TC05093

Appeal number: TC/2015/01797

VAT - s 73 VATA - whether restaurant takings under-declared - assessment of takings by HMRC following observations and examination of records - whether HMRC correct to assess to best judgment - yes - whether quantum correct - no - assessment reduced and appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ENFIELD TANDOORI LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER TOBY SIMON

Sitting in public at Fox Court, Brooke Street, London on 15 January 2016

Mr Kevin Andrews for the Appellant

Ms Rita Pavely Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Enfield Tandoori Limited ('the Appellant') against the decision of the Respondents ('HMRC') to assess the Appellant for VAT under s 73 VATA 1994 ('VATA') in the sum of £7,930 (plus interest), reflecting under-declared output tax for the periods 03/12 and 06/12.

2. The original assessment, for VAT periods 06/06 to 06/12 inclusive, was £81,682 plus interest. However, following a review of the assessments HMRC accepted that it had not met the time limit as detailed in s 73(6)(b) VATA. The assessment had not been made within one year after evidence of facts sufficient in the opinion of the Commissioners to justify the making of an assessment came to their knowledge.

3. Section 76(6)(a) VATA allows an assessment to be made within two years of the end of a prescribed accounting period and therefore based on the date of notification of the assessment (3 March 2014) the assessment which related to VAT accounting periods 03/12 and 06/12 remained valid. The decision was accordingly varied to best judgment assessments of £3,935 in the 03/12 quarter and £3,995 in the 06/12 quarter, a total of £7,930.

4. HMRC's review conclusion letter was issued on 16 April 2014. The thirty day Appeal period therefore expired on 15 May 2014.

5. The Appellant applied for permission to appeal out of time. The Appellant's Notice of Appeal was received by the Tribunal Service on 9 February 2015 (dated 6 February 2015), by email (265 days after the expiry date for lodging an appeal). A request for the acceptance of the late appeal was made by the Appellant's representatives, VAT Consultants Ltd, advising that the appeal was made late due to the fact that *"for a considerable amount of time we were seeking responses from the respondents regarding issues raised prior to and within the respondents review. This culminated in a letter sent to the respondents on 4th February 2015 inviting a response regarding issues raised that the respondents had thus far and to date refused to address"*.

6. HMRC agree that there had been ongoing correspondence between the parties but that the Appellant had been put on notice that if it did not agree with the review conclusion the decision could be referred to an independent Tribunal but within the specified time limit. After reviewing the background to the correspondence which the Appellant asserted caused the delay in submitting the appeal and because HMRC lodged no objection, the application to appeal out of time was allowed.

Factual background

7. On the evening of 11 November 2011 two teams of HMRC staff (two officers in each team) visited and dined at the Appellant's premises, Enfield Tandoori, an Indian restaurant at 14 London Road, Enfield, owned by Mr Shomrat Khan.

8. Each of the HMRC teams had £30 per head to spend. They were instructed to observe and make a record of details of their order; how the order was recorded; the final bill (number, table number, values etc.). If a bill was produced a copy had to be retained for HMRC's records; how the payment was recorded; the number of staff; other customers on the premises upon entry and entering the premises; any food orders that might be traced to sales bills; any takeaway/delivery sales.

9. Each team was instructed to draw a 'table map' identifying the table at which they sat and the tables where any particular observations were made.

10. Enfield Tandoori has eleven tables which can seat four, one table which can seat six and a table which can seat two. Its maximum capacity at any one time therefore is 52 customers.

11. Team A arrived at 19.30pm. They followed a couple into the restaurant. There was one table of four already seated. The total customers in the restaurant on arrival including the HMRC officers was therefore eight. The HMRC officers were seated at a table for four near the front of the restaurant on the right hand side.

12. At about 19.40pm, two more diners arrived and were seated at a table for six, followed a few minutes later by another four diners who joined them. Their table was next to the officers.

13. At about 19.51pm two more diners arrived. They were sat at the table next to the officers on the other side.

14. Further diners arrived at 19.55pm, (seven - four adults and three children); and more at 19.58pm (two); at 20.00pm (four) at 20.03 (three); at 20.03pm(two); at 20.07pm (two).

15. At 20.15pm a party of four left. It was not seen how they paid.

16. More diners arrived at 20.18pm (two).

17. At 20.45pm Team B arrived and was seated at the back of the restaurant at a table for four on the left hand side.

18. At about 20.50pm a party of two left. The restaurant took payment using a portable credit/debit card machine.

19. At 20.55pm five diners arrived. They temporarily sat at a table for four just inside the door to wait for a table for five to become available.

20. At about 21.00pm a party of two left. They paid by credit/debit card.

21. The total number who had entered the restaurant, excluding the four officers, at that point was thirty-nine. Three groups had left the restaurant. Two were observed to pay by card. The officers were unable to ascertain how the other group had paid and therefore it is possible that they paid in cash.

22. When Team B arrived at 20.45pm they observed that "almost all the tables were occupied except the last table on the right hand side at the back of the restaurant" [the officer must have meant to say left hand side because they were seated on the LHS of the restaurant according to the table plan which he prepared]. According to Team A at that time there would have been 32 diners including the two Team A officers and therefore there should have been 20 spare seats. However most of the diners were in parties of two (6) and most of them would have occupied tables for four. In fact when Team B arrived there were 11 parties of diners occupying one assumes 11 tables. As there are only 13 tables that would back up why Team B said that most tables were occupied, although it does not explain why they said that there was only one table remaining.

23. Once seated Team B counted 35 customers in the restaurant including themselves and the two officers from Team A. According to Team A there were 34.

24. During the period Team A were at the restaurant (19.30pm to 21.10pm) they observed a total of four takeaway collections. Two paid by card, one paid cash £10 (and received change). It was not possible to see how the other one paid.

25. Team A's bill came to £50.80 which was paid in cash, the officers handing over £55 to cover a tip. The officers left at about 21.10pm.

26. Team B reported that during the time they were in the restaurant, between 21.30 and 22.15pm, three groups of five customers and two groups of two customers came into the restaurant, that is, a total of nineteen customers. As there were already at least 34 customers dining in the restaurant when they arrived, of which two were the two officers from Team A, then if 19 customers arrived then a maximum of 51 diners entered the restaurant that evening.

27. Team B said it was difficult to see everything and in particular how customers were paying and therefore they did not record how customers paid when they left.

28. The officers noted that there was one bar staff, three waiters and one manager. Three chefs could be seen through the kitchen door at the back of the restaurant. An older man also exited from the kitchen during the evening and left. It was not clear whether he was an employee.

29. Orders were taken on a carbonised order pad, that is, in two parts. The top copy of the order was then taken to the bar area at the front of the restaurant and the other was passed to the kitchen. At the end of the meal a hand written bill was given to the officers. Once payment was made, a small tear off strip showing the total bill and the date was given to the customer. The detailed bill was retained by the restaurant. The detailed bill had no date on it and the number noted in the top left corner was 11/2 (possibly referring to table 11, two customers). Only one credit/debit card machine was seen which was kept at the bar. It was unclear whether any particular person was responsible for use of the machine. When payments were made, the machine was brought to the customer and the transaction carried out at the table.

30. Team B observed two takeaway orders being collected.

31. There were 12 customers still in the restaurant when Team B left at 22.45pm.

32. HMRC state in their statement of case that the officers noted a total of 17 groups and 60 customers and also a number of takeaway sales. However the reports by Team A and Team B say that there had been a total of 18 groups and55 customers in the restaurant plus 6 takeaways. It seems to us likely that the group of 5 who were waiting for a table may have been double counted, and therefore it will be assumed that there were 55 customers and 17 groups in the restaurant that evening.

33. On 24 January 2012, HMRC followed up the observation by visiting the Appellant's premises to undertake a review of sales and VAT records. Checks undertaken appeared to show an apparent under-declaration of sales during the VAT period when the observation had taken place. Although the bills of the HMRC staff were present within the records, the bills for a number of the customers that were observed that evening were not within the records.

34. Of the 55 customers (including Teams A and B) noted on the evening of the 11 November 2011, only 43 appeared within the records. Six bills appeared to have been omitted, a shortfall of approximately 22%.

35. HMRC recorded 4 parties of five customers, whereas the Appellant only recorded 2; and HMRC had recorded 8 parties of two customers, whereas the Appellant only recorded 4.

36. When HMRC met with the Appellant on 24 January 2012, they explained that they would be enquiring into the Appellant's VAT returns on the basis that the observations on 11 November 2011 revealed a significant difference in numbers of customers recorded by HMRC, as opposed to those recorded in the Appellant's records. The Appellant was advised of the possibility of an assessment being imposed. He was invited to say whether he had any explanations or disclosure to make as that may impact on any subsequent penalty.

37. In May 2012 the Appellant's agent queried the conclusions HMRC had drawn from the observations. The agent suggested that there may be some occasions when a bill is not raised, for example if a group included any friends, relatives or business colleagues of the proprietor, Mr Khan.

38. HMRC responded explaining that although the bills for the two cash purchases (for Teams A and B) were within the records, potentially twelve of 55 customers had been omitted. There had also been no indication that any of the diners were anything other than paying customers.

39. Following the HMRC visit on 24 January 2012, Mr Richard Jones, the HMRC officer conducting the enquiry, examined the business accounts and undertook a number of credibility checks. He conducted a 'drinks to total credibility exercise', a 'customer bills exercise', and a 'napkin exercise'.

40. An analysis of the Appellant's records showed that the business normally declares gross sales of approximately £60,000 per quarter.

41. Mr Jones examined two sample weeks of bills in December 2011 and identified the number of covers, the number of bills and the sales value for both eat-in and delivery/takeaway. He traced the daily sales values to the sales listing which broke down the sales into cash and card. He was satisfied with that. He also established that deliveries may be taken out of a back door to the car used for the deliveries. The average spend per head for the eat-in customers in the sample periods selected was £18.98. During the two weeks reviewed there were 105 parties eating in and 88 deliveries/takeaways.

42. The sales from eat-in were £6,075.70 per two weeks, whilst the delivery/takeaways were £2,603.50 per two weeks, a total of £8,679. The average spend per party was £44.96 (£8,679 divided by 193 parties).

43. *Credibility checks*

i. Drinks to total exercise

A drink to total exercise was carried out on periods 09/10 to 03/11. An examination of the business records identified a value for gross sales from drinks of approximately £30,000. A review of the customer bills for one week in each of June, September and December 2010 indicated that drinks accounted for 16.18% of the total customer

bills. This suggested that the total customer bills should have been £185,414, whereas the gross sales declared were only £173,314 - a shortfall of £12,100 or 6.5%.

ii. Customer bills

A review of the purchases of customer bill pads showed that 200 pads (each containing 50 bills) were purchased on 15 October 2007 and 500 on 4 August 2008.The business' current stock on the day of the visit was 85 pads of the black and white pads and 64 of coloured pads.

From this it may be assumed that the 200 had been used in that period each with 50 bills i.e. 10,000 bills. There are approximately 290 days in this period which would suggest 34 bills per day although some bills could have been spoiled or used for other purposes thus reducing the average per day.

HMRC said in correspondence with the Appellant's agent that the gross sales declared in the 274 days within periods 09/10 to 03/11 were £173,314 which equated to £632 per day. With an average bill of £44.96 this would equate to only 14 bills a day.

Napkins and hot towels

The Appellant provided a letter from Cottonmill (Laundry and Linen Services) Limited, its napkin and hot towel providers, which said that the Appellant's weekly contract quantities included 300 napkins of which there was an average usage of between 55% and 65% i.e. say 200 and therefore 2,600 in a quarter (200 x 13 weeks). Cottonmill said that the Appellant had been reminded not to use white napkins for cleaning as they easily stained and were difficult to launder up to standard.

To secure the contract the Appellant was offered a cheap disposable version of hot towels on a fully complimentary basis which consisted of 1,000 per box supplied on average every eight to ten weeks. HMRC said that the information suggested that approximately 200 napkins would be used each week.

The average sale per eat-in customer had been calculated at £18.98 which, if 200 napkins reflected 200 meals, indicated eat-in sales per week of £3,796. The review of the two weeks of bills in December 2011 suggested that 70% of the sales were eat-in, and therefore the expected weekly sales were £5,422 (£3796/70x100) and quarterly sales of £70,486 or £281,944 per annum.

The information provided by Cottonmill suggested that 1,444 hot towels were purchased each quarter (1,000 for every eight - ten weeks). There was therefore a discrepancy between the 2,600 napkins per quarter used and 1,444 hot towels per quarter used, which suggested that more had been used.

44. Officer Jones notified the Appellant of the results of the credibility checks inviting a response. In the absence of a reply, on 21 September 2012, Officer Jones determined that he would have to make an assessment of the Appellant's profits which would be calculated on the basis that the Output Tax declared equated to 72% of the true Output Tax value (43/60). That is, only 43 customers were recorded whereas 60 had been observed. He assumed that the spend per head remained fairly constant throughout the year and on 11 October 2012 made an assessment as follows:

Period.	Output Tax.	Outputs.	Gross Out puts.	Uplifted Output Tax.	Assessment.
P06/12	10,274.72	51,373.00	61,647.72	14,270.44	3,995.00
P03/12	10,118.94	50,595.00	60,713.94	14,054.08	3,935.00

45. The agent for the Appellant responded that the assessment was flawed for a number of reasons.

(1) The observations were only conducted on one day and it would be entirely unrepresentative and unfair to extrapolate any discrepancies over an extended period. Observations undertaken over more than one day would have assisted in eliminating potential errors. Also the observation was undertaken on Armistice Day which was also a Friday, one of the busiest nights of the week when additionally customers may also spend more. The observations therefore would not be representative.

(2) By Team B's own admission, their observations were made from a position where they could not see clearly what was happening. Even a modest error could lead to a significant distortion. The agent argued that if you are looking for the bill for a party or person who was not in fact there, then that will create a perceived but false discrepancy. Team B may not have been able to distinguish between a new customer from a returning smoker customer or a stepping out smoker customer from a departing customer. It is not at all unusual for more than one individual to go out and for them to chat outside the restaurant and then return to different tables. Such occasions could very easily be misinterpreted. These issues, combined with the added confusion of people entering and leaving with a takeaway or just waiting for a menu, could easily explain the apparent discrepancies of customer numbers. These issues had not been adequately addressed by HMRC.

(3) The drink to total exercise was meaningless as it made no allowance for staff consumption complimentary drinks and wastage. If these are taken into account, the adjustments expunges the modest discrepancy (6.5%) identified by HMRC.

(4) The customer bill pad exercise was never a reliable check. Businesses will always purchase more than required and replace prior to running out. Pads are sometimes spoiled or used for other purposes. Also, the HMRC exercise did not indicate whether takeaway meals had been included.

(5) HMRC's calculations comparing the use of napkins and hot towels were flawed. Clearly 2,600 napkins would not equate to 2,600 meals whereas 1,444 hot towels each equating to a meal would be likely to be more representative, given that a hot towel is handed out after dining. Furthermore some customers used more than one napkin. Napkins may be soiled and have to be replaced, sometimes more than once. If there were 1,444 meals per quarter that would be 111 per week at £18.98 per meal giving £2,106 per week amounting to £3,008, including takeaways or £39,104 per quarter which was in line with the Appellant's returned figures. Alternatively the agent suggested that using the information provided by Cottonmill, if 165 napkins (of 300) were used each week (55%) with an average meal price of £18.98 there would be weekly sales of £3,131, and even though this took no cognizance of non-use of napkins, the resulting figure was again in line with the returned takings. This clearly suggested that the declared sales were more than likely to be correct.

46. HMRC replied that:

(1) Although the observations were undertaken on a Friday, there was nothing to suggest that business takings (in terms of numbers of diners) were more likely to be suppressed on a Friday than on any other day. HMRC did not address the possibility that the amount spent per diner on a Friday may be more than on other days, e.g. Monday to Thursday as that was relevant to their methodology.

(2) Whilst it is possible that the group of five entering the restaurant at 20.55pm had been counted twice, that still left 5 groups and 12 customers unaccounted for. Further whilst it is possible that diners may pop out of the restaurant for a cigarette, the discrepancies noted by the officers related to groups of diners not individuals.

(3) Beer and wine is sold by the bottle which would mean that wastage was kept to a minimum. The restaurant proprietor Mr Khan had been asked about own use and complimentary drinks and said that there were none.

(4) HMRC's exercise indicated that 50% of customer bill pads were unaccounted for.

(5) Napkins. HMRC accepted that there will be more napkins used than meals eaten but not as many as 50% more. In respect of the hot towels, it is possible that some are purchased from suppliers other than Cottonmill and that more than 1,444 were used.

Issues to be determined

47. The issue to be determined by the Tribunal is whether HMRC's VAT assessments as set out above are to best judgment. The burden of showing that the assessments have not been made to the best of HMRC's judgment falls on the taxpayer.

48. If satisfied that an assessment has been raised to best judgment the Tribunal, as part of its supervisory function, has to consider whether the quantum of the assessment is correct.

49. Although the parties provided a joint bundle, this did not include an agreed statement of facts. The Tribunal is therefore also concerned with a fact-finding exercise. The chronology above sets out events, correspondence and meetings between the parties and the rationale used by each in justifying their calculations of the Appellant's VAT for the periods in question. It also identifies the main facts and issues in dispute.

Evidence

50. We were provided with two binders of documents and evidence consisting of;

i. The decision, the assessment and the review decision.

ii. Copy correspondence between the parties.

iii. A copy of the observation report and the visit report including notes (not contemporaneous but typed up afterwards (from notes taken by the observing officers whilst in the restaurant) and information extracted from the Appellant's records. We were not provided with a copy of the meal bills or records from which HMRC had noted the customer numbers recorded on the night of 11

November 2011. These documents were provided on the day of the hearing and were not included in the bundle. It is not clear if they had been put to Mr Khan previously.

iv. A summary of HMRC's calculations supporting the assessment. We were however not provided with any copy accounts for the business or other primary evidence relating to its gross turnover/profits.

v. Relevant legislation and case law authority.

We were not provided with any witness statements, but the HMRC officer Mr Richard Jones who made the assessment gave evidence on oath as did Mr Khan the proprietor of the restaurant.

51. HMRC's enquiry and visit report, in addition to the information summarised in paragraphs 40 – 43 above, also recorded that:

i. The restaurant is open 18.00pm to 23.00pm seven days a week. There are seven employees of which only one is full time. Staff are paid by cash on a weekly basis for a 20 to 30 hour week. The wages bill for June was £4,698. Staff also received food.

ii. There are 14 tables with seating for up to 52 people.

iii. There is no till, just a cash drawer with a float of £100. There is a single credit card reader.

iv. Orders are taken on un-numbered duplicated pads. The top copy goes to bar area and a second copy to the kitchen. Any additional orders for drinks or other items are added to top copy. This order pad forms the basis for the bill and has a tear off bottom section to act as a receipt. At the end of the night the order bills are added, compared to the cash and credit card takings and the Daily Gross Total is recorded in a loose-leaf cashbook. Meal bills are retained. Daily bundles of bills together with the business' credit card report are totalled and values transferred to the cashbook, which is passed to accountant.

v. VAT Returns are prepared by the accountant. The Appellant passes the sales records, purchase invoices, bank statements and paying in books to his accountant.

vi. With regard to Purchases, the Appellant's accountant produces a manual monthly listing for purchases. Invoices are filed in the same order as the listings. Mr Jones was able to reconcile entries on the purchase listing to original invoices and also the VAT account.

vii. Mr Jones selected a week from each of the returns for periods 06/10, 09/10 and 12/10, and carried out an arithmetical check of daily bundles of bills, and was able to trace values to the cashbook. He also satisfactorily traced values from the cashbook to the VAT Account and VAT Return.

viii. Mr Jones examined the accounts for April 2010 and was satisfied that the turnover and VAT figures reconciled.

ix. He also examined the bank statements for October to December 2010. The gross sales declared for that period were £62,537.45 of which £18,598.75 were cash which was sufficient to cover the wages and the small amount of purchases paid cash. The credits on the statements were £44,699.50. Examination of the debits supported the Appellant's contention that the majority of the purchases were paid via the bank.

x. With regard to the observation carried out 11 November 2011, HMRC say they observed at least 55 customers to have dined. The average spend per head of the two pairs of officers was £25. From this Mr Jones concluded that the daily gross takings for eat-in customers on the 11 November 2011 should have been £1,375 to which should be added a value for takeaways. If he assumed that 75% of the sales are eat-in then he might have expected daily sales of £1,875.The business would therefore be expected to turnover per annum considerably more than the Appellant had actually returned.

xi. The restaurant has a contract with Cottonmill Linen Ltd to supply, amongst other bits of laundry, up to 300 napkins a week although they state that the trader is only using 55-65% of the potential usage. At an average spend of £25 per head and with 200 napkins being used a week he said that eat-in sales of around £65,000 per quarter could be expected on the assumption that the napkins are used for nothing else. In addition there will be the takeaways for which no napkin will be used. Officer Jones' methodology suggested that if takeaways accounted for say £10,000 per quarter then total sales would be approximately £300,000 per annum compared to £240,000 returned.

52. At the hearing Officer Jones gave evidence:

(i) In cross examination, he agreed that the discrepancy identified in the 'drinks to total' credibility check could possibly be explained by complimentary drinks, wastage and staff drinks. He emphasised however that the check did not form the basis of his assessment.

(ii) With regard to the average spend per customer, which he had calculated at £18.98, Officer Jones said that he had taken a week at the beginning of December 2011 and a week at the end. He said that although December could traditionally be regarded as one of the busier months, his analysis had not shown any significant difference from the figures on the 11 November 2011 observation. In cross examination however he agreed that 11 November 2011 was a Friday and also Armistice Day which might have meant increased customer numbers and turnover.

(iii) Officer Jones said that he had also analysed a week in each of June, September and December 2010 which showed that sales of food were respectively £4,421, £3,942 and £5,004, indicating a clear increase in December. Sales of drinks were respectively £639, £632 and £1,028, again showing an increase in December. Officer Jones' calculations showed that the average spend per customer for those three sample weeks was £16.18, including drinks (compared to the £18.98 calculated for the two weeks he had chosen in December 2011). He had not attached any significance to these particular calculations when undertaking the assessment, in that they may have shown that average spend per customer was less than £18.98.

(iv) Officer Jones confirmed that he had examined the business' VAT outputs between 2009 and 2011 which showed that the two VAT quarters figures either side of Christmas

for 2009, 2010 and 2011 had always been more, although not substantially more, than the other two quarters. Again he had not attached any significance to the figures.

(v) Officer Jones agreed that when undertaking the napkin credibility check, he had used a figure of 65% (200 used) of 300 (supplied) per week, whereas Cottonmill put the figure at between 55% and 65%. He agreed that in his analysis of the observations in November 2011 that his figure of £25 per head was *"just an estimate, we hadn't seen the visit figures then"* and that an average of £19 per head or possibly less than that was more likely. He also agreed that the HMRC officers perhaps had to stay in the restaurant longer than an average customer and that the £25 they each spent may have been unrepresentative.

(vi) Officer Jones said that he had not included the observing officers contemporaneous notes in HMRC's evidence. Instead he had arranged for the notes to be typed up afterwards. He said that the officers were however very experienced and the notes would be entirely accurate. Again he emphasised that the assessment was based on the discrepancies identified at the observation, and not particularly any of the credibility checks.

(vii) Officer Jones said that in his view, one night's observation was adequate. An observation over a longer period was not necessary for the purposes of determining average customer numbers and takings. He disagreed that there was any possibility of customers having been double counted as a result of leaving and re-entering the restaurant.

(viii) He agreed that in undertaking the bills order pad check he had made no allowance for spoiled bills or pads used for another purpose.

(ix) He also agreed that he had not made any allowance in respect of soiled napkins or napkins used not by diners but for other purposes.

53. Mr Khan in giving oral evidence said:

(i) He was unable to explain the discrepancy in customer numbers/bills identified by HMRC in the 11 November 2011 observation. He said that many of his customers were regulars and know each other; they therefore occasionally leave the restaurant for a cigarette and re-enter. In cross examination he agreed that if customers did leave and re-enter, the waiters would not clear and re-lay their table and therefore that meant that there would be less likelihood of diners being double counted.

(ii) Mr Khan said that Friday was by some margin the busiest night of the week, sometimes being as much as 60% busier than other nights.

(iii) He said that sometimes people entering the restaurant do not always eat, there may be a group of four, with two drinking but not eating. Children sometimes do not eat, or parents bring food for them but they would still have been counted by HMRC as part of the group.

(iv) Mr Khan agreed that it was unfortunate that bill pads were not numbered. He said that pads were sometimes used for other purposes, customers make mistakes and often an order has to be retaken. Some pads were damaged/spoilt with drinks etc. Sometimes the carbonated copy did not work particularly well so the order is discarded and redone.

(v) With regard to napkin use Mr Khan said that of the 55% - 65% sent for laundering, not all had been used for a meal. Many, he said, were old, soiled and permanently marked. He says that he said that he had been asking Cottonmill for new replacements but the old soiled ones, laundered, kept coming back and therefore were repeatedly returned. He said that customers frequently spill drinks on them and are given another. Cottonmill charge the same, whether he sends one napkin or three hundred napkins for laundry. He said that it was an exaggeration to suggest that every single week 200 napkins were used, reflecting 200 meals.

(x) Mr Khan confirmed that the hot towels were free from Cottonmill. He did not purchase hot towels from any other supplier.

(xi) He said that in his estimate approximately 30% of customers paid by cash, and maybe more at Christmas.

(xii) Mr Khan was not able to explain why he used a cash drawer in preference to a till; that was just the way he had always operated. His staff had been with him for some time, he trusted them and although some time ago there had been pilfering there had been none in the recent past or at the time of the observation.

(xiii) Mr Khan said that he did not have a CCTV system which he accepted was unusual for licensed premises, particularly when they were often required for a premises licence.

Relevant legislation

54. The relevant VAT legislation is contained in VAT Act 1994:

Section 4 Scope of VAT on taxable supplies

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Section 73 Failure to make returns

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

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

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

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

Section 77 of the Act states –

(1) Subject to the following provisions of this section, an assessment under section 73 shall not be made -

(a) more than [4 years] after the end of the prescribed accounting period or importation or acquisition concerned.

Section 77(4) of the Act (prior to 1 April 2009 and relevant to VAT periods prior to 04/09) previously read as follows –

(4) Subject to subsection (5) below, if VAT has been lost -

(a) as a result of conduct falling within section 60(1) or for which a person has been convicted of fraud, or

(b) an assessment may be made as if, in subsection (1) above, each reference to [3 years] were a reference to 20 years.

Section 77(4) of the Act provides (w.e.f 1 April 2009) -

(4) In any case falling within subsection (4A), an assessment of a person('P''), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).

(4A) Those cases are-

(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf).

Schedule 11, section 6 of the Act – contains the rules regarding the Duty to keep records -

6(1) Every taxable person shall keep such records as the Commissioners may by regulations require, and every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member State any goods which are subject to a duty of excise or consist in a new means of transport shall keep such records with respect to the acquisition (if it is a taxable acquisition and is not in pursuance of a taxable supply) as the Commissioners may so require.

(2) Regulations under sub-paragraph (1) above may make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases)(4) The duty under this paragraph to preserve records may be discharged—

(a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for Her Majesty's Revenue and Customs.

Regulation 31 of the Value Added Tax Regulations 1995 provides -

Records

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,
(b) his VAT account,
(c) copies of all VAT invoices issued by him,
(d) all VAT invoices received by him, ...

Schedule 24 Finance Act 2007 – Penalties for errors (effective from 1 April 2009 and relevant to penalties issued for VAT periods 04/09, 01/10, 01/11, 04/11, 07/11 and 10/11).

Section 60(1) of the Act provides –

(1) In any case where—
(a) for the purpose of evading VAT, a person does any act or omits to take any action, and
(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

Section 60(7) of the Act provides that the burden of proof of liability to a s 60(1) civil evasion penalty lies upon the Commissioners.

Section 70(1) allows the Commissioners to mitigate the penalty including to nil.

Section 76(1)(b) provides for the making of an assessment of a Section 60 penalty.

Section 77(2) provides that a civil evasion penalty assessment (under section 60) must be made at any time before the expiry of the period of two years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined.

'Best Judgment'

55. By way of an outline of the meaning and principles of 'best judgment,' where it appears to HMRC that a return or returns are incomplete or incorrect, an assessment may be made to the best of HMRC's judgment. [VATA 1994, s 73(1)(7)(7A)(7B), s 75(1); FA 1996, Sch 3 para 10]. However, there must be material before HMRC on which to make their judgment and they must exercise their powers honestly and bona fide.

56. Although HMRC's decision must be reasonable and not arbitrary, they are under no obligation to do the work of a taxpayer by carrying out exhaustive investigations but if they do make investigations, they must take into account material disclosed by them (*Van Boeckel v C & E Commissioners,* QB 1980, [1981] STC 290.

57. The function of the Tribunal is supervisory. An assessment should only be held to fail the 'best judgment' test if made dishonestly, vindictively or capriciously, where it is a spurious estimate or guess in which all the elements of judgment are missing, or where it is wholly unreasonable. Without such a finding there is no justification for the Tribunal to set aside an assessment.

58. The function of the Tribunal is also to ascertain whether the assessment is to best judgment. (*MH Rahman (t/a Khayam Restaurant) v C & E Commrs*, QB [1998] STC 826 and *C & E Commrs v Pegasus Birds Ltd*, CA [2004] STC 1509. Once the Tribunal has

accepted that HMRC were entitled to make the assessment, the amount is for the Tribunal to decide (*Murat v C & E Commrs,* QB [1998] STC 923 (TVC 3.172)).

59. The Tribunal must look at what information HMRC relied upon to make the assessment and then make a value judgment as to how they arrived at the assessment. It is not a function of the Tribunal to engage in a process that looks afresh at all the evidence before it (*Georgiou and another (t/a Mario's Chippery) v C & E Commrs*, CA [1996] STC 463 (TVC 3.6).

60. Further, an assessment must be considered as a whole and if it is not made to the best of HMRC's judgment, then it is wholly invalid and void and cannot be corrected by any subsequent amendment to it or treated as partly valid.

61. The principle of 'best judgment' was explained in *Van Boekel v Customs and Excise Commissioners*by Woolf J, when giving judgment, said at 292:

> "The contention on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment. Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. The very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them.
>
> Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure that they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly it should be recognised, particularly bearing in mind the primary obligation, of the taxpayer to make the return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed upon the commissioners of carrying out exhaustive investigations.
>
> What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material 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."

62. In *McCourtie v CEC* [Lon/92/91], Dr. Brice said that

i. The facts should be objectively gathered and intelligently interpreted
ii. The calculations should be arithmetically sound
iii. Any sampling techniques should be representative.

63. The judgment of Woolf J in *Van Boeckel* was referred to with approval by the Privy Council in *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, in which the Council said:

> "The element of guess-work and the almost inevitable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."

64. In *McNicholas Construction Co Ltd v Commissioners of Customs & Excise* (2000) STC 533 Mr. Justice Dyson said that:

> "the words 'to the best of their judgment' permit the commissioners a margin of discretion in making an assessment; a taxpayer may only challenge the assessment if he can show that the commissioners acted outside the margin of their discretion, by acting in a way that no reasonable body of commissioners could do. In order to succeed, the taxpayer must show that the assessment was wrong in a material respect, and that if so, the mistake is such that the only fair inference is that the commissioners did not apply best judgment, as explained in Woolf J in *Van Boeckel v Customs & Excise Comrs* (1981) STC 290."

65. The case of *Argosy Co Ltd v IRC (Guyana)* [1971] UKPC 5; [1971] 1 WLR 514, although a Direct Tax case, describes the best judgment test:

> "It is between, on the one hand, an estimate of guess honestly made on such materials as are available to the commissioners, and on the other hand, some spurious estimate or guess in which all elements of judgment are missing."

66. Mr Justice Carnwath in *Rahman trading as Khayam Restaurant v CEC*, at para 6 said:

> "I have referred to the judgment in some detail, because there are dangers in taking Woolf J's analysis of the concept of 'best judgment' out of context. The Tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar Wednesbury principles (See *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

67. Lord Justice Carnwath in *Pegasus Birds v HMRC* [2004] STC 1509 CA (at para 38(i)) said:

> "The Tribunal should remember that its primary task is to find the correct amount of tax as far as possible, on the material properly available to it, the burden resting on the taxpayer…"

68. The Tribunal must consider whether, on a balance of probabilities, the Appellant has established that the assessment was not made by the Commissioners to the best of their judgment. However if it was not so made, a tribunal is not bound to reject an assessment. In *Pegasus Birds*, Carnwath LJ said-

"Although the Tribunal's powers are not spelt out, it is implicit that it has power either to set aside the assessment or to reduce it to the correct figure... In my view, the Tribunal, faced with a 'best of their judgment' challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Even if the process of assessment is found defective in some respect... the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly."

Appellant's case

69. The Appellant's grounds of appeal as summarised in the Notice of Appeal are:

i. That there is no safe evidence to support the assessment and penalty.

ii. There is nothing to indicate any flaw with the Appellant's VAT returns. Neither is there is anything to indicate any under-declared sales.

iii. The Assessment is based on one day of observations only.

iv. The assessing officer said that the basis of the assessment was only a "starting point for an agreement of under-declared sales". This indicates a preconception of under-declaration.

v. When other credibility checks are properly applied, including sound cash management, the indication is that there is no fault with the Appellant's VAT returns.

vi. The arguments and decisions presented by HMRC in their review lack foundation and the justifications offered are no more than platitudes.

vii. HMRC review decision of cut and paste type, has no solid foundation in fact or relevance to the appealed matter and HMRC officers have thus far been unwilling/unable to explain the basis of those extraordinary decisions.

viii. The Appellant has requested explanation of the decisions many times and one HMRC officer recognised this and sent the matter for a more detailed explanation. The officer in receipt of this function refused to comply.

ix. HMRC refused to address valid points raised on behalf of the Appellant. This to a lay person appears contrary to the Appellant's human rights.

70. At the hearing, Mr Andrews for the Appellant said that the assessment was flawed and reiterated the reasons he had set out in the notice of appeal and in correspondence with HMRC (see paragraph 45 above).

71. He expressed concern that the observing officers typed notes may not reflect the contemporaneous notes and that none of the officers were present as witnesses to give evidence and be cross-examined.

72. He said that the assessment was unwarranted and in any event excessive having been based on erroneous assumptions. The assessment was not objective and fair.

HMRC's Case

73. Section 73(1) VATA 1994 states that the Commissioners may assess, to the best of their judgment, returns where it appears amounts of VAT have been incorrectly stated. An assessment is likely to be made where there is clear evidence of an under-declaration or in a case where there has been an element of presumption to determine the true amount of tax.

74. Following invigilation undertaken at the Appellant's premises, where customer numbers were recorded, subsequent checks of records showed that a third of the bills (6 out of 17) and nearly a third of customers (17 out of 60) were unrecorded on the date of the invigilation.

75. The significant shortfall of numbers of customers recorded by HMRC, as opposed to those recorded in the records, has not been satisfactorily explained by the Appellant.

76. The 'best judgment test' has been considered by the Courts and Tribunals in numerous cases and it had been made it clear that an assessment is still acceptable even if the material on which it is based is limited.

77. At the hearing, Ms Pavely for HMRC summarised the benchmark for best judgment as set out in *Van Boeckel*. In short:

- HMRC should not have to do the work of the taxpayer;
- HMRC must perform their function honestly and above-board;
- HMRC should fairly consider all the material before them and on that material, come to a decision which is reasonable and not arbitrary;
- There must be some material before the Commissioners on which they can base their judgment.

78. Ms Pavely referred to the High Court decision in the case *of Mohammed Hafizar Rahman (t/a Khayam Restaurant)* CO 2329/97which she said made it clear that where a business successfully disputes the amount of an assessment, the assessment may be reduced, but it will rarely fail the best judgment test.

79. In the case of *Phuong Dhoung Jimmy Lee (t/a Jumbo Express)* [14127] the assessments were based on invigilation and test purchases carried out on one day. It was said that it was acceptable for HMRC to issue a best judgment assessment based on one day's observations, especially due to the obvious indicators that not all the customers, and therefore sales, were recorded. In this present case, HMRC recorded three parties of five customers, whereas the Appellant only recorded two; and HMRC recorded eight parties of two customers, whereas the Appellant only recorded four.

80. Ms Pavely argued that as clearly stated in case law precedent, HMRC do not have to carry out exhaustive investigations. They only need to be satisfied that the returns are incorrect or incomplete. HMRC must take any necessary action and produce a result that is deemed to be reasonable and not arbitrary.

81. If the amount of the assessment is disputed then the onus is on the Appellant to disprove the assessment. In HMRC's view the Appellant has not done this.

82. In this case, Officer Jones made an honest attempt to make a reasonable calculation of the amount due and the assessment has been raised to best judgment. The method adopted by Officer Jones to calculate the assessment was perfectly acceptable.

83. Ms Pavely referred to the case of *Pegasus Birds Ltd*, where Lord Justice Carnwath gave guidance to Tribunals in relation to the consideration of challenges to an assessment raised under best judgment. To summarise, he made four points:

i. That the primary task of the Tribunal 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." This should be the focus of the Tribunal and they should not be "diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment."

ii. Where a taxpayer seeks to challenge the assessment as a whole on best of judgment grounds, "it is essential that the grounds are clearly and fully stated before the hearing begins."

iii. That the Tribunal should insist at the outset that any allegations of dishonesty or other wrong-doing should be stated unequivocally, that the allegation and basis for it should be fully particularised and that it be responded to in writing by the Commissioners. No cross examination of HMRC officers may be allowed until that is done.

84. Ms Pavely argued that the Appellant had not volunteered any information, documentation or material to base figures on, nor even any explanation of the shortfall in unrecorded customers. As such, the assessment raised cannot be regarded as not being to best judgment, having been based on recorded observations made at the Appellant's premises. The figures were not guesswork devoid of sound judgment or estimated spuriously but were based on trained officers' observations.

85. HMRC dispute the Appellant's assertion that the other checks undertaken following the visit to the restaurant in January 2012 indicate no fault with the Appellant's returns. In any event they did not form the basis of the assessment.

86. The Appellant has not shown that the assessment should not have been raised or provided any evidence to show that the assessment is unreasonable or arbitrary.

Conclusion

87. The onus of proof rests with the Appellant to show that the assessment for VAT has not been made to best judgment. The standard of proof is the ordinary civil standard of the balance of probabilities.

The evidence

88. The basis of the VAT assessment is that the Appellant's records showed that on 11 November 2011 he had only 43 customers whereas HMRC observed 60. That represents a shortfall of 28.3% and that is the amount which HMRC have applied uniformly across the Appellant's returned output figures. If the Appellant normally returns takings of approximately £60,000 per quarter and £240,000 per annum that would mean actual gross income of £334,728 and £ 94,728 being under-declared.

89. At the hearing Officer Jones acknowledged that a party of 5 may have been double counted and therefore the shortfall was actually 21.8%. That would mean actual gross income of £306,905 and an under declaration of £66,950.

90. In support of the assessment, but using different methodology, Officer Jones said that the officers spent £25 per head when observing on 11 November 2011, and using that as an average spend per customer, if there were 55 customers, the total eat-in takings should have been £1,375 to which takeways, of which there were six that evening, would have to be added. If an average takeaway was £15, the total takings that evening would be £1,465 and annual takings £534,725 which would of course be entirely unrealistic.

91. It is unlikely that a Friday evening, when there were 55 customers in the restaurant, would be representative of a typical weekday, and as Officer Jones agreed, customers would be unlikely to stay in the restaurant as long as the observing officers did. Therefore customers would in all probability spend less. Indeed Officer Jones calculated the average eat-in spend at £19 per customer not £25.

92. Officer Jones said that the Appellant's usual returned takings of £60,000 per quarter or £650 per day equated to 34 customers a day at £19 each. If takeaways are factored in that would reduce the average number of customers to between 25 and 30 but increase it if the average eat-in meal was nearer £16, which was the figure at which Officer Jones arrived using a different methodology.

93. Mr Khan said that Friday was the busiest night of the week, sometimes by as much as 60%. This may have been an educated guess or possibly an exaggeration but if the average eat-in was say £17.50 and the average number of customers was reduced conservatively by 30%, including takeaways, (70% of 55) the average sale per day would be 38 customers x £17.50 = £665 per day plus takeaways, so say £715 per day x 13 weeks = approximately £65,500 a quarter, which is only 10% short of the Appellant's returned figures, rather than 28.3% short as reflected in the assessment.

94. We were not given copies of the Appellant's records which detailed customer receipts on the night of the observation. It may have been that the children for example had not been 'billed', that is recognised as customers (in terms of numbers recorded on the bill). If that was the case then the figure of 43 recorded customers should be increased to say 46. If so that would reduce the proportion of under declaration to 16.37%.

95. Officer Jones suggested that bill/order pad usage equated to 34 bills per day whereas gross sales declared equated to only 14 bills per day – Paragraph 43 above. However the arithmetic was flawed because there are of course only 174 days in the period 09/10 to 03/11 and that would equate to 22 bills a day. Further, the periods examined included the Christmas period which may have inflated the average bill. In that event the average bill per day, using the same methodology, would have been greater than 22 per day and if there had been some modest wastage, say 15%, then the usage could have been 25 per day or more. This indicates that the restaurant had an average of between 25 or 30 customers a day including takeaways which is less than HMRC factored into their assessment. Overall the bill/order pad analysis does not lead to any helpful conclusion.

96. With regard to the drinks to total exercise, Officer Jones acknowledged that the modest discrepancy of 6.5% could be explained by wastage, staff consumption and complimentary drinks.

97. Based on an analysis of napkin use Officer Jones suggested that the Appellant's annual turnover could be as high as £281,944. However the data he was using was extracted from the Christmas period. He said there was no great difference between the average in December and the average seen in November on the evening of the test purchase. However the average on 11 November 2011 would have been higher than usual because it was a Friday and therefore the comparison does not prove anything.

98. We consider that a count-up of hot towels rather than napkins is likely to give a more accurate number of people dining at the restaurant. If it were an average of 1,500 hot towels used per quarter at an average eat-in of £19 that would equate to takings of £114,000 per annum to which would have to be added drinks and takeaways. Again this method does not help in estimating the Appellant's annual takings, but it does not suggest that the Appellant's returned figures were significantly lower than actual figures.

99. There was however a clear discrepancy between the number of customers dining at the restaurant on 11 November 2011 and the number recorded by the Appellant. He has not been able to provide an explanation for that. We think it likely, as noted above, that the party of five arriving at 20.55pm were double counted. We do not accept that the observing officers double counted any other customers, but if they did it is unlikely that more than two were double counted. That would leave 10 customers unrecorded, that is 18% of the total for which there is no explanation. However if the number recorded did not for example include the three children (in the party of seven which arrived at 19.55pm) because they did not have a meal or shared a meal, that could further reduce the difference to 46/53 i.e. 7 or 13.2%. This is approximately half the shortfall assessed by Officer Jones, but still a significant number.

100. We should express our concern at the time between the observations and the records audit and the Public Notice 160 notification. Had this been much shorter, it might be that Mr Khan would have been better able to recall the circumstances on the night of 11 November, rather than having to rely – over two months later – on generalised explanations. We also think the observing officers notes should have been disclosed at the time of the formal interview and included in the bundle.

101. However, the Appellant has not provided a satisfactory reason why he does not maintain a till. HMRC record keeping guidance states that retail (including catering) businesses should maintain till rolls or some other form of electronic record of sales. The Appellant is required under the VAT Act 1994, Schedule 11, s 6(1), and the VAT Regulations 1995, regulation 31, to retain his business and accounting records. However he has no till rolls or 'Z' readings or other electronic evidence to substantiate his gross takings.

102. The Appellant has been trading for many years and has a premises licence but does not have a CCTV system, presumably because his licence was originally a justices' license which has not been reviewed since the Licensing Act 2003. If he had such a system, it would have been relatively simple for him to prove the number of customers entering his restaurant on any given evening.

103. As set out in *Van Boekel* and *McCourtie*, there are a number of underlying principles which must be observed in order for HMRC to arrive at a best judgment determination. Clearly there must be some material before the Commissioners on which they can base their judgment and HMRC must perform that function honestly and bona fide. Our primary task is to ensure that the facts have been objectively gathered and

intelligently interpreted in order that we can find the correct amount of tax as far as possible, on the material available.

104. On the basis of all the evidence, we find that there has been an under-declaration of output tax and HMRC have properly raised an assessment to best judgment.

105. Having reached that conclusion we have to consider the amount of the quantum of the assessment. Whilst not reached arbitrarily or as a random estimate, without judgment, the assessment in our view is flawed in so far as it over estimates the under-declaration. On the information and material available and for the reasons set out above, the assessment is excessive and should be reduced by 50%.

106. The appeal is therefore allowed in part and the assessment adjusted accordingly.

107. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 16 MAY 2016