



TC07359

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**Appeal number: TC/2014/01936
TC/2015/07078**

VAT – assessment – failure to keep records – appeal dismissed

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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KINGSLEY DOUGLAS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER DEAN
MS SUSAN STOTT**

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Sitting in public at Manchester on 3 May 2017 and 2 April 2019

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Mr N. Ginniff, Counsel for the Appellant

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**Mr J. Nicholson, litigator of HM Revenue and Customs' Solicitor's Office, for
the Respondents**

DECISION

5 1. By Notices of Appeal dated 9 April 2014 and 20 November 2015 the Appellant appealed against HMRC's decisions to raise assessments to VAT for the VAT quarterly period 09/09 in the sum of £7,319.17 and VAT periods 06/10 to 12/13 totalling £132,693.00.

10 2. The appeal first came before the Tribunal on 3 May 2017 when we heard evidence on behalf of the Appellant from Mr Douglas, Mr Ryan and Mr Cornwall. It became apparent during the Appellant's evidence that there was further evidence available which had not been filed and which was highly relevant to the issues in this appeal. With some reluctance we agreed to adjourn the hearing in order for the additional material to be produced and to allow time for HMRC to review the records
15 and provide any additional evidence in response.

20 3. We are grateful to Mr Nicholson and Mr Ginniff for their efforts in narrowing the issues in this appeal prior to the hearing on 2 April 2019. We were advised that following analysis of the records HMRC no longer contended that the Z readings were inaccurate or non-sequential. HMRC also accepted that the 12 test purchases carried out by HMRC were contained in the business records and were recorded in the Simplex books. The issues remaining related to the accuracy and reliability of the tills and whether the tills were operating or operated correctly in that no sales had been excluded. HMRC contend that in the absence of evidence, namely till rolls, to verify
25 the figures recorded by the Appellant, the only option was to carry out a business economic exercise to establish using best judgement the correct amount of tax due. The Appellant contends that the records were provided and are reliable and the assessment was not made using best judgement.

Background

30 4. The Appellant is a sole trader who at the relevant time operated 3 shops trading as Confectionary, Tobacconist and Newsagent at Crosby Road, Liverpool Road and South Road in Liverpool.

5. The Appellant was registered for VAT with effect from 1 August 1995.

35 6. On 4 September 2014 HMRC visited the Appellant and were advised that the Appellant at that time ran three shops, having sold a fourth two years earlier. The Appellant stated that he discounted cigarettes heavily; at the time of the visit 40p per packet and previously 60p per packet. The Appellant also stated that he had been told by another HMRC officer that journal till rolls did not need to be retained.

40 7. The VAT summaries produced by the Appellant indicated a negative mark up of -20% on Standard Rated ("SR") goods. In a letter dated 18 September 2014 HMRC sought clarification and evidence of the following:

- An explanation of missing Z readings in the period 20 May 2012 to 31 May 2012;
- Z readings taken to research problems with a till;
- 5 • Evidence of an agreement between the Appellant and previous visiting HMRC officer that journal till rolls did not need to be retained;
- Evidence of the discounts applied to cigarettes sales in the periods 03/12 and 06/12;
- Details of purchases made in the 03/12 period but claimed in the 06/12 period;
- Treatment of Payzone and lottery transactions.

10 8. In a letter dated 30 September 2012 the Appellant sought clarification and advised:

- Missing Z readings were a result of sensitive keys on the tills, any such extra Z readings were invariably not retained;
- He had been advised by a previous officer that journal till rolls were not
15 required;
- He varied the rate of discounts.

9. On 1 October 2012 officer Berry responded to the Appellant, stating that the previous visiting officer had not agreed the non-retention of journal till rolls and reiterating the points made in the earlier letter. The officer wrote again on 18 October
20 2012 stating that there was no agreement with the previous visiting officer and enclosing copies of two letters issued to the Appellant regarding retention of records. The officer provided advice regarding the correct treatment of Payzone and lottery transactions and queried the apparent differences between the Appellant's self-assessment and VAT returns in the periods ending 31 December 2009 and 2010. The
25 officer also referred to differences between the Retail Scheme calculations and figures included on VAT returns for periods 06/11, 09/11 and 03/12. In a separate letter of the same date the officer instructed the Appellant to retain all till journal rolls and Z readings and advised that all records must show which of the 3 shops they relate to, as the records within the Simplex book had become mixed up. He also instructed the
30 Appellant that all records must be kept for 6 years.

10. On 4 November 2012 the Appellant provided an explanation regarding the differences between the Self-Assessment accounts and VAT returns, and VAT returns and Retail Scheme calculations. On 15 November 2012 the officer sought a more detailed explanation.

35 11. A visit to all three shops took place on 6 December 2012. During the visit the Appellant provided further explanations regarding the differences between the Self-

Assessment and VAT returns. It was noted that Z readings were not carrying forward a cumulative total and there was no detailed record of lottery prize pay-outs. At that time there was a 20p discount on cigarettes but no evidence of previous levels of such discounts. A record was made of the prices at the time of the visit and the Appellant provided explanations of over-rings and mistakes supported by fragments of till receipts.

12. A further visit to all three shops took place on 31 January 2013. On that date HMRC officer Welsh carried out a till analysis. The officers also noted that the price of cigarettes was 10p below marked price. At Liverpool Road the shop assistant explained that packs of 20 cigarettes were sold with a 10p per packet discount and packs of 10 cigarettes were sold as marked.

13. Between 14 January and 23 February 2013 officers made a number of test purchases. A total of 12 purchases were made; 4 at each shop and each purchase was made on a different day. Three purchases related to packs of 10 cigarettes and no discounts were given. Nine purchases related to packs of 20 cigarettes in respect of which:

- One had a 20p discount applied;
- Five had discounts of 10p applied; and
- Three had no discounts applied.

14. In a letter to the Appellant dated 26 March 2013 officer Berry reiterated concerns regarding differences between Self-Assessment and VAT returns and requested written reconciliations of the differences and copies of the annual accounts for 31 December 2009 and 2010. The officer requested all Z readings and journal till rolls for the period 6 December 2012 to 31 March 2013 and VAT summaries for the same period. The officer also requested a record of all uncorrected over rings from the first use of the tills to 6 December 2012 to allow an accurate Daily Gross Takings (“DGT”) figure to be calculated and the first (or closest to) Z reading for each till.

15. A further visit took place on 16 May 2013 at which officer Berry uplifted purchase invoices for VAT periods 12/12 and 03/13 and VAT summaries. At the visit the Appellant showed the officer bags of till rolls and advised that he had not had time to put them in order.

16. By letter dated 20 May 2013 officer Berry requested evidence of opening and closing stock and stock lost through wastage and/or fire/theft/flood. On 8 July 2013 officer Berry sought clarification of when the discounting of cigarettes started and any factors which the Appellant considered directly affected his day to day business practices. On 19 August 2013 the Appellant provided:

- Opening and closing stock figures;
- Details of thefts;

- The available stock taking reports; and
- Details of the length of time discounting had been taking place.

17. On 19 September 2013 the officer sought the Appellant's permission to make direct contact with the Appellant's stock taker. On the same date the officer issued a
5 VAT assessment in the sum of £10,802 for the 09/09 VAT quarter on the basis that the Appellant had understated his gross sales used in the retail scheme calculation. Correspondence ensued in which the Appellant disputed the decision and stated that his sales were accurately recorded via nightly Z readings which had not been disputed by officer Walsh who reviewed the Appellant's records. Officer Berry explained that
10 HMRC did not accept the Appellant's explanation as to why one of the till drawers was left open and provided details of the work carried out by officer Walsh in respect of the bags of till rolls provided by the Appellant and which HMRC did not consider to be complete across the 3 shops.

18. The Appellant's stock taker advised HMRC on 8 November 2013 that:

- Working papers were not retained;
- Stock transfers were an internal matter for the client;
- The method of calculating stock;
- That "in Mr Douglas' shops there are always a large quantity of cigarettes that had been damaged"; and
- Agreement was given that "the figures appear high but cigarettes are a very
20 expensive item".

Evidence

19. We heard evidence on behalf of the Appellant from Mr Douglas, Mr Ryan and Mr Cornwall. On behalf of HMRC we heard evidence from Officer Walsh and Officer
25 Bebbington. The evidence is summarised below.

20. The Appellant provided four witness statements in which he explained that he has traded as a newsagent, sweets and tobacconist since 1974. He now trades from only two shops. During the relevant period the Appellant opened the shop at Crosby Road North at 5am as the newspapers for all shops were delivered there. He then
30 delivered some to the other shops. The Appellant left the main operational duties to staff members who record all mistakes and cash refunds throughout the day. Before the Appellant closed the shops between 9:30pm and 10:00pm, the staff members tally up the floats and take Z readings. The Appellant collects the takings on a daily basis. The takings are reconciled daily. The Appellant explained that he has only ever used
35 daily Z1 readings and recorded the figures in his Simplex book. The Appellant stated that the default settings which display a cumulative grand total or Z2 reading has never been used and he was not even aware of the Z2 function until informed by

HMRC officer Walsh. He noted that HMRC have in the past always been satisfied with his process of using Z1 readings. The Appellant explained that the button for the Z readings was sensitive and sometimes when a read was printed consecutive Z readings would be printed which had a zero value as there were no sales in between.

5 All Z reads are sequential and cannot be altered; the journal rolls from all shops show this. The total cumulative registered sales from all 3 shops shown on the Z2 reading acquired by HMRC officer Walsh amounted to £20,667,030.53. There is a question as to the reliability of this in trying to accurately establish the period to which it relates. The Appellant also notes that the reliability is further diminished as he traded from

10 four shops until 2010.

21. The Appellant stated that HMRC's comparison between the Z2 readings and output sales figure on VAT returns is inaccurate because the figures should be compared with the total Z readings within the Simplex books for a complete reconciliation. However, this reconciliation cannot be accurately performed as the Z2

15 readings from the fourth shop would need to be used.

22. The Appellant agreed that HMRC's calculations for period 6/12/12 to 31/1/13 are accurate as they cover a defined period between the Z2 readings being taken. There is a difference of £1,747.79 between HMRC's calculations and the Z1 total reading which is accounted for by the difference in time at which the readings were

20 taken; HMRC officer Walsh took the Z2 readings at an unknown time of the day whereas the Z1 readings are always taken at the end of the day. HMRC have compared the sales figures without taking into account Payzone, Lotto, Paypoint and over-rings in respect of which the Appellant has always kept records. The Appellant noted that he had provided HMRC with all journal rolls from the Liverpool Road shop as evidenced by HMRC's document on returning the records which states "KC

25 Douglas Liverpool Road Journal Rolls (Checked)." In those circumstances the Appellant cannot understand HMRC's accusation that not all records could be obtained.

23. Following the opening of a large local Sainsburys supermarket nearby in June

30 1998, the Appellant noticed a significant drop in turnover. As a result, the Appellant chose to further discount cigarettes to address the decreasing custom and it also created new trade. The Appellant noted that the test purchases made by HMRC were all properly recorded and accounted for. The Appellant stated that discounting decreased over the years as he was seeking to retire and sell the business.

35 24. The Appellant stated that at an audit by HMRC officer Jones, he was told that his practices and records complied with statutory requirements. The Appellant's system of record keeping has not altered in over 40 years of trading. The Appellant was told by HMRC that he did not need to retain journal rolls however he has always retained all records due to assessments raised by HMRC in the past which resulted in

40 a VAT Tribunal hearing approximately 20 years ago regarding the profit margins on cigarette sales and in which the Appellant was successful. Another assessment was raised approximately 10 years later which was ultimately withdrawn by HMRC. In a subsequent statement the Appellant clarified that he had previously kept all records in the same bag, following a discussion with HMRC officer Webb in 2004 about the

5 volume of paper, she advised that the Appellant should keep the Z1 readings for takings, Paypoint and Payzone with the details of corrections and lottery refunds only. This information was put into a separate bag for each day for all of the shops but the Appellant continued to retain the journal rolls for all of the shops for all periods in different bags. The Appellant stated that Officer's claim that no records were provided for 67 Crosby Road North (which he later clarified should have read Liverpool Road) was not correct. The Appellant disputed officer Walsh's evidence that not all till rolls were provided; he maintained that he had kept all till rolls which officer Walsh uplifted, checked and returned in a bag marked as "checked".

10 25. The Appellant was referred to a letter from officer Berry dated 18 September 2012 which noted:

15 "I have requested that you provide actual 'journal' till rolls for the above dates showing the detail of the daily transactions. You have stated that you have not produced or retained any journal till rolls, and that this practice was previously agreed with HMRC.

As retention of the detailed till rolls is a legal requirement of the retail scheme which you are using, please can you supply evidence of any such agreement."

20 26. The Appellant stated that he had given all till rolls to officer Walsh. It was put to the Appellant that the rolls were not for the correct period and that he had not provided them to officer Berry. The Appellant stated that he had not organised the till rolls into periods, they were kept in bin bags for all 3 shops but that he had kept all of the till rolls. It was noted that in a letter from HMRC officer Webb dated 10 August 2004 the Appellant was advised:

25 "With regards to the box of purchase invoices given to me, only the two 'odd' invoices in the box were from the period I had requested. The rest of the box related to a different period altogether...

As the registered person, you should be aware that it is a legal requirement to retain **all** business records for a minimum of six years. I am enclosing our Retail Scheme publications for your information."

30 27. Further correspondence from officer Berry dated 1 October 2012 responded to the Appellant's assertion that he had been advised by Mrs Webb that he did not need to retain till rolls:

35 "I have examined our file and have spoken to Mrs Webb. There is no trace of any such agreement in the file. Mrs Webb has advised me that she did not make any agreement with you...

I have requested that you provide actual 'journal' till rolls for the above dates showing the detail of the daily transactions. You have stated that you have not produced or retained any journal till rolls, and that this practice was previously agreed with HMRC".

28. In a letter dated 18 October 2012 Officer Berry reiterated Mrs Webb's confirmation that no agreement had been made with the Appellant regarding retention of till rolls. The Appellant maintained that he had kept all till rolls and that they were given to officer Walsh adding that the till rolls had filled a large room.

5 29. The Appellant stated that following the leasing of 67 Crosby Road North where the records were kept it was discovered that the new tenant disposed of some of the items. However most records, including sequential Z readings were still available. The records were placed in 3 bags representing the 3 week period which the parties had agreed to review following the hearing in 2017. Each bag contained each separate
10 day's trading, Paypoint and Payzone receipts and Z readings, over ring receipts and lottery pay-outs. Upon collection the HMRC officers would not co-operate in listening to any comments or explanation regarding the information.

15 30. On 19 July 2017 HMRC advised that they could not reconcile the amounts to the Simplex books and stated that some of the Z readings were incomplete. The Appellant was surprised at this as he was able to complete full reconciliations before submitting the records. He requested that all records were returned in order to carry out another reconciliation and illustrate to HMRC how the figures accurately flow from the register to the accounts. However, when the Appellant met HMRC officers Walsh and Bebbington to obtain the records he discovered that some were missing.
20 When this was pointed out Officer Walsh stated he would return to Manchester to retrieve them as there must have been a mix up at the office. Some of the remaining records were then returned in October 2017. However, some remain outstanding, The Appellant decided to photocopy sequential readings provided to HMRC to ensure this did not happen again. The Appellant highlighted the error by HMRC Berry in referring to a lack of records for Crosby Road North which he later amended to
25 Liverpool Road as a further example of the disarray on HMRC's part. The Appellant stated that he has since proven that records were returned in an HMRC bag which clearing showed that they related to Liverpool Road.

30 31. In cross-examination the Appellant was asked why records produced as additional evidence related to different periods to those directed by the Tribunal and in respect of which HMRC had found discrepancies. The Appellant explained that the records were provided as an example to show that HMRC had been given all records. The Appellant was asked about the analysis carried out by HMRC which showed in respect of records for 3 October 2010 discrepancies between figures recorded in the
35 Simplex book to those on the Z readings. The Appellant explained that the adding up could be wrong or staff could have entered the wrong amount manually as Lotto, Paypoint and Payzone could not be scanned.

40 32. In relation to the evidence from the Appellant's stocktaker, the Appellant confirmed that he provided the figures of thefts etc adding that he was not insured and therefore it was not done for his benefit or profit. In correspondence to officer Berry dated 10 December 2013 the Appellant explained that when he attended the shops each night to close, he looked at how much tobacco stock there was on the gantry and if there has been a theft the stocktaker can see what remains and calculate the value of stock taken.

33. The Appellant stated that Officer Walsh's reference to the tills being "brand new" is incorrect. He explained that a number of years ago he purchased three cash registers from BEC Ltd for the shops, one of which was an ex-demonstrator, and due to the volume of trade at the South Road store, the cash drawer became faulty and would not open again once closed unless the "no sale" button was repeatedly pushed until the drawer eventually opened. The Appellant swapped the till to the quieter shop on Crosby Road North until he could afford to repair it, however he was informed by Mr Ryan at BEC Ltd that the company which made the tills had gone into liquidation. This till was inspected by HMRC officer Berry who witnessed the way it would not open correctly once closed. HMRC officer Walsh, who believed that the till drawer being open represents a risk to the revenue and undermines the integrity of sales reported, also accepted on site by demonstration that the till mechanism meant that once closed there were difficulties in re-opening the till resulting in numerous "no sales" being recorded. The Appellant explained that he had not requested that the tills be programmed other than to scan items, the sale price of which the employees had programmed into the tills. The Appellant stated he had no knowledge that tills could record a "Grand Total" on Z readings, the absence of which was queried by officer Walsh. The Appellant stated that he simply obtained a Z reading at the end of each day and checked it matched the cash in the till. He knew nothing about Z1 or Z2 readings nor did he programme the till to suppress "voids".

34. Mr Ryan, a director of BEC Cash Registers Ltd gave evidence on behalf of the Appellant. He confirmed that he supplied a number of cash registers to the Appellant over the years. The latest one was a Gellar model and when the Appellant queried how to repair or replace parts for the till at Crosby Road North, Mr Ryan confirmed that the company had gone into liquidation and therefore parts and replacements could not be obtained. This meant that the register would remain open for fear of it not opening when required. The remainder of the tills functioned to full effect. Mr Ryan explained that Geller designed the tills and provided them with SD cards to place in the tills. The tills are generally used in bars so needed to be programmed to scan the items sold by the Appellant. He stated that the Appellant only wanted a till that would scan and provide a total at the end of the day; he did not need or want a "Grand Total" function nor did he ask Mr Ryan to change the programme so that the function was not included and "voids" were suppressed.

35. Mr Blair of BSS (Professional Stocktakers and Valuers) provided an undated written statement which confirmed that he has provided a stocktaking service to the Appellant for the past 25 years which were carried out quarterly until the last few years when they were done bi-annually. When one of the premises was burgled Mr Blair provided a stocktaking service for the Appellant's personal records. During the time Mr Blair has known the Appellant he has always discounted his cigarettes heavily; more so than most retailers.

36. Mr Alex Cornwall, an employee of the Appellant, has been employed by the Appellant almost continuously since he was 16 except for a gap year and during his time at University. He explained that the Appellant has two set shifts; mornings 6am – 1pm and afternoon 1pm – 9.30pm. Mr Cornwall works a mixture of shifts. When working in the afternoon his duties included cashing up at the end of trading hours,

counting the cash float and printing Z readings of the day's takings for the Appellant to collect when locking up. Mr Cornwall confirmed that he put all sales through the tills. He stated that the cash register at Crosby Road North had been problematic for at least one year; if the drawer jammed whilst processing a transaction the simplest
5 solution to open the drawer was to consistently ring in a zero-value sale. The easiest solution was to keep the drawer open at all times. He added that over-rings were noted manually and sorted out later by the Appellant. Mr Cornwall confirmed that the Appellant had always discounted cigarettes with the sole purpose of being the
10 cheapest tobacconist in the area. The discount varied from 10p to 40p; 40p on packs of 20 to 10p or 20p on packs of 10. There never appeared to be a set structure to the discounts; the Appellant would just tell Mr Cornwall at the start of the week.

37. On behalf of HMRC, officer Laura Bebbington gave evidence. Officer Bebbington took over the Appellant's case following the retirement of Officer Berry who had carried out a mark-up exercise to test the returned figures. Officer
15 Bebbington explained that one of the first issues she reviewed were the VAT returns submitted; the fact that the Appellant was almost permanently in a repayment position stood out as highly unusual for a business in cigarettes, tobacco and news. At the time officer Bebbington took over there were still Z readings missing and it was known that the Appellant traded with an open drawer which led officer Bebbington to
20 conclude that the records provided could not be relied upon. The next step was then to look at how the assessment had been calculated and steps taken to verify information provided by the Appellant.

38. Officer Bebbington explained that she checked the goods sold by the Appellant and which items were standard-rated (cigarettes, confectionary) and which were zero-
25 rated (papers). The purchase invoices for 12/12 were used to work out the percentage product split. The standard-rated goods sold by the Appellant made up between 70 - 80% and the remainder were zero-rated goods. The prices used by officer Berry were based on information obtained during assurance visits, including noting prices on display and information given by an employee. Test purchases were also carried out
30 by HMRC to check the level of discount offered by the Appellant on cigarettes.

39. Officer Bebbington reviewed all of the documents and concluded that overall the zero-rated mark-up of 34% was consistent across most periods and reasonable. Officer Bebbington stated that the figures for the standard-rated mark-up calculations for each of the categories of goods – specifically cigarettes – were based on prices
35 paid in a series of test purchases made by HMRC officers and also a purchase invoice dated 27 November 2012. Officer Bebbington noted that there were no copies of the purchase invoices from Parfett's (the supplier) but officer Berry had written to the Appellant on 28 October 2014 enclosing copies of his notebook entries which recorded the selling prices for various goods and the purchase invoice had originally
40 been provided by the Appellant. Officer Bebbington highlighted that the Appellant had not disputed those figures.

40. Officer Bebbington reviewed the documentation which led to the 20% mark-up applied to other standard rated goods including the Schedule of VAT arrears. She concluded that officer Berry had used an average amount as this category only

amounted to 1.4% of goods for resale. Officer Bebbington concluded that the average amount used was reasonable as it compares with the mark up on confectionary. Officer Bebbington noted that an adjustment had been made to period 09/09 for losses and transfer of stock which had reduced the assessment.

5 41. Officer Bebbington explained that the Appellant had advised officer Berry that
he was in a repayment position due to the discount given on cigarettes which were
marked up by 2 – 3%. Officer Berry had then looked at how this would relate to the
20% figure. Officer Bebbington noted that the Appellant had said that cigarettes were
10 discounted by 40p – 60p per packet. However, the test purchases showed that the
discounts were in the region of 20p; no discounts had been given on packets of 10 and
only a small discount on packets of 20. The selling prices were applied to cigarettes
and the assessment was calculated on the basis of the weighted mark-up i.e. rather
than applying an overall mark-up, it was weighted to the volume of goods sold. Of the
15 80% of standard-rated goods sold, 70% were cigarettes which had a major effect on
the overall mark-up. The prices from test purchases were used together with the
information provided by an employee who said that only packets of 20 cigarettes were
discounted. The result was a 4.42% mark-up on packets of 20 and 5.77% on packets
of 10 giving an overall weighted mark-up for all standard goods of 7.16%.

20 42. Officer Bebbington concluded that the economic exercise carried out by officer
Berry was reasonable and had taken into account all the information available and
made adjustments to take account of issues such as theft and damage. Officer
Bebbington stated that the Appellant's debt to his supplier did not form part of the
assessment as the Appellant's true financial position was unknown without full
investigation and evidence in support.

25 43. In cross-examination officer Bebbington was asked about mark-ups relating to
1998 – 2002 provided by the Appellant on standard-rated goods which had been
accepted by HMRC. Officer Bebbington did not agree; she explained that various
officers have enquired into the Appellant's tax affairs and have challenged the figures
on the VAT returns leading to assessments being raised. Some of the assessments
30 were withdrawn for technical reasons and others were paid by the Appellant by taking
the amount owed off the repayment figure.

35 44. Officer Bebbington explained that the assessment took into account the
discounts at that time; officer Berry had been told 40p by the Appellant but that was
not borne out by the test purchases and a visit to the premises by officer Berry where
he was given information about the discounts by an employee. Officer Bebbington
agreed that the discounts could have varied but stated that if that had been the case she
would expect to see the VAT returns fluctuate however they remained in a repayment
position. Officer Bebbington did not accept that the assessment was weakened by the
same brand being purchased in the test purchases; she explained that officer Berry
40 would have looked at the bestselling brand which the officers would have been told to
buy. Officer Bebbington noted the Appellant's assertion that he increased the price of
cigarettes when the business was for sale in order to increase profit, however she
explained that only one of the shops was for sale and that the prices of cigarettes were
similar across all of the shops.

45. Officer Bebbington accepted that the test purchases were made at different times, on different dates and were recorded in the books but explained that the point of the exercise was to test pricing rather than what was in the records. Officer Bebbington clarified that the issue was not whether errors were identified but rather the reliability of the records and in this case there were risks identified which led HMRC to conclude that the records could not be relied upon without verification of the underlying records.

46. HMRC officer Anthony Walsh was consulted by Officer Berry in relation to anomalies in the records produced by the Appellant's cash registers as Officer Walsh is authorised under s114(3) FA 2008 to access, inspect and check the operation of computers and associated apparatus including cash registers. Officer Walsh visited the premises at Crosby Road North and saw that the cash register had a bar code scanner attached which he was told by the Appellant was in working order and that 99% of sales were captured by scanning bar codes. The Appellant explained that Mr Cornwall had programmed the registers as and when required and that the items that were not scanned but were recorded manually were "scratch cards, RRP price marked items, products which have differing bar codes".

47. Officer Walsh noted that the cash drawer of the register remained open, presenting a significant opportunity to secure cash from sales to the drawer without an actual sale being registered. Officer Walsh was told by the Appellant that the drawer did not always open when the button was pressed and this was demonstrated to Officer Walsh who concluded that this posed a significant risk to the revenue and undermined the integrity of sales reported by the register in the Crosby Road North shop.

48. The Appellant demonstrated to Officer Walsh that in attempting to print a Z report, more than one Z report of that type was printed. Officer Walsh asked the Appellant about his understanding of what legally constituted a record of Gross Daily Takings to support retail scheme calculations, to which the Appellant responded that he had retained a full record only since receiving direction from Officer Berry in the recent past.

49. Officer Walsh noted that the cumulative Grand Total of registered sales had been programmed not to appear on Z reports of the type printed by the Appellant to support his declared sales. Officer Walsh explained that the Grand Total assists HMRC in inspections as it allows for a cumulative value of sales across an extended period of time to be readily identified provided it is accurate and visible on the Z report. Officer Walsh queried why, contrary to the default settings, this was the case to which the Appellant replied that he had not asked for the Gross Takings to be suppressed and that the Gross takings had not appeared since he had the till. The Appellant confirmed that no period Z reports (also referred to as Z2 reports) were taken in the ordinary course, just the daily takings Z1 reports. Officer Walsh also noted that "voids" did not appear on the Z readings which could potentially be used to reduce the value of sales as they would not be recorded on the material provided to HMRC. Officer Walsh explained that this was the reason why the till rolls were so important as they would show if there had been any misuse of the "void" function.

50. In relation to over-rings caused by human error the Appellant advised that where this occurs staff print out a receipt at the time and sign the journal till roll. No attempt was made to correct over-rings on the register; instead a manual entry is made in the “other receipts” column of the Simplex book to be adjusted from the sales totals carried forward from the Z’s that include uncorrected errors. The Appellant confirmed that these receipts were retained but not the journal till rolls due to paper storage issues.

51. Officer Walsh printed off a series of Z1 reports, namely Hourly Sales reports, NRG (Non Resettable Grand Total) reports and Training Mode Full Sales reports. Officer Walsh carried out the same procedure at the Appellant’s other two premises. Officer Walsh noted that the Z1 Hourly Net Sales reports showed very high values and volumes of registrations which indicate that the reports cover a significant period of time, although there was no evidence to confirm how long. The cumulative registered sales from all shops according to the reports was £20,667,030.53. Average customer spend values were calculated across all periods, many of which produced inflated results that indicated inaccurate recording of sales if the cumulative total was used.

52. On 31 January 2013 Officer Walsh and Officer Berry returned to the business premises and took further Z reports for analysis. The journal rolls in each register were also uplifted for analysis. The Z1 Hourly Net sales reports printed on 31 January 2013 shows cumulative sales of £538,100.11 across all three shops. The Z2 Hourly Net Sales reports printed on the same date showed total cumulative sales of £21,544,100.73. Analysis of the average spend values across all periods of the Z2 Hourly Net Sales reports shows some periods where values are far in excess of what would be expected for this type of business which is indicative of inaccurate recording of sales.

53. Comparison of the cumulative sales total, assumed to relate to a period of no more than 5 years based on the Appellant’s statement as to when the tills were obtained, to the business’ declared VAT outputs for periods 12/07 to 03/13 indicated that registered sales exceeded declared sales by £14,880,690 which HMRC concluded was unsustainable by the business and confirmation that the registers were an unreliable record.

54. Due to the substantial disparity between registered and declared sales Officer Walsh recommended to Officer Berry that a detailed analysis be carried out of journals and Z readings produced by all three registers over an extended but clearly defined period of time to calculate a true value of sales. The relevant records were requested together with how the records should be presented in order to be efficiently and effectively inspected and reconciled. However, when officer Berry attended the Crosby Road North premises to collect the records the Appellant presented a “room full to capacity with bags of till rolls” with the Appellant explaining that “they were all there” but “he did not have the time to sort them”. It was agreed that Officer Walsh would attend on 17 May 2013 to extract the information he required and collect purchase records for VAT periods 03/12 and 06/12.

55. When Officer Walsh attended he took photographs and examined the records to the best of his ability given the unsorted manner in which they were presented. He provided a receipt which clearly references the fact that it was not possible to confirm the completeness of the journal rolls at the time although Officer Walsh believed he had uplifted every journal roll that was present. Officer Walsh explained that the till rolls he obtained covered the period November 2012 to March 2013. He described how he had tipped the bin bags on the floor to find all the till rolls which he then put into a separate bag. He stated that there were not many till rolls in the bin bags which mainly contained loose receipts and Z reads. The till rolls were easy to find as they are bulky items and officer Walsh confirmed that he was satisfied he had checked the whole room. Officer Walsh confirmed that once he had identified Z reports to the tills rolls and then identified the shop to which it related he placed the till rolls into bags and marked which shop it related to. There were no till rolls relating to Liverpool Road. The record of over-rings which the Appellant had stated were receipts printed out by staff when an error was made were not presented in a manner in which Officer Walsh could effectively assess its completeness or even uplift for reconciliation to the Simplex books although he managed to identify some potential uncorrected over-rings. Following his review of the records officer Walsh confirmed that he had been unable to reach a conclusion as to the integrity of the records. He stated their reliability was questionable because they had not all been provided and there appeared to be some inaccuracies. Added to this, there was further doubt about their reliability due to the open till drawer which provided the potential for unregistered sales. Officer Walsh explained that there were inaccuracies on the Appellant's own account; by way of example sometimes items were entered into the till as 'fruit and veg' when they were not and the Appellant did not sell fruit or vegetables. Although HMRC accepted that the figures on the Z readings were entered into the Simplex books, the accuracy of the figures on the Z readings could not be checked and the risks and inaccuracies highlighted above undermined their reliability.

56. Officer Walsh noted that early Z reports had been uplifted. One report dated 15 December 2007 identified the source shop as South Road but was in fact produced by a different cash register. Officer Walsh concluded that this confirmed that either the Gellar register was introduced between the end of 2007 and early 2008 or that two registers were in use for an unknown period of time.

57. Officer Walsh used the journal rolls uplifted and his knowledge of the Z1 Full Report counters sighted on records on previous visits to use best judgement in assessing the source shop of the rolls by matching them within report counter sequence. He then replicated the counts and values on each Z1 Full Report within the journal roll, including those uplifted in January 2013, onto an Excel spreadsheet and sorted them into order according to date and report counter. Officer Walsh stated that it became apparent from this exercise that no journal rolls relating to Liverpool Road had been made available during the visit on 31 January 2013.

58. Officer Walsh concluded from his analysis that the records produced by the cash registers were inaccurate and that values are registered incorrectly. He noted that the Appellant had failed to produce on request complete records to allow a reconciliation of adjustments he made in the Simplex books to account for over-rings.

Officer Walsh took the view that any further attempts to inspect the records were unlikely to add any value to the enquiry in support of either HMRC or the Appellant.

59. Officer Walsh noted that the Appellant contended that the cash registers were acquired second hand which explains the discrepancy between registered and declared sales; Officer Walsh disputed this assertion on the basis that the manufacturer confirmed that the model in question was only released to the worldwide market in 2007 which leaves little chance that any of the registers had been used prior to the Appellant's acquisition of them.

60. Following the hearing in 2017 the Appellant was directed to produce the till journal, Simplex books and records of over rings for periods agreed between the parties. The Appellant had stated at the hearing that the records were available and could be produced.

61. On 9 June 2017 Officer Walsh and Officer Bebbington attended the premises to collect the records. The Appellant produced three large, clear plastic bags for each of the three years agreed (2010, 2011 and 2012) which contained individual paper bags. Officer Walsh confirmed that no till journal rolls were produced.

62. Officer Walsh described how the contents of the smaller paper bags held Z readings from tills, lottery and scratchcard refund tickets, Paypoint vouchers and receipts from tills said to evidence over-rings. Officer Walsh confirmed that other than being contained in bags the documents were completely unsorted and there was no accompanying schedule to enable a check for completeness and no way of identifying which record related to which shop.

63. Officer Walsh examined all of the Z readings that had been provided. Detailing the Z report numbers where they could be identified, apparent breaks in the sequence were identified. Officer Walsh also noted that a number of the Z reports had been manually torn part way up which obfuscated their origin, processing date and place in the sequence of other Z reports. Officer Walsh further noted that some Z reports with nil counts and values were present, consistent with the Appellant's statement that some had been produced in error.

64. The Appellant subsequently provided many of the missing Z reports although some remain outstanding. Officer Walsh confirmed that the records were returned to the Appellant in September 2017 and October 2017 as an oversight on the initial return resulted in some records not being returned.

65. A revised analysis of the records was produced by HMRC. Officer Walsh confirmed that it is clear from comparisons of the Simplex sheet that the Simplex adjustments for over-rings, lottery pay-outs and Paypoint redemption vouchers are inaccurate when compared to the till values; the sum of the Simplex book postings for Paypoint exceeds the sum of Paypoint till registrations by £1,700.16 and the sum of the Simplex book postings for Payzone exceeds that registered on the tills by £2,961.24 giving a total weekly discrepancy of £4,661.40.

5 66. Officer Walsh confirmed that it is clear from the comparisons on the Simplex sheet that Simplex adjustments for over-rings, lottery pay-outs and Paypoint redemption vouchers are inaccurate when compared to the documents provided to evidence the adjustments; the sum of the adjustments made exceeds the sum total in the documents by £61.48 across the week.

10 67. The Appellant later explained in response to HMRC raising the discrepancies that the till values for Paypoint and Payzone are not carried forward to the Simplex book because “Paypoint and Payzone reads HMRC have taken from the register readings of course will not correspond to the actual Paypoint and Payzone reads as they do not take into consideration refunds, overrings etc which is why the PayZone and PayPoint reads are required.”

15 68. Officer Walsh concluded that the unsuccessful reconciliation of the Z reports values to Simplex book Paypoint and Payzone postings, together with the Appellant’s admission that they are inaccurate proves that the records cannot be relied on in isolation. The Appellant has also failed to comply with his legal responsibility as required under section 4.4 of VAT Notice 727 to provide a record of Daily Gross Takings where the business uses a retail scheme concession. A Z report in isolation does not constitute a record of Daily Gross Takings and a till journal roll should be produced where a till is used. The Appellant has also failed to keep the required records for the purpose of accounting for VAT as per paragraph 6(1) Sch 11 VATA 20 1994 and Regulations 31(1) and 32(2) of the VAT Regulations 1995.

Submissions

25 69. The Grounds of Appeal set out in the Notice of Appeal state that the VAT due was calculated using the direct calculation scheme by independent book-keepers. The Appellant submitted that HMRC had not made an assessment using best judgement as no account had been taken of staff and customer pilferage, damaged goods, burglaries and other wastage and disruptions to the business. HMRC’s figures for purchases of crisps, drinks and other items are not correct and HMRC had failed to provide information relating to the test purchases to analyse how the officer reached his 30 conclusion. The Appellant also contended that the assessments are arithmetical projections based on assumptions which were not made to best judgement. The test purchases have all been traced through the records from till to the VAT return as correct and accurate.

35 70. On behalf of the Appellant Mr Ginniff submitted that throughout the relevant period the Appellant used electronic tills and the day’s takings were totalled using the Z button. Readings were taken from Paypoint and Payzone machines and the day’s takings were manually and meticulously recorded in the Simplex daily accounting book which shows the Z reading for each shop, record of Paypoint and Payzone figures and net Lotto figures, over-rings and other adjustments for each day. The daily 40 figures are totalled each week.

71. The VAT calculations were carried out by an independent firm called Total Accounting Services from the Simplex book figures and provided to the Appellant for inclusion in the VAT return.

5 72. The accuracy of the system is demonstrated from the till roll to the entry on the VAT return. It was accepted by HMRC that the Z readings are accurately recorded in the Simplex book and there is no dispute about the calculations carried out by Total Accounting Services.

10 73. The Appellant has kept all records since commencing business. Officer Berry described the store room as “full to capacity with bags of till rolls”. The test purchases carried out by HMRC were all recorded in the till rolls which indicates that the records were accurate.

15 74. The Appellant repeatedly offered to provide HMRC with records to address any specific concerns. After the adjournment of the hearing in May 2017 the Appellant hoped to provide HMRC with till rolls for the 6 weeks specified by the Tribunal however he discovered that a tenant of the shop where records were stored had destroyed the bags of till rolls without the Appellant’s knowledge or permission. The Z readings and other records were still available for the relevant periods. The analysis of the records provided by HMRC revealed no specific errors.

20 75. The issue relating to the faulty till drawer was not investigated in any depth and would not be sufficient to raise an assessment on all three shops. HMRC also accepted that the initial query regarding non-sequential Z readings was no longer in issue; it was accepted that the Z button was sensitive and could produce more than one Z readings.

25 76. The issue relating to Geller tills being programmed to omit takings was not raised in HMRC’s Statement of Case and the first mention by officer Walsh that there was the possibility of “voids” being suppressed was made in his 2nd witness statement dated 26 June 2018. It is submitted that HMRC raised this because there was insufficient evidence that the records were inaccurate. Officer Walsh accepted that the likelihood of there being an error in all three tills which suppressed sales stretches
30 credibility. There was also the evidence of Mr Ryan which confirmed that the Appellant attempted to repair the drawer but was unable to do so due to the manufacturer going into liquidation. Mr Ryan also confirmed that the tills’ programme was supplied by Geller on an SD card which was used to programme all three tills. He stated that the Appellant did not have the knowledge to re-programme
35 the tills and simply wanted machines that scanned and produced Z1 totals. Whilst officer Walsh maintained that examination of the till rolls may have revealed “voids”, the till rolls that were looked at did not show this and analysis of the till rolls might not have revealed anything more.

40 77. In cross-examination officer Walsh accepted that his evidence that interrogation of the tills, Z1 and Z2 readings showed a considerable amount of missing sales between 6 December 2012 and 31 January 2013 was not a reliable conclusion as comparing the Z1 and Z2 readings was like comparing “apples and pears”. He also

accepted that the Z1 readings at the start and end period led to a figure close to the Z1 figure recorded by the Appellant and that the difference of £1,700 could be explained by the readings being taken at different times of the day. Officer Walsh also accepted that the Appellant had dealt with over-rings in his records by requiring his staff to manually record them which he then recorded in the Simplex book.

78. The evidence of officer Bebbington reviewed that of officer Berry who had since retired. No further work was carried out on the integrity of the records; officer Bebbington simply looked at the economic exercise carried out by officer Berry in arriving at the figures used in the assessments. The economic exercise ignored that the Appellant was known for discounting cigarettes and there was evidence to confirm this from the Appellant, Mr Cornwall and the stock taker

79. The test purchases confirmed that discounts were given at various levels at various times in the separate shops. HMRC failed to take account of earlier investigations by HMRC or wastage by damaged or stolen stock.

80. Mr Ginniff submitted that the Appellant kept all necessary records, save for those destroyed without his knowledge, and afforded the facility to HMRC to collect and review them. HMRC's assertion that there were no records provided for Liverpool Road was incorrect as there was an HMRC green bag marked "checked" for records at that shop.

81. The Appellant submits that s73(1) VATA 1994 is not satisfied. As to the issue of best judgement, the Appellant submits that in the absence of evidence from officer Berry the Tribunal cannot assess whether the assessments were considered in an "overall" manner as to whether they were "wholly unreasonable" in the circumstances. At the time of making the assessments the test purchases had been carried out which showed discounting of cigarettes at different rates and at different times. The purchases were recorded on the till. *Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505 is authority for the fact that there is no requirement to carry out investigation which may or may not provide further material. However, in this case Officer Berry made no such investigation despite the Appellant's offer to assist and it is unknown whether officer Berry's assessment complied with the following guidance in *Van Boeckel*:

"It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment."

82. Mr Ginniff highlighted that there had been a previous Tribunal hearing in respect of different periods at which HMRC had failed to review information in the Simplex books and at which the Tribunal noted that the Appellant's evidence appeared credible. HMRC abandoned the case which turned then, as now, on mark-ups and the only change since that time is the reduction in discounts with a view to selling the business.

83. For HMRC's figures to be correct, they must be alleging that the Appellant has failed to declare sales of almost £1,000,000 over 16 return periods; this is more than £4,800 each week. As at January 2015 the Appellant owed £185,000 to his main wholesaler and was overdrawn on his personal accounts. Three of the shops were transferred to third parties for the cost of fixtures and fittings and stock at value, one shop closed as the new owners could not pay, another went out of business despite a rent free period of 12 months and the remaining shop had a rent free period until September 2017. The Appellant operates from one shop which he rents. This is at odds with the allegation that the Appellant has benefitted from undeclared takings in excess of £990,000 over those periods. The appeal should be allowed and the assessments reduced to nil.

84. On behalf of HMRC Mr Nicholson submitted that due to the Appellant's poor record keeping, HMRC are unable to verify the Appellant's VAT returns based on the documentation that was provided and therefore the Appellant has failed to discharge the burden of showing that the returns are accurate. The Appellant has failed to keep till rolls as required by section 4.4 to VAT Notice 727 – Retail Schemes to calculate the Daily Gross Takings figure. The Appellant was advised about which records to keep; when the records were requested they were found to be incomplete and therefore could not be used to verify the Appellant's returns.

85. HMRC contend that the Appellant has failed to keep the required records for the purpose of accounting for VAT as per paragraph 6(1) Sch 11 VATA 1994 and Regulations 31(1) and 32(2) of the VAT Regulations 1995 and as set out in VAT Notice 727. HMRC noted that the business had been in an almost consistent repayment position which, HMRC contend, is not credible. The assessments raised were considered to be the under-declared VAT and many questions remained outstanding at the time the assessment was made. Officer Walsh confirmed that the till records provided are not robust enough to conclude that they accurately record all sales. The full till rolls for the period directed by the Tribunal were not provided despite the Appellant's evidence that all till rolls were retained and that he could provide them to HMRC. The Appellant's evidence that he kept all records is contradicted by the correspondence of officer Berry which records the Appellant's assertion that he had been advised by Mrs Webb that he did not need to retain the till rolls. It is also contradicted by the letter from officer Berry advising that Mrs Webb had confirmed she had not made any such agreement with the Appellant. The evidence of officer Walsh is further confirmation that the Appellant did not provide full till rolls to HMRC. The Appellant's evidence has been produced, in the main, throughout the proceedings and reflects evidence of his choosing rather than that requested by HMRC or directed by the Tribunal.

86. In the absence of full records, the only option available to HMRC was to carry out a business economic exercise. The assessment calculations are based on a weighted mark-up exercise carried out by officer Berry and which was reviewed by officer Bebbington following officer Berry's retirement. The purchase invoices for the VAT accounting period 12/12 was used to work out the percentage product split. The prices used in the exercise were based on information gleaned by officer Berry during his visits when he noted the prices charged and spoke to the shop assistant at the

Liverpool Road shop. The test purchases ascertained the level of discount offered by the Appellant's business in relation to the sale of cigarettes. HMRC submit that the exercise provides reasonable and realistic results.

5 87. HMRC submit that the assessment is wholly reasonable and justified. The Appellant has failed to provide the necessary documents to verify his declarations. HMRC contend that the returns are either incomplete or incorrect. The Appellant has failed to keep the requisite records to operate the retail scheme nor has he complied with the record keeping requirements previously advised by HMRC. HMRC do not accept the Appellant's assertion that the documents provided are accurate and that
10 HMRC previously accepted this; a business such as the Appellant's should not be in a repayment position on a regular basis.

88. HMRC do not accept that the assessment was not made to best judgement. The principles to apply were set out in *Van Boeckel* and can be summarised as follows:

- HMRC should not be required to do the work of the taxpayer;
- 15 • HMRC should carry out their task honestly and fairly by considering all of the material before them;
- A decision should be reached on the basis of that material which is reasonable and not arbitrary;
- 20 • There must be some material before HMRC upon which they can base their judgement.

89. In *Rahman t/a Khayam Restaurant v Customs and Excise Commissioners (No 2)* [2002] EWCA Civ 1881 the Court stated that the assessment must not be reached dishonestly, vindictively or capriciously. The assessment must not be a spurious estimate, guesswork which lack elements of judgement or wholly unreasonable. Mr
25 Nicholson submitted that there is no evidence to indicate that the assessments were raised dishonestly, vindictively or capriciously; to the contrary the assessments were based on all the available information.

90. Mr Nicholson disputed the suggestion that HMRC had accepted figures previously provided by the Appellant in relation to mark-ups in the period 1998 –
30 2002 nor did he accept that HMRC had previously withdrawn assessments as a result. He submitted that previous investigations do not assist in determining the issues in this appeal due to the passage of time.

91. HMRC submit that the Appellant has failed to show that the assessments raised are not correct and the appeal should be dismissed.

35 **Discussion and decision**

92. HMRC's assessment was raised under section 73 Value Added Tax Act 1994 ("VATA94"), which provides in relevant part as follows:

73 Failure to make returns etc

5 (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 judgement and notify it to him.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person –

10 (a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

15 an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount is being VAT due from him for that period and notify it to him accordingly.

93. It is a well-established principle following *Van Boeckel* that an assessment is made to best judgement if HMRC “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.” *Van Boeckel* also endorsed the concept that the officer making the assessment:

25 “must not act dishonestly, or vindictively or capriciously, because he must exercise judgement in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of the assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee’s circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guess work.”

30 94. Once this threshold is passed, the burden falls on the taxpayer to establish on the balance of probabilities that the assessment is excessive. In *Tynwydd Labour Working Men’s Club and Institute Limited v Customs and Excise Commissioners* [1979] STC 570 it was stated that:

35 “... any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. There should be no difficulty in the way of the Appellant assuming this burden. The facts and figures are known to him, and if he does not understand the Commissioners’ case, the rules provide for the
40 Commissioners to give a proper explanation.”

95. We began by considering whether s73 (1) VATA was satisfied. The Appellant contends that all records were kept and consequently s73 VATA is not satisfied as there was no failure on his part to keep records and no basis upon which HMRC could conclude that the returns were incomplete or incorrect. HMRC submit that the
5 Appellant failed to keep records required to verify the returns and analysis of the records provided led HMRC to conclude that the returns are incomplete and inaccurate.

96. Much was made of the till rolls and whether or not they had been retained by the Appellant. This should not have been an insurmountable hurdle; either the
10 Appellant had the till rolls or he did not. However, we found the Appellant's evidence on this issue confused, contradictory and inconsistent. The Appellant was adamant that he had retained all till rolls since he started trading. However, this was simply not borne out by the evidence.

97. As far back as 2004 the Appellant was advised by HMRC officer Webb that he
15 was legally required to keep all trading records. In 2012 officer Berry referred to the Appellant's assertion that he had not retained till rolls by previous agreement with HMRC. The Appellant was asked to provide evidence of this agreement but none was provided. To the contrary, officer Berry makes reference to checking with officer Webb who confirmed that no such agreement was made. The Appellant's letter to
20 HMRC dated 30 September 2012 states:

“Previously, I did not keep ‘Z’ readings but instead kept all ‘journal’ till rolls. As you can imagine these were extremely voluminous (at one time I had nearly a room full of them) and it was agreed with your colleague Mrs G Webb that it was only necessary to keep the ‘Z’ readings. Previously I had not kept these but
25 only the ‘journal’ till rolls. It was at the suggestion of your colleague that I changed my system. If you are telling me that it is a legal requirement to keep all ‘journal’ till receipts, I will do so.”

98. In correspondence dated 4 November 2012 the Appellant stated:

“I am grateful for your drawing my attention to the relevant section of VAT
30 notice 727...and following receipt of your letter I have implemented the regulation by ensuring that all employees are aware that all daily till rolls are to be kept...with effect from 1st October 2012.”

99. HMRC requested that all records – including the till rolls - were made available for the period 6 December 2012 to 31 March 2013. Officer Berry attended and saw a
35 room “filled to capacity with unmarked bags.” In a letter dated 7 November 2013 officer Berry stated:

“I advised you that I had only asked for the period requested and queried why you had not complied with my request. You responded that you had not got the
40 time. Under the circumstances I phoned Officer Walsh who attended the following day.

He uplifted all of the bags of journal rolls which he could see. He has analysed these and found them to be incomplete across all three shops for the period requested.”

5 100. The Appellant’s response was that if HMRC advised him in what respect the records were incomplete he would endeavour to address any queries.

10 101. We considered the evidence carefully. The correspondence from the Appellant indicates that he previously retained till rolls but then stopped, at some point prior to 2012. In 2012 the Appellant was clearly advised that he was legally required to retain all records, including till rolls, and he agreed to do so with effect from 1 October 2012. In our view this contradicted the Appellant’s oral evidence that he had always kept the till rolls and we were satisfied that this inconsistency undermined his credibility.

15 102. Furthermore, in 2013 when till rolls for a specified period were requested the Appellant failed to provide complete records. The Appellant did not dispute this in written correspondence, instead he advised that he would endeavour to assist. Again, this was inconsistent with his oral evidence that he had kept all records and provided them to HMRC.

20 103. We preferred the evidence of officer Walsh who gave a clear and cogent account of attending to uplift the till rolls whereupon he found a room with a number of bin bags which he emptied out to find the till rolls. We accepted officer Walsh’s evidence that there were not many till rolls, which were easily identified due to their size, and that the bin bags were mainly full of loose receipts and Z readings. We also noted that although officer Berry had described a room “full to capacity with bags of till rolls”, officer Berry did not in fact sort through the bags to ascertain what exactly was in them. Moreover, the Appellant did not assist, instead explaining he did not have time to sort the records from which we inferred that the Appellant did not have a clear idea as to what records existed in relation to each shop. We were satisfied in assessing all of the evidence that officer Walsh’s account that the records were not complete was accurate.

30 104. Our view that the Appellant’s evidence lacked credibility was reinforced by the adjournment, the sole purpose of which was to afford the Appellant the opportunity to provide the till rolls for specified periods which he maintained he had kept. No till rolls were produced. The Appellant provided more unsorted Z readings, receipts and similar items with no schedule to enable HMRC to identify which records related to which shop. We found the evidence that the Appellant’s records had been destroyed without the Appellant’s knowledge by the tenant at Crosby Road lacked credibility; if the Appellant continued to retain and store his records we queried how he had failed to notice that there were fewer items in the storage room. However, even giving the Appellant the benefit of doubt and accepting that some records had been destroyed, we formed the view that the Appellant had no clear knowledge of what records existed for each shop.

105. We considered the Appellant’s evidence that HMRC were incorrect to contend that no till rolls had been produced for Liverpool Road and that the HMRC bag

marked ‘Liverpool Road Journal Rolls (checked)’ supported this. However there was no evidence before us as to who had marked the bag, what they had checked for or what was found and we concluded that we preferred the clear evidence of officer Walsh who had sorted through all the records provided and we accepted his confirmation that no till rolls were provided for Liverpool Road.

106. The conclusion we reached was that the Appellant did not have the till rolls he maintained he had and the records provided were not complete. The result was that HMRC did not have the underlying records with which to verify the Z readings which formed part of the figures declared on the Appellant’s returns. Furthermore, features were identified such as the open till drawer and ability to void a sale which increased the potential for inaccuracy. In addition to this there were discrepancies which the Appellant accepted such as recording a sale for fruit and veg which in fact related to Payzone items. Having considered all of the evidence, we were satisfied that there was ample evidence in support of HMRC’s conclusion that the Appellant had failed to keep all relevant records, nor had he afforded the facilities necessary to verify the returns and the records were unreliable. We observe that, in our view, HMRC had gone to great lengths in trying to obtain all relevant records and sorting through bin bags to identify which shops the records related to with no assistance from the Appellant who had failed to comply with the legal requirement to retain all records and who even stated in correspondence dated 13 October 2013 that “it is up to you to extract the information you require from the information I have directed you to.”

107. The information provided to HMRC by the Appellant was incomplete; the Z readings were recorded in the Simplex books with various adjustments and other items such as Paypoint. However, the Z readings contained only a summary of the sales and without the till rolls to provide a full representation of all registrations we were satisfied that HMRC were perfectly entitled to carry out a business economic exercise to reach a best judgement assessment.

108. We considered Mr Ginniff’s submission that the programming of the till and issue of ‘voids’ had not been pleaded in HMRC’s Statement of Case and that there was no evidence that the open till drawer or programme on the cash register had led to incorrect returns. However, these features did not form part of the assessment. Their relevance relates to whether the records provided by the Appellant were reliable and the existence of the risks identified without the ability to verify increased the doubt as to the reliability of the records. The evidence was clearly set out in officer Walsh’s witness statement and we were wholly satisfied that the Appellant was not prejudiced by HMRC’s reliance on the evidence; the Appellant had the opportunity to respond and did so by calling evidence from Mr Ryan. We accepted the evidence of Mr Ryan that the Appellant had not requested the tills to be programmed so as to suppress ‘voids’. However, as we have noted HMRC did not allege as part of its case that ‘voids’ had been suppressed by the Appellant or an employee, indeed there was no evidence upon which such an allegation could be based. The relevance of the evidence was simply that it formed part of HMRC’s analysis of the reliability of the records and risk factors identified which affected or may have affected the reliability of the figures provided by the Appellant in support of his returns.

109. Having concluded that HMRC were correct that the only option available was to carry out a business economic exercise, we considered the task carried out by officer Berry and which was reviewed by officer Bebbington. We rejected the Appellant's submission that the Tribunal is unable, in the absence of evidence from officer Berry,
5 to analyse whether the assessments were considered in an "overall" manner as to whether they were "wholly unreasonable" in the circumstances. Following the retirement of officer Berry, his economic exercise was reviewed by officer Bebbington who adopted the evidence. Any criticism that the overall effect was not considered was a matter to be put to officer Bebbington. However, even though the
10 point was not pursued in cross-examination we were satisfied for the following reasons that the reasonableness was a matter that had been taken into account and that HMRC had not misused their power in the manner cautioned against in *Van Boeckel* at [81] above.

110. The evidence of officer Bebbington relating to the assessment is set out above.
15 We accepted officer Bebbington's evidence which we found was clear, cogent and compelling. The officer considered whether, in the first instance, the making of an assessment was reasonable. We accepted the evidence that the records (many of which were still missing at the time the assessment was made and reviewed by officer Bebbington) could not be relied upon which led to the economic exercise being
20 carried out.

111. We were satisfied that officer Bebbington used all of the information available to verify the information provided by the Appellant. Purchase invoices were used to calculate goods sold and the percentage product split between standard-rated and zero-rated goods.

112. In relation to the prices used in the exercise, we found that the use of information obtained during the relevant period by visits to the shops and information from an employee was wholly reasonable. The Appellant's assertion as to the discounts applied to cigarettes was vague, unsupported by evidence and inconsistent with Mr Cornwall. Mr Cornwall's evidence confirmed that discounts varied and that
30 there was no set pattern. We noted that Mr Cornwall gave a higher discount figure than that applied by HMRC, however there was no evidence before us to indicate when the discounts referred to by Mr Cornwall were given and we concluded it was reasonable for the figures recorded by HMRC during the test purchases and the information from an employee which gave a lower figure to be used as they were
35 obtained during the relevant period.

113. In those circumstances we were satisfied that it was reasonable for HMRC to use the information obtained by visits and test purchases. We noted that officer Bebbington had considered the reasonableness of the mark-ups and taken into account adjustments for losses and transfer of stock. We rejected the Appellant's submission
40 that the assessment was flawed by the brand of cigarettes purchased or the time of day of the purchases; the onus rests with the Appellant to show that the assessment was flawed and there was no evidence in support of the submission. Moreover, officer Bebbington explained that the brand purchased is a factor considered by HMRC

officers in test purchases and that the relevance of different dates for the test purchases was to establish pricing.

114. We considered the principles set out in the authorities cited above. We concluded that HMRC fairly considered all of the material available and in doing so, arrived at a decision which is reasonable and not arbitrary as to the amount of tax due. We had no hesitation in concluding that HMRC had not acted dishonestly, vindictively or capriciously. The burden of proof in this appeal rests with the Appellant and we found that there was no evidence upon which we could conclude that the Appellant had shown the assessment to be wrong.

115. We considered the Appellant's assertion that HMRC have raised assessments in the past which were successfully appealed and that HMRC had previously accepted figures provided by the Appellant. We noted that this was disputed by HMRC. We did not find the evidence from either party on this matter assisted us in determining the issues in this case. We were not provided with full details of the previous assessments or Tribunal hearings and we took the view that even if we had been provided with such information, it was not relevant to this appeal. Each case must be decided on its merits and we therefore disregarded the evidence relating to historical matters.

Conclusion

116. The Appellant has failed to discharge the burden of displacing the assessment.

117. The appeal is therefore dismissed.

118. 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.

**JENNIFER DEAN
TRIBUNAL JUDGE**

RELEASE DATE: 04 SEPTEMBER 2019