; Mr Passey submitted that "it would appear that the till time had not been adjusted for the clock change". Mrs Spence responded by saying this was irrelevant – the Z rolls simply showed actual sales, and a change in the clock made no difference. Mrs Spence is correct.

103. Having considered all the above, we agree that the assessments for each period should be reduced to take into account a 4% inflation factor and the zero rated sales, but for nothing else.

The timing of the VAT assessments

104. The assessments were issued on 9 August 2017 under VATA, s 73(1) for the period from June 2010 through to April 2017. The statute requires that these assessments "shall not be made later than" the time limits set out in VATA s 73(6), namely

> "(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."

105. Both parties accepted that the assessments for VAT periods 10/15 to 04/17 were within the time limit in (a) above. The issue was with the assessments for periods 08/10 through to 07/15.

The Appellants' position

106. Mr Brown submitted that the assessments for periods 08/10 through to 07/15 were made more than one year after evidence of facts, sufficient in HMRC's opinion to justify the making of that assessment, had come to their knowledge, and that as a result, those assessments were out of time.

107. We noted that Mr Cowgill had raised the time limit issue when he submitted grounds of appeal to the Tribunal on behalf of the Company on 1 September 2017, and he also confirmed

in a letter dated 9 August 2018 that the same ground was being relied on in relation to the PLN issued to Mr Akhtar. Mr Brown's skeleton argument, filed and served on 26 October 2020, also said that the assessments for periods 08/10 to 7/15 were out of time.

HMRC's position

108. HMRC's Statements of Case and their skeleton argument was silent on the time limit issue. There was also no mention in Mr Morgan's witness statement as to why HMRC delayed issuing the assessment until 9 August 2017, despite having had the till rolls since the end of July 2016. During the first day of the hearing Mrs Spence made no submissions on this time limit issue, neither did she draw our attention to any documentary evidence which might provide an explanation for the delay.

Mr Morgan's evidence

109. Mr Morgan was due to give evidence on the second day of the hearing. Before he took the stand, Mr Brown asked the Tribunal to rule that it would be unfair to the Appellants if Mrs Spence asked Mr Morgan, by way of evidence-in-chief, to expand his witness statement in order to provide reasons why the time limit set by s 73(6)(b) had been satisfied. He submitted that HMRC had had plenty of time to serve evidence on the point, which had been front and centre since the beginning of the proceedings, and if evidence was now provided for the first time on the second day of the hearing, it would amount to an ambush.

110. Mrs Spence responded by saying that it was a question of fact; that the role of witnesses was to give evidence of fact, and that her questioning should not be limited in the way requested by Mr Brown.

111. We agreed with Mr Brown. This issue had, as he said, been centre stage since the beginning of the proceedings, almost three years previously. HMRC had had ample time to put forward any evidence as to why they had taken so long to issue the assessment but had not done so. The Tribunal's directions had been issued on 27 June 2018, and they included the following:

> "Not later than 7 September 2018 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be ('witness statements') and shall notify the Tribunal that they have done so."

112. In addition, as already noted earlier in this decision, the directions also said:

> "At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

113. The parties had therefore been directed, well in advance of the hearing, to put their witness evidence in written form, and they had permission only to ask the witness "supplemental questions" at the hearing.

114. Asking Mr Morgan about the reasons why there was a gap between July 2016 (when the till rolls and other information supporting the VAT returns was provided to HMRC), and the issuance of the assessment over a year later, was not a "supplemental question". It was an entirely new area on which HMRC had put forward neither documentary or witness evidence.

115. We agreed with Mr Brown that it would be procedurally unfair to permit Mrs Spence to lead evidence-in-chief from Mr Morgan on that issue, and we directed accordingly.

Weisenfeld

116. After the hearing, we noted that the UT (Judges Richards and Greenbank) had approved the same approach in *Weisenfeld and Strom v HMRC* [2019] UKUT 301 (TCC) ("*Weisenfeld*") where the directions given to the parties were identical to those given to the parties in this case..

117. In *Weisenfeld* the UT had to decide whether a witness (Mr Weissbraun, the appellants' representative) should have been permitted to give oral evidence about the existence of a trust for the first time at the hearing of the appellants' appeals. The UT said at [65]:

> "If Mr Weissbraun had given his evidence orally for the first time at the hearing when witness statements made no mention whatsoever of an oral declaration of trust, the Appellants would have circumvented the requirements of the FTT's directions and exposed HMRC to a risk of 'ambush'."

118. The UT went on to say that it was "no answer" for Mr Weissbraun to say that he had not realised the importance of the issue, because:

> "he was the Appellants' duly appointed representative and should not have acted in that capacity unless he felt that he had a sufficient knowledge of Tribunal procedure and general principles of litigation."

119. In this case HMRC (through their representative Mrs Spence) may belatedly have appreciated the importance of the time limit issue, and we noted that HMRC's skeleton argument had been drafted by a different officer, not by Mrs Spence. But that is to no avail; the Respondents are HMRC as a body, and they are of course "expected to know Tribunal procedure and general principles of litigation".

The case law about s 73(6)(b)

120. In *Pegasus Birds v HMRC* [1999] STC 95 ("*Pegasus Birds*"), Dyson J set out six principles to be used in deciding whether "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" has come to their knowledge of HMRC. These are:

> "1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and*

> *Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous *to Wednesbury (see Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) [2012] STC 1738 at 1748 (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10-11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act."

121. When *Pegasus Birds* went to the Court of Appeal under reference [2000] STC 91, Dyson J's decision was upheld, albeit without expressly referring to the above principles. Aldous LJ, giving the leading judgment (with which Henry LJ and Scott Baker J agreed) said that the purpose of VATA s 73(6) was "to protect the taxpayer from tardy assessment".

122. In *Lazard Brothers & Co Ltd v HMRC* (1995) VAT Decision 13476, Mr Abel, an HMRC officer, had decided that Lazards had over-claimed input tax. Following correspondence between the parties, HMRC assessed the company, which appealed on the basis that the assessment was out of time. The VAT Tribunal (Mr Paul Heim), after a careful review of the authorities, concluded as follows:

> "The Tribunal does not consider that the making of calculations upon facts in the possession of the Commissioners comes within the terms of evidence of facts sufficient to justify the making of the assessment. The making of the assessment is the exercise of the Commissioners' judgment upon the facts.."

123. In *Next Group plc v HMRC* [2011] UKFTT 122, the HMRC officer in the case had been provided with the information needed to make the assessments, but remained concerned that the arrangements were abusive, and asked Next Group for further information. More than a year later, the officer was informed by letter that no further relevant documentation existed about the motives behind the arrangements. When giving oral evidence, the officer conceded that this later letter "did not add any evidence to that which he already had, rather, it was an absence of evidence" (see [69] of the decision). Judge Bishopp decided at [71] that the assessments relating to VAT periods 05/04 to 08/05 were out of time under VATA s 73(6)(b) because the officer "had all the information he needed in order to make the assessments he did make".

Discussion

124. The statutory test refers to "evidence of facts", and it follows from that wording that the time limit does not run from the date HMRC finish considering those facts, making calculations based on those facts, or informing the taxpayer about their findings. Instead, it runs from the date "the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioner". This is clear from *Pegasus Birds,* and the first instance decisions in *Lazards* and *Next* both take the same approach.

125. Our findings set out earlier in this decision include the following:

> (1) having received the till rolls by the end of July 2016, HMRC undertook an analysis of that evidence, together with the uplifted audit roll, and carried out various calculations;

(2) on 25 August 2016, Ms Hooper-McIlquham emailed Mr Passey to say HMRC wanted to arrange a meeting with him and Mr Akhtar "following my review of the records";

(3) the meeting was held at Hodge Bakshi's offices on 28 September 2016. Ms Hooper-McIlquham began the meeting by saying that its purpose was to "discuss the findings of HMRC's review of the documents and information supplied in respect of the recent VAT compliance check". HMRC explained penalties; Mr Morgan presented "some of the finding with respect to analysis of transaction numbers on Z rolls" and gave Mr Akhtar, Mr Passey and Mr Bashir a copy of sample calculations for the two days 26 and 27 August 2015, and said that HMRC "believe that two Z reads are being taken each day, which works out at an average of £400 p/w not being declared".

(4) The notes concluded by saying:

> "no further information was provided by [Mr Akhtar] or [Mr Passey] and the meeting was concluded until such time as [Mr Akhtar] was able to provide the information that was required by HMRC. It was agreed that this would be provided after written request accompanying the notes of meeting."

(5) Despite the reference in that paragraph to "further information" being "required" by HMRC, there was no reference in the meeting minutes to any such information. The only outstanding point was Mr Akhtar's offer to provide dates when he was away from the business, but this information was not "required" by HMRC. It is true that the Company had not fully complied with the Sch 36 Notice, because it had failed to provide HMRC with till rolls after 1 June 2016, but HMRC made no further reference to this either in the meeting or subsequently.

(6) On 1 November 2016, Ms Hooper-McIlquham sent Mr Passey a copy of the meeting minutes. Although Mr Passey asked for further time to consider those minutes, no comments were provided to HMRC at any time.

126. We agree with Mr Brown that the assessments issued on 9 August 2017 were on the basis of the information provided to HMRC before the end of July 2016, and that HMRC had therefore been provided with "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" more than one year before the assessments for periods 08/10 through to 07/15 had been made.

Conclusion on the assessments

127. We confirm the assessments for periods 10/15 through to 04/17, after adjustments for inflation and zero-rated sales, but set aside those for the earlier periods.

The penalty

128. As noted above, the penalty was charged under FA 2007, Sch 24 on the basis that the behaviour had been deliberate and concealed. We begin with that legislation, which is cited so far as relevant to this appeal.

The legislation

129. FA 2007, s 97 is headed "penalties for errors", and it begins:

> "(1) Schedule 24 contains provisions imposing penalties on taxpayers who
>
> (a) make errors in certain documents sent to HMRC…"

130. Sch 24, para 1 reads:

> "(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 a liability to tax…
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part."

131. A VAT return is one of the documents listed in the Table below that paragraph.

132. Para 3 is headed "degrees of culpability" and provides:

> "(1) For the purposes of a penalty under paragraph 1, an 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 on P's part but P does not make arrangements to conceal it, and
>
> (c) 'deliberate and concealed' if the inaccuracy is deliberate [on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

133. Para 4 provides that penalties which are in "category 1" namely those with no offshore element, are 30% of the "potential lost revenue" or "PLR" for careless action; 70% of the PLR for deliberate action, and 100% of the PLR where the action is both deliberate and concealed.

134. Para 5 defines the PLR as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

135. Sch 24, Part 3 is headed "Procedure", and with that part, para 13 is headed "assessment" and reads:

> "(1) Where a person becomes liable for a penalty under paragraph 1, HMRC shall
>
> (a) assess the penalty,
>
> (b) notify the person, and
>
> (c) state in the notice a tax period in respect of which the penalty is assessed….
>
> (2) An assessment
>
> (a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),
>
> (b) may be enforced as if it were an assessment to tax, and
>
> (c) may be combined with an assessment to tax.
>
> (3) An assessment of a penalty under paragraph 1…must be made before the end of the period of 12 months beginning with

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.

(4) …

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn."

Whether deliberate and concealed

136. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the Tribunal (Judge Greenbank and Mr Bell) held at [63] that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document". Mr Brown submitted that this was the correct test, and we agree.

137. We have found as facts that the Company's lunchtime sales had been consistently suppressed, in order that they be omitted from VAT returns. We have also found that this suppression was carried out by Mr Akhtar himself, or by a family member at his direction. Mr Akhtar, the Company's director, therefore provided HMRC with the Company's VAT returns, in the full knowledge that those returns were understated, and with the intention that HMRC rely on them as accurate. This behaviour is clearly deliberate.

138. The statute does not define "concealed", but gives the example of "submitting false evidence in support of an inaccurate figure". Mr Akhtar deliberately over-wrote the audit rolls, to conceal the existence of the lunchtime sales. It was only a mixture of good luck and painstaking detective work by Mr Morgan, Ms Rogers and Ms Hooper-McIlquham that allowed HMRC to identify what had happened. We have no hesitation in finding that the behaviour was not only deliberate, but that Mr Akhtar made arrangements to conceal the suppression and thus the understatement in the Company's VAT returns.

Whether penalty should be reduced because assessments for earlier periods invalid

139. We have set aside the assessments for the periods before 10/15, because they were not made within the time limit prescribed by VATA s 73(6).

140. Mr Brown referred to para 4, which required penalties to be calculated as a percentage of the PLR, which was defined by para 9 as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment". Mr Brown submitted that as the corrective assessments for periods prior to 10/15 were out of time, there was no "additional amount due or payable", and that the penalty should be reduced in consequence. Mrs Spence submitted that that the penalties should not be set aside, but did not provide a reasoned argument to support that position. We therefore considered the law for ourselves, as set out below.

141. We began by noting that the statutory phrase is "due *or* payable", not "due *and* payable", which occurs frequently in tax statutes. As far as we could establish, Sch 24 was the first time the phrase had been used. That the wording was not accidental is indicated by the fact it has reappeared with some regularity in the context of both penalties and certain anti-avoidance

provisions (see FA 2008, Sch 41; FA 2009, Sch 55 and 56; FA 2013, Sch 43C in relation to the former, and FA 2016, Sch 18 and FA 2017, Sch 27 in relation to the latter).

142. We have already agreed with Mr Brown that there are no additional amounts "payable" by the Company in relation to the earlier periods. The issue is therefore whether there was an amount "due". In *Re Airedale Garage Co Ltd, Anglo-South American Bank Ltd v Airedale Garage Co* [1933] 1 Ch 64 at 78–79, Lord Hanworth MR said, albeit in a different statutory context:

> "I think the words 'due and payable' in s 264 of the Companies Act [1929] are meant to refer to a liability in respect of which there had to be a payment..."

143. In other words, "due" means that there is a liability and "payable" that "there had to be a payment". It is well established that there is a difference between a liability to tax, its assessment and its payment. In *Whitney v IRC* [1926] AC 37 at 52, Lord Dunedin said:

> "There are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

144. From this it would follow that by using the phrase "due *or* payable" Parliament e did not limit the issuance of penalties to situations where extra tax was actually payable, but allowed penalties to be issued also where there only was a liability.

145. The Company had a liability to VAT in each quarter since 08/10 which was higher than that which it had reported. Mr Morgan assessed the Company to that extra VAT, but the assessments for the earlier periods have been set aside because they were out of time. However, as Lord Dunedin said, that does not change the fact that the Company was *liable* to pay VAT on its lunchtime sales, even though the earlier assessments have been set aside, so that the tax is not payable.

146. We then considered the structure of Sch 24 to see whether it supported a reading of the word "due" as meaning "liability", and noted the following:

(1) Para 1 provides that a penalty "is payable" when a person deliberately or carelessly gives HMRC an inaccurate document with the intention that HMRC should rely on it. This establishes a person's liability to a penalty is confirmed by ,para 13(1), which begins "when a person *becomes liable to a penalty* under paragraph 1". Thus, by giving HMRC inaccurate VAT returns from 2010 onwards, the Company was liable to a penalty.

(2) Para 13(1) also provides that when a person is so liable, HMRC shall "assess the penalty; (b) notify the person and (c) state in the notice the tax period in respect of which the penalty is assessed". Nothing in that paragraph ties the issuance of a penalty to the validity of a supplementary assessment of the underpaid tax.

(3) Para 13(2) says that a penalty assessment "(a) shall be treated for procedural purposes in the same way as an assessment to tax…; (b) may be enforced as if it were an assessment to tax and (c) may be combined with an assessment to tax". Again, none of these provisions make the issuance of a penalty conditional on the validity of a corrective assessment.

(4) Para 13(3) says that HMRC must issue the penalty assessment within 12 months of either (a) the end of the period within which an appeal could be brought, or has been determined, against "the decision correcting the inaccuracy" or (b) "if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected". These time limit provisions therefore only take effect if HMRC either issue a corrective assessment to collect the underpaid VAT, or, if there is no such assessment, the taxpayer himself corrects the inaccuracy.

(5) We considered whether this provision carried the necessary implication that penalties could only be raised if the tax position had been corrected, either by a valid assessment, or by the taxpayer himself. However, we decided that this was not the position, because:

(a) nowhere in the Schedule does it state that a penalty can only be raised if the tax position was corrected, and as a matter of statutory interpretation, that purpose cannot be narrowed by a provision dealing only with time limits;

(b) para 13(3) itself makes clear that a penalty can still be levied even if the taxpayer corrects the inaccuracy, and it follows that penalties are not conditional on corrective assessments;

(c) para 13(2) provides that the normal procedural rules apply to penalties issued under the Schedule, "except in respect of a matter expressly provided for by this Act". If neither of the two time limit provisions in paragraph 13(3) bite, because there has been neither a valid corrective assessment nor a self-correction, the normal VAT time limits therefore apply. In a case of deliberate evasion of VAT, this would be 20 years (VATA s 77(4) and (4A)).

147. We also considered the Explanatory Notes for Sch 24. In *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said at [5]:

> "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have."

148. The Notes say this about the term "PLR":

> "'Potential lost revenue' is a new phrase which replaces the concept of 'tax difference' used in direct taxes whereby the penalty was applied to the difference between the tax per the return and the correct tax due. It is intended to have broadly the same effect except to remove some of the ambiguity for example where the inaccuracy relates to overstated tax deducted at source. It also replaces the concept of 'VAT which would have been lost' and 'VAT evaded or sought to be evaded' in the current regime."

149. That explanation provides further support for the view that the purpose of Sch 24 is to enable HMRC to issue penalties which relate to the "difference between the tax per the return and the correct tax due": in other words, that the penalties relate to a tax liability which was not shown on the submitted return.

150. Finally, we considered the Court of Appeal's judgement in *Ali (t/a Vakas Balti) v HMRC* [2006] EWCA Civ 1572 (Tuckey, Arden and Lloyd LJJ), which came to the same decision on similar facts by reference to the previous VAT penalty legislation. By the time that case reached the Court of Appeal, the position can be summarised as follows:

(1) Mr Ali ran a restaurant, and had failed to register for VAT even though his turnover was above the relevant threshold;

(2) HMRC issued an assessment, and later purported to increase that assessment. At the VAT Tribunal hearing, HMRC accepted that the amended assessment was invalid, and that they were now out of time to issue a supplementary assessment.

(3) HMRC had also issued a civil evasion penalty under VATA s 60, which was linked to the VAT they had sought to collect by that invalid assessment.

(4) The High Court set aside that penalty on the basis that Mr Ali could not have evaded VAT which was not due from him.

151. At the Court of Appeal Lloyd LJ, giving the leading judgment, said at [48]:

> "…it may not be the most attractive proposition for the Commissioners to say that they should be able to make a penalty assessment for a higher amount of evaded tax when they could have, but did not by error, even by incompetent error, raise a tax assessment for the corresponding amount. On the other hand, if it is a case of error, and if the Commissioners can satisfy the burden of proof on them of showing that the taxpayer's conduct was dishonest, it is not obvious that the taxpayer should escape not only liability for the amount of tax which was really due from him, but also the separate sanction for his dishonest conduct."

152. Lloyd LJ then referred at [49] to the fact that VATA s 60 "speaks of tax evaded, as well as of tax sought to be evaded" and said "this shows that a penalty may be levied even if the taxpayer has succeeded in evading liability for the tax which should have been due".

153. At [51] he said:

> "There is no express provision in the 1994 Act which links the amount of tax evaded, for the purposes of section 60, to the amount of tax found to be due, upon a return (if any), an assessment and (if there is one) an appeal…[the alternative reading] would prevent the Commissioners from making a civil evasion penalty assessment in a type of case in which that would not be consistent with the intention of the Act. Thereby, it would limit significantly the scope for using the civil evasion penalty as a sanction for dishonest conduct in relation to VAT."

154. Arden LJ issued a concurring judgment, referring at [57] to the exact same situation in which HMRC find themselves in the instant appeal (emphases added):

> "…actual evasion can also occur if a person has failed to make a return or made an incorrect return, and the Commissioners acquired sufficient knowledge of that fact to raise an assessment in accordance with the requirements of the 1994 Act but failed to do so within the period allowed for this by sec 73(6)…There is nothing in sec 60 to limit the circumstances in which evasion arise to those in which no error on the part of the Commissioners occurred."

155. She continued by saying that this outcome "does not lead to an absurd or unfair result. It would not be absurd for Parliament to have concluded as a matter of policy that penalty assessments should be disconnected from the final determination of the VAT due". She supported that statement by reference to the then current legislation, but also said "it may be seen as unfair that taxpayers should have the benefit of [HMRC's] errors where there has been dishonesty" and concluded that "there is no basis for reading into sec 60 a requirement that the

amount of the penalty be fixed only by reference to the amount of the VAT finally determined to be due".

156. Although Sch 24 introduced a new concept, PLR, which the Notes on Clauses say replaced the concept of "VAT evaded or sought to be evaded", there is no indication in either the wording of the new penalty provisions, or in those Notes, that Parliament intended to introduce "a requirement that the amount of the penalty be fixed only by reference to the amount of the VAT finally determined to be due". That would be a significant change from the earlier penalty position, and if it had been intended, we think it likely that the Notes would have referred to it.

157. For all those reasons, we find that the penalty is not to be reduced because the assessment of the earlier periods has been set aside.

Mitigation

158. Sch 24, para 10 provides that a penalty for deliberate behaviour is a maximum of 100% and a minimum of 50% of the PLR. Sch 24, para 9 provides for mitigation of the penalty within that 50% band depending on the person's "disclosure", which is divided into:

(1) telling HMRC about it;

(2) giving HMRC reasonable help in quantifying the inaccuracy ("helping"); and

(3) giving HMRC access to records.

159. HMRC's normal practice is to allocate 40% of the available band to "helping" and 30% each to "telling" and "giving access to records". Mr Morgan mitigated the available band by 40%, made up of 20% for helping and 20% for giving access to records, and nil for telling. The overall penalty was thus reduced by 20% (being 40% of the available band of 50%).

160. Mr Brown submitted that the mitigation for "giving" was too low because "the records on which the assessment was based were freely given". Mrs Spence did not agree, pointing out that they were only provided after the Company was issued with a Sch 36 Notice. We agree with Mrs Spence and find that there is no basis for further mitigation, either for the reason put forward by Mr Brown or for any other reason.

Conclusion

161. The penalty due is thus to be calculated as follows:

(1) the original PLR of £109,670, reduced by inflation of 4% pa and by the zero-rated sales adjustment as set out earlier in this decision; and

(2) that figure is then to be mitigated by 20%, so as to give a penalty of 80% of the PLR as calculated above.

The PLN

162. Sch 24, para 19(1) provides that:

> "Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer."

163. On 11 January 2018, HMRC issued Mr Akhtar with a PLN for the whole amount of the penalty charged on the company, on the basis that the inaccuracies in the Company's VAT returns were "attributable" to him.

164. Mr Brown submitted that Mr Akhtar did not know that the returns were inaccurate. Mrs Spence referred to the evidence which formed the basis for the findings of fact we have made earlier in this decision, which we do not need to repeat here.

165. Given those findings of fact we have no hesitation in agreeing with HMRC that the inaccuracies are "attributable" to Mr Akhtar, and we uphold the PLN in a slightly reduced amount to take into account inflation and the zero rated sales.

Decision and appeal rights

166. We therefore find as follows:

(1) the VAT assessments for periods 08/10 through to 07/15 are set aside;

(2) the assessments for periods 10/15 to 04/17 are to be reduced to take into account inflation and the zero-rated sales, as explained at §102 and §103;

(3) the penalty and the PLN are upheld, subject only to the calculation adjustments explained at §161.

167. The parties have permission to revert to the Tribunal if they cannot agree those matters of calculation, but on those matters only.

168. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 05 JANUARY 2021