



[2019] UKFTT 661 (TC)

TC07436

CORPORATION TAX AND VALUE ADDED TAX – assessments – time limits – best judgment – alleged suppression of takings – penalty assessments – decision in principle – further consideration to be given to quantum of assessments if not agreed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2016/04739
TC/2016/04740**

BETWEEN

EXOTIC SPICE (SPROTBOROUGH) LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR DAVID MOORE**

Sitting in public in Manchester on 12-14 November 2018 and 1 April 2019 with written submissions on 8 April 2019 and 7, 14 and 21 May 2019

Mr Taher Nawaz of T Nawaz & Co Ltd for the Appellant

Mr Paul Marks of HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against corporation tax and value added tax assessments and associated penalties which HMRC contend arise in connection with the appellant's business operating a restaurant and takeaway. HMRC allege that the appellant has deliberately suppressed its takings and has sought to conceal that suppression.

2. Enquiries into the appellant's corporation tax return for accounting period ended 30 June 2011 commenced in March 2013. In due course enquiries were commenced into later corporation tax returns and into the appellant's VAT returns. There was a visit to the appellant's premises on 6 June 2013 for a meeting with Mr Ala Uddin, the appellant's director. On 10 May 2014 there was an unannounced visit to observe the cashing up and a further unannounced visit on 17 April 2015 with a view to conducting an invigilation of sales. The assessments to corporation tax, value added tax and penalties were originally made in February, March and June 2016. Those assessments were subsequently revised. The sums now in dispute total £362,366 and the assessments may be summarised as follows:

Corporation Tax	£ 136,849	Accounting periods ending 30 June 2011, 2012, 2013 and 2014
Corporation Tax Penalties	£ 99,215	Accounting periods ending 30 June 2011, 2012, 2013 and 2014
Value Added Tax	£ 73,219	VAT periods 03/12 to 03/15
Value Added Tax Penalties	£ 53,083	VAT periods 03/12 to 03/15

3. The corporation tax assessment for the year ended 30 June 2012 was a discovery assessment. HMRC contend that they are entitled to make that assessment because they discovered that there was a loss of tax which was the result of deliberate behaviour on the part of the appellant. The burden is on HMRC to establish that they are entitled to make a discovery assessment. In relation to penalties, the burden is on HMRC to establish deliberate and dishonest suppression of takings. If HMRC establish these matters then the burden is on the appellant to establish that the assessments and penalties are excessive.

4. The appellant also contends that the VAT assessments were not made to best judgment. A similar submission in relation to the corporation tax assessments was not pursued. In the case of VAT there is clear authority that the focus of the Tribunal should be on the amount of the assessments. We shall start therefore by considering how the assessments were arrived at and return to the question of best judgment in the light of our findings of fact.

5. There are a number of issues raised by the parties relating to the quantum of the assessments which we are not able to resolve based on the evidence and the submissions before us. This decision is therefore a decision in principle with quantum to be either agreed by the parties in light of our decision or restored to the Tribunal for determination.

6. We heard evidence from the following persons on behalf of HMRC:

(1) Ms Joanne Jackson who is a senior officer of HM Revenue & Customs. She has many years of experience of VAT enquiries.

(2) Mr Richard Gibson who is a senior officer of HM Revenue & Customs. He has many years of experience and since 2012 he has been a corporation tax specialist.

7. We heard evidence from the following persons on behalf of the appellant:

(1) Mr Ala Uddin who is a director of the appellant and has acted as such since 2009. He is responsible for all day to day operations of the appellant.

(2) Mr Mohammed Mostofa who has been employed by the appellant for some 9 years. He works front of house and there is an issue as to whether he is simply a waiter or whether he has any managerial responsibilities.

8. Each witness supplied a witness statement and gave oral evidence. Our findings of fact are based on the witness evidence and the documentary evidence before us. Following the hearing, both parties were content to make their closing submissions in writing. Those submissions were detailed, extensive and in some respects made in trenchant terms. We do not repeat them in detail in this decision but we have considered them closely and taken both parties' submissions fully into account.

BACKGROUND FACTS

9. By way of background we find the following facts which are not controversial.

10. The appellant is in business operating an Indian restaurant and takeaway in Sprotborough, near Doncaster, South Yorkshire. The appellant company was formed in 2008 and registered for VAT on 1 July 2009. The business is run by Mr Ala Uddin who is a director of the appellant. It trades under the name Mehfil Indian Brasserie and is open 7 days a week. It has a maximum capacity at any one time of 46 covers although that number of diners would never be seated at the same time.

11. The busiest nights of the week are generally Friday and Saturday nights. On a busy night there would generally be 4 waiters on duty. At all material times the chef was Mr Abdul Khaliq. He is the longest serving member of staff at the restaurant. There are also a number of other kitchen staff.

12. The entrance door to the restaurant opens into a lounge seating area where there is a bar and access to the toilets. The lounge area has four round tables at which drinks are taken. There are three dining tables near the entrance and nine more dining tables in the main restaurant area. The bar area is separated from the kitchen and the main restaurant area by a partition wall.

13. A till in the form of a cash draw is kept under the bar together with booking diaries. There is a separate box for cash tips kept by the side of the till. Cash tips are taken out every Saturday night and added up. Customers might also add tips to card payments.

14. The restaurant uses pre-printed meal bills for each table in the restaurant. A blue carbon copy of the meal bill goes to the kitchen and the white copy remains front of house. The meal bills are pre-printed with the name of the restaurant, the VAT registration number and other details. Waiters write down the table number, number of covers, each dish ordered and the price of each dish, total value of drinks and the total bill.

15. Takeaway meal bills are simply pre-numbered lined white pages which show each dish ordered and the total value of the order. Again, there is a carbon copy for the kitchen. Mr Uddin and Mr Mostofa explained the "grid system" which was used for takeaway orders. This evidence was not controversial. Mr Uddin prepared a hand drawn grid in which each box was given a number between 1 and 80. A diagonal line would be placed through boxes on the grid in numerical order to signify a takeaway order. That number would be put on the bottom of the kitchen copy of the meal bill to ensure orders were dealt with in turn. The total number of diagonal lines would be the total number of takeaways for that night. The following night an opposite diagonal line would be placed in each box, making a cross for each takeaway for that night.

16. The white copies of meal bills are used to cash up at the end of each evening as we shall explain later. They are disposed of at the end of each evening together with the kitchen copies.

17. An enquiry was opened into the appellant's corporation tax return for accounting period ending 30 June 2011 on 1 March 2013. Initially Mr Stuart Hadley of HMRC had responsibility for the enquiry. He did not give evidence as he has since retired.

18. There was a meeting on 6 June 2013 attended by Mr Hadley, Mr Uddin, the appellant's accountant and others. The following relevant information was recorded as being provided by Mr Uddin:

(1) The cashing up procedure was described by Mr Uddin. He would total the sales from meal bills. A "z reading" showing the card sales that day would be taken from the appellant's card terminal used to take card payments. No record of the z readings was kept. The difference between total sales and card sales was the cash sales which would be reconciled to cash in the draw. The daily total sales was then entered into a handwritten takings book.

(2) Cash is not banked but used to pay cash wages. If there is insufficient cash on hand to pay wages then Mr Uddin withdraws cash from the business bank account.

(3) If Mr Uddin is away then the chef is in charge.

(4) The restaurant opens at 6pm. The advertised closing time is 11.30pm but it often closes early if there is no custom. Often there will be no new customers after 9-9.30pm and over the previous few days the restaurant had closed by 10-10.15pm.

19. In April 2014 HMRC's enquiry was extended to cover the appellant's VAT returns and Officer Jackson became involved in the enquiry. At that stage it was perceived by HMRC that the business was declaring insufficient cash takings to pay the wages, but that is not an issue specifically pursued by HMRC on this appeal.

20. The enquiry involved a covert visit to the restaurant on Saturday 10 May 2014 when two groups of two HMRC officers dined at the restaurant. One group comprised Officer Steven Hunt and Officer Gibson. The other group comprised Officer Jackson and Officer A Martin. At the end of the evening the officers made themselves known to staff and observed the cashing up procedure. Mr Uddin was on holiday at this time and not present at the restaurant. The circumstances of the cashing up were highly contentious and we deal with those circumstances in our findings of fact below.

21. The officers uplifted certain records including the white meal bills for that night, the takeaway grid which recorded the number of takeaway orders served and certain booking diaries for 2012 and 2014. The diary for 2012 had most of the pages ripped out and contained only pages for 23 December 2012 onwards. The diary for 2014 had pages ripped out for all dates prior to 10 May 2014.

22. HMRC subsequently obtained bank statements for the business from July 2010 to April 2015. Sums paid into the account broadly on a daily basis had the narrative "DUALITY SPROTROUGH" together with the trading date to which each credit related. It was agreed that these represented daily credits for card transaction payments made by customers. There were no cash deposits.

23. HMRC did not carry out any checks into the appellant's purchase records or into Mr Uddin's personal financial position.

24. On 10 March 2015 an enquiry was opened into the appellant's corporation tax return for the accounting period ending 30 June 2013.

25. HMRC made a further unannounced visit to the restaurant on 17 April 2015 with a view to performing an invigilation of the evening's trade. The appellant, on advice from Mr Nawaz, refused permission for the invigilation to take place. We deal with the circumstances of HMRC's attendance at the restaurant on this date in our findings of fact below. The officers continued to make observations from outside the premises which were recorded on invigilation sheets.

26. On 11 August 2015 an enquiry was opened into the appellant's corporation tax return for the accounting period ending 30 June 2014.

27. HMRC considered that a comparison of the daily takings for 10 May 2014 (a Saturday) to the daily takings for 28 and 29 December 2012 (a Friday and a Saturday) and 31 December 2012 suggested suppression of takings. In particular, the daily gross takings were significantly higher on 10 May 2014 and the ratio of card:cash payments was significantly higher. HMRC considered that this indicated suppression of cash takings.

28. Officer Jackson calculated that the ratio of card payments to cash payments on 10 May 2014 was 54.5:45.5. She concluded that was the normal ratio of card:cash payments and decided to issue VAT assessments to the appellant based on that ratio. A penalty was also issued pursuant to Schedule 24 Finance Act 2007 for alleged inaccuracies in the appellant's VAT returns. The penalty was based on what HMRC considered to be deliberate and concealed behaviour.

29. The VAT assessments were made on or about 18 March 2016 for periods 03/12 to 03/15 and the VAT penalties were notified on 23 June 2016. The VAT assessments initially totalled £69,980 and the total penalty initially charged totalled £50,735.

30. The following closure notices were issued by Officer Hadley in relation to the corporation tax enquiries for the 2011, 13 and 14 accounting periods, followed by a discovery assessment issued by Officer Gibson in relation to the 2012 accounting period:

Date	Period Ending	Corporation Tax Charged £
8 Feb 2016	30 June 2011	49,139
6 Nov 2017	30 June 2012	40,027
9 Feb 2016	30 June 2013	44,865
9 Feb 2016	30 June 2014	47,939

31. The total amount of corporation tax charged was £181,970. This included corporation tax on the alleged suppressed takings which were treated as profits chargeable to corporation tax, together with an alleged liability pursuant to section 455 Corporation Tax Act 2010 on the basis that the suppressed profits were treated as loans by the appellant to Mr Uddin who was a participator in a close company.

32. The assessments to corporation tax were based on a card:cash ratio of 55:45. Penalty assessments in respect of alleged inaccuracies in the corporation tax returns were issued on 22 June 2016 pursuant to Schedule 24 Finance Act 2007. The total penalty was £131,930. The assessments and penalty assessments were subsequently upheld on review.

33. In April 2018 Mr Gibson identified certain errors in the assessments for 2012 to 2014 which would increase the assessments. He proposed adjustments for these errors which arose because incorrect "merchant acquirer" data for the card sales in 2012 had been used and in 2013 and 2014 credit had not been given for all turnover declared by the appellant in those years.

34. In May 2018 Mr Gibson identified further adjustments to the assessments which he considered were necessary to give credit for additional purchases in line with the additional turnover which had been charged to corporation tax. To make those adjustments he used an expected gross profit rate of 65% for restaurants derived from a CCH publication. The effect of this is to reduce the total corporation tax assessments to £136,849, of which £61,140 represents corporation tax on additional profits and £75,709 represents a charge to corporation tax under s455.

35. The VAT originally assessed was £69,980 which excluded periods 7/11 to 12/11 because at the time of the assessment those accounting periods ended outside the usual 4-year time limit. The assessment was based on 54.49% of sales being made by card and applying that ratio to the merchant acquirer data to give what Officer Jackson considered was the true sales. Officer Jackson subtracted what she believed to be the gross sales declared on the VAT returns to give the suppressed sales and the VAT fraction was applied to that figure.

36. In April 2018 Officer Jackson formed the view that an adjustment was required to the VAT assessments. In September 2011 the appellant had applied to use the VAT flat rate scheme although the application had been rejected. Where the flat rate scheme is used the outputs included in the return are gross sales and the net tax due is treated as a fixed flat rate % of gross sales. The rate depends on the trade category of the trader. Officer Jackson had assumed that the appellant's VAT returns had been produced without using the flat rate scheme. In fact, we understand that the appellant produced returns for periods 03/12 to 03/14 on the basis that the flat rate scheme applied and gross sales inclusive of VAT were included in the return. The effect of Officer Jackson's adjustments in April 2018 would have been to increase the VAT chargeable from £69,980 to £88,298. Both parties agreed however that in making these adjustments there were errors in Officer Jackson's calculations for 09/14 to 03/15. As mentioned, we shall leave the effect of those errors to be determined by the parties in the light of this decision.

37. In May 2018 Officer Jackson made further adjustments to the VAT assessments for periods 06/14 to 03/15. The declarations for these periods did not use the flat rate scheme but no credit had been given for any increase in inputs associated with increases in outputs in the original assessment. For these periods Officer Jackson gave additional credit for input tax incurred based on the notional input tax credit during the flat rate scheme returns, which worked out as 15.4% of the output tax calculated to be due for those periods. This adjustment meant that the total amount assessed for the relevant periods on the respondents' case is £73,219, subject to errors mentioned in the previous paragraph.

38. In the course of submissions, HMRC pointed to what were said to be unexplained differences between the turnover on which the declared profits for corporation tax were based and the sales declared for VAT purposes. It does not appear to us that these differences affect the corporation tax now assessed or the VAT now assessed so we shall not consider them further.

APPROACH TO THIS APPEAL

39. The VAT assessments were made pursuant to section 73 Value Added Tax Act 1994 ("VATA 1994") which provides as follows:

"Where a person has failed to make any returns required under 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." (emphasis added)

40. The appellant contends that the VAT assessments were not made to best judgment and in any event there has been no suppression of takings. The approach that this tribunal should

take when faced with a challenge based on best judgment was described by the Court of Appeal in *Pegasus Birds Ltd v Commissioners of HM Revenue & Customs* [2004] EWCA Civ 1015. It is well established that two distinct questions can arise on a challenge to an assessment under section 73 VATA 1994. First, whether the assessment has properly been made under the power conferred by section 73(1) including the use of best judgement. Second, whether the amount of the assessment is correct. In relation to best judgement, where a tribunal is satisfied that HMRC have made a mistake in the assessment, Carnwarth LJ (as he then was) at [21] re-affirmed the question to be asked in the following terms:

“... the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary.”

41. Carnwarth LJ also gave guidance to tribunals when faced with a challenge based on best judgment. At [38] he stated as follows:

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

...

There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing.”

42. In this decision we shall focus initially on facts which are relied on to support the VAT assessments and in particular whether there was any suppression of takings leading to an underdeclaration of VAT, and if so the amount of that underdeclaration. We shall then go on to consider the question of best judgment.

43. The burden of establishing that an assessment is excessive lies on the Appellant. In *Khan v Commissioners for HM Revenue & Customs* [2006] EWCA Civ 89, Carnwarth LJ summarised the position as follows:

“69. ...The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

‘The element of guess-work and the almost unavoidable 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.” (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).”

44. Where the issue of best judgment arises, we consider it is to be determined by reference to the material available to HMRC at the time their assessment was made. We do not accept a submission made by the respondents that best judgment is a continuous process in the sense that an assessment which was not made to best judgment can subsequently be cured by amendment.

45. The respondents’ case in relation to the quantum of the VAT assessments was initially that if we were to find there was deliberate suppression of takings then the assessments, as

amended should be confirmed. However, both parties accepted during the hearing that subject to issues of time limits and best judgment, other adjustments to the VAT assessments and the corporation tax assessments may be required. In the circumstances we must deal with the following issues:

- (1) Whether there has been suppression of takings leading to an understatement of sales in the appellant's VAT returns, and if so to what extent.
- (2) Whether the VAT assessments were to best judgment, and if not what follows from that finding.
- (3) Whether the VAT assessments were made within the time limits specified by VATA 1994.

46. For corporation tax purposes we are concerned with whether there has been an understatement of profits rather than sales, and if so to what extent. In the appellant's written closing submissions the appellant confirmed that it did not pursue any argument of best judgment relating to the corporation tax assessments. Again, the burden is on the appellant to satisfy us that the assessments are excessive, and if so to what extent. The corporation tax assessment for 2012 was a discovery assessment and in relation to that assessment there is a burden on the respondents to satisfy us that they made a discovery that the appellant's self assessment led to a deficiency in the tax payable. We must also be satisfied that the conditions for making a discovery assessment were satisfied.

47. The most significant computational issue arises from the alleged suppression of takings and we shall focus on this aspect of the VAT and corporation tax assessments.

48. In relation to the penalties, the burden is on the respondents to establish that there were deliberate inaccuracies in the appellant's VAT returns and corporation tax returns. Essentially, on the facts of this case, the question is whether the respondents have satisfied us that the appellant deliberately suppressed its declared sales and profits. We must then go on to consider whether the appellant sought to conceal the inaccuracies in its returns. There is no challenge to the reduction in the penalties for disclosure and it is not said that there are any special circumstances to justify a special reduction,

RIGHT TO A FAIR HEARING

49. The appellant contends that his right to a fair trial has been prejudiced by incomplete disclosure of documents by HMRC. In relation to the penalties the appellant relies on his rights under Article 6(3) which provides as follows:

“Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) ...”

50. Mr Nawaz submitted that there had been a failure to provide the officers' notes in a timely fashion. For example, it is said that notes of the invigilation on 17 April 2015 were not provided until shortly before the hearing. He also relies on the fact that HMRC have not provided their “case control sheet” setting out the progress of the investigation. We do not consider that the appellant has been prejudiced in any way by late production of the notes of the visit on 17 April 2015 or by the alleged failure to provide a case control sheet which may or may not exist. We are satisfied that there is reliable evidence as to the progress of the investigation and that the appellant has been able to fully test HMRC's case as to the alleged suppression of takings.

THE FACTUAL ISSUES

51. The Respondents rely on a number of matters in seeking to establish deliberate suppression of cash sales on the part of the appellant. It is alleged that:

- (1) It is evidence of suppression that takings on 10 May 2014 were the highest nightly takings declared up to that date and showed one of the lowest card:cash sales ratios. The presence of the officers meant that there was no opportunity for Mr Uddin to suppress the takings.
- (2) On some dates the takings book shows daily gross takings less than the card sales for those dates.
- (3) Evidence from booking diaries, where available, indicates a higher level of takings than has been declared.
- (4) The normal ratio of card sales to cash sales was 55:45, whereas the declared ratio showed a much lower level of cash sales. In particular, the respondents rely on the actual ratio on the night of 10 May 2014 and what the officers say they were told by Mr Mostofa at the visit on that night.
- (5) HMRC's visit on 17 April 2015 was deliberately frustrated by the appellant in order to conceal suppression of takings.
- (6) Prime records were deliberately destroyed by Mr Uddin so as to remove any possible "audit trail" of the appellant's figures for daily gross takings.

52. We shall consider the evidence relevant to these allegations below, bearing in mind the submissions of both parties as to the significance of that evidence. Our findings of fact are based on the evidence and are made by reference to the balance of probability.

53. In some respects the respondents seek to draw inferences from the evidence which we do not consider can properly be drawn. In this decision we set out our primary findings of fact and then we discuss the inferences which we consider can properly be drawn from those findings. We focus on what we consider to be the most significant evidence.

54. The evidence and submissions reveal a number of subsidiary issues between the parties. In relation to some of these issues the evidence is equivocal and we are unable to make findings on the balance of probabilities. In relation to other issues we have not found it necessary to make any finding in order to decide the appeal. The fact that we do not refer to all the evidence adduced or to all the parties' submissions does not mean that we have not considered that evidence or those submissions.

(1) Takings on 10 May 2014

55. The recorded takings on 10 May 2014 excluding HMRC officers were £2,457.50. This comprised card sales of £1,387 and cash of £1,070. There were 20 meal bills and 46 takeaway orders on that night. It was a Friday night and HMRC say that it is significant that on other Friday or Saturday nights when HMRC were not present for the cashing up the declared takings were much lower. The Appellant contends that 10 May 2014 was much busier than normal. In support of this it relies upon the evidence of Mr Mostofa.

56. Mr Nawaz suggested at various times during the hearing and in his closing submissions that HMRC had somehow inflated the takings for 10 May 2014 by causing officers or others to eat at the restaurant. This was a baseless submission not supported by any evidence and we reject it. We are satisfied on the basis of the evidence before us that the takings on 10 May 2014 included 2 x meal bills for the HMRC officers. Otherwise the takings were from ordinary customers unconnected with HMRC's enquiries.

57. The following facts emerge from the evidence as to the takings on 10 May 2014 and evidence available as to takings on other nights:

(1) 10 May 2014 was the highest takings the restaurant had ever declared until that night. The next highest figure for a Friday or Saturday was £2,259 on 1 March 2014.

(2) The assessments cover the period from 1 July 2010 to 31 March 2015. In that period the takings on 10 May 2014 were exceeded only by the declared takings on New Year's Eve 2014 which were £2,861. Mr Uddin accepted that New Year's Eve would not be representative of normal trade.

(3) The declared takings on Fridays and Saturdays in the period 19 September 2013 to 3 January 2015 show a median of £1,429. The range starts at £400-600 (2 nights) and ends at £2,200-2,600 (1 night). There are only 4 nights including 10 May 2014 above £2,000.

(4) The evidence included takings for 970 nights in the period between 1 July 2010 and 3 January 2015. The declared takings exceeded £2,000 on only 14 nights and there were 5 Fridays and Saturdays out of 273 on which takings exceeded £2,000.

(5) In terms of card sales, 10 May 2014 was not an unusual Saturday night. The card sales of £1,387 were exceeded on 105 nights in the period 1 July 2010 and 3 January 2015.

(6) The card:cash ratio fell below that on 10 May 2014 on 11 days indicating higher proportions of cash takings. Those days were generally lower takings days as follows:

Date	Takings Declared £	Card Sales £	Card %
30/11/10	166.70	60.90	36.53
06/12/10	91.80	39.95	43.52
22/12/10	572.70	266.50	46.53
22/01/13	86.20	47.80	55.45
22/04/13	145.30	75.10	51.69
07/04/14	183.50	102.65	55.94
10/05/14	2,457.50	1,387.10	56.44
24/05/14	1,035.00	534.80	51.64
11/06/14	82.65	28.80	34.85
08/09/14	149.25	80.60	54.00
29/09/14	149.20	61.35	41.12
03/11/14	170.80	72.80	42.62

58. It is not in dispute that the takings on 10 May 2014 were not normal for the business. The appellant says that is because there were many more cash customers than usual. We consider that evidence below when we come to look at the cashing up on that night.

59. The appellant relies on the cash drawings made by Mr Uddin as indicating that 10 May 2014 was an unusual night and produced much more cash takings than normal. Mr Uddin's evidence was that he only made cash drawings from the appellant's business bank account when the cash in the till was insufficient to pay the wages. There were no cash withdrawals in the period from 3 May 2014 to 26 June 2014. This is said to support the appellant's case that the cash takings on 10 May 2014 were higher than usual which meant that Mr Uddin did not need to make withdrawals from the bank.

60. The bank records show that Mr Uddin made regular cash withdrawals. Looking at the period from 2 July 2013 to 26 June 2014 there were round sum withdrawals broadly on a weekly basis in sums of £200, £300, £400 or £500. There was a cash withdrawal of £300 on 3 May 2014 and then no withdrawals until 26 June 2014. Hence, for a period of some 7 weeks there were no cash withdrawals.

61. The circumstances in which this was dealt with in Mr Uddin's evidence was unsatisfactory, given that the appellant relies heavily upon this as evidence that on 10 May 2014 an unusually large amount of cash was paid by customers. The point was not dealt with by Mr Uddin in his evidence in chief and therefore Mr Uddin was not cross-examined on it. The point was raised very briefly in re-examination by way of a leading question from Mr Nawaz to the effect that after 10 May 2014 there was a lot of cash and no withdrawals for 4 or 5 weeks, which Mr Uddin confirmed.

62. Mr Nawaz submitted that because of the large amount of cash received on 10 May 2014 there had been no need for Mr Uddin to make withdrawals of cash from the bank account for several weeks following that date. We can see the logic in the submission, but it is only that, a submission. Mr Uddin did not specifically give evidence to that effect.

63. In closing submissions the Respondents did not say anything more than that we must look at the evidence as a whole in deciding whether there was an unusually large amount of cash takings on 10 May 2014.

64. Notwithstanding how this was dealt with in the witness evidence, we shall take into account in our consideration of the evidence that the pattern of regular cash withdrawals ceased between 3 May 2014 and 26 June 2014 and that one explanation for that may be that there was an unusually large amount of cash taken on 10 May 2014.

65. The takings for 10 May 2014 fell into VAT period 06/14. Takings for 09/14 and 12/14 showed an increase followed by a significant decrease in 03/15. The appellant's accounts also show a significant increase in turnover between the year ended 30 June 2014 (£217,561) and the year ended 30 June 2015 (£244,250). HMRC suggest that this was because there was less suppression of takings following HMRC's unannounced visit on 10 May 2014. Mr Uddin's evidence was that a busy wine bar opened next to the restaurant a few weeks before that visit. He further said that the appellant's business improved after the wine bar opened. That is a credible explanation for the increased turnover and it is notable that the officers recorded that the wine bar was very busy on the night of the visit.

66. At best the increase in turnover is consistent with suppression. However, we do not consider that this is probative evidence that there was suppression. Further, we do not consider that there are any relevant and probative trends in the declaration of gross outputs for VAT periods between 09/11 and 06/15 that assist the case advanced by either party in this appeal.

(2) The takings book

67. Mr Uddin maintained a handwritten takings book. For each week, commencing on a Sunday and ending on the following Saturday, the takings book records the date, the daily gross takings and the weekly gross takings. The total figure for tips in the week is also recorded. Mr Uddin gives the takings books to the appellant's accountants who use them to prepare the appellant's VAT returns and corporation tax returns.

68. The takings book for the 6 days prior to 10 May 2014 and for 11 December 2014 shows figures for declared takings lower than the card sales credited to the bank for each day. The table below shows the takings declared for the weeks including those dates, highlighting those dates where card sales appear to exceed daily gross takings:

Date	DGT Declared £	Card Sales £
4 May 2014	350	418
5 May 2014	451	630
6 May 2014	204	242
7 May 2014	115	103
8 May 2014	401	465
9 May 2014	1,586	1,695
10 May 2014	2,457	1,387
7 Dec 2014	576	527
8 Dec 2014	276	250
9 Dec 2014	225	185
10 Dec 2014	283	165
11 Dec 2014	283	319
12 Dec 2014	1,773	
13 Dec 2014	1,685	

69. We have not included the card sales for 12 and 13 December 2014. There appears to be only one credit to the bank account for card sales on those dates totalling £3,129. The combined declared takings for those dates was £3,458

70. We are satisfied that the figures for week ending 10 May 2014 were entered into the takings book by Mr Khalique. Mr Uddin was initially firm in his oral evidence that only he wrote the takings figures in the takings book. If he was away the meal bills were kept for him and he would update the takings book when he returned. Mr Khalique would not do this because his English and his writing were not very good. For example, his “4” looked like a “9”.

71. Later, when we looked at the takings book for the week ending 10 May 2014 it became apparent that the takings book was in a different handwriting. Mr Uddin then said that Mr Khalique had written the figures for that week because he was away. It seemed to us that Mr Khalique’s handwriting was perfectly legible.

72. Mr Uddin’s faulty recollection is not in our view significant. It simply demonstrates that memory of matters several years ago can be unreliable and documentary evidence is often more reliable than uncorroborated oral evidence (see *Kimathi v Foreign & Commonwealth Office* [2018] EWHC 2066 (QB) at [95] to [97]). That is the basis on which we assess the evidence generally in this appeal.

73. For the week ended 10 May 2014 we have no evidence from Mr Uddin or Mr Khalique as to why the card receipts should be greater than the daily gross takings. There is no evidence from Mr Khalique as to how or when he went about writing up the takings book. Apart from the week ending 10 May 2014, the only other date when credit card receipts were greater than daily gross takings was 11 December 2014. Mr Uddin could not initially explain why this should be the case. However, in re-examination he suggested that it may be caused by queries on card transactions which were not processed and credited until some time after the query was resolved. The true explanation may well be something to do with a delay in the processing of card payments and therefore we do not read anything into these anomalies.

(3) The booking diaries

74. Officer Jackson uplifted two bookings diaries which she found behind the bar during the visit on 10 May 2014. Diary pages were largely ripped out, which Mr Uddin explained was so that the diaries would open easily at the correct page. The only pages retained were for 23, 27 – 31 December 2012 and 10 May 2014. Entries in the diaries were in manuscript and showed the name, time, number of covers and sometimes a phone number. All entries on 10 May 2014 were crossed through save the last booking at 9.15pm. Almost all entries on the dates in December 2012 were crossed through and some entries were also ticked.

75. The table below refers to four dates when the booking diaries were available, including the visit on 10 May 2014. It compares daily gross takings to the bookings recorded and other relevant facts for those dates:

Date	Day	Diners Booked	First Booking	Last Booking	DGT £	Cash %	Card %
28 Dec 2012	Friday	68	6pm	8.30pm	1,021	22	78
29 Dec 2012	Saturday	66	6pm	8.30pm	1,740	8.5	91.5
31 Dec 2012	NYE	122	6pm	10.30pm	2,031	10	90
10 May 2014	Saturday	60	6.30pm	9.15pm	2,457	43.5	56.5

76. There are a number of unusual aspects to these details:

(1) The takings declared in the takings book for 31 December 2012 were £2,031.30 with card sales of £1,832.40 and bookings for 122 covers. This compares to 10 May 2014 when there were bookings for only 63 covers yet the takings were some £400 less.

(2) On 28 December 2012 the takings per booked diner were £15.01 but that would assume there were no takeaway orders at all and no walk-in customers. The comparative figure for 10 May 2014 was £40.95

77. Mr Uddin accepted that the figures in the table did not look right. He suggested that the explanation was that not all of the customers booked would have come to the restaurant.

78. The booking diary for 31 December 2012 showed approximately 122 bookings which HMRC contend were served. This was hotly contested by the appellant. Mr Uddin said that the restaurant did not have the capacity to serve that number of customers in one evening. His evidence was that a full sitting would involve a maximum of 33 diners and an average of 28 diners. On busy days, service slows down and a table might take more than two hours to serve. Allowing for two full sittings he considered that the capacity was about 56 diners. He said it is very rare that a table can be turned 3 times in one evening. Whilst more diners might be served if there was a large party it would be impossible to serve 122 diners on 31 December 2012.

79. Mr Nawaz pointed to the meals taken by HMRC officers on 10 May 2014, with tables of two being seated for approximately 2 hours in a busy period starting at 20.15 and 1¼ hours in a less busy period at 21.15. Mr Uddin's evidence was to the effect that this was illustrative of table times generally.

80. The appellant sought to convince us that the explanation for the figures in relation to 31 December 2012 was that there must have been a large number of cancellations.

81. We were provided with photographs taken by Mr Uddin of the restaurant on 31 December 2012 with a view to showing that the restaurant was not full all the time even on a busy night. The evidence did not clearly identify what time in the evening each photograph was taken but

it seems that the photographs were taken between 8.42pm and 11.40pm. We take that evidence into account but in our view it has little weight relating as it does to a different year and simply shows a snapshot at certain times in the evening.

82. Mr Nawaz annexed to his closing submissions reports from the BBC and Daily Telegraph websites describing the weather between 27 – 31 December 2012. The reports were not specific to South Yorkshire. Mr Nawaz submitted that the weather was bad between Christmas and New Year in 2012 which would have led to many customers cancelling or failing to show. This material was not available during the hearing and there was no evidence from Mr Uddin or Mr Mostofa to the effect either that the weather at that time was bad or that it caused more cancellations or no-shows than usual. In the circumstances we do not consider that this evidence has any probative value.

83. Mr Marks produced a table showing how it might be possible for the restaurant to have served the 122 customers shown in the booking diary for 31 December 2012. It involved tables of 2 completing their meals in an hour which Mr Uddin said was not possible when the restaurant was busy. It also included 1 table being turned 4 times in the evening.

84. Mr Nawaz relied on several reviews by customers on TripAdvisor between May 2013 and December 2015 which Officer Jackson had obtained. All that the reviews really show is that this is a busy restaurant and some reviewers had long waits for tables and commented on service slowing down when the restaurant was busy. Mr Nawaz suggested that some customers would be likely to cancel bookings in such circumstances, and also that if service slowed down when busy Mr Marks' table was unrealistic.

85. We are satisfied that the restaurant accepted bookings for 122 diners on 31 December 2012. We must therefore consider whether it is likely that approximately half these diners cancelled their bookings to bring that evening more into line with Mr Uddin's evidence as to the maximum capacity of the restaurant and the number of diners served on 10 May 2014. If Mr Uddin is right as to the capacity of the restaurant then the restaurant would never have accepted that many bookings unless some parties cancelled before other bookings were accepted.

86. As we have said, the diaries in December 2012 included a combination of crossings out and ticks, whilst those for 10 May 2014 only had crossings out. Mr Uddin said that he would tick and cross out entries when customers arrived and cross out bookings when they cancelled. If a booking did not turn up then it would not be ticked or crossed out. Waiters were told to do the same but would sometimes forget to tick an entry when a customer arrived.

87. On 31 December 2012 there were 16 bookings for approximately 58 diners at times on or after 8.30pm. One of those bookings was for 2 people at 9.30pm but it was not ticked or crossed out suggesting that they did not turn up. 11 of those bookings for 41 diners were ticked and crossed out. On Mr Uddin's evidence that indicates that those diners were served. We acknowledge that on some occasions not all diners booked in a party will turn up, equally on some occasions more than the number of diners booked in a party will turn up.

88. There were 19 bookings for approximately 65 diners at times up to and including 8pm. However, there are only 2 ticks. We do not accept that only two of these bookings turned up. The explanation must be either that waiters forgot to tick the diary, or that the system did not operate as described by Mr Uddin.

89. There was no evidence from Mr Mostofa or any other waiter as to the system used for making entries in the booking diaries, or that waiters incorrectly operated the system. We do not accept Mr Uddin's description of the booking diary entries. It is not logical to both tick and cross through an entry when a diner is seated. In our view the more likely explanation of the

system is that bookings would be crossed through when diners arrive and are shown straight to their table. When diners arrive and wait in the bar before being seated the entry is ticked and only crossed through when they are shown to their table. This is not only logical but more consistent with the diary entries on 31 December 2012. There are fewer ticks early in evening when more tables will be free, although customers may still want a drink in the bar first or may prefer to wait in the bar if fellow diners have not yet arrived.

90. We accept that some people will cancel bookings and those bookings will be crossed out. It is difficult to say how many people might cancel bookings on any one night. Mr Uddin's evidence was that there would be many cancellations especially on Friday and Saturday nights often at the last minute. There was no evidence to that effect from Mr Mostofa. There may well have been some cancellations on 31 December 2012 and it is likely that one booking for 2 covers did not turn up.

91. In the absence of meal bills we cannot say based on the evidence before us exactly how many diners were served on 31 December 2012 or whether it would have been possible for the restaurant to accommodate 122 diners on that night. However, based on Mr Uddin's evidence we are satisfied that between 8.30pm and closing time at least 41 diners were served. There is no reason why between 6pm and 8.30 pm another 41 diners could not be served. On the balance of probabilities we are satisfied that at least 82 people dined in the restaurant that night. That is also consistent with the known card sales. It gives a ratio of card sales:diners of 22.34 compared to 22.73 on 10 May 2014.

92. The diary for 10 May 2014 shows 17 bookings with approximately 62 diners. All entries are crossed out save the last entry at 9.15pm which is a table for 2. It is clear from the diaries that they are pre-populated with times every half hour from 6pm to 10pm before any bookings are inserted. There was at least some expectation that there might be bookings up to 10pm. Four entries for tables of 2, 6, 6 and 4 have telephone numbers next to them. Mr Uddin's evidence was that he would generally take telephone numbers where the booking was for more than 3 or 4 diners but he would not generally take telephone numbers of regular customers. We accept that evidence. It suggests that the persons who had booked were mainly regulars.

93. It is common ground that there were 20 tables served that night with 61 diners, excluding HMRC officers. There was a broad correlation therefore between the tables and diners booked and the tables and diners served, with the possibility of some cancellations and some walk-in customers who had not booked.

94. Mr Uddin said that there was very little late trade after 9.30pm. The booking diaries to some extent support this, but there are also walk-in customers. For example, on 10 May 2014 two diners entered the restaurant at 9.50pm. It is clear also from the pre-populated times in the diaries that there is at least some expectation of bookings up to 10.30pm. Further, Mr Mostofa said that on a Friday or Saturday night he would expect some customers to come in later in the evening, say between 9.30 and 10pm.

(4) Ratio of card sales to cash sales

95. We can and do take judicial notice of the fact that over recent years the proportion of transactions by card will have generally increased although we cannot say to what extent this would be likely to reflect in the appellant's takings which might depend on various factors including the restaurant's customer base.

96. The respondents contend that the true ratio of card sales to cash sales was approximately 55:45, in other words on a typical night 55% of takings would be via credit or debit cards and 45% would be in cash. HMRC submit that Mr Uddin deliberately failed to include a significant

proportion of cash takings in his takings book resulting in a much higher card:cash ratio. The card:cash ratios based on declared takings for the years up to 30 June 2014 were as follows:

Year Ended	Card %	Cash %
30 June 2011	84.87	15.13
30 June 2012	87.30	12.70
30 June 2013	87.98	12.02
30 June 2014	90.23	9.77

97. Evidence of the declared daily gross takings from the takings book and evidence of the daily card sales from the bank statements show that on a weekly basis the ratio of card:cash sales is broadly consistent between 80-90%. On a daily basis it can be seen that on occasions it falls to between 40-70%.

98. HMRC rely on the ratio observed on 10 May 2014 as evidence of suppression of takings and also for the basis on which they have calculated the assessments. The evidence relied upon by HMRC to support their case as to the average ratio is the actual cashing up which took place on the 10 May 2014 and what Officers Jackson and Gibson say they were told by Mr Mostofa during that visit, namely that the usual ratio was 50:50 or 55:45.

99. The evidence as to the circumstances of the visit on 10 May 2014 and what Mr Mostofa told the officer is hotly contested. The appellant's case is that Mr Mostofa did not say that the usual ratio of card sales to cash sales was 55:45. Mr Nawaz submitted that Officer Jackson's note suggesting that he did was added at a later date and reflects the actual ratio for that night and not what Mr Mostofa had told the officers. The appellant contends that this is why HMRC did not raise the significance of the ratio until a letter dated 7 January 2016.

100. We have already touched on some of the evidence as to the ratio of card:cash sales on 10 May 2014 and on other nights based on declared takings. We must now consider the visit on 10 May 2014 in more detail. Issues arise in relation to the events on 10 May 2014 when the officers made themselves known to Mr Mostofa. The principal issues which arise may be summarised as follows:

- (1) Mr Mostofa's role in the business and his experience of cashing up. In particular whether he was in a position to give any reliable estimate as to the usual card:cash ratio.
- (2) The circumstances of the cashing up and whether Mr Mostofa was pressurised by the officers during the cashing up.
- (3) Whether Mr Mostofa gave the officers any estimate of the usual card:cash ratio, and if so what estimate.

101. We first consider Mr Mostofa's role in the restaurant and his experience of cashing up at the end of a night.

102. Mr Mostofa was employed as a waiter, which involved taking bookings, waiting on tables and taking payments. Other waiters performed the same role. There would be 4 waiters working on a Friday or Saturday night. If 20 tables were served in total, he might serve 4 or 5 tables and take payment from 4 or 5 tables.

103. Mr Mostofa's evidence was that it was very rare for him to do the cashing up. If Mr Uddin was not there the cashing up would be done by Mr Khalique, the chef. On this occasion

it was only because Mr Khalique was dealing with outstanding takeaway orders on a very busy day that Mr Khalique asked him to do the cashing up. Mr Mostofa stated that he had only ever cashed up on one or two occasions and he did the best he could having watched Mr Uddin do it in the past. Based on the evidence we have heard we are satisfied that Mr Khalique, the chef, was effectively in charge of the restaurant in the absence of Mr Uddin. This is what Mr Uddin had told the Respondents at an interview on 6 June 2013. It was also common ground that Mr Khalique was given the cash by Mr Mostofa at the end of the evening on 10 May 2014. There was also unchallenged evidence that Mr Khalique filled in the takings book for the week ending 10 May 2014 in the absence of Mr Uddin.

104. We do not think it likely that Mr Mostofa would have been asked to do the cashing up if he had no real experience of doing it. We have not heard from Mr Khalique. There has been no explanation as to why Mr Khalique did not give evidence and there may be a very good reason. The respondents have not taken any point about the absence of such evidence and we do not draw any adverse inference from the fact he has not given evidence. We do consider that if Mr Mostofa had no experience of cashing up it is unlikely Mr Khalique would have asked him to do the cashing up. More likely is that he would have asked Mr Mostofa to secure the cash and meal bills until he could do the cashing up himself.

105. We are satisfied from the evidence before us that when Mr Uddin was away he would leave the chef Mr Khalique in charge of cashing up. Mr Khalique was the longest serving employee at the restaurant. Mr Mostofa would only do the cashing up on occasions that Mr Uddin was not present and Mr Khalique was too busy. On those occasions Mr Mostofa would count the cash and the card slips and reconcile these to the cash meal bills and the card meal bills which were kept on separate spikes on the bar. He would then hand the cash and the meal bills to Mr Khalique.

106. Whilst Mr Khalique was in charge of the restaurant as a whole, we are satisfied that Mr Mostofa acted as the front of house manager in the absence of Mr Uddin. That was the impression gained by Officers Jackson and Gibson and as we shall see Mr Mostofa also signed Mr Gibson's note of the cashing up writing a description of himself as "manager" next to his name.

107. The appellant's case is that Mr Mostofa was not in a position to say what the normal card:cash ratio was because he was not responsible for cashing up save on rare occasions. Mr Mostofa's evidence to us was contradictory. On the one hand he stated he was in no position to say what might be described as a "normal" card:cash ratio. On the other hand, he stated that in his experience as a waiter taking payments from customers, on most days there would be 80-90% card payments which is why he told the officers that there was an unusual level of cash that day. We are satisfied that to some extent the appellant and Mr Mostofa are seeking to play down Mr Mostofa's role in and knowledge of the business to cast doubt on his ability to give a reliable estimate of the ratio.

108. Mr Mostofa would know from many years' experience working as a waiter in the restaurant whether the card:cash ratio was 50:50 or 90:10. He would know whether there was a broadly even split between customers paying by card and customers paying by cash or a large majority of customers paying by card. Mr Mostofa would be in a good position to give an estimate of the proportion of card to cash payments.

109. We now consider the circumstances of the cashing up and whether Mr Mostofa was pressurised by the officers during the cashing up.

110. The officers present on behalf of HMRC at the cashing up were Officers Jackson, Gibson, Hunt and Martin. Officers Hunt and Gibson dined together and Officers Jackson and Martin dined together. There were no other officers of HMRC present that night.

111. The handwritten observation record for Officers Hunt and Gibson shows that they entered the restaurant at 8.15pm, paid for their meal at 10.10pm and left the premises at 10.15pm.

112. The handwritten observation record completed by Officer Jackson shows that she and Officer Martin entered the restaurant at 9.15pm. The time of their transaction paying for the meal is 10.30pm and no time is entered for the time they left the premises. Observations include “when we left @ 22:35 the table of 6 by the wall were still in and yet to pay”, and “table for 6 pd 10:50 by card when we were cashing up”.

113. Mr Nawaz pointed to an inconsistency in Officer Jackson’s notebook entry as to the timings. It shows the test eat with Officer Martin taking place from 9.00pm to 10.40pm with the word “out” inserted next to 10.40pm. There is then a note that a table of 6 paid using the card machine at 10.50pm, followed by a note “Entered PPOB @ 10.57”.

114. There is what appears to be a further inaccuracy in Officer Jackson’s observation record which notes 3 card machines being observed when in fact there was only one card machine.

115. These inconsistencies and the inaccuracy do cause us some concern as to the reliability of some of the details recorded by Officer Jackson. However, it does not seem to us that they are so significant as to call into question the reliability of Officer Jackson’s notes generally. We do bear them in mind when considering the accuracy of Officer Jackson’s notes on matters of substance, and the weight to be attached to the documentary evidence.

116. Officer Jackson described her handwritten notebook entries as “trigger notes”. She produced a more detailed typed note of her visit on 10 May 2014. This was dated 13 May 2014 and was stored in HMRC’s computer systems in a controlled access folder. There was also a typed note detailing the progress of Officer Jackson’s enquiries commencing with the visit on 10 May 2014 through to extracts from the TripAdvisor reviews obtained in December 2015. This latter document was sent to the appellant in a pre-assessment letter dated 11 February 2016. There were therefore 3 different versions of the visit on 10 May 2014 – the original handwritten notebook, the typed notes dated 13 May 2014 and the notes sent to the appellant in February 2016. The latter version is identical to the typed notes dated 13 May 2014. None of the other officers present made notes of the visit as such, although each made handwritten notes of certain aspects of the visit with which they were involved. For example, Officer Gibson made notes in connection with the cashing up and Officers Hunt and Martin made notes of interviews with the kitchen staff and waiters.

117. We are satisfied that the officers re-entered the restaurant after their meals at or about 10.50pm. It is common ground that Mr Mostofa was behind the bar. He says that he was cleaning glasses whilst Officer Jackson’s typed note records that he had laid out the meal bills and was adding them up but the cash was still in the till. We cannot make findings in relation to such details, but it is not disputed that Mr Mostofa was at least intending to cash up.

118. As we have found, in the absence of Mr Uddin Mr Mostofa acted as a front of house manager. The officers believed that he was in charge of the restaurant and once he had finished cashing up he signed a cashing up record completed by Officer Gibson. In his own handwriting he described his role as “manager”. Mr Mostofa stated that he only put the word manager down because Officer Jackson said he had to as he was the person they were speaking to on the night. We do not consider it likely that Mr Mostofa would describe himself as the manager, simply because he was told to do so, if he was not at least thought of as a front of house manager in the absence of Mr Uddin.

119. There was an issue as to whether it was Officer Hunt or Officer Jackson who introduced the four of them as HMRC officers to Mr Mostofa, explained what they intended to do and gave him a notice of inspection and factsheet. Mr Mostofa was adamant that it was Officer

Jackson and that she did not give him time to read the notice of inspection. Officers Jackson and Gibson were clear that it was officer Hunt, who they both described as doing the “in”, by which they meant the introduction. This was their recollection and they both described Mr Hunt as suitable for the task because he was “smooth” or “a smooth operator”. We prefer their evidence on this aspect to that of Mr Mostofa. It is a detail they were both likely to recall. We do not accept that by both using the word “smooth” their evidence was in some way coached, which was a suggestion made by Mr Nawaz.

120. Mr Mostofa suggested that the way in which the officers dealt with him was intimidating and he was pressurised. For example, he says that that he wanted to read the notice of inspection but he was told by Officer Jackson that it was “just a formality” and that Officer Jackson came behind the bar uninvited. He also says that whilst he was cashing up Officer Jackson and another officer were continuously firing questions at him and he was not given an opportunity to answer questions properly. We are not satisfied that the officers were intimidating or that they pressurised Mr Mostofa. Having said that many people in Mr Mostofa’s position that night might feel concerned and anxious about the situation which might affect the reliability of the answers he gave to the officers’ questions. We take that into account in our findings

121. Following the introductions, Officers Hunt and Martin went into the kitchen to ask questions of the kitchen staff and other waiters, including the chef, Mr Khalique. They obtained details of their roles in the restaurant, hours worked and wages. Officer Jackson took over the dealings with Mr Mostofa and made her own handwritten notes. Some of the contested matters surrounding the details of Mr Mostofa’s dealings with Officers Jackson and Gibson are of no consequence and it is not surprising that some 4 years later there was a difference in recollection of the witnesses about certain matters. Other matters are more significant and we consider these below.

122. Mr Mostofa explained to Officer Jackson how he would do the cashing up. Officer Jackson’s description of this in her notebook is not detailed and it is difficult to follow which probably reflects the fact that Officer Jackson was both asking questions and taking notes. It appears that Mr Mostofa would add up the card meal bills from one of the spikes on the bar and then add up the cash meal bills from the other spike. He would add these two figures together and write the total down. He would then write the card total down and take this from the total to give the cash. There was no reference to Mr Mostofa reconciling the card takings to readings from the card machine or the cash takings to what was in the till although it appears from Officer Gibson’s notes that this is what Mr Mostofa did.

123. Mr Mostofa explained to Officer Jackson that he had worked at the restaurant for 7 years, although he had been away for about a year during that time. He confirmed that Mr Uddin was on holiday. He would retain the meal bills for when Mr Uddin came back from holiday and that he would give the cash to the chef, Mr Khalique. Mr Mostofa then told Officer Jackson about payments that had been made out of the till that night to two part time staff, Rebecca and Shareen.

124. Mr Mostofa performed a cashing up in front of Officers Jackson and Gibson. We are satisfied that Mr Mostofa knew what he was doing. That was the impression gained by the Officers and Mr Khalique would not have asked Mr Mostofa to do the cashing up if he did not know how to do it.

125. Officer Jackson stated that she saw a post-it note behind the bar near the meal slips which she picked up and noted the figures in her notebook. What is noted in her notebook was as follows:

note: Takings	– 2555.65
	1387.10

	- 1138.55
	48.30 TIPS

	- 1186.85

126. The post-it note was not in evidence, although Officer Jackson told us that she thought she had uplifted it and would normally have done so. We are satisfied that this was at least part of Mr Mostofa's record of the cashing up.

127. During the cashing up Officer Gibson made a record of the denomination of notes and coins counted by Mr Mostofa. The total came to £1,158.70. He noted "cash taken out during the day", namely £70, £98.10 and £48.30. The £70 was paid to Rebecca and the £48.30 was described as tips, although tips were not kept in the main till but in a separate box. Mr Gibson also noted card payments of £1,387.10 and a float of £70.

128. Based on those figures, Mr Gibson noted the total gross takings as "2643.90 / 2595.60". The first of those figures appears to be made up as follows:

Cash in Till:	1,158.70
Card Receipts:	1,387.10
Cash taken out:	70.00
Cash taken out:	98.10
Less float:	(70.00)

	2,643.90
	=====

129. The figure of £2,595.60 is that total less the tips. It appears that the sum of £48.30 for tips related to cash tips. The total tips in the week ended 10 May 2014 were recorded by Mr Khalique as £86.50 which would suggest that card tips that week totalled £38.20.

130. Mr Gibson also noted the "X or Z Reading total: 2555.65". This appears to be the takings recorded by Mr Mostofa on the post-it note. It appears therefore that there was some £40 more cash in the till than would be expected and Mr Gibson noted that "float must have been greater explained before" which is a plausible explanation.

131. Mr Gibson's note was signed by himself and Officer Jackson. It was also signed by Mr Mostofa who as we have said in his own handwriting described himself as "manager".

132. Mr Gibson also made a separate handwritten note in which he identified 3 piles of meal bills totalling £2556.20 and made up of £755, £519.30 and £1,281.90. It was not clear from the evidence how this reconciled to the figures noted above. In oral evidence Officer Gibson recalled three different piles for cash, card and takeaway meal bills. However, the note had the word "Takeaway" crossed out next to the figure £755 which made Mr Gibson think that he might have originally believed, incorrectly that one of the piles was takeaway meal bills.

133. It does not appear that Mr Mostofa was asked about how the tips were treated in his cashing up. At one stage during the hearing both parties agreed that tips did not go to the staff

and so they were correctly included in the turnover declared for tax purposes. However, Mr Uddin later gave evidence that he would take card tips out of cash in the till and place it with the cash tips prior to being distributed to the staff.

134. As a result, the appellant's case was not entirely clear as to whether tips were retained by the appellant or distributed to staff. The tips were included in declarations made for tax purposes. If tips were distributed to staff then some adjustment may be need to the assessments. We shall leave this as a matter for the parties to agree.

135. During the course of her discussions with Mr Mostofa, Officer Jackson also entered a small stock room behind the bar where wine and beer was stored.

136. After the cashing up, Officer Jackson asked Mr Mostofa to read out the serial numbers of each £20 note in the till and she recorded each serial number in her notebook. She identified that the 5 x £20 notes used by the officers to pay for their meals were present in the till.

137. At some stage after the cashing up, the chef Mr Khaliq came into the bar area and indicated that he was collecting the cash on behalf of the director. It is not clear whether he came in from the kitchen or through the front entrance but nothing turns on that fact.

138. Officer Jackson uplifted the meal bills and the two booking diaries referred to earlier, together with various other business records such as purchase invoices. By this stage all the officers were front of house and Mr Hunt issued a receipt for these documents which was given to Mr Mostofa.

139. At the end of the visit Officer Jackson advised Mr Mostofa to keep all the booking diaries. Mr Mostofa accepted that he had been told this by Officer Jackson and said that he had told both Mr Khaliq and Mr Uddin about this.

140. Officer Jackson's notebook contains the serial numbers of 46 x £20 notes, including 5 which had been used by HMRC officers to pay for their meals. The notebook records 3 x £20 notes and 1 x £10 note as having been given to a staff member called Rebecca as wages at 10pm. There is a further inconsistency between Officer Jackson's notes and Officer Gibson's record of his observations of the cashing up. Officer Gibson records 7 x £10 notes being paid to Rebecca.

141. We now consider whether Mr Mostofa gave an estimate of the normal card:cash ratio to Officers Jackson and Gibson.

142. The serial numbers which Officer Jackson noted took up some 3½ pages of her notebook. On the middle page the following entry appears in Officer Jackson's handwriting by the side of the serial numbers:

“split
cash 1,000
card 12-1300
50:50
45:55
cash:card”

143. Officer Jackson's evidence was that she gave an example of cash takings of £1,000 and asked Mr Mostofa if on such a night it would be normal to have card takings of £1,200 – 1,300. Mr Mostofa said that it would be quite normal. Officer Gibson's evidence was that questions about the card:cash ratio would be asked at every unannounced visit. He recalled Mr Mostofa did not appear to understand the question about the card:cash ratio which was why Officer Jackson used the example of £1,000 in cash. Mr Mostofa did not recall being asked this

question, but he said if he had been asked he would not have known the answer because he did not usually cash-up.

144. As we have said, we are satisfied that Mr Mostofa was in a position to provide an estimate of the normal card:cash ratio, and he would have been able to give an answer to the question.

145. Mr Mostofa's evidence was that the allegation he had said the normal ratio was 50:50 or 45:55 was "an absolute lie". He accepted that he may have been asked if the cash:card ratio for that night was 45:55. As far as Mr Mostofa recalled Officer Jackson had simply stated to Mr Mostofa that "you appear to have a lot of cash today" to which he responded that the day had been very busy and that the amount of cash takings was unusual. He said that he would recognise most regular customers but that night there were many customers whom he did not recognise and that many of them had paid in cash.

146. Mr Nawaz submitted that we should not rely on Officer Jackson's account of this exchange because she had no proper note of what Mr Mostofa allegedly said, it was not clear whether Mr Mostofa was allegedly saying what the normal ratio was rather than what the actual ratio was for that day, it was notable that Officer Gibson did not make a note of the exchange.

147. Mr Nawaz suggested that it was unlikely that Officer Jackson would ask about the split when she was recording the serial numbers of notes in the tills.

148. In her typed notes Officer Jackson recorded in more detail that when asked, Mr Mostofa stated that the cash:card split was usually 50:50 or 45:55 and that the 10 May 2014 "was a normal busy night, and the customers are mainly from the village and are locals". This appears in the typed notes following a paragraph describing Mr Khalique entering the restaurant to collect the cash and information about payments to Rebecca. Mr Nawaz described this as being "slipped in" whereas the rest of the typed note followed a logical chronology. He put to Officer Jackson that this had been added to her notebook subsequently which Officer's Jackson and Gibson both denied.

149. Officers Jackson and Gibson denied that the exchange described by Mr Mostofa took place. We are not satisfied that it did take place in the terms described by Mr Mostofa. Officer Jackson would not at that stage have known what the usual split was for the restaurant between card and cash and she would not have been in a position to say what was a lot of cash.

150. The appellant's case was that Officer Jackson had fabricated her evidence, in particular her evidence that Mr Mostofa had described the usual card:cash ratio and had said that this was a normal busy night. It is said that the notebook entry is not credible because the ratio would not be discussed whilst Officer Jackson was noting down serial numbers of banknotes, and the typed note is not credible because reference to the ratio appears after Mr Khalique arrived to collect the takings.

151. We are satisfied that Officer Jackson's notebook entries were intended by her to be trigger notes and that they were written up in a fuller typed form on 13 May 2014 when events were still fresh in her mind. We consider that it gives a reliable account of significant matters discussed at the visit. In particular, Officer Jackson understood from Mr Mostofa that he was giving an estimate of the usual ratio of card:cash transactions and that it was a normal busy night. There is a possibility that Mr Mostofa somehow misunderstood the question he was being asked about the card:cash ratio and thought that Officer Jackson was asking him about the actual ration for that night rather than the usual ratio. However, on the basis of the evidence as a whole we consider it more likely that Mr Mostofa did understand the question and gave an honest answer to it when he said that the card:cash ratio was usually 50:50, although we accept it is possible that the reference to 45:55 was a reference to the actual ration that night. We reject the allegation that Officer Jackson has fabricated her evidence.

152. We are not satisfied from the evidence that there were many customers who Mr Mostofa did not recognise but who were paying cash. No explanation has been given as to why that might be the case. In our view it is a convenient excuse given after the night in question to explain what turned out to be a low card:cash ratio compared to previously declared takings. We are not satisfied that there was an unusual amount of cash that night.

(5) Visit on 17 April 2015

153. Officers Jackson, Gibson and Hadley together with Officer Uglow attended the appellant’s premises on Friday 17 April 2015. Officers Jackson and Gibson made themselves known to Mr Uddin and stated their intention to carry out an invigilation of sales from inside the premises. Officer Jackson recorded that Mr Uddin was initially happy to allow them to observe trade but he then telephoned Mr Nawaz and following that call Mr Uddin asked the HMRC officers to leave the premises. He was entitled to do so.

154. Mr Uddin denied that he ever said that he was happy for them to observe trade. In any event, Officer Jackson handed the notice of inspection to Mr Uddin and spoke to Mr Nawaz on the telephone. There was a discussion about the contents of the notice and Officer Jackson acknowledged that Mr Uddin could refuse entry to the officers. Mr Nawaz says that Officer Jackson read the notice to him over the phone but alleges that she kept skipping a paragraph which said that the trader did not have to let the officers enter the premises or carry out an inspection. Officer Jackson denied this. There is no need for us to resolve this conflict of evidence.

155. In the circumstances observations continued from outside the premises between 6.00pm and 10.45pm when the restaurant closed. Officer Jackson made 4 attempts to telephone the business between 7.25pm and 7.45pm and was met by an engaged tone. HMRC suggested that the telephone had been disconnected or left off the hook to purposefully reduce trade. We take into account that staff may have been on the phone to customers and Mr Uddin also said that in busy periods they may leave the phone off the hook. The observation records show takeaway customers continuing to enter the restaurant until the last takeaway at 8.49pm. It also shows that the last customers to be served entered the restaurant at 9.45pm. There is also evidence that two groups of two people entered the restaurant at 10.25pm and 10.35pm but left without dining or carrying a takeaway. The doors were then locked at 10.40pm.

156. HMRC observed 33 takeaway orders and 54 customers served inside the premises. That is consistent with a record Mr Uddin had been asked by Mr Nawaz to make of the numbers of takeaways and diners served that night. The appellant’s records for the evening’s trade were as follows:

	Number of orders/diners	Value £
Takeaway Sales	33 orders	718.90
Restaurant Sales	54 diners	972.05
Bar drinks	n/a	30.00

157. This was a busier Friday than normal according to the appellant’s records. The total sales declared was £1,720.95. The average transaction value for takeaways was £21.75 and the average meal cost per diner was £18. Card sales amounted to £1,552.05, or 90.2% of total sales. The card sales represented 39 transactions. Cash sales declared amounted to £168.90. The meal

bills for this evening were destroyed by Mr Uddin in accordance with his usual practice. It is unfortunate that Mr Uddin and Mr Nawaz did not consider it relevant to retain the meal bills but we do not read anything into the fact that Mr Uddin followed his normal practice.

158. At one stage HMRC suggested that Mr Nawaz must have advised Mr Uddin to close the restaurant early on this night so as to reduce trade. Mr Marks withdrew that allegation during the course of Mr Uddin's cross-examination. However, HMRC still allege that the restaurant was closed early to reduce trade, albeit they do not suggest this was on the advice of Mr Nawaz. We are not satisfied on the evidence that the restaurant was closed early on this evening with the intention of reducing the trade HMRC would observe.

159. The declared takings for 17 April 2015 were not verified and could not be compared to retained meal bills. We do not accept at face value that the cash takings for the evening were as declared by the appellant. When the figures are compared to 10 May 2014 there are some anomalies. In particular, the average transaction value for a takeaway on 10 May 2014 was £26.97 compared to only £21.75 on this night. We also note that on 10 May 2014 there were 46 takeaway sales with a value of £1,240.65, which was larger than the dine-in sales of £1,166.95. On 17 April 2015 the value of dine-in sales was larger than the value of takeaway sales.

160. If the card sales that night were 55% of total sales, then the cash sales would have been approximately £1,270 rather than the declared cash sales of £168.90. That would give total sales of £2,822. That is significantly higher than the sales on 10 May 2014 despite there being fewer takeaway and dine-in customers. It seems likely therefore that on this night the true ratio of card:cash sales was higher than 55%.

161. It is difficult to draw any conclusions from the evidence in relation to this night. On balance, however we do consider it likely that the appellant did stop taking takeaway orders on 17 April 2015 in order to reduce the trade observed by HMRC. The real issue remains whether 10 May 2014 was a typical night, as HMRC contend or whether it was an unusual night, as the appellant contends.

(6) Destruction of prime records

162. It is part of HMRC's case that Mr Uddin has deliberately destroyed business records in order to conceal the suppression of takings by the appellant. The records concerned are meal bills for restaurant and takeaway customers and the booking diaries.

163. In the first instance HMRC contend that the appellant had a legal obligation to keep the meal bills or some other record of individual sales. Reliance is placed on *paragraph 21 Schedule 18 Finance Act 1998* in relation to company tax returns for corporation tax purposes which provides as follows:

“21(1) A company which may be required to deliver a company tax return for any period must —

(a) keep such records as may be needed to enable it to deliver a correct and complete return for the period, and

(b) preserve those records in accordance with this paragraph.”

164. HMRC say that merely keeping a takings book with a record of daily gross takings is not sufficient for the appellant to prepare a complete and correct return.

165. The Appellant contends that there is no requirement for it to maintain records of individual sales. It is entitled to simply maintain a record of its daily gross takings.

166. We have not been pointed to any clear and express requirement for the appellant to keep a record of individual transactions. We were not referred to any relevant authority concerning record keeping requirements, although we are aware ourselves that in the context of VAT the VAT Tribunal in *Courage Limited v HM Customs & Excise (Decision 8808)* in 1992 held that when a business operated a retail scheme there was a requirement under Notice 727/3 to keep records of individual transactions. However, it is not suggested that the appellant operated a retail scheme.

167. The real issue for present purposes is not whether there was a legal requirement to keep the meal bills and booking diaries, but whether Mr Uddin was aware of any such legal requirement. In the circumstances, it is not necessary for us to make any finding as a matter of law as to whether there is a legal requirement for a trader such as the appellant to maintain a record of individual transactions. Further, the fact that the appellant was not keeping meal bills or any other record of individual transactions was known to HMRC from the meeting on 6 June 2013. It was not put to Mr Uddin that HMRC had made him aware that he was required to keep a record of individual transactions, and Mr Uddin's evidence was that he had not been told to keep such records by his accountants. There was also evidence from Mr Uddin that on occasions customers might take meal bills with them, for example if needed for expense claim purposes. This practice was not explored further in the evidence, nor how it might affect the cashing up procedures.

168. We were told by Mr Uddin that at one time he did keep meal bills on a shelf in a small store cupboard at the restaurant but that they kept falling off the shelf and with no suitable storage place at the restaurant he did not wish to keep them at home.

169. Based on the evidence, we accept that Mr Uddin was not aware of any requirement to keep records of individual transactions. Further, we are not satisfied that he deliberately destroyed meal bills to conceal evidence of suppression of takings. We do note however that if meal bills had been retained our task in determining some of the factual issues on this appeal would have been easier.

170. We are satisfied that at the visit on 10 May 2014 Officer Jackson told Mr Mostofa that the booking diaries should be kept and pages should not be destroyed. Mr Mostofa accepted Officer Jackson had told him this and said that he in turn had told Mr Khaliq and Mr Uddin. Mr Uddin did not recall whether, when he returned from holiday, Mr Mostofa told him that the officers had said that the bookings diaries should be retained. We do know that pages continued to be ripped out of the booking diaries. However, there was no written direction to Mr Uddin to keep the booking diaries. In the circumstances we are not satisfied that Mr Uddin continued to rip out pages of the booking diaries in order to conceal any suppression of takings. He had a credible reason for doing so, to make it easier to find relevant pages in the diary when taking a booking.

Generally

171. HMRC conducted no analysis of Mr Uddin's private assets or his income and expenditure. They did not prepare capital statements, which may be used to identify any unexplained increases in assets.

172. Mr Nawaz referred us to a number of cases where capital statements were used by the Inland Revenue in what used to be known as back duty cases. There is no rule of law that HMRC must adduce certain types of evidence in order to support an assessment in relation to suppressed income. Indeed, it would have been open to the appellant to prepare capital statements to establish that there was no deficiency of income. Either way, we must decide this appeal based on the evidence before us.

173. As mentioned earlier, HMRC initially considered that the business was declaring insufficient cash takings to pay the wages. That point has not been pursued in this appeal, although HMRC do contend that wages paid in cash have not all been declared in the appellant's accounts. It was put to Mr Uddin, based on what the appellant's staff told Officers Hunt and Martin on 10 May 2014, that the total hours worked by staff in a week would be 174 hours. Mr Uddin did not dispute that figure, or that at the minimum wage the total wages paid out in cash would be approximately £55,000 in the year ended 30 June 2014. In comparison, the accounts for that year show wages of £46,635. HMRC suggest that the difference of just over £8,000 was paid using some of the suppressed cash takings. By way of response, Mr Uddin suggested that employees might have changed their hours over the year or that the restaurant might have been short staffed at some times. This issue was not, as far as we can see, foreshadowed prior to the hearing and there was no evidence as to how the wages figures in the accounts were arrived at. Mr Uddin was being asked to explain it on the spot. We do not consider that this evidence helps us resolve whether there was suppression of takings.

DISCUSSION – THE ASSESSMENTS

174. Mr Nawaz submitted that there was no evidence that Mr Uddin manipulated the takings. We accept that there is no direct evidence to that effect. However, we are entitled to draw inferences from our primary findings of fact based on the evidence as a whole. In light of our primary findings of fact we now consider what further findings we can make as to the principal factual issues on the balance of probabilities.

175. Neither party has attempted any detailed statistical analysis of the takings records. We must draw the inferences we consider appropriate from the evidence before us, whilst recognising that we should be cautious about placing significance on deviations from average or median figures.

176. We are satisfied that 10 May 2014 was an unusual night, not because of the amount of cash takings, but because it produced the highest takings the restaurant had ever had until that night. It is notable that the card takings were in line with card takings for other busy nights.

177. Mr Nawaz submitted that it was not strange that there were few nights with takings approaching or greater than 10 May 2014 because this was close to the capacity of the restaurant which was 60-65 diners over two sittings. We do not accept that submission. We have found that there were at least 82 diners on 31 December 2014.

178. Based on the evidence, 10 May 2014 shows a normal level of bookings, a normal level of card receipts but an abnormal level of cash. The appellant accepts that there was an abnormal level of cash takings on that night and points to the evidence of Mr Mostofa to the effect that there were a large number of customers on that night that he did not recognise and that many of them paid in cash. He also relies on the absence of cash withdrawals by Mr Uddin in the weeks following 10 May 2014.

179. We do not accept Mr Mostofa's evidence that there were a large number of customers that night who were not regulars. We prefer the evidence of Officer Jackson who made a note to the effect that Mr Mostofa told her it was a normal night with regular, local customers. We take into account the absence of cash withdrawals by Mr Uddin, but there may be other explanations for that. We simply do not know based on the evidence adduced.

180. HMRC also relied on the pattern of sales disclosed by the takings book. In particular, they say that the weekly card:cash ratio was too consistent. We do not know and cannot gauge to what extent a restaurant would be likely to have a consistent card:cash ratio and within what range the ratio might be expected to vary.

181. As we have said, we do not read anything into the fact that on some nights in May 2014 and December 2014 the card sales were greater than the declared takings.

182. For the reasons given above we are satisfied that on 31 December 2012 at least 82 diners were served in the restaurant. There is great disparity between the declared takings of £2,031 for 31 December 2012 and the declared takings of £2,457 when 61 diners were served on 10 May 2014. We acknowledge that this does not take into account takeaway sales but in our view it supports the respondents' case that there was suppression of takings on 31 December 2012.

183. It is difficult to draw any conclusions from the TripAdvisor reviews save that we are satisfied that this is a busy restaurant, especially on Friday and Saturday nights and this may affect service times, which is not disputed.

184. Mr Nawaz introduced evidence from a different restaurant which was the subject of an HMRC enquiry involving observations of trade and the ratio between card and cash takings. He sought to rely on this material to suggest that the Appellant's ratio derived from declared takings was reasonable. Indeed, the respondents also sought to rely on this evidence and to point out variances between the declared takings for that restaurant and the appellant's declared takings. We do not accept that this evidence has any real relevance or weight in the context of this appeal.

185. There are variations in the ratio of card:cash takings, including some nights where the ratio was lower than the ratio observed on 10 May 2014. That would tend to support the appellant's case that the ratio observed on that date is consistent with an overall average in the region of 90% card takings and we take that into account.

186. We take into account our findings as to what was said on 10 May 2014. We have found that Mr Mostofa was in a position to give a reliable estimate of the usual ratio of card:cash sales. He was not pressurised by the Officers but he may have been concerned and anxious and we accept that may have affected the reliability of what he told the Officers. Our finding based on all the evidence is that Mr Mostofa did tell Officers Jackson and Gibson that the usual cash:card ratio was 50:50.

187. We are not satisfied that the declared ratio of 90% card:cash sales on 17 April 2015 is reliable. For the reasons given above we consider that the restaurant's takings on that night were reduced because the appellant at some stage deliberately stopped taking new orders for takeaways and we do not accept the declared takings at face value.

188. Mr Nawaz points to the absence of any corroborative evidence to support suppression of takings, for example observations of cashing up on other days, evidence of off-record purchases or evidence that the director's lifestyle or assets were inconsistent with his declared income. We take into account the absence of such corroborative evidence although as we have said, we must decide this appeal on the basis of the evidence before us.

189. Taking into account the evidence as a whole, we find on the balance of probabilities that Mr Uddin was suppressing the cash takings of the business in the period from July 2010 to March 2015. We do not consider that he was looking to make declarations with a specific card:cash ratio in mind. However, suppression of cash at a relatively consistent proportion of overall takings would cause the card:cash ratio to be consistently reduced. The best estimate of the extent of that suppression is to be made by comparing the observed ratio on 10 May 2014 to the declared ratio for all the periods under consideration.

190. We are not satisfied that Mr Uddin deliberately destroyed meal bills and booking diaries in order to conceal suppression of takings. However, we do find that Mr Uddin made false entries in the appellant's takings books throughout the period of the assessments in order to conceal the fact that cash takings were being suppressed.

BEST JUDGMENT

191. The original VAT assessments were greater than the amounts in dispute in the appeal. The reasons for this are as follows:

- (1) Officer Jackson mistakenly assumed that the appellant's VAT returns for periods 03/12 to 03/14 had been prepared without adopting the flat rate scheme.
- (2) Officer Jackson did not give any credit for increased input tax credit on purchases to support the suppressed sales.

192. We are satisfied, in the light of all the evidence, that Officer Jackson made an honest mistake when she assumed that the appellant's VAT returns for periods 03/12 to 03/14 had been prepared without adopting the flat rate scheme. Officer Jackson was aware that the appellant had been refused permission to adopt the flat rate scheme. A close look at the returns would have indicated that the flat rate scheme had been adopted for certain periods. However, this mistake falls far short of what is required to establish that Officer Jackson was not making an honest and genuine attempt to make a reasoned assessment.

193. Officer Jackson did not give credit for any undeclared purchases which might be associated with the suppressed sales which she had identified. In our view she was not bound to assume that the appellant was suppressing its input tax on some standard-rated purchases as well as its output tax on sales. When the issue was raised by the appellant at a hearing on 17 April 2018 Officer Jackson gave consideration to the issue and decided that it would be appropriate to make such an adjustment. We do not consider that Officer Jackson can fairly be criticised for not making the adjustment at the time the original VAT assessments were made.

194. In the circumstances we are satisfied that the original assessments were made to best judgment.

DISCOVERY ASSESSMENT

195. The appellant contends that there is no "sustainable discovery" to justify the corporation tax discovery assessment for the accounting period ending 30 June 2012. The appellant does not make any further submission as to why it contends that there is no sustainable discovery.

196. We can deal with this point very shortly. No enquiry was opened into the appellant's return for the period ending 30 June 2012. HMRC rely upon paragraphs 41-46 Schedule 18 Finance Act 1998 in relation to their assessment for that accounting period. Paragraph 41 provides that where an officer discovers, as regards an accounting period of a company, that (a) an amount which ought to have been assessed to tax has not been assessed, or that an assessment to tax is or has become insufficient, the officer may make an assessment in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax.

197. The power to make a discovery assessment is exercisable in the circumstances set out in Paragraphs 43 or 44 Schedule 18. For present purposes paragraph 43 is relevant. A discovery assessment may be made if the amount which ought to have been assessed is not assessed because of careless or deliberate conduct on the part of the company or a person acting on behalf of the company.

198. It is clear that in February 2016 Officer Hadley concluded that there had been suppression of takings in accounting periods ending 30 June 2011 to 2014. His conclusion in relation to 2012 was a discovery for the purposes of paragraph 41 that an amount which ought to have been assessed to tax had not been assessed. We do not accept Mr Nawaz's submission that there was no discovery in relation to that accounting period. We are also satisfied that the

amount which ought to have been assessed was not assessed because of the deliberate conduct of Mr Uddin on behalf of the appellant.

199. In the circumstances, HMRC were entitled to make a discovery assessment.

TIME LIMITS FOR THE VAT ASSESSMENTS

200. Section 73(6)(a) VATA 1994 requires HMRC to make the assessments to VAT no later than 2 years after the end of the accounting period or 1 year after evidence of facts, sufficient in the opinion of the Commissioners to justify the assessment, comes to their knowledge. It provides as follows:

“(6) An assessment made under subsection (1) ... 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, come 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) ... another assessment may be made under that subsection, in addition to any earlier assessment ...”

201. The appellant contends that the VAT assessments were made more than one year after evidence of facts sufficient to justify the assessments came to Officer Jackson's knowledge. The appellant's case is that Officer Jackson was in possession of all the evidence on which she based the assessments on 10 May 2014 whereas the assessments were not made until 18 March 2016.

202. We were referred to a brief case note of the decision of the Upper Tribunal in *ERF Ltd v HM Revenue & Customs* [2012] UKUT 105 (TCC). We have looked at that case in detail and it endorsed the approach of Dyson J in *Pegasus Birds Ltd v Customs & Excise Commissioners* [1999] STC 95 who set out various principles as follows:

“1. The Commissioners' opinion referred to in section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question: C & E Commissioners v Post Office [1995] STC 749, 754G.

3. The knowledge referred to in section 73(6)(b) is actual, and not constructive knowledge: C & E Commissioners v Post Office at p755D. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii): Heyfordian Travel Ltd v C & E Commissioners [1979] VATTR 139,151; and Classicmoor Ltd v C & E Commissioners [1995] V &DR 1, 10.I.27.

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury: Classicmoor paras 27 to 29; and more generally John Dee Ltd v C & E Commissioners [1995] STC 941, 952D-H.

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in section 73(6)(b) of VATA.”

203. We did not have any submissions from either party as to the application of these principles but we have endeavoured to apply them to the facts of this case.

204. The person who decided to make the VAT assessments and the person whose opinion is relevant for the purposes of section 73(6)(b) is Officer Jackson. The appellant in the present case must establish that Officer Jackson had all the facts necessary to conclude that Mr Uddin had been deliberately suppressing the appellant’s takings and material to quantify the intended assessments. The appellant must also show that it was unreasonable on “Wednesbury principles” not to make an assessment at that time.

205. On 10 May 2014 Officer Jackson had the results of the cashing up exercise. She did not have all the takings books. In particular, she did not have the takings book covering the period 6 October 2013 to 30 June 2014, including the date of the cashing up. There was an issue as to whether these had been provided to HMRC in several boxes of records which were subsequently returned to the appellant. In any event, it is clear that Officer Hadley and we infer Officer Jackson considered that this evidence was required because Schedule 36 Notices were issued to the appellant on 2 December 2014 and 22 September 2015. There was also other relevant material required by those information notices. Mr Nawaz provided copies of the takings records on 13 October 2015.

206. In the course of giving evidence Officer Jackson said that it was not until after the visit in April 2015, her attempts to obtain further information following that visit and after she obtained reviews from the TripAdvisor website, that she felt she had enough information to make the VAT assessments. The TripAdvisor material was obtained in December 2015 or January 2016.

207. It does not seem to us that the TripAdvisor material was necessary for Officer Jackson to conclude that there had been suppression or to quantify the suppression. However, having decided to undertake an invigilation we are satisfied that Officer Jackson was entitled to wait until after the 17 April 2015 visit and after sight of the takings records provided in October 2015 before reaching her conclusions, both as to the fact of suppression and the amount of tax undeclared. In the circumstances, we are satisfied that the VAT assessments made in March 2016 were not out of time.

208. The appellant also contends that in so far as any adjustments to the VAT assessments arise from an incorrect use of the flat rate scheme they are well outside the period of 4 years for making such assessments. We were not taken to any statutory provisions setting out time limits for making amended assessments in these circumstances. Further, it is not apparent that the original VAT assessments have been formally amended as such. If necessary, and as part of any further hearing on quantum, the parties shall have an opportunity to provide clearer and fuller submissions on this issue. We note also that the Tribunal has power under section 84(5) in certain circumstances to specify the correct amount of an assessment where the amount specified in an assessment is less than it ought to have been.

QUANTUM

209. For reasons given previously, this decision is a decision in principle. We make no finding as to the precise quantum of the assessments, or the penalties based on those assessments. Having found that there was suppression of takings and profits in all the periods under consideration we are satisfied that the best method to quantify the amount of VAT and corporation tax due for those periods is the respondents’ method using the credit:cash ratio. No alternative method has been suggested. However, some adjustments to the original

assessments will be required for certain matters and may be required for other matters. We will hear further submissions and if necessary further evidence in relation to the following matters:

- (1) Necessary adjustments to the VAT assessments arising out of the mistaken assumption of Officer Jackson that the appellant's VAT returns for periods 03/12 to 03/14 had been prepared without adopting the flat rate scheme.
- (2) Necessary adjustments to the VAT assessments arising out of the fact that Officer Jackson did not give any credit for increased input tax credit on purchases to support the suppressed sales.
- (3) Necessary adjustments to the corporation tax assessments to give credit for additional purchases.
- (4) Possible adjustments for the treatment of tips.

210. In relation to the corporation tax assessments, these partly relate to a charge pursuant to Section 455 Corporation Tax Act 2010. The sums extracted by Mr Uddin and not declared either fall to be treated as his earnings and have not been declared as such for PAYE and national insurance purposes, or were loans on which a charge arises under s455. It is to the appellant's advantage that they be treated as loans and the appellant did not invite us to treat them in any other way.

DISCUSSION – THE PENALTIES

211. The penalties in this case were imposed pursuant to Schedule 24 Finance Act 2007 and relate to both corporation tax and VAT. References to paragraph numbers in this section of our decision refer to Schedule 24.

212. Paragraph 1(1)(a) provides that a penalty is payable where a taxpayer gives HMRC a document including a corporation tax return and a VAT return and two conditions are satisfied. The first condition for present purposes is that the document contains an inaccuracy which leads to an understatement of liability to tax. The second condition is that the inaccuracy was careless or deliberate.

213. Paragraph 3 distinguishes between inaccuracies which are "*deliberate but not concealed*" and those which are "*deliberate and concealed*".

214. Paragraph 4 makes provision for the standard amount of penalties. The standard penalty is 70% of the potential lost revenue ("PLR") for deliberate but not concealed action and 100% of the PLR for deliberate and concealed action.

215. Paragraphs 9 and 10 provide for reductions in the standard penalties where a person discloses an inaccuracy. Disclosure in this context is defined as:

- “(a) telling HMRC about it,
- (b) giving HMRC reasonable help in quantifying the inaccuracy..., and
- (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy ... is fully corrected.”

216. There is a distinction for these purposes between an “unprompted” disclosure and a “prompted” disclosure. Paragraph 9(2) provides that a disclosure is unprompted if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy. Otherwise a disclosure is prompted.

217. Paragraph 10 sets out the reductions for disclosure which HMRC must apply to a penalty. The reduction which HMRC must apply will depend on whether the disclosure was prompted

or unprompted. It must also reflect the “*quality*” of the disclosure. Paragraph 9 defines the quality of a disclosure as including the “*timing, nature and extent*” of the disclosure.

218. The reduction in the standard penalty by reference to the quality of disclosure gives a range of potential penalties. In the case of a deliberate but not concealed inaccuracy the minimum penalty for a prompted disclosure is 35% of the PLR and the maximum is 70% of the PLR. In the case of a deliberate and concealed disclosure the minimum penalty for a prompted disclosure is 50% of the PLR and the maximum is 100% of the PLR.

219. Paragraph 11 also permits HMRC to reduce a penalty generally “*if they think it right because of special circumstances*”.

220. It follows from our findings of fact that we are satisfied there were deliberate inaccuracies in the appellant’s VAT returns and corporation tax returns.

221. The respondents contended that the appellant had destroyed records of sales in order to conceal the inaccuracies. However, we have found that Mr Uddin did not destroy records in order to conceal his suppression of takings, even though his destruction of meal bills had that effect. What he did do however is make false entries in the takings book in order to conceal the deliberate inaccuracies in the returns.

222. In the circumstances we are satisfied that the penalties were properly imposed on the basis of deliberate behaviour with concealment. The appellant did not argue that he ought to be given a greater reduction for disclosure or that there were any special circumstances which would justify a special reduction. Subject to any adjustment to the quantum of the assessments, we confirm the penalties in principle.

CONCLUSION

223. For the reasons given above we find as follows as a matter of principle:

- (1) The appellant deliberately suppressed its takings in order to reduce the amount of VAT and corporation tax for which it would be liable.
- (2) The extent of that suppression falls to be calculated by reference to a card:cash ratio of 55:45.
- (3) The original VAT assessments were made to best judgment and were in time.
- (4) The penalties were properly imposed, subject to any adjustments to the underlying assessments.

224. If the parties are unable to agree the quantum of the assessments, the parties shall inform the Tribunal within 90 days of the release of this decision. The Tribunal will then give directions to determine issues of quantum.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

225. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 30 OCTOBER 2019