TC07930

Procedure - application for late appeal - no good explanation – refused - evidence as expert – no - VAT - suppression of takings - best judgment – appeal dismissed - Income Tax – - best judgment – appeal dismissed - penalties - appeals allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05402 and TC/2018/05415

BETWEEN

MOHAMMED ADAM NASIR **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Edinburgh on 9 and 10 March 2020

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

Elizabeth McIntyre and Matthew Mason, Officers of HMRC, for the Respondents

DECISION

INTRODUCTION

1. These appeals involve both direct and indirect taxes and consequential penalties.

Direct Taxes

2. The matters under appeal are:

(a) The 2013/14 Notice of Further Assessment in the sum of £3,582.93 made under Section 29 Taxes Management Act 1970 ("TMA") issued on 31 May 2018.

(b) The 2014/15 Notice of Further Assessment in the sum of £13,550.52 made under Section 29 TMA issued on 31 May 2018.

(c) The 2015/16 assessment in the sum of £9,967.74 made under Section 28A(1) and (2) TMA issued on 31 May 2018.

(d) The Penalties issued under Schedule 24 Finance Act 2007 ("Sch 24") in the sum of £5,691.23.

Indirect Taxes

3. The matters under appeal are the assessments made under Section 73 Value Added Tax Act 1994 ("VATA") issued to the appellant in relation to under-declared sales and the penalty issued under Sch 24. The assessments are in the sum of £25,652 and the associated penalty in the sum of £12,569.48.

The Information before the Tribunal

4. I use the word "information" in this heading since there was a dispute between the parties on a number of issues.

5. I had the Bundle which, in respect of Tab C being correspondence, extended to 460 pages. It was extraordinarily difficult to navigate since there were what seemed to be endless chains of emails where it was difficult to identify what was being said and when. There was repetition. The index was of minimal value. Furthermore this appeal involved both direct and indirect taxes and the Bundle made no differentiation.

6. Both parties had lodged Skeleton Arguments that covered both direct and indirect taxes.

7. I had the witness evidence of the appellant. I also had the witness statements of Officer Minns (direct tax) and Officer Harley (indirect tax). All gave oral evidence. I deal with Mr Nawaz's witness statement at paragraphs 59 *et seq* below.

8. At the end of the Hearing there was no time for submissions and on 1 May 2020, the Covid-19 pandemic having intervened, I issued Directions to the effect that both parties should lodge Closing Submissions with each other and the Tribunal by no later than noon on 22 May 2020.

9. Mr Nawaz, for the appellant, immediately responded stating that HMRC should lodge their submissions first because it "…is normal for HMRC in penalty cases to prove dishonesty before the burden falls on the appellant to dislodge the assessments" and then he should have time to respond.

10. As a result of the remote working caused by Covid-19 there was no response by the Tribunal to that and the passage of time meant that both parties lodged their Submissions on 22 May 2020.

11. The appellant's Submission included what were described in the covering email as three attachments but were in fact:

(1) Copies of correspondence with the Tribunal and HMRC about the late appeal for 2016/17 that Mr Nawaz stated had not been included in the Bundle.

(2) Two spreadsheet calculations, one of which used a revised mark-up and the other purported to work out "overall ZR vs SR mark-ups" (these had been produced to the Tribunal on the second day of the hearing).

(3) A print out of one page from a Crime Report on the Cost of Crime to Convenience Stores in 2017.

(4) Schedules showing re-calculation of a number of items.

12. On 11 June 2020, HMRC lodged an objection. In particular they stated:

> "For the avoidance of doubt, HMRC specifically object to the production of further spreadsheets which purport to support the Appellant's position that there has been no under-declaration of turnover within the business records, especially since there is a paucity of evidence to support the assertions made on those calculations."

13. Their default position was that if the evidence were to be admitted then "…appropriate weight is placed on these spreadsheets and the assertions therein".

14. On 12 June 2020, Mr Nawaz responded stating that there was no new evidence as it had been part of his witness statement and furthermore that it had been agreed that the calculations would form part of the Submissions.

15. On 14 June 2020, Mr Nawaz lodged what amounted to a further Submission. He suggested that if HMRC maintained their opposition then there should be a telephone hearing.

Preliminary and procedural matters

Application for permission to lodge a late appeal

16. Following the statutory review in respect of the direct taxes, HMRC issued an assessment for the 2016/17 tax year under Section 28A(1) and (2) TMA on 13 September 2018 and the associated Sch 24 penalty on 3 October 2018.

17. The appellant's agent sought a review and on 8 October 2018, HMRC wrote to the agent confirming that the assessment and penalty had been issued and stated that those would be submitted for review by an independent officer.

18. On 10 February 2020, the appellant's agent lodged an application ("the Application") with the Tribunal requesting that an appeal against the 2016/17 Tax and Penalty Assessments be conjoined with the extant appeals with the Tribunal.

19. He argued that it appeared that no review had been completed and, given that the subject matter of the 2016/17 assessments and penalties was precisely the same as that for the extant appeals, there would be no prejudice to HMRC if all matters were dealt with at the same time.

20. On 25 February 2020, HMRC lodged an objection. The grounds for objection were that:

(a) On 21 November 2018, HMRC had written to both the appellant and his representative advising the outcome of the review of the 2016/17 assessment and associated penalty which was to the effect that they were upheld.

(b) On 27 December 2018, HMRC lodged with the Tribunal and the appellant's representative two Statements of Case in respect of the current appeals.

(c) The Statement of Case relating to direct taxation specifically dealt with the 2016/17 assessment and Sch 24 penalty as a preliminary matter pointing out that no appeal had been lodged with the Tribunal and therefore HMRC did not consider that the Tribunal had jurisdiction to hear appeals in regard to those matters.

(d) The Application provided no explanation as to why the Application had been made seriously and significantly late.

(e) In terms of Section 49G TMA, the appeal should have been made within 30 days of the date of the review and therefore should have been lodged by 21 December 2018.

The Law

21. The Tribunal's power to admit a late appeal is contained in Section 49 TMA which reads as follows:-

> "49. **Late notice of appeal**
>
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree the tribunal gives permission."

22. Section 49H TMA gives the Tribunal power to grant permission to notify a late appeal to the Tribunal. The proper approach to such applications is set out by the Upper Tribunal in *Martland v HM Revenue & Customs*[1] ("Martland"). The Upper Tribunal reviewed the authorities and concluded as follows:

> "43. …The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".
>
> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

[1] [2018] UKUT 178 (TCC)

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal . In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

23. Lastly, at all times I have had in mind Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") which reads:-

> "**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

Discussion

24. At the Hearing, and in correspondence previously, Mr Nawaz argued that this was simply an extension of the existing appeal and HMRC's opposition to his Application was "disgraceful". Given that penalties were involved such an Application would, and should, always be granted. He was not conversant with *Martland* so I provided him with a copy and time to read it.

25. I had cited it to Mr Nawaz since he had stated that he had only lodged the Application because he was aware that some things were done differently in Scotland and he did not know the detail.

26. We are in Scotland, and as I pointed out to Mr Nawaz, the binding authority in Scotland in relation to the general approach to such discretionary decisions is set out by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City*[2] ("Aberdeen") and in particular at paragraphs 22-24. Those read as follows:-

> "[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. **The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit**. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.
>
> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details

[2] 2006 STC 1218

> of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.
>
> [24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one and another, for example, in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

27. At paragraph 26 of *Martland* the Upper Tribunal cited with approval these paragraphs from *Aberdeen* and went on to analyse, and approve, the five stages in *Aberdeen.* The starting point is to note the sentence that I have highlighted in bold in paragraph 22.

28. As is pointed out in *Martland,* at paragraph 32, in an Application such as this because *Aberdeen* was concerned with specific statutory criteria, one does not look for a reasonable excuse but rather for a "good explanation for the delay".

29. Mr Nawaz repeatedly argued, both at the Hearing and in Closing Submissions, that *Martland* was irrelevant and in any event should be distinguished on the facts. Of course it can be distinguished on the facts but that is to miss the point. As can be seen from paragraph 44, which I quote above, it is binding authority for the approach to be adopted when considering applications for admission of a late appeal. If there were to be a conflict between *Martland* and *Aberdeen* and in the years since *Martland* I am aware of none, *Martland* is of persuasive authority in Scotland and sets out a short test to be applied in three stages.

30. In the interests of brevity, I will consider the three headings from *Martland* which encompass the five in *Aberdeen.*

The length of the delay

31. On 21 November 2018, HMRC issued the decisions on the outcome of the review of the 2016/17 assessment and the 2016/17 Sch 24 penalty to the appellant and copied that to Mr Nawaz. Mr Nawaz denied having received an email with the copy but yet produced to me his telephone where, certainly, the first page of the email was blank but he scrolled down and the copy letter to the appellant was undoubtedly issued to him. I saw it on his telephone.

32. There is some doubt about whether or not the appellant actually received the letter and he alleges that he did not. I can see that in March 2018, Mr Malik of West Yorkshire Accountancy Services ("the accountant") said that not all mail was received by the appellant at the address held by HMRC for him since that appeared to be the address of "a family member". However, that is not consistent with the Notice of Appeal subsequently lodged with the Tribunal on 18 August 2018 in regard to the earlier years. That gave the appellant's address as being the address held by HMRC for the appellant. It was certainly the address to which almost all other correspondence was directed (some went to the business address) and that appears to have been received by him. However, whether or not the appellant received it, based on the evidence of his own telephone, Mr Nawaz had a copy of the letter. That letter made it explicit that any appeal should be lodged with the Tribunal by no later than 30 days from 21 November 2018, namely 20 December 2018.

33. Furthermore, even if neither the appellant nor Mr Nawaz had received the letter of 21 November 2018, HMRC issued the Statements of Case in respect of the current appeals on

27 December 2018. They were undoubtedly received by both Mr Nawaz and the appellant. The Statement of Case in respect of the direct taxes had, on the first page, the following note:-

> "**PRELIMINARY NOTE**
>
> Following the statutory review HMRC issued an assessment for the 2016/17 tax year under s.28A(1) & (2) TMA 1970 on 13 September 2018 and the 2016/17 Schedule 24 FA 2007 penalty on 03 October 2018.
>
> HMRC note that whilst the assessment and penalty have been appealed to HMRC and subsequently reviewed, HMRC are unaware of any appeal as having been made to made (sic) to Tribunals Service in respect of the matters, therefore, HMRC consider Tribunals Service have no jurisdiction to hear appeals relating to the matters at this time.
>
> As such HMRC propose to make no further reference to the 2016/17 matters at this time."

34. Accordingly, at a bare minimum, the delay was between 27 December 2018 and 10 February 2020 when the Application was received by the Tribunal. That is a delay of 410 days. That is a very serious and significant delay in the context of a 30 day time limit.

What is the reason for the delay? Is there a good explanation?

35. The reason given in the Application was that Mr Nawaz had not lodged an appeal with the Tribunal, having appealed to HMRC, because he had not traced a review decision. He stated in his Skeleton Argument that: "It is normal in such circumstances to simply extend the existing appeal to related matters…".

36. In his Closing Submissions, Mr Nawaz argued that it was relevant that HMRC had made procedural errors that had led to the 2016/17 assessment and penalties being vacated after the review. Whilst it may be that that led to the further appeal being "overlooked", as he says, it does not explain why an application for a late appeal was not lodged following receipt of the Statement of Case.

37. His only explanation of that was that he had been sure that an application would be granted because that always happened. Of course, even the briefest review of FTT decisions on applications for late appeals would show that a great many are refused. That is not a good explanation.

38. On 1 March 2019, the Tribunal Service administration wrote to Mr Nawaz stating that:-

> "The Tribunal has not been able to trace an appeal to the Tribunal regarding the 2016/17 assessment and penalties referred to in the opening paragraphs of HMRC's Statement of Case.
>
> If your client has lodged an appeal with the Tribunal against the 2016/17 assessment and penalties apparently issued in September and October 2018, then please let the Tribunal know and provide the TC reference number."

39. Mr Nawaz replied on 6 March 2019 simply stating:-

> "I attach herewith the review conclusion letter which seems to suggest that the assessment and related penalties for 2016/17 were cancelled. If this is not the case then clarification is needed and I can confirm that if valid the appeal to the Tribunal should cover all assessments covered by the same assessment process and based on the same so-called 'evidence'".

That review conclusion letter was dated 18 July 2018 and, of course, had been superseded by the subsequent issue of the new assessment and penalties. It had also been lodged with the extant, and properly lodged, appeal.

40. As can be seen, Mr Nawaz's email is confusing at best. It is not clear, and was not clear at the Hearing, quite why he thought that the Tribunal should clarify whether or not the review conclusion letter had cancelled the earlier assessment and penalties. That is entirely a matter for HMRC and the Tribunal would have had no access to subsequent correspondence. In any event, although the review conclusion letter is long the bullet points in the second paragraph on the first page are succinct and clear. The relevant ones read:

> "• Closure Notice for 2016/17 should be **cancelled**
>
> • Penalty for 2016/17 should be **cancelled**".

There is no dubiety. Furthermore, he knew that a new assessment and penalty for 2016/17 had been issued and he had corresponded with HMRC about that and requested postponement of the tax and penalty, stating on 19 September 2018 that "Once the review is complete, if unfavourable, we move the appeal to the FTT". On 3 October 2018, Officer Harley wrote to the appellant setting out very clearly HMRC's view of the matter and the appeals, reviews and Tribunal process. In particular, he pointed out that although the Closure Notice and Penalty for 2016/17 had been cancelled, new ones had been issued.

41. Mr Nawaz argued that that correspondence had been copied to HMRC, who had raised no objection, and therefore he had effectively lodged an appeal. I observe that HMRC had been sent a copy for information but had not been asked to comment and in any event the review conclusion letter had nothing to do with the new assessment and penalty for 2016/17 so there was no requirement for them to comment.

42. Firstly, it is not up to either HMRC or the Tribunal administration to decide on an application to the Tribunal for a late appeal. As the many decisions on late appeals make clear, it is a matter for the exercise of judicial discretion. I do not accept Mr Nawaz's arguments in his Closing Submissions that it was incumbent upon the Tribunal to direct the appellant to lodge an appeal. That is quite simply a matter for the appellant and his advisor. The Tribunal had quite properly drawn Mr Nawaz's attention to the fact that they had no record of an appeal. It was not incumbent on them to do even that.

43. The Tribunal's email had made it clear that a separate appeal for 2016/17 was required. When the Tribunal issued Directions to parties on 17 April 2019 the letters referenced only the original appeals.

44. Mr Nawaz is an accountant and had previously lodged appeals with the Tribunal in the proper form. Indeed he has repeatedly stressed his extensive Tribunal experience. He should have been aware that only appealable decisions can come to the Tribunal and that each carries its own appeal rights.

45. Furthermore, he should have been conversant with the provisions of Rule 20 of the Rules which sets out the requirements for a valid appeal. His email does not comply.

46. In summary, objectively considered, he should have had no reason to think that a valid appeal had been lodged.

What are the other circumstances of the case?

47. I do understand that if I do not extend the time for lodging an appeal then the appellant would suffer prejudice as he would be unable to litigate the matter. On the other hand HMRC have the right to expect finality and for them 2016/17 has been closed for more than a year.

48. HMRC are entitled to expect that it is in the public interest that the policy of finality in litigation is upheld and that statutory time limits are respected.

49. The strength, or not, of the appellant's case is a relevant consideration. Mr Nawaz had made it clear that all relevant documents and evidence were included in the Bundle. Since this was a preliminary issue, I have looked first at the Skeleton Arguments since, as directed by *Martland,* there should not be a detailed analysis of the underlying merits.

50. Unfortunately (as can be seen from paragraph 206), Mr Nawaz has argued that HMRC has not produced evidence of the appellant's capital and income and expenditure. I say unfortunately because it is the appellant who has failed to produce that evidence and it was requested by HMRC, repeatedly.

51. In terms of Section 50 TMA the burden of proof in relation to the assessment lies with the appellant. There has been very little compliance with repeated requests for evidence as opposed to theoretical modelling based on one month's trading in a period outwith the periods with which these appeals are concerned.

52. The appellant has conceded that the VAT Returns have considerable omissions of both sales and purchases. The income tax assessment in the sum of £14,700.28 is derived from the VAT enquiry. It is for the appellant to provide evidence of the true figures, as I will explain in my decision.

53. Remarkably little evidence, as opposed to assertion, had been produced by, or for, the appellant. Prior to the hearing, notwithstanding numerous reminders, the appellant had not produced the records for his business during the period of the enquiry.

54. Had I issued a verbal decision on the late appeal I would have taken the view that the appellant's case was not at all strong and indeed that proved to be the case given that the appeals for the earlier years have in fact failed.

55. As far as the associated penalty of £3,087.05 is concerned, the quantum would certainly have been arguable.

56. Mr Nawaz argues that "…tribunal proceedings are meant to be informal to enable non-lawyers, to include the appellant and his representative to participate in such proceedings". However, both *Aberdeen* and *Martland* make it explicit that particular importance should be given to the need to "…enforce compliance with rules…". Furthermore, as can be seen from paragraph 47 of *Martland,* "…being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules".

57. At a bare minimum, no explanation, let alone a good one, has been given even for the failure to lodge an appeal between the service of the Statement of Case in December 2018 and the email correspondence with the Tribunal in early March 2019.

58. Having weighed every relevant factor in the balance, I have decided that the Application should be refused. As can be seen, in fact, the appeal would not have succeeded in any event.

Mr Nawaz's witness statement

59. Mr Nawaz had lodged in process a witness statement and HMRC sought a Direction clarifying the basis upon which the witness statement had been submitted as they argued that it contained matters which could be considered as "…submissions which may be pertinent to the conduct of the Appellant's appeal rather than matters of fact".

60. The witness statement is set out as if it were a statement of an expert witness. It recites Mr Nawaz's experience and qualifications and articulates diverse opinions at some length. It annexes 9 schedules of calculations by Mr Nawaz. Those calculations are predicated on a number of assumptions that he explained in his witness statement.

61. HMRC lodged in process a copy of the Law Society of Scotland "Expert Witness Code of Practice". I also drew Mr Nawaz's attention to the Supreme Court decision in *Kennedy v Cordia (Services) LLP*[3]. I annex at Appendix 2 extracts therefrom which set out the basic requirements for an expert witness in Scotland.

62. Mr Nawaz stated that he had frequently provided such witness statements in Tribunal hearings.

63. Whether or not that is the case, in terms of Scots law, Mr Nawaz is clearly not an expert witness. That being the case, I am bound by and follow Mrs Justice Proudman in *HMRC v Sunico*[4] at paragraph 29 where she states:

> "29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties' respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence."

64. Therefore, any opinion evidence, and much of the witness statement is opinion evidence, would fall to be disregarded.

65. Mr Nawaz ultimately agreed to withdraw the witness statement and indicated that he would use it as a foundation for written submissions. That was entirely a matter for him.

66. It was certainly not ever agreed, as he states in his response to HMRC's objection to his Closing Submissions, that he could furnish evidence in Closing Submissions.

67. Closing Submissions are, and can only ever be, simply arguments based on the evidence adduced in a Hearing. That is to say that they should summarise the main factual points arising from the evidence and provide legal argument based thereon.

68. Whether written or oral they are not a forum for the introduction of opinion or of evidence.

69. For the same reasons that the opinions of Mr Nawaz would not have been admitted in evidence in the Hearing because he is not an expert, his opinions, as opposed to legal argument, do not fall to be weighed in the balance as evidence by the Tribunal.

70. In *Edwards v HMRC*[5] the Upper Tribunal cited with approval the FTT in *Qureshi v HMRC*[6] at paragraph 15 which reads:

> "15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that 'would have' or 'should have' happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

71. HMRC are entirely correct in saying that the spreadsheets ("the Schedules") and the Crime Report produced with the Closing Submissions are not admissible. However, I have had regard to Rule 2 of the Rules, and to avoid both expense and delay, I have not formally upheld HMRC's objection but am simply giving those arguments and Schedules the appropriate weight and that for the reasons set out below.

The Substantive Appeals

72. The history of both the VAT enquiry and the income tax enquiry that followed on from that is lengthy. I have set out at Appendix 1, at length, the factual details of that history and

[3] [2016] UK SC 6
[4] [2013] EWHC 941 (CH)
[5] [2019] UKUT 131 (TCC)
[6] [2018] UKFTT 115 (TC)

those are findings in fact which form part of this decision. The arguments deployed by both sides are woven through that.

73. In having an Appendix covering findings in fact I have approached matters in a slightly unconventional manner because throughout there has been a challenge by both parties to the approach, evidence relied upon, or lack thereof, and the arguments of the other party but nevertheless, in my view, for the Tribunal, the issues are actually relatively limited.

74. I say that because it has never been disputed that the VAT returns that were the subject of the enquiry were inaccurate and incomplete and that the appellant has never produced the relevant records for his business. What was in dispute was the quantum of the assessments for both taxes and where the burden of proof lay in that regard. In that context, methodology was also an issue.

75. Therefore in the interests of clarity the Appendix carries the detail and I now narrate an overview of the key findings in fact and then move to my analysis thereof in respect of the two taxes. I will then consider the penalties which are in dispute.

76. Officer Minns was responsible for the VAT enquiry and Officer Harley the Income Tax enquiry. Latterly the correspondence was between Mr Nawaz and both officers covering both taxes. For that reason, in the Appendix, I deal with the taxes separately until March 2018 when the two became intertwined.

Summary of Key Findings in Fact

77. The appellant has been registered for VAT with effect from 15 December 2013 having acquired the business as a transfer as a going concern from the previous owner. He was a sole trader and therefore paid income tax based on his trading activity.

78. In March 2017, Officer Minns made an unannounced visit to the appellant's business premises. During the period April to August 2017 Officer Minns corresponded with the appellant, his accountant ("the accountant") and the till support company and suppliers, namely J W Filshill Limited ("Filshill") and obtained:

(a) The annual accounts for the last three years.

(b) VAT workings for the last four periods.

(c) Till reports for VAT periods 07/15 to 07/17 ("the Filshill data").

79. All of the VAT workings produced by the accountant highlighted the facts that neither the bank statements nor the electricity bills had been provided.

80. Officer Minns compared the figures from the Filshill data with the declarations in the VAT returns and established that there was a significant understatement of output tax in the returns.

81. On 18 August 2017, he wrote to the appellant raising concerns about various inaccuracies including the discrepancy between the values of sales declared in the VAT returns of £405,894 and the sales of £1,149,633 recorded in the Filshill data. Officer Minns enclosed a schedule showing a potential loss of VAT of £91,596 (an average of £7,633 per quarter).

82. On 23 October 2017, HMRC opened an enquiry into the 2015/16 Self-Assessment Tax Return ("SATR") and on 8 November 2017 Officer Harley wrote to the appellant and to the accountant advising that the check into the SATR for the year ending 5 April 2016 had been extended to a full enquiry. It was explicitly stated that this was as a result of the ongoing VAT enquiry as it was believed that that might have an impact on the appellant's income tax

position. He asked for information. There was no response. Subsequently an enquiry into the SATR for the year ending 5 April 2017 was opened.

83. Although the accountant continued to deal with compliance work, Mr Nawaz was appointed as the appellant's representative for the purposes of the VAT enquiry on 27 August 2017. On 4 September 2017, he wrote to Officer Minns and, amongst other things, stated that he believed that there were a number of missing purchases and he requested an extension of time to obtain information. He subsequently acted in the SATR enquiry.

84. On 5 September 2017, Officer Minns sent Mr Nawaz copies of the workings from the accountant and the Filshill data and requested evidence of the potentially omitted purchase invoices. Concerns were expressed over the fact that the level of input tax claimed exceeded the amount of output tax declared in every VAT return submitted from period 04/14 to 01/17. In particular, Officer Minns requested "comprehensive and irrefutable evidence to support the sales in earlier periods" supported by bank analysis and cash reconciliations. Under the heading "MY PREVIOUS POINTS OUTSTANDING - ACTION Required" Officer Minns requested information about cashing up and banking procedures, annual cash analysis, Z reads and other matters.

85. Correspondence ensued including in particular a letter from HMRC dated 30 October 2017 pointing out that information had been requested a long time ago and, since 4 September 2017, Officer Minns had been awaiting revised VAT workings. The necessary actions required of the appellant were again reiterated as being:

(a) Submission of revised VAT workings.

(b) Provision of bank reconciliations matching sales and purchase invoices.

(c) An explanation as to why the VAT returns were not correct.

(d) Consideration of the implications for SATRs.

(e) Responses to questions previously posed such as in relation to Z readings, cash reconciliation etc.

86. The deadline for a response was extended to 30 November 2017. Shortly put, it can be seen from Appendix 1 that items (a), (b) and (e) have never been provided by the appellant. There have only been partial responses, unsupported by any evidence, to (c) and (d) to the effect that the errors in the VAT returns were the fault of the accountant and an assertion that since income tax depended on profits, not turnover, there was no loss of tax.

87. Furthermore no evidence was ever received in relation to the actions required on outstanding points or bank analysis or cash reconciliation. Although samples of missing invoices were produced a full list has never been received.

88. On 12 January 2018, Officer Harley wrote to the appellant pointing out that he had had no response to his letters of 8 November 2017 and set out the information that was still required in order to progress the various checks into the appellant's personal tax affairs. In particular he enclosed a schedule that detailed what he required ("the Schedule") and that reads:

> "Schedule of information and documents needed to carry out our check
> Unless otherwise stated, all requests refer to the period 01/04/15-31/03/16.
>
> 1. Details of any balance in figures, journal entries or adjustments used to make the financial accounts.
> 2. Banking cash ledgers, analyses or reconciliations.

3. The record of personal drawings and capital introduced or, if not recorded, details of how they were calculated.
4. The business books and records including sales, purchase, cash and petty-cash books.
5. The prime records of sales; for example till rolls, z-readings, card-payment slips.
6. The purchase invoices and expense receipts.
7. Stock records including the stock counts taken at 31/03/15 and 31/03/16.
8. Statements, cheque stubs and pay-in slips for all bank, savings, credit-card accounts used in connection with business income and expenditure. Please include statements for any personal accounts used for business purposes.
9. Details of any other sources of income not included in the return.
10. Using the enclosed form, details of all household expenditure.
11. Returned: telephone, fax, stationery and other office costs: An analysis of the amount claimed of £21,143 along with details of the private use adjustment of £5,216 has been arrived at."

89. Despite frequent requests, and copies sent to Mr Nawaz, who was instructed to act in the Income Tax enquiry in March 2018, none of that has ever been furnished.

90. Having issued a revised assessment for VAT to Mr Nawaz and the appellant on 19 January 2018, on 22 January 2018, Officer Minns wrote to the appellant stating that the two most recent deadlines had passed without provision of the summary of the corrected VAT returns with workings and evidence for periods 04/14 to 04/17 or the detailed information that was required. Therefore, he had had no alternative but to raise VAT assessments based on the limited information that he had. He also pointed out that although he had some partial replies from Mr Nawaz there had been no "back up" being the requisite evidence.

91. He explained the basis of the assessments and the key points were:

(a) The sales had been increased in line with the Filshill data (ie he had compared those till reports for periods 10/15 to 01/17 with the VAT returns and had then applied the average figure from the till reports to calculate the output tax for periods 04/14 to 07/15).

(b) He accepted the argument that the inputs would have been understated but, in the absence of evidence, best judgment meant that inputs would be increased at the same rate as the taxable sales.

(c) He pointed out that to arrive at the cost of sales he had used the lowest gross profit (19.06%) disclosed in the appellant's accounts in the three years in question and converting it to a mark-up (23.54%).

(d) He had added overheads incurring VAT and he had calculated those on the basis of the figures in the annual accounts.

92. The additional VAT due was £25,653. He again requested an explanation as to why the errors had occurred.

93. On 6 February 2018, in relation to VAT, Mr Nawaz emailed stating that he believed that the overall standard rated mark-up "…is likely to be…" between 18 and 20% because the mark-up on cigarettes varied between zero, 5% and 10% and requested a without prejudice settlement at 19%. He argued that the figure in the first six quarters should not exceed £2,000 per quarter as the average used by Officer Minns failed to recognise that the appellant was building up the stock and also building the business by special offers.

94. Officer Minns wrote to the appellant on 9 February 2018, amongst other matters, asking how the 19% mark-up had been calculated and whether a representative period had been used. He again stressed that he required sales information from the till system to establish the

correct level of sales and that he could not simply accept arguments without evidence. He required revised VAT returns with back-up evidence.

95. As far as penalties were concerned he stated that he would revisit the issues of penalties if he was given "far more detail…on what was supplied" to the accountant and detail on checks and processes for purchases and payments etc. That detail was set out clearly in six bullet points which read:

> "• Did they receive the bank statements and receive sales summaries from the tills and if not why not?
>
> • How were the sales figures calculated by you, what records were produced showing the sales and what was sent to the previous book keepers?
>
> • Who was responsible for collating all the purchase invoices and how were they sent to the book keepers?
>
> • What checks were in place to make sure the purchase invoices sent were correct and not already sent or complete?
>
> • Was the bank account used by the book keepers to verify the purchase invoices?
>
> • Did Mr Nasir check purchases and payments to suppliers to the accounts or bank? Please supply evidence to show this."

96. The appellant was given until 9 March 2018 to respond. The only response ever received from the appellant in relation to the issues on penalties was one sentence in the appellant's witness statement stating that he had kept all purchase and expense invoices and bank statements in a filing cabinet and had sent them to the accountant quarterly. Mr Nawaz did repeatedly state that the appellant had sent the accountant everything that they had requested.

97. On 28 February 2018, Officer Harley, having received no response to any of his letters, wrote to the appellant and the accountant. He explained that at that point it seemed as if there would be additional VAT due of £25,653 and that he had calculated adjustments to turnover based on that. He had apportioned net sales figures from the VAT returns to attain net sales for each year and he uplifted the costs of sales on the basis of a 19.06% gross profit ratio (being the same figure used by Officer Minns and the lowest achieved in any of the appellant's annual accounts).

98. In summary, the revised additional Income Tax and Class 4 NIC amounted to £42,839.41. There was also interest thereon of £1,858.29. The matter of penalties would be pursued separately. He said that if the VAT figures were adjusted then those figures would be adjusted in line with that. In fact, he did revise those figures on 28 March 2018 showing a reduced new total liability of £44,246.84 that he said followed on "…from the agreed VAT position". He requested a response by 27 April 2018.

99. On 22 March 2018, Officer Minns wrote to the appellant stating that as he had not received any further information the assessment was now due for payment and a penalty decision would be issued shortly. Mr Nawaz replied and advised that "if push came to shove" they could find additional input VAT evidence but he would consider leaving the matter on a without prejudice basis if penalty suspension conditions could be imposed. He reiterated that the cause of the problem was poor book keeping.

100. On 26 March 2018, Officer Minns responded pointing out that he had requested the additional purchase evidence many times and in its absence he had allowed the lowest mark-up for input tax.

101. On 28 March 2018, Mr Nawaz replied, with a copy to Officer Minns, since he disagreed with both officers.

102. He argued that:

(a) Both officers were using a mark-up that was not appropriate because the margins in the business were considerably less than the margins in "ordinary grocery stores" because of the high level of discounted cigarettes and groceries sold.

(b) The sales declared for VAT purposes had excluded a lot of purchases and there would obviously be additional sales. He produced an illustration based on deemed additional sales and purchases which gave a consistent mark up over the period of between 9.05 and 9.42%.

(c) It was not necessary to produce all input tax invoices where using a mark-up was appropriate. A mark-up exercise for VAT purposes would indicate lower margins than that apparent from the filed accounts as his exercise proved.

(d) The return for the period 04/17 was correct as all purchase invoices had been claimed and all sales declared so no adjustment was required.

(e) HMRC were required to produce evidence of profits.

(f) In this case there was "…no evidence of capital accretions/introductions or refusal to give access to records".

103. On 24 April 2018, Officer Minns wrote to Mr Nawaz with a copy to Officer Harley and the appellant enclosing letters in respect of both taxes (his own letter was incorrectly dated the following day).

104. Officer Harley's letter included the following:

(a) Confirmation that, in line with the decision in the VAT enquiry not to challenge the net sales figure for the VAT quarter 04/18, those figures had been used in the computations. It was emphasised that that was a concession only as the Filshill data had shown a higher figure for sales. (The 04/18 was a typing error and it should have referred to 04/17.)

(b) The income tax figures had been derived from the VAT enquiry.

(c) The additional sales identified in the Filshill data had provided evidence of additional profits. The figures for turnover had been significantly increased and therefore the taxable net profits.

(d) None of the information requested in the letter of 12 January 2018 had been provided by the appellant so he had had to proceed on the basis of the available information. He enclosed a further copy of the Schedule.

(e) He had applied a Cost of Sales ("COS") figure of 19.06% for all years and that was consistent with the outcome of the VAT enquiry. That was the lowest COS recorded in the financial accounts produced. The financial accounts for the years to 31 March 2014 and 31 March 2016 recorded COS of 21.47% and 19.79% respectively.

(f) He had made other concessions on a without prejudice basis in a bid to settle the enquiry by agreement.

(g) HMRC concluded that in the absence of the evidence and information that they had requested they would issue income tax assessments using best judgment and as reflected in the computations sent to the appellant on 6 April 2018.

(h) Mr Nawaz was again requested to furnish the information and evidence specified in the Schedule and to respond by 24 May 2018.

105. Officer Minns' letter pointed out:

> "However I still have no new information on which I can amend my assessments
>
> - That would be a set of reconstructed records for periods which have been shown to have incorrect submissions.
> - I have requested numerous times but not received a representative period reconstructed to show an alternative mark-up
>
> …
>
> SUMMARY
>
> I have raised a VAT assessment based on the till sales summaries for the VAT periods 10/15 to 01/17. The sales evidenced for the six periods were £1,149,633 but the sales declared were £405,894. For other VAT periods 04/14 to 07/15 no till sales information was available and purchase invoices were omitted …
>
> - I used the lower of 3 years mark-ups shown in the 3 years annual accounts. This was the basis I used to determine and maximise your clients input tax and therefore reduce the VAT due.
> - I have allowed a lower figure to be accepted by HMRC for the 04/17 VAT return than that evidenced by Filshill as the net VAT was within acceptable range. This has had a knock on effect or (sic) reducing the Income Tax due in all periods to the benefit of your client …
>
> I will raise the penalty based on a deliberate but not concealed basis …".

The letter concluded by intimating the appeal and review rights.

106. The response from Mr Nawaz was to the effect that there were further invoices to claim but that the appellant was willing to agree to the assessment provided the penalties were dealt with under penalty suspension conditions. He still argued that the mark-up percentage was incorrect.

107. In May 2018, correspondence continued. In particular:

(a) Although he had asked for more, Officer Minns stated that the minimum amount of evidence that he would require would be a reconstructed three months VAT period for the period ending 31 July 2016 accompanied by workings and analysis to support any mark-up calculations.

(b) Mr Nawaz provided various workings although he conceded these were not complete calculations of all input tax.

(c) On 27 May 2018, having argued that the Filshill data did not reflect the correct mark-up calculations because the appellant often marked down goods, he provided what he described as "a stab at working out mark-ups". He produced two Schedules, the first of which was based on Filshill data for April 2018 (which is outwith the period of enquiry) and the second of which was based on period 04/17 which is, of course, the period where HMRC knew that the figures in the return were wrong but where by concession they had not used the significantly higher Filshill data.

(d) He stated that the figures in those were provided on a without prejudice basis in a bid to achieve settlement in relation to VAT but not for direct tax. His new calculations had made an assumption that there should be a provision of 2% for thefts, breakages, mark-downs and price matches. There was no evidence to vouch that. Again, entirely unsupported by any evidence he had assumed a mark-up of 16.73% and a margin of 14.33% but conceded that when PayPoint and lottery are excluded those figures became 24.21% and 19.49%. He provided commentary on the various mark-ups which he believed reflected the activities of the business.

(e) On 16 May 2018 a penalty explanation letter and schedule was issued to the appellant in the sum of £12,569.48 based on a deliberate but not concealed penalty.

108. On 31 May 2018, Officer Harley issued a Closure Notice for 2015/16 under Section 28A(1) and (2) TMA and Discovery Assessments under Section 29 TMA for the tax years ended 5 April 2014, 2015 and 2017. He also issued a Notice of Penalty Assessment in the sum of £20,842.70

109. He made it explicit that, in the absence of provision of any business records, he had relied on the Filshill data and his view of the matter set out in the conclusion letter dated 24 April 2018 was unchanged (see paragraph 104 above). The total liability for Income Tax and Class 4 NIC was £41,801.47 and interest to 31 May 2018 was £2,042.69.

110. On 5 June 2018, Mr Nawaz responded to Officer Harley intimating an appeal saying that:

(a) He was not aware that any information had been sought and not provided.

(b) The negotiations with Officer Minns were on a without prejudice basis to resolve the issue of lost invoices.

(c) There were many expenses that had not been claimed.

(d) There was no evidence of any additional profits evidenced by eg additional drawings and HMRC had failed to identify and produce such evidence.

111. Officer Harley responded the following day pointing out that neither the appellant nor Mr Nawaz had responded to the request for the information in the Schedule. He said that in the absence of any business records or other information:

> "Conclusions had been drawn as far as possible in alignment with the VAT enquiry and within that scope has indeed been provided to discuss matters on a without prejudice basis. From that concessions have been applied where deemed appropriate to try to reach a settlement by agreement."

112. Mr Nawaz's response was that no further information was required from him as HMRC had not addressed the question of profits.

113. In the interim, on 1 June 2018, Officer Minns responded to Mr Nawaz's email of 27 May 2018, with a copy to Officer Harley, making the following points:-

(a) The reduction of 2% for theft etc could not be accepted as there was no evidence underpinning it.

(b) The calculations that Mr Nawaz had produced could not be accepted not least because the 04/17 VAT period was not a complete picture as it had missing purchase invoices. Furthermore, the Filshill data showed sales of £206,541 whereas the return had sales of only £135,991. It had been a concession not to amend that period because the net VAT declared was within an acceptable range.

(c) The officer had been asking for a full disclosure since 18 August 2017 and had not received the requested detailed workings for all VAT periods and nor had he received evidence of the additional input tax invoices.

(d) As pointed out in his email of 22 May 2018 he expected to receive a full listing of purchase invoices and the extra invoices to be identified separately and scanned. He had not even seen a representative period's workings for even three months. He could not accept one month's sales analysis to COS with no backup. All of the cigarettes could have been purchased in one month and that would skew the figures. He expected to see a full list of the purchase invoices to evidence entitlement to input tax. In the

absence of any of that he had been very fair with an allocation of input tax based on the lowest mark-up in the annual accounts.

(e) He could not consider Mr Nawaz's argument that the mark-up on standard rated products is not correct in the absence of a full quarter's listing as a representative period with additional invoices identified. He would also require listings for other periods to ensure that they are not being claimed twice.

(f) As far as input tax on other items is concerned he expected to see invoices for those items but, for example, in relation to the Audi car he had not received answers to the questions posed on 18 August 2017.

(g) As far as penalties are concerned he had decided that the behaviour was deliberate but not concealed because the accountant had made it clear that they had requested bank statements and sales information on numerous occasions and that they had input all the purchase invoices submitted to them. In essence HMRC had discovered that the appellant had not given the accountant enough information to complete the VAT returns correctly and as a result both sales and purchases were supressed.

(h) Since 18 August 2017, HMRC had been asking for full disclosure and reconstituted VAT returns but they had not been received. The appellant had been given the benefit of the increased input tax on the basis of the records provided.

114. On 5 June 2018, Mr Nawaz emailed both officers arguing in particular that the appellant had relied on the accountant for the submission of the VAT returns and that the appellant had always provided the accountant with all that was requested including bank statements. The email requested a statutory review.

115. Lastly, the accountant's position has been straightforward and clear from the start in that even the original workings pointed out that bank statements and utility bills had not been furnished.

116. On 3 May 2018, Officer Harley had contacted the accountant to ascertain exactly what had happened in regard to the errors in relation to the declarations made for the various taxes involved in the enquiry.

117. The questions posed and the answers received the following day were unambiguous, namely:-

"Q1. Can you confirm if any purchase invoices supplied to you by Mr Nasir were missed or ignored in your calculations and subsequent submissions in the VAT returns?

A1. No (worked on the information provided)

Q2. Were you given details of all sales from Z readings? This may have been via till analysis or sales summaries? Please give details.

A2. No, this information was requested on several occasions.

Q3. For VAT period ending 1/17 the records you provided show you hadn't received bank statements. Can you confirm if you received bank statements for any or all periods?

A3. No, again requested on several occasions.

Q4. The sales on the till are significantly higher than those indicated by the VAT returns and annual accounts. Did you carry out a bank reconciliation and/or sales reconciliation? If so what was the outcome?

A4. No, I expected this as we had to resort to mark up in this case."

118. The appellant continued to employ the accountant in compliance matters for some time after the enquiries were raised by HMRC.

The Law

119. I set out the relevant law at some length in relation to both VAT and Income Tax since Mr Nawaz has repeatedly alleged that the officers did not do enough to establish the correct quantum for the assessments and that they had not discharged their burden of proof. There is no such dispute in relation to the law on penalties and the argument is simply whether the appellant's behaviour was innocent or careless or deliberate.

VAT

120. The VAT assessments were made pursuant to section 73(1) 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)

121. There is no dispute in this case that the VAT returns were incomplete and incorrect. Accordingly, Section 73 VATA is engaged.

122. There is a considerable body of case law on what amounts to "best judgment".

123. The requirements for a decision to be found to be to the best of HMRC's judgment, were set out in the High Court case of *Van Boeckel v C & E Commissioners*[7] where Woolf J, as he then was, said at 290 and 292*e* - 293*a*:

> "The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of the tax due before making the assessment. Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them…
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.
>
> Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

HMRC relied upon that case in the review conclusion letter dated 19 July 2018 and indeed Mr Nawaz did so in his Closing Submissions.

124. I was not referred to the case but three further criteria were identified in the case of *C A McCourtie*[8] where the Tribunal stated:

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[7] *[1981] STC 290*,

> "In addition to the conclusions drawn by Woolf J in Van Boeckel earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias."

125. Again, I was not referred to the case but at paragraph 30 of his judgment in *Rahman (t/a Khayam Restaurant) v Commissioners of Customs and Excise* ("Rahman")[9], Chadwick LJ cited the quotation from Woolf J in *Van Boeckel* that I have set out in paragraph 128 and went on to say at paragraph 30:

> "It is instructive, also, to note the way in which Mr Justice Woolf applied that test to the facts in the *Van Boeckel* appeal. He rejected the criticism that the commissioners had acted arbitrarily in extrapolating results over a five week period to the whole period of assessment. As he said (*ibid,* 295*h*):
>
> > 'It is perfectly proper for the commissioners, if they choose to do so, to make a test over a limited period such as five weeks, and take the results which are thrown up by that period of five weeks into account in performing their task of making an assessment in accordance with the requirements of s 31 [of the Finance Act 1972, now section 73(1) of the 1994 Act].'
>
> He rejected, also, the criticism that the commissioners had not made sufficient investigation into the way in which the taxpayer's business (in that case, a public house) was run. He said this, (*ibid*, 296*a-b*):
>
> > 'As I have indicated, unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations then they have got to take into account the material disclosed by those investigations. Obviously, as a matter of good administrative practice, it is desirable that the commissioners should make all reasonable investigations before making an assessment. If they do that it will avoid, in many cases, the necessity of appeals to the tribunal. However to try and say that in a particular case a particular form of investigation should have been carried out, is a contention which, in my view, as a matter of law, bearing in mind the wording of s 31(1), is difficult to establish.'"

126. Lastly, at paragraph 36 of his judgment in *Rahman* Chadwick LJ stated in relation to "best judgment":

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

127. 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 Customs and Excise*[10]. It is well established law that two distinct questions can arise on a challenge to an assessment under section 73 VATA. The first question is whether the assessment has properly been made under the power conferred by section 73(1) including the use of best judgment. The second is whether the amount of the assessment is correct.

128. In relation to best judgment, where a Tribunal is satisfied that HMRC have made a mistake in the assessment, Carnwarth LJ (as he then was) having considered a number of Authorities, at paragraph 21 identified the formulation of the "relevant question" to be asked, namely:

> " … 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

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[8] *LON/92/191*
[9] [2002] EWCA Civ 1881
[10] [2004] EWCA Civ 1015

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."

He went on to state that that was binding upon not only the Court of Appeal but also Tribunals.

129. At paragraph 38 under the heading Guidance to Tribunals he stated:

"… 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."

130. That is the approach that I have adopted, commencing with the quantum of the assessment.

131. The first point that I must make is that Mr Nawaz is entirely wrong in stating as he did (see paragraph 9 above) in regard to Closing Submissions and also in the Hearing that it is for HMRC to prove dishonesty before the burden falls on the appellant in relation to the assessments. Furthermore HMRC have never made any allegation of dishonesty.

132. The burden of establishing that an assessment is excessive undoubtedly lies on the appellant. In *Khan v HM Revenue & Customs*[11], Carnwarth LJ (as he then was) 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)."

and at

"73…But, as to the precise calculation of the amount of tax due, in my view, the burden rests on the appellant for all purposes."

133. Where the issue of best judgment arises, it is to be determined by reference to the material available to HMRC at the time their assessments were made.

134. As far as the obligation to keep records for VAT purposes is concerned, Regulation 31(1) of the Value Added Tax Regulations 1995 provides;

"(1) Every taxable person shall, for the purposes of accounting for VAT, keep the following records-

(a) his business records

(b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him,

….

(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him…."

[11] [2006] EWCA Civ 89

(2) The Commissioners may –

(a) in relation to a trade or business of a description specified by them, or

(b) for the purposes of any scheme established by, or under Regulations made under the Act, supplement the list of records required in paragraph (1) by a notice published by them for that person …".

135. At the material time the appellant was operating, inappropriately, a Retail Scheme.

136. VAT Notice 4.4 which applies to traders within the Retail Scheme provides:-

"… you must keep a record of your [Daily Gross Takings]. You must include in your DGT record;

- All payments as they are received by you … from cash customers for your retail supply;
- The full value, including VAT, of all your credit or other non-cash retail sales at the time you make the supply; and
- Details of any adjustments made to this record".

Income tax

137. Section 29 TMA is headed "Assessment where loss of tax discovered" and the relevant subsections read:

"Section 29 Assessment where loss of tax discovered

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

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

(b) that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive,

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

(2) [not applicable]

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

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

(b) ... in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

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

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

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

(b) informed the taxpayer that he had completed his enquiries into that return,

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

138. In *Charlton v HMRC*[12], the Upper Tribunal (Norris J and Judge Berner) considered the meaning of the word "discover" in section 29 TMA. (Mr Gordon was counsel for Mr Charlton in the case.) They said at paragraph 28:

> "We agree with Mr Gordon that the word 'discovers' does not connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed."

139. At paragraph 29 they added "The mere fact that a threshold must be crossed does not mean that something more than a change of opinion is required" and at paragraph 37 they said:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

140. In relation to the discovery assessments, it is for HMRC to show that they made a discovery and that the assessments were issued within the statutory time limits. There is no dispute that in this case there are no timing issues.

141. It is for the appellant to show that the assessment should be set aside or reduced.

142. In *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)*[13] at 667, Lord Hanworth MR stated:

> "Now it is to be remembered that under the law as it stands the duty of the [Tribunal] who hear this appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to [the Tribunal] by examination of the Appellant…or by other lawful evidence, that the Appellant is overcharged by any assessment, the [Tribunal] shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the [Tribunal is] to hold the assessment as standing good unless the subject - the Appellant - establishes before the [Tribunal]…that the assessment ought to be reduced or set aside."

143. HMRC relied upon a quotation from Walton J in *Johnson v Scott* (HM Inspector of Taxes)[14], but it is appropriate to put it in greater context and quote a longer section. He stated of assessments:

> "Indeed, it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all to one person only –the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than overestimates as well. But what the Crown has to do in such a situation is, on the known facts, make reasonable inferences…the fact that the onus is on the taxpayer to displace assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as in the case of this matter, figures have to be inferred, what has to be made is a fair inference as to such figures may have been. The figures themselves must be fair."

144. HMRC also relied on a quotation from Walton J in *Nicholson v Morris*[15] and again it is appropriate to put it in greater context and quote a longer section, namely:-

> "In this day and age most people have at any rate a bank account and with a little ingenuity the statements of a bank account can be analysed to provide a wealth of information as to how much a person has received, how much it has cost them to live, and so on and so forth … If not, he may have had other material. … What on earth could I or anybody else at this stage, in the total absence of evidence,

[12] [2012] UKUT 770
[13] [1927] 11 TC 657 at 667
[14] [1978] 52 TC 383 at 394
[15] 51 TC 95

substitute for them? The answer is it is a complete and utter impossibility; and that is why, of course the Taxes Management throws upon the taxpayer the onus of showing the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer and chapter and verse for the right answer, and it is idle for any taxpayer to say to the Revenue, 'hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults'. That is not a duty on the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would of course fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return and, if challenged, to support the return he has made, or, if that return cannot be supported to come completely clean, and if he gives no evidence whatsoever, he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered."

145. Section 50(6) TMA provides that if, on appeal, the Tribunal decides that the appellant is overcharged by an assessment or a self-assessment "… the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good". There is also power, in section 50(7) TMA to increase the assessment if the Tribunal decides that the appellant has been undercharged.

146. The relevant provisions of Section 12B Taxes Management Act 1970 ("TMA") read as follows:

"Records to be kept for purposes of return

(1) Any person who may be required by a Notice … to make and deliver a term for year of assessment or other period shall –

(a) Keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(b) Preserve those records until the end of the relevant day, that is to say the day mentioned in subsection (2) below, or where a return is required by notice given on or before that day, whichever that day and the following is the latest …

(2) In the case of a person carrying on a trade, profession or business alone or in partnership –

(a) The record is required to be kept and preserved under subsection (1), or (2A) above shall include the records of the following, namely

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place; and

(ii) in the case of a trade involving dealing in goods, all sales and purchases of goods made in the course of the trade …".

The evidence

147. As can be seen it is not disputed that the VAT returns were inaccurate and incomplete. As I indicated at paragraph 96, in his witness statement the appellant stated that he had kept all purchase and expense invoices and bank statements in a filing cabinet and sent them to the accountant quarterly. In the course of the enquiry he had repeatedly been asked what had been sent to the accountant and when (in particular see paragraph 95). The only response had been from Mr Nawaz who stated that the appellant had always sent the accountant everything that had been requested. Bizzarely, in oral evidence the appellant alleged that the accountant had not asked him about bank statements as there was no need to do so since he paid them by bank transfer. That makes no sense.

148. Of course, the appellant's evidence is in stark contrast with the information in the workings obtained from the accountant which were sent to Mr Nawaz on 5 September 2017.

It is also in stark contrast with the written and unambiguous replies provided by the accountant to Officer Harley on 4 May 2018.

149. In the appellant's oral evidence-in-chief he stated that he had generated sales reports quarterly for the VAT returns and he then sent those to the accountant with the invoices and bank statements that he kept in the drawer together with electricity bills and, indeed, anything else for which he had paid. He was unable to explain, why, if that was indeed the case, he had not said so in his witness statement.

150. The witness statements were produced in response to directions issued by the Tribunal which were accompanied by a 'Notes to appellants', which, in relation to witness statements, said:

> "In order to ensure that the parties can prepare properly for the hearing, it is important that they know in advance the case that the other side will put at the hearing. For this reason the Tribunal requires both parties to submit in advance written statements ... to give evidence about what happened... **The witness statement should be written by the witness** setting out the true facts in so far as he knows them ... setting out his own version of events." (emphasis added)"

151. In cross-examination, the appellant conceded that Mr Nawaz had prepared his witness statement for him after he had explained his understanding of matters to him. However, for example, in cross-examination, he also conceded that his assertions in paragraph 18 of his witness statement about potential additional input VAT was information provided to him by Mr Nawaz. There were many other matters where it became clear that the appellant was describing what Mr Nawaz had told him.

152. Unfortunately what the witness statement did not do was give any detail about Z reports, cashing up and banking procedures or many of the other matters on which he had repeatedly been asked to provide information. It put HMRC in the difficult position of having to cross-examine a witness on evidence being given for the first time at the hearing.

153. In examination-in-chief, in response to questioning, he argued that before the introduction of minimum pricing, he had offered significant discounts on alcohol and his best-selling item was Buckfast which he stated he was currently selling for £7.49 where the cost price was £6.20 including VAT. Before the introduction of minimum pricing he had been selling it at £5.49 where the cost price was £5.30. He gave no indication what he meant by best-selling nor what the margin on other alcohol might have been.

154. On cross-examination he was taken to the sales printout that had previously been produced (see paragraph 107(c) above) and, in particular, to the entry for Off Licence. That indicated a mark-up of 30.2%. That was the sales history for the month of April 2018. HMRC put it to him that minimum pricing in Scotland was introduced on 1 May 2018. It was.

155. He then argued that he had kept a list next to the till where he, or his staff, had noted what discount had been applied. He said that discounts were primarily offered on cigarettes and alcohol. He said that the actual price would be entered manually so it would not show on the till reports which recorded the Recommended Retail Price ("RRP"). He was asked why he had not given the list to HMRC and he stated that he did not think that it was relevant.

156. He also stated that he had seen no need to tell Filshill although he alleged that he had told the accountant. He was unable to explain why this was the first time that the existence of any such list had been mentioned.

157. In his evidence Officer Minns, who is a very experienced officer, had said that to the best of his knowledge an EPOS system (ie what the appellant utilised) can calculate VAT every day and can cope with discounts by voiding, amending and over-ringing the entries. In

cross-examination he was asked whether he was aware that the appellant "could not process mark downs" and his answer was no. It was not put to him that his evidence to the effect that he should have been able to do so, was in any way flawed.

158. The appellant did not explain why his till system did not cope with mark downs. It was simply a bland assertion that it did not. Had the appellant included this in his witness statement then HMRC and the Tribunal would have been able to explore the accuracy of the appellant's assertion.

159. HMRC have repeatedly asked the appellant to explain how his business operated on a day to day basis starting with the letter of 5 September 2017 but the hearing was the first time that any information was offered.

160. The appellant confirmed that he kept no record of what was actually sent to the accountant or when. He also confirmed that he ran till reports at the end of staff shifts, which meant up to three times per day, but he did not retain them or the daily till reports. That is a failure to retain prime records of the business which demonstrate the level of daily gross takings (DGT) of the business.

161. When he was asked in more detail about the sales of Buckfast the appellant stated that he would know how many cases he had bought and how many he had left. He would make a note of the numbers sold on a notepad, rip the page out and keep it with the other papers and then throw it away. Although he said that it was his best selling alcohol, no information was offered as to what percentage of his alcohol sales it comprised or indeed what the other alcohol sales might be or the margins on those.

162. Although he was very clear that he had given all relevant information to the accountant he could not remember what information, including the numerous letters from HMRC, he had given to Mr Nawaz. He was taken to a number of those letters and was unable to recall or explain what he had discussed with Mr Nawaz. He denied that he had known that the accountant's workings highlighted the fact that no bank statements or electricity bills had ever been provided. He conceded that he had not even looked at the Bundle.

163. As can be seen from paragraph 64 of Appendix 1, as long ago as 1 May 2018, HMRC had told Mr Nawaz that if he believed that the accountant had failed then he should contact the accountant. There is no evidence that that happened other than a vague statement in the appellant's witness statement that "… when I challenged them they initially stated that they had accounted for everything but when I asked for paperwork they reduced the payable amount by over £2,000 and it became clear that I was not being served well by them and have since moved to accountants close by." There is no evidence of that.

164. In terms of Rule 15 of the Rules, the appellant could have cited the accountant as a witness but did not. It was simply argued that the accountant had been at fault. In Closing Submissions Mr Nawaz argued that the appellant should be found to be credible and that the Tribunal should "completely disregard the 'evidence'" from the accountant since the accountant had not given evidence at the hearing. It was also argued that the annual accounts, which, of course, the appellant had approved, could not be relied upon.

165. By contrast, HMRC argued that the appellant's evidence was at times vague and evasive even when describing the day to day operation of his business and cited the lack of clarity, for example, about cashing up procedure at the end of the day. They suggested that, if they were uncharitable, the vagueness was an attempt at obfuscation.

166. In summary, there was very little substance to the appellant's evidence and he was indeed very vague on numerous issues. Despite being aware from 18 August 2017 that the reason for the enquiry was because the VAT returns prepared by the accountant were very

significantly at odds with the Filshill data, the appellant continued to employ the accountant for ongoing compliance matters, even when he should have been aware that the accountant was consistently stating that there had been a failure to provide information.

167. On the balance of probability, I find the evidence from the accountant to be the more credible and consistent.

168. Lastly, in relation to the appellant's evidence in regard to stock, he, and Mr Nawaz, have repeatedly said that in the earlier periods for which there are no till records (ie in the period before 10/15) stock had been built up. Since this business was taken over as a going concern, the appellant should have had evidence as to the previous trading record. Nothing has been produced.

169. A brief glance at the accounts, which were approved by the appellant, shows that in the first year (2013/14), which of course was only three and a half months, the opening stock was £13,600 and the closing stock was £15,000. In the two following years the opening and closing figures remained constant at £15,000.

170. In his Closing Submissions Mr Nawaz argued that, because there were low sales in the first accounts, that meant that the stock was building up. He also states for the first time, and there is no evidence to back it up, that the reasons there were increased purchases was because Filshill had offered credit. That is not admissible evidence since it was not spoken to in the course of the hearing and is merely an unsupported assertion by Mr Nawaz but I mention it for completeness. The point is that there were very low sales and very low purchases in the first three and a half months. However, if one looks at the sales and purchases in each of those three sets of accounts, the ratio of sales to purchases is a fairly consistent 24.10%, 24.85% and 23.70%.

171. I do not accept the argument that there is evidence that there was a build-up of stock because the business had been run down.

172. In summary, I accepted the evidence from the accountant which was supported by the contemporaneous VAT workings. I found the evidence of the two officers to be clear, consistent, straightforward and wholly credible. I found the appellant's evidence to be vague and unsupported by external evidence.

Methodology

173. There is absolutely no doubt that the appellant has failed in his statutory obligation to keep records. There has never been any explanation as to why he has not even obtained duplicate bank statements, let alone produced even one reconstituted VAT return supported by evidence.

174. HMRC's repeated requests for evidence, as opposed to unsupported argument, have never been met to any relevant extent.

175. In his email of 14 June 2020, which at paragraph 15 above I describe as a further submission, Mr Nawaz argued that prior to the hearing the parties had agreed that "…in order to determine a reasonable claim for input tax a mark-up would be used." He accurately records that HMRC used the mark-up used in the 2014/15 accounts (23.55%) with a gross profit margin of 19.06% giving rise to assessable VAT of £25,655.

176. He goes on to argue that that cannot be correct as:

(1) The accounts are unreliable with a lot of missing information, and

(2) "it is evident that the margins on standard rated goods are a lot lower than overall margins and it is this which needs to be established."

177. He correctly records that prior to the hearing the appellant had "… sought to indicate the fallacy of using global mark-ups by alluding to mark-ups applying in April 2018 …". He went on to argue that in the course of the hearing Officer Minns had said that it would be more appropriate to look at October 2016 which fell within the period under enquiry. That is not entirely accurate. What the Officer did do, which was very fair to the appellant, was that when he was taken to the schedule analysing April 2018 by Mr Nawaz, he pointed out that it was outwith the period of the enquiry, was for one month only and if one compared it with the Filshill data for April 2016 it showed a higher margin on kiosk sales (8.19% as opposed to 7%). Incidentally, in writing this decision I noted that the level of kiosk sales in April 2018 was significantly lower at £15,780.81 than in April 2016 when it was £18,898.31. In itself, that supports Officer Minns' point that the figures for one month alone cannot be representative.

178. Certainly on the second day of the hearing the appellant lodged in process two further schedules prepared by Mr Nawaz which purported to show margins etc for October 2016 and the Officer was invited to comment on them.

179. However, just as he had in his letter of 1 June 2018 (see paragraph 113(d) above), he was very clear that one month was not even one VAT quarter and simply could not be viewed as being in any way representative. He pointed out that sales figures for one month without any purchase invoices or bank statements were of very limited evidential value.

180. The appellant had never explained how the business operated and in the absence of any records other than the Filshill data, whilst he understood the arithmetic, he could not agree with the arguments based on the analysis of one month's trading. He needed to see multiple periods since variations were not only possible but likely. One month could show very skewed trading depending on what purchases were made.

181. When it was put to him that he had not wanted to see invoices and preferred to use mark-ups he vigorously rejected that argument and was very clear that he had always wanted to see, at a bare minimum, invoices for at least three month's trading. That is borne out by the correspondence.

182. I agree with Officer Minns that it cannot be said that that one month is in any sense representative. I find that his approach in seeking more information and repeatedly giving extended time to do so was fair.

183. As I indicate at paragraph 73 above, throughout the period of enquiry and indeed at the hearing there has been a challenge by both parties to the approach, evidence relied upon, or lack thereof, and the arguments of the other party. That remains the case with the Closing Submissions and indeed the various schedules produced by Mr Nawaz. Nevertheless, in my view, for the Tribunal the issues are actually relatively limited.

184. The key fact is that the appellant has failed in his statutory duty for both direct and indirect taxes to keep accurate records. He has not produced bank statements or records or representative workings or reconstituted VAT returns. He has not provided any of the evidence requested in relation to his SATR.

185. Throughout unsupported assertions have been made. A good example is the argument advanced in relation to theft. (Although he had bracketed breakages and goods past their sell by date with theft, Mr Nawaz concedes that there is no evidence in relation thereto.)

186. As I indicate at paragraph 11, Mr Nawaz produced with his Closing Submission a one page print-out from a report by the Association of Convenience Stores called "The Crime Report 2017". That is new "evidence" and as long ago as 1 June 2018, Officer Minns had told Mr Nawaz that he had produced no evidence in relation to theft.

187. Although Mr Nawaz has used it to argue that it states that "…there were losses of £4,361 per store on average to theft…", it certainly does not. In fact, under a heading "Crime Overview" it states that "Shop theft cost the average store £2,605 in the last year." It can be seen from the index that there was a section in the report on shop theft but that was not produced. There is no evidence as to what might be an average store and whether the appellant's business is such a store.

188. Furthermore, it purports to represent the "… experiences of 7,123 convenience stores based on the responses from 24 different retailers". It then goes on to state, quite correctly, that "Every local shop is different and so too are the challenges they face ….". The only other piece of information that could be derived from that page is a graphic which states that crime against convenience retailers costs an estimated £232m for the sector, there is a cost of £4,631 per store and £3,907 per store is spent on crime prevention. The sector must therefore be significantly greater than 7123 stores! It is of literally no evidential value.

189. Another problem is the alleged discounts on alcohol. That has apparently been calculated for the appellant by reference to the evidence on the sale of Buckfast. I only had the oral evidence of the appellant which was entirely unsupported by any sales or purchase data. I, and the officers, know extremely little about the appellant's sales of Buckfast or any other alcohol (see paragraphs 154 -157). The appellant's evidence on that was very vague. It certainly does not form any reliable foundation for any argument and nor does it support the suggestion in the Schedule TN16 attached to the Closing Submissions that 50% of alcohol sales were Buckfast and that there should be a discount of 13.76% applied to that 50%.

190. I do not intend to address every argument advanced by Mr Nawaz based on his various Schedules because the same basic flaw runs through them all. They are not supported by relevant evidence adduced prior to or in the course of the hearing..

191. His starting point is that, as he says on the second of the Schedules he produced on the second day of the Hearing, "It would be dangerous to use a generic mark-up or margin on accounts which suffer from missing purchases and sale". Well that is the appellant's problem. He has been given repeated opportunities to produce revised VAT returns supported by invoices and other records. He has not.

192. Like Officer Minns, I understand the arithmetic in some of the Schedules but I can see little or no evidence, as opposed to unvouched assertions, supporting them.

193. An example of a particular problem is one to which he did not take Officer Minns. In his Closing Submissions he attached a Schedule TN15 which he stated was an updated Schedule of one that had been attached to his witness statement at TN8.1. In the witness statement it was described as being the workings supporting the weighted mark up on tobacco products although it was headed "Workings sheet to calculate margins on cigarette and tobacco sales after mark downs".

194. Firstly, and obviously, it is wholly unsupported by any evidence. Secondly, as it makes clear it is using the alleged selling price on 11 June 2019 and in the case of sales of multiple packs, the alleged cost on 14 June 2019 (which I have to assume is an error in terms of the use of the word cost!) which is after the appeals had been lodged with the Tribunal. No-one has ever spoken to it.

195. It referenced another Schedule, namely TN8, which was headed "Used to work out a weighted mark-upon cigarettes and tobacco". That too is wholly unsupported by any evidence. I can see only two items that appear in both of those Schedules. That suggests that neither is representative. Bluntly, neither is of any evidential value.

196. Furthermore, he freely admitted that TN8 was "not ideal" as that was based on one purchase invoice dated 14 June 2017. His argument was that it "…was there to illustrate the fallacy of the way HMRC have assessed.". Therein lies the major problem for the appellant.

197. The case law to which I have referred is entirely consistent. In particular, firstly, as can be seen from paragraph 132, the precise calculation of the tax is a matter for the appellant. Not only do assessments remain valid until they are shown to be wrong but also the appellant must have shown positively what corrections should be made to make them right or more nearly so. Secondly, and crucially, as can be seen from paragraph 127, the appellant has to demonstrate that the methodology underpinning the assessments was obviously flawed.

198. In summary, the appellant has patently failed to retain adequate records vouching either the sales or the purchases of the business and nor has he produced any reconstructed VAT working for even one VAT quarter. He has not produced relevant evidence underpinning the assumptions put forward by Mr Nawaz. The use of the period 04/17 is inappropriate for a number of reasons prime amongst them being that it not only was known to have missing purchase invoices but it was also known that the sales figures were wrong (see paragraph 200).

199. I agree entirely with all of Officer Minns' arguments in his letter of 1 June 2018 (see paragraph 113 above) explaining why he had no choice but to make a best judgment assessment.

200. I find that at no time did Officer Minns act capriciously or arbitrarily. He made an honest and genuine attempt to make a reasoned assessment of the VAT due by the appellant based on the very limited information available to him. The very fact that he made a concession not to amend period 04/17, notwithstanding the fact that the Filshill data showed sales of £206,541 whereas the return had sales of only £135,991, demonstrates that.

201. I am in no doubt that the appellant's accounts are inaccurate but they are the best evidence, as opposed to unvouched assertions, that was available to HMRC. There is an excellent word that describes the approach of the appellant in this matter and that is *ipsedixitism* which means the dogmatic insistence that something is a "fact" without providing any supporting evidence.

202. Therefore, I find that the assessment made by Officer Minns was made to his best judgment. The extrapolation back for the period for which there was no Filshill data was a reasonable approach to take. He has very fairly made adjustment for input tax on missing purchases on the very limited information available. I find that he calculated the amount assessed honestly and above-board, fairly considering all the material available to him, and he came to a decision that was reasonable and not arbitrary. Since the onus of proof lies with the appellant the assessment must stand.

203. As far as income tax is concerned, it followed precisely the same approach as for VAT but of course the legal framework is different.

204. The fact that the discrepancy between the sales declared in the VAT returns and the sales in the Filshill data was so very large (£743,739) is self-evidently a discovery for the purposes of section 29 TMA. I say self-evidently but Mr Nawaz argues that that is not evidence of a loss of tax because the SATR depends on profits not turnover. To that extent he is correct.

205. However, it certainly indicated that the prime records were very inaccurate thereby raising a presumption that there was a loss of tax. As can be seen from the VAT enquiry, because there was such an extensive failure to keep relevant records, HMRC were required to make a best judgment assessment.

206. At paragraph 50 of the Closing Submissions, Mr Nawaz stated:

> "It is a known fact that HMRC are in receipt of information which can enable them to see whether or not a taxpayer is declaring his profits appropriately. This information includes any purchases of property, deposit interests, share dividends and clearing of loans, if such is the case. There is absolutely no evidence produced by the Respondents or anything that casts aspersions on the amount of profits declared for tax purposes … Surely therein lies the fallacy of assessments based on mark-ups with no attempt to evaluate the means of the taxpayer by looking at capital statements which the authorities on the subject indicate should be done."

207. That is quite simply wrong as can be seen from the case law cited at paragraphs 138-144.

208. As can be seen from the extensive findings in fact, the appellant has repeatedly been requested to provide relevant evidence supporting his tax returns and has failed to do so. In the absence of that, given the Filshill data and the accounts Officer Harley had undoubtedly made a discovery that there was a loss of tax. The provisions of section 29 TMA have been met.

209. As with VAT, I accept that the accounts for the relevant years were inaccurate but, as the cases make clear, that is the appellant's problem. He has produced no evidence (as opposed to assertions) and therefore in the words of Walton J (see paragraph 144 above) "…if he gives no evidence whatsoever, he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered".

210. That may well be the case here but it is his own fault.

211. In the absence of any relevant evidence Officer Harley recalculated the figures of turnover based on the inaccuracies identified as part of the VAT enquiry, namely the under-declared sales, to arrive at the figures used as the basis of HMRC's calculations in arriving at the revised profit figures. Specifically he allowed the same concession as Officer Minns so the sales for 04/17 were stated at the lower figures of £135,991 rather than the much higher figure of £206,451 shown in the Filshill data.

212. In calculating the taxable net profits he reviewed the only evidence available to him and issued the assessments based on best judgement. He apportioned the net sales, taken from the revised sales derived from the VAT periods to calculate the net sales for each year. The COS figure was uplifted on the basis of 19.06% for all years. That was the lowest Gross Profit Rate disclosed in the appellant's annual accounts which had been provided to HMRC. Although it was known that purchases had been omitted the appellant had not produced accurate figures for those.

213. As a concession Officer Harley made no adjustment to the expenses or allowances claimed in the annual accounts and he used those figures when calculating the revised taxable net profits for each year.

214. I find that Officer Harley has looked at the known facts and has made "fair" inferences based thereon.

215. Since the appellant has entirely failed to discharge the burden of proof the assessments must stand.

Penalties

216. As I indicated at paragraph 119, the legislative provisions pertaining to penalties are not in dispute. However there is a dispute about the nature of the appellant's behaviour and in particular whether his behaviour was innocent on the basis that he relied on the accountant

and, if not, whether it was careless or deliberate. The reductions to the percentage rates charged as penalties were not in dispute.

217. As far as reliance on the accountant is concerned, even if it were to be established that the accountant was at fault, and it has not been, although it was not a penalty case, I agree with the Upper Tribunal in *HMRC v Katib*[16] where at paragraph 58 they stated:

> "58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise."

218. I find that the appellant's behaviour was at best careless.

219. As far as the income tax penalties are concerned the review officer decided that the penalties should be based on careless rather than deliberate behaviour albeit in their Skeleton Argument, HMRC argued that it was deliberate behaviour. Mr Nawaz argued that if penalties were to be applied then it should be on the basis of careless behaviour for both taxes since the cause of the penalty was the same. I agree with Mr Nawaz that the underlying behaviour was the same for both taxes.

220. I was not referred to them but there are numerous Tribunal decisions on the meaning of deliberate in the context of penalties. Although I am not bound by them I agree with what is stated in the following cases.

221. In *Auxilium Project Management Ltd v HMRC*[17] ("Auxilium") the Tribunal said:

> "63. In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

222. Secondly, in *Kinesis Positive Recruitment v HMRC*[18] ("Kinesis") the Tribunal stated:

> "56. The Tribunal [in a previous case] approached the question of whether behaviour was deliberate by considering whether the action was 'taken consciously where there was an appreciation that there was a choice.' We consider that is a useful starting point but that also regard should be had to the ordinary meaning of the word 'deliberate' which, according to the Oxford English Dictionary, is as follows:
>
> well weighed or considered; carefully thought out; formed, carried out, etc with careful consideration and full intention; done of set purpose; studied; not hasty or rash."

223. Lastly, in *Baig v HMRC*[19] ("Baig") the Tribunal stated:

> "53. … Further, an inaccuracy can in some circumstances be held to be deliberate where it is found that the person consciously or intentionally chooses not to find out the correct position, in particular, where the person clearly knew that he should have taken steps to ascertain the position."

224. As can be seen at paragraph 172 above, and indeed elsewhere in this decision, I did not find the appellant's evidence to be reliable. However, that is not the end of the story.

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[16] [2019] UKUT 189 (TCC)
[17] [2016] UKFTT 249 (TC)
[18] [2016] UKFTT 178 (TC)
[19] [2020] UKFTT 318 TC

225. Firstly, looking at *Auxilium* whilst I have no doubt that a reasonable taxpayer would certainly not have acted with such a cavalier disregard for the need to keep records etc that is not the test. As that case makes clear it is a subjective test of what the appellant intended to do. That ties in with the proposition in *Kinesis* that there has to have been careful consideration and full intention.

226. I can understand why the officer thought that the appellant had deliberately set out to suppress takings and that therefore his behaviour was deliberate. However, looked at in the round, his course of behaviour in terms of what was or was not sent to the accountants, and the records he maintained both in terms of statutory records and, for example, stocks such as Buckfast, not only disadvantaged HMRC but severely disadvantaged him in that it is abundantly clear that significant amounts of purchase invoices were neither forwarded to the accountant nor retained by him.

227. Whilst his evidence was undoubtedly unreliable, nevertheless, I formed the view that he was a young man with no relevant previous business experience who had an approach to record keeping etc which can only be described as chaotic. I do not think that he had carefully thought out the consequences for himself in terms of the missing purchase invoices and the failures to check information, let alone thought about the consequences for HMRC. Accordingly, I find that on the balance of probability, his behaviour was not deliberate but careless, albeit at the uppermost level. For the same reasons I do not think that, at that time, he had consciously or intentionally chosen not to find out the correct position.

228. I therefore find that the penalties to be applied for both taxes are on the basis that it was careless behaviour with the reductions previously applied.

229. HMRC have considered special circumstances and I agree with them that there are none for either tax.

230. In the case of the income tax penalty, HMRC had agreed that the penalties were suitable for suspension but since the appellant had not agreed that penalties are exigible the conditions for suspension have not been set. In the case of the VAT penalty HMRC had not hitherto considered the question of suspension since they had classed the behaviour as deliberate and it was therefore not an option. There is therefore no appealable decision as yet in regard to suspension.

Decision

231. For all these reasons the appeal is dismissed in regard to the assessments which are confirmed as to quantum. As far as the penalties are concerned the income tax penalty is confirmed and the VAT penalty is varied to a penalty on the basis of careless behaviour and therefore the appeal on penalties is allowed in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

232. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 9 NOVEMBER 2020

Appendix 1

The factual background

1. The appellant has been registered for VAT with effect from 15 December 2013. It was a transfer as a going concern from the previous owner who had been trading for some 10 years.

2. On 9 March 2017, Officer Minns, a Higher Compliance Officer in HMRC, visited the appellant's business premises, Keystore Cumnock, on an unannounced visit, accompanied by two Trading Standard Officers but the appellant was not present. The cashier contacted him by telephone and the officer explained the reason for the visit. The appellant suggested that the officer arrange to retrieve the sales records from the till support company and suppliers, Filshill and the accountant would provide the annual accounts and VAT workings.

3. On 19 April 2017, the officer sent an email to the appellant and to the accountant referring to the previous discussion and asking for copies of:

(a) The annual accounts for the last three years;

(b) VAT workings for the last four periods; and from the appellant

(c) Access to the till reports via Filshill.

5. On 8 May 2017, the first two items were provided by the accountant. The VAT workings highlighted the facts that "NO BANK STATEMENTS PROVIDED" and "NO-ELECTRICITY BILL" had been provided.

6. On 13 May 2017, the appellant emailed details for Filshill and authorisation to retrieve the till reports. On 24 May 2017 Filshill provided monthly VAT reports from monthly sales data from the till for August, September and October 2016 together with the quarterly report for period 10/16. On 24 May 2017, Officer Minns emailed and asked what was included under the heading "Kiosk" and was told that that would "..mostly be cigarettes but would also cover sundries, cigars and e-cigs etc". He also asked for quarterly reports for other periods which they undertook to send to him provided the appellant authorised them to do so.

7. However, on 31 July 2017, Filshill emailed Officer Minns stating "… I confirm that I have not yet received written consent from Mr Nasir to try and retrieve the information/reports you have requested". It was only on 15 August 2017 that Filshill were in a position to email Officer Minns stating that they had received verbal confirmation for authorisation to dial in and run the relevant reports.

8. On 17 August 2017, they provided eight quarterly VAT reports for periods ending 07/15 to 07/17 from the "back office reports" ("the Filshill data"). Officer Minns questioned the sales in the 07/15 report and discovered that it only included the month of July, so he excluded that from his calculations and decided not to use that period in any assessment.

9. On 18 August 2017, having reviewed the annual accounts and VAT workings furnished by the accountant in conjunction with the Filshill data, Officer Minns wrote to the appellant setting out the position as he understood it. That letter was copied to the accountant.

10. Concerns were expressed in respect of discrepancies between the values of sales declared and those recorded on the information produced by Filshill. Officer Minns enclosed a schedule showing a potential loss of VAT of £91,596 (an average of £7,633 per quarter). The letter also set out concerns that the appellant had been using a Retail Scheme to calculate

the amount of output tax due on the sales when the tills in use were capable of providing the information to calculate the VAT due on the sales. Lastly, there was concern expressed about the level of VAT claimed in relation to the operation of a car.

11. The appellant was asked to comment and, if so advised, to provide further information by 15 September 2017.

12. Pertinently, HMRC stated as follows:-

> "**What you need to do**
>
> Before we make assessments of tax due, I would like to give you the opportunity to comment on my findings and calculations.
>
> If you would like to comment or give me any more information, please contact me by 18 September 2017.
>
> FULL DISCLOSURE
>
> This is your opportunity to give me the correct figures for both sales and purchases and to tell me how the errors arose. As you have submitted VAT returns you knew to be correct it is likely there will be a deliberate penalty applied. Please consider this and tell me what the circumstances were surrounding the returns submitted not being correct...".

13. The appellant instructed Mr Nawaz in that regard on 29 August 2017.

14. On 4 September 2017, Officer Minns received an email from Mr Nawaz, setting out the reasons why he disagreed with the potentially assessable amount of £91,596. The reasons given included:-

(a) Purchase invoices may have been omitted from the records.

(b) The extrapolation back from the periods based on the Filshill records did not recognise the state of the business when the appellant took over the business.

(c) There was no recognition that the business was building up the stock levels.

(d) There was no recognition of the wide variety of mark-ups obtained on the goods sold by the business nor the proportion of the type of goods possibly distorting the expected mark-up.

He requested an extension of time until 30 November 2017 to provide further information.

15. On 5 September 2017, Officer Minns provided Mr Nawaz with copies of the Filshill data and requested further information relating to the operation of the tills and the calculation of the amounts declared on the VAT returns submitted. He also enclosed copies of the workings from the accountant.

16. As indicated above, those workings highlighted the fact that the accountant had not been provided with bank statements or utility bills.

17. He requested evidence of the potentially omitted purchase invoices. Concerns were expressed over the fact that the level of input tax claimed exceeded the amount of output tax declared in every VAT return submitted from period 04/14 to 01/17. In particular, he requested "comprehensive and irrefutable evidence to support the sales in earlier periods" supported by bank analysis and cash reconciliations. Under the heading "MY PREVIOUS POINTS OUTSTANDING - ACTION Required" he requested information about cashing up and banking procedures, annual cash analysis, Z reads and other matters.

18. He extended the time for response to 18 October 2017.

19. On 11 September 2017, Mr Nawaz emailed requesting further information in relation to the Filshill data and the accountant's workings that had been sent to him. Officer Minns

responded later that day telling him to make contact with the accountant direct if he required more than the one year of VAT workings that HMRC had obtained.

20. On 27 October 2017, Officer Minns issued an email to both Mr Nawaz and the appellant pointing out that the deadline for provision of information had passed without delivery of the information. Mr Nawaz responded later that day requesting further time to produce information relating to the purchase listings.

21. Officer Minns responded on 30 October 2017 pointing out that the information had been requested a long time ago and since 4 September 2017, he had been awaiting revised VAT workings. The necessary actions required of the appellant were again reiterated as being:

(a) Submission of revised VAT workings;

(b) Provision of bank reconciliations matching sales and purchase invoices;

(c) An explanation as to why the VAT returns were not correct;

(d) Consideration of the implications for SATRs;

(e) Responses to questions previously posed such as Z readings, cashing up and banking procedures etc.

22. The deadline for a response was extended to 30 November 2017.

23. On 29 November 2017, Mr Nawaz told Officer Minns that he had received a large number of invoices from five major suppliers which he had listed, but two days previously he had received further invoices which had not been analysed. He had also obtained a list of purchases for a further four quarters from the accountant. His argument was that there were a large number of missing invoices and he proposed calculations regarding omitted input tax. He expressed concerns about the stated level of mark-up purported to have been achieved by the business. He pointed to the assessed figure of £7,633 that was being used for the first six quarters where HMRC had no sales records and asserted that those figures were too high as the business was not as profitable at the beginning and had had to be built up.

24. Officer Minns replied on 1 December 2017 allowing a further extension of time to 12 January 2018 for production of the summary of the corrected VAT returns with workings and evidence for the periods 04/14 to 04/17 and answers to the questions previously posed.

25. Having issued a revised assessment for VAT to Mr Nawaz and the appellant on 19 January 2018, on 22 January 2018, Officer Minns wrote to the appellant stating that the two most recent deadlines had passed without provision of the detailed information that was required. Therefore he had had no alternative but to raise VAT assessments based on the limited information that he had. He also pointed out that although he had some partial replies from Mr Nawaz there had been no "back up" being the requisite evidence.

26. He explained the basis of the assessments and the key points were:

(a) The sales had been increased in line with the Filshill data (ie he had compared those till reports for periods 10/15 to 01/17 with the VAT returns and had then applied the average figure from the till reports to calculate the output tax for periods 04/14 to 07/15 (£2,845)).

(b) He accepted the argument that the inputs would have been understated but, in the absence of evidence, best judgment meant that inputs would be increased at the same rate as the taxable sales.

(c) He pointed out that to arrive at the cost of sales he had used the lowest gross profit (19.06%) disclosed in the appellant's accounts in the three years in question and converting it to a mark-up (23.54%).

(d) He had added overheads incurring VAT and he had calculated those on the basis of the figures in the annual accounts.

27. The additional VAT due was £25,653. He again requested an explanation as to why the errors had occurred.

28. On 6 February 2018, Mr Nawaz emailed Officer Minns with a copy to the appellant arguing that the mark-up achieved on cigarettes would affect the proposed assessment as would omitted input tax of £13,017.60 which he had identified. It was again argued that the extrapolation for the first six quarters had not recognised that the appellant had built up the business by special offers and by building up the level of stock. In relation to the proposed penalties the email stated:

> "… we feel that there is a case of bad book-keeping where the systems used to calculate VAT by mark-ups and by ignoring a lot of purchases was not correct. There does not appear to have been any attempt to conceal or to deceive and in these circumstances we feel that penalty suspension conditions should be applied where correct figures should be submitted on say the next two returns and these could be regarded as the suspension conditions".

29. On 9 February 2018, Officer Minns wrote to the appellant advising that HMRC still had concerns about the amounts declared on the VAT returns and were awaiting explanations about the behaviours leading to the errors.

30. He made it explicit that the assessment was based on the till sales reports, previous VAT returns and annual accounts to provide a level of input tax that was fair and reasonable. He pointed out that if he accepted Mr Nawaz's argument on unclaimed input tax that would give rise to a VAT liability of £78,578.40 rather that the £25,653 achieved by using the mark-up he had applied.

31. The officer stated that the business had registered for VAT on 15 December 2013 as a transfer of a going concern and had been trading for some 10 years previously. Therefore he could not accept the argument that there would be a large build-up of stock without having sight of purchase invoices and detailed VAT workings. He required sales information from the till system to establish the correct level of sales.

32. The primary point that he made was that he could not simply accept arguments without evidence. He required revised VAT returns with back-up evidence.

33. He stated that he would revisit the issues of penalties if he was given "far more detail…on what was supplied" to the accountant and detail on checks and processes for purchases and payments etc. That detail was set out clearly in 6 bullet points which read:

> "• Did they receive the bank statements and receive sales summaries from the tills and if not why not?
>
> • How were the sales figures calculated by you, what records were produced showing the sales and what was sent to the previous book keepers?
>
> • Who was responsible for collating all the purchase invoices and how were they sent to the book keepers?
>
> • What checks were in place to make sure the purchase invoices sent were correct and not already sent or complete?
>
> • Was the bank account used by the book keepers to verify the purchase invoices?
>
> • Did Mr Nasir check purchases and payments to suppliers to the accounts or bank? Please supply evidence to show this."

34. The appellant was given until 9 March 2018 to respond. The only response ever received from the appellant in relation to the issues on penalties was one sentence in the appellant's witness statement stating that he had kept all purchase and expense invoices and bank statements in a filing cabinet and had sent them to the accountant quarterly. Mr Nawaz did repeatedly state that the appellant had sent the accountant everything that they had requested.

35. On 14 February 2018, responding to proposals from Mr Nawaz, Officer Minns wrote to him again stating that the mark-up used in the calculations was the lowest mark-up shown in the annual accounts.

36. He conceded that although it might be that there may be an argument on cigarette and newspaper sales, no evidence had been produced to evidence a lower mark-up. HMRC reiterated that no evidence had been provided to support a claim for any further amounts of input or output tax. There was no evidence of a build-up of stock so the earlier periods would not have a lower mark-up.

37. As far as penalties were concerned, Officer Minns stated that he believed that the accountant had not received bank statements or sales information from the tills or from Filshill. He stated that the appellant had patently failed to check the returns compiled by the accountant or to compare those with the information held by him.

38. On 15 February 2018, Mr Nawaz emailed Officer Minns stating that following his return to the UK on 26 February 2018 he would provide evidence about cigarette purchases and the provision of bank statements and the role of the accountant.

39. On 22 March 2018, Officer Minns emailed both the appellant and Mr Nawaz stating that Mr Nawaz had not been in touch for more than a month and that the detailed information requested in relation to penalties had not been furnished. Therefore penalties in relation to the VAT errors would be issued.

40. Later that day, Mr Nawaz replied requesting a review and advising

> "I thought that I had written to you on the basis that if push came to shove we can and will find additional evidence of the input VAT of considerably in excess of that allowed … Please let me know if penalty suspension conditions will be applied as this is not a case of deliberate suppression but no more than poor book-keeping."

41. On 26 March 2018, Officer Minns emailed Mr Nawaz pointing out that:

(a) Evidence in support of any claim for input tax should be held at the time the VAT return was submitted

(b) He had asked repeatedly for that information but it had not been forthcoming

(c) He also reiterated that the appellant had been given the benefit of the doubt by using the lowest mark-up shown in the annual accounts.

(d) The behaviours displayed, such as failing to provide the accountant with till readings and bank statements, taken with the fact that the sales on the VAT returns compared with the till readings were £246,036 less in the four periods from 07/16 to 04/17 (and that should have been obvious) were such that HMRC considered the behaviours were deliberate.

42. He suggested that since the accountant was still acting for the appellant for compliance matters, then the accountant should be contacted to comment. He pointed out the time limits and requested a response within 30 days. There is no evidence that the accountant was contacted in that regard by the appellant or Mr Nawaz.

Income Tax

43. On 23 October 2017, HMRC wrote to the appellant and the accountant opening an enquiry under Section 9A TMA into the SATR submitted for the year ending 5 April 2016 and specifically into the claim for depreciation on the self-employed pages of the SATR. A check would also be made about various expenses claims.

44. On 8 November 2017, Officer Harley wrote to the appellant and to the accountant advising that the check into the SATR for the year ending 5 April 2016 had been extended to a full enquiry. It was explicitly stated that this was as a result of the ongoing VAT enquiry as it was believed that that might have an impact on the appellant's income tax position. He asked for information.

45. On 12 January 2018, Officer Harley wrote to the appellant pointing out that he had had no response to his letters of 8 November 2017 and set out the information that was still required in order to progress the various checks into the appellant's personal tax affairs. In particular he enclosed a Schedule detailing the information and documents that he required to complete his checks. That read:

> "Schedule of information and documents needed to carry out our check
>
> Unless otherwise stated, all requests refer to the period 01/04/15-31/03/16.
>
> 12. Details of any balance in figures, journal entries or adjustments used to make the financial accounts.
> 13. Banking cash ledgers, analyses or reconciliations.
> 14. The record of personal drawings and capital introduced or, if not recorded, details of how they were calculated.
> 15. The business books and records including sales, purchase, cash and petty-cash books.
> 16. The prime records of sales; for example till rolls, z-readings, card-payment slips.
> 17. The purchase invoices and expense receipts.
> 18. Stock records including the stock counts taken at 31/03/15 and 31/03/16.
> 19. Statements, cheque stubs and pay-in slips for all bank, savings, credit-card accounts used in connection with business income and expenditure. Please include statements for any personal accounts used for business purposes.
> 20. Details of any other sources of income not included in the return.
> 21. Using the enclosed form, details of all household expenditure.
> 22. Returned: telephone, fax, stationery and other office costs: An analysis of the amount claimed of £21,143 along with details of the private use adjustment of £5,216 has been arrived at."

46. Despite frequent requests, and copies sent to Mr Nawaz, who was instructed to act in the Income Tax enquiry in March 2018, none of that has ever been furnished.

47. On 16 February 2018, Officer Harley wrote to the appellant and the accountant advising that an enquiry under Section 9A TMA would be opened into the SATR for the year ending 5 April 2017. Officer Harley also wrote to the accountant seeking confirmation that they were still acting for the appellant in relation to income tax and advising that HMRC were in the process of calculating direct tax liabilities based on the VAT enquiry into the appellant's business affairs. He enclosed a copy of the letter of 12 January 2018 with enclosures.

48. On 28 February 2018, Officer Harley wrote to the accountant and the appellant pointing out that no information had been received and in the absence of that he was forced to rely on the Filshill data which suggested undeclared sales.

49. He explained that at that point it seemed as if there would be additional VAT due of £25,653 and that he had calculated adjustments to turnover based on that. He had apportioned net sales figures from the VAT returns to attain net sales for each year and he uplifted the

costs of sales on the basis of a 19.06% gross profit ratio (being the same figure used by Officer Minns and the lowest achieved in any of the appellant's annual accounts). In summary the revised additional Income Tax and Class 4 NIC amounted to £42,839.41. There was also interest thereon of £1,858.29. The matter of penalties would be pursued separately.

50. On 13 March 2019, Officer Harley wrote to the appellant requesting written authorisation to allow HMRC to deal with Mr Nawaz in relation to income tax enquiry and sought clarification of the address for the appellant.

51. On 26 March 2018, Mr Nawaz emailed Officer Harley intimating that an appeal was being made against the direct tax assessments on the basis that they were excessive and had used estimates which might not be appropriate. He sought further information.

52. On 28 March 2018, Officer Harley replied with a copy to the appellant stating that assessments had not been issued in respect of income tax and nor were there penalties; therefore there was no current appeal and it was simply a compliance check.

53. He also provided a revised calculation for 2016/17 showing a new reduced total liability of £44,246.84 that he said followed on "…from the agreed VAT position". He requested a response by 27 April 2018.

Both Taxes

54. On 28 March 2018, Mr Nawaz replied, with a copy to Officer Minns, since he disagreed with both officers. He argued that:

(a) Both officers were using a mark-up that was not appropriate because the margins in the business were considerably less than the margins in "ordinary grocery stores" because of the high level of discounted cigarettes and groceries sold.

(b) The sales declared for VAT purposes had excluded a lot of purchases and there would obviously be additional sales. He produced an illustration based on deemed additional sales and purchases which gave a consistent mark up over the period of between 9.05% and 9.42%.

(c) It was not necessary to produce all input tax invoices where using a mark-up was appropriate. A mark-up exercise for VAT purposes would indicate lower margins than that apparent from the filed accounts as his exercise proved.

(d) The return for the period 04/17 was correct as all purchase invoices had been claimed and all sales declared so no adjustment was required.

(e) HMRC were required to produce evidence of profits.

(f) In this case there was "…no evidence of capital accretions/introductions or refusal to give access to records".

55. On 24 April 2018, Officer Minns wrote to Mr Nawaz with a copy to Officer Harley and the appellant enclosing letters in respect of both taxes (his own letter was incorrectly dated the following day).

56. Officer Harley's letter included the following:

(a) Confirmation that, in line with the decision in the VAT enquiry not to challenge the net sales figure for the VAT quarter 04/18, those figures had been used in the computations. It was emphasised that that was a concession only as the Filshill data had shown a higher figure for sales. (That was a typing error and it should have referred to 04/17.)

(b) The income tax figures had been derived from the VAT enquiry.

(c) The additional sales identified in the Filshill data had provided evidence of additional profits. The figures for turnover had been significantly increased and therefore the taxable net profits

(d) None of the information requested in the letter of 12 January 2018 had been provided by the appellant so he had had to proceed on the basis of the available information. He enclosed a further copy of the Schedule of information and documents.

(e) He had applied a Cost of Sales ("COS") figure of 19.06% for all years and that that was consistent with the outcome of the VAT enquiry. That was the lowest COS recorded in the financial accounts produced. The financial accounts for the years to 31 March 2014 and 31 March 2016 recorded COS of 21.47% and 19.79% respectively.

(f) He had made other concessions on a without prejudice basis in a bid to settle the enquiry by agreement

(g) HMRC concluded that in the absence of the evidence and information that they had requested they would issue income tax assessments using best judgment and as reflected in the computations sent to the appellant on 6 April 2018.

(h) Mr Nawaz was again requested to furnish the information and evidence in the Schedule and to respond by 24 May 2018.

57. Officer Minns' letter pointed out:

"However I still have no new information on which I can amend my assessments

- That would be a set of reconstructed records for periods which have been shown to have incorrect submissions.
- I have requested numerous times but not received a representative period reconstructed to show an alternative mark-up

…

SUMMARY

I have raised a VAT assessment based on the till sales summaries for the VAT periods 10/15 to 01/17. The sales evidenced for the six periods were £1,149,633 but the sales declared were £405,894. For other VAT periods 04/14 to 07/15 no till sales information was available and purchase invoices were omitted …

- I used the lower of 3 years mark-ups shown in the 3 years annual accounts. This was the basis I used to determine and maximise your clients input tax and therefore reduce the VAT due.
- I have allowed a lower figure to be accepted by HMRC for the 04/17 VAT return than that evidenced by Filshill as the net VAT was within acceptable range. This has had a knock on effect or (sic) reducing the Income Tax due in all periods to the benefit of your client …

I will raise the penalty based on a deliberate but not concealed basis …".

58. The letter concluded by intimating the appeal and review rights.

59. On 26 April 2018, Mr Nawaz wrote to Officer Minns with a copy to the appellant and Officer Harley arguing the position in regard to both mark-ups and penalties but went on to say that in regard to direct taxes "I was not aware that there was any information outstanding". He relied on paragraph 19 Schedule 36 Finance Act for the argument that a taxpayer does not have to provide certain types of information in response to an Information Notice. There has never been an Information Notice served in the matter.

60. On 1 May 2018, Officer Harley replied pointing again to the Schedule and said that if that information and evidence was provided it might affect his decision.

61. On 1 May 2018, Mr Nawaz wrote to Officer Minns with a copy to the appellant and to Officer Harley stating that the VAT assessments were not made to best judgment and were not reasonable. The email also stated:

> "… With regard to a penalty you are not suggesting that Mr Nasir deliberately withheld information from his accountant. My understanding is that they had all the original invoices, many of which, such as those from Costco were ignored, which is why Mr Nasir had to obtain duplicates from the supplier. You are perfectly aware of the method used by the accountants in applying markups (sic). Any sales information was likewise available …".

62. He stated that the position in regard to VAT remained unaltered referring to the illustration he had produced of how additional purchases and sales would have a significant impact on margins. He stated: "If you apply the correct mark up (sic) the assessment will reduce significantly. The other side of the coin, getting additional/copy purchase invoices is something that can be dealt with prior to any FTT hearing".

63. Officer Minns responded in respect of both direct and indirect taxes on 2 May 2019 by email (copied to Officer Harley and the appellant). He pointed out that purchase invoice information and reconstructed VAT returns (or at least an actual sample period) had been requested on multiple occasions in order to allow the correct amounts due to be established. All that had been received from Mr Nawaz was an "illustration mark-up and suggestions of extra input tax with no invoices".

64. He asked if Mr Nawaz was accusing the accountant of having ignored purchase invoices, sales information and bank statements. He suggested that if the appellant was inferring that the accountant had failed then that question would be posed to the accountant by HMRC.

65. He also pointed out that Mr Nasir should have recognised the large discrepancy between the level of sales declared of £405,894 and the level of sales on the till of £1,149,633.

66. Lastly, he stated that the income tax position would be adjusted in line with the VAT position.

67. On the same day he wrote to Mr Nawaz stating that he was disappointed that he still had not received invoices, and summary or sample periods and nor had he had an answer about the accountant. He was passing the papers to another officer for review.

68. On 2 May 2018, Mr Nawaz replied stating:

> "… Sales Credibility – the position is that traders like Mr Adam Nasir have very limited knowledge of what represents credible sales and, for better or worse, rely on their representatives …".

He made an offer to provide details of a sample period in respect of the available records and invoices.

69. On 3 May 2018, Officer Harley had contacted the accountant to ascertain exactly what had happened in regard to the errors in relation to the declarations made for the various taxes involved in the enquiry.

70. The questions posed and the answers received the following day were:-

> Q1. Can you confirm if any purchase invoices supplied to you by Mr Nasir were missed or ignored in your calculations and subsequent submissions in the VAT returns?
>
> A1. No (worked on the information provided)
>
> Q2. Were you given details of all sales from Z readings? This may have been via till analysis or sales summaries? Please give details.

A2. No, this information was requested on several occasions.

Q3. For VAT period ending 1/17 the records you provided show you hadn't received bank statements. Can you confirm if you received bank statements for any or all periods?

A3. No, again requested on several occasions.

Q4. The sales on the till are significantly higher than those indicated by the VAT returns and annual accounts. Did you carry out a bank reconciliation and/or sales reconciliation? If so what was the outcome?

A4. No, I expected this as we had to resort to mark-up in this case.

71. On 4 May 2018, in an exchange of emails which were copied to the appellant and Officer Harley, firstly Officer Minns wrote to Mr Nawaz giving an extension of time to 31 May 2018 to provide:

> "INFORMATION TO BE SUPPLIED
>
> Please supply as many reconstructed VAT returns as you have. That is detailed reports on excel/sage or similar showing all transactions. Initially scan and send in the top 10 purchase invoices for each quarter. Please put the scanned purchase invoices in a single file and capture that. Please show COS with VAT and sales with VAT clearly identifying mark ups.
>
> MINIMUM REQUIREMENT
>
> If you have done any as yet and will find this too onerous then please complete three month VAT period for the period ending 31/07/16. If you are suggesting a mark-up then please supply your workings/analysis to support this clearly showing the VAT."

72. Secondly, Mr Nawaz stated that "…I missed the issue of your wanting figures…you had provided for figures based on extrapolation I thought that was the end of the process."

73. On 16 May 2018, penalty explanation letters were issued to the appellant in respect of the errors for both direct and indirect taxes.

74. On 21 May 2018, Mr Nawaz sent Officer Minns a spreadsheet which he described as "copies of the detailed listings" with details of the additional invoices with input tax of £32,158.90. He suggested two ways of proceeding whereby either HMRC could ask for copies of any of the invoices or they could check with the suppliers directly. Alternatively a "global" approach could be adopted using a much lower gross profit and reflecting a higher level of standard rated purchases.

75. Officer Minns replied on 22 May 2018 pointing out that the calculations led to a much higher figure for VAT than that actually assessed and a mark-up of an average 38.06% rather than the 23.54% used by HMRC which was more beneficial for the appellant. He confirmed that the accountant's position was unchanged. They had stated that they had repeatedly asked for Z readings and bank statements and they had worked on the basis of the information provided; accordingly the position on penalties had not changed.

76. Mr Nawaz replied later that morning stating that, having looked at the figures for 04/17 he saw that the input tax must have been understated so he had obtained duplicate invoices from some suppliers and those led him to believe that there were further gaps. He conceded that: "The exercise was never intended to be a complete calculation of input tax.". However, he argued that the mark-up should not be based on the accounts because many of the standard rated items, like cigarettes were very low margin and the mark-up would drop considerably if the level of purchases was added to the sales account. Lastly, there should be a higher input tax allowance.

77. Officer Minns replied pointing out that 04/17 was not an appropriate base period since it was only as a concession that that period had not been amended. The Filshill data showed sales of £206,541 whereas the return had sales of only £135,991. The concession had been made because the net VAT declared was within an acceptable range. That concession had benefitted the appellant as it had been used to quantify income tax for previous years. He also pointed out that he still had not seen a complete listing showing the mark-up percentage and he needed that to be demonstrated in a representative sample period.

78. On 27 May 2018, Mr Nawaz replied agreeing that the Filshill data did record sales but the appellant argued that the actual cash receipts were "invariably" lower because the appellant had to discount items.

79. He stated that he had had "…a stab at working out mark-ups.." and provided two Schedules, the first of which was based on Filshill data for April 2018 (which is outwith the period of enquiry) and the second of which was based on period 04/17. (Mr Nawaz argued that the Filshill data did not show the correct mark-up calculations because the appellant often marked down goods.)

80. He stated that these figures and his analysis were provided on a without prejudice basis in a bid to achieve settlement in relation to VAT but not for direct tax. His new calculations had made an assumption that there should be a provision of 2% for thefts, breakages, mark-downs and price matches. There was no evidence to vouch that. Again, entirely unsupported by any evidence he had assumed a mark-up of 16.73% and a margin of 14.33% but conceded that when PayPoint and lottery are excluded those figures became 24.21% and 19.49%. He provided commentary on the various mark-ups which he believed reflected the activities of the business.

81. On 31 May 2018, Officer Harley issued a Closure Notice for 2015/16 under Section 28A(1) and (2) TMA and Discovery Assessments under Section 29 TMA for the tax years ended 5 April 2014, 2015 and 2017.

82. He made it explicit that in the absence of provision of any business records he had relied on the Filshill data and his view of the matter set out in the conclusion letter dated 24 April 2018 was unchanged (see paragraph 56 above). The total liability for Income Tax and Class 4 NIC was £41,801.47 and interest to 31 May 2018 was £2,042.69.

83. On 31 May 2018, a Notice of Penalty Assessment in the sum of £20,842.70 was issued to the appellant in respect of the errors in direct tax matters.

84. On 5 June 2018, Mr Nawaz responded intimating an appeal saying that:

(a) he was not aware that any information had been sought and not provided,

(b) the negotiations with Officer Minns were on a without prejudice basis to resolve the issue of lost invoices,

(c) there were many expenses that had not been claimed, and

(d) there was no evidence of any additional profits evidenced by eg additional drawings and HMRC had failed to identify and produce such evidence.

85. Officer Harley responded the following day pointing out that neither the appellant nor Mr Nawaz had responded to the request for the information in the Schedule. He said that in the absence of any business records or other information:

> "Conclusions had been drawn as far as possible in alignment with the VAT enquiry and within that scope has indeed been provided to discuss matters on a without prejudice basis. From that concessions have been applied where deemed appropriate to try to reach a settlement by agreement."

86. Mr Nawaz's response was that no further information was required from him as HMRC had not addressed profits.

87. In the interim, on 1 June 2018, Officer Minns responded to Mr Nawaz's email of 27 May 2018 , with a copy to Officer Harley, making the following points:-

(a) The reduction of 2% for theft etc could not be accepted as there was no evidence underpinning it.

(b) The calculations that Mr Nawaz had produced could not be accepted not least because the 04/17 VAT period was not a complete picture as it had missing purchase invoices.

(c) The officer had been asking for a full disclosure since 18 August 2017 and had not received the requested detailed workings for all VAT periods and nor had he received evidence of the additional input tax invoices.

(d) As pointed out in his email of 22 May 2018, he expected to receive a full listing of purchase invoices and the extra invoices to be identified separately and scanned. He had not even seen a representative period's workings for even three months. He could not accept one month's sales analysis to COS (cost of sales) with no backup. All of the cigarettes could have been purchased in one month and that would skew the figures. He expected to see a full list of the purchase invoices to evidence entitlement to input tax. In the absence of any of that he had been very fair with an allocation of input tax based on the lowest mark-up in the annual accounts.

(e) As far as Mr Nawaz's argument that the mark-up on standard rated products is not correct, he could not consider that in the absence of a full quarter's listing as a representative period with additional invoices identified and listings for other periods to ensure that they are not being claimed twice.

(f) As far as input tax on other items is concerned he expected to see invoices for those items but, for example, in relation to the Audi car he had not received answers to the questions posed on 18 August 2017.

(g) As far as penalties are concerned he had decided that the behaviour was deliberate but not concealed because the accountant had made it clear that they had requested bank statements and sales information on numerous occasions and that they had input all the purchase invoices submitted to them. In essence HMRC had discovered that the appellant had not given the accountant enough information to complete the VAT returns correctly and as a result both sales and purchases were supressed.

(h) Since 18 August 2017, HMRC had been asking for full disclosure and reconstituted VAT returns but they had not been received. The appellant had been given the benefit of the increased input tax on the basis of the records provided.

88. On 5 June 2018, Mr Nawaz emailed both officers arguing in particular that the appellant had relied on the accountant for the submission of the VAT returns and that the appellant had always provided the accountant with all that was requested including bank statements. The email requested a statutory review.

89. On 18 July 2018, HMRC issued their review conclusion letter in respect of the direct taxes. HMRC concluded that the decision should be varied as follows:

(a) The Discovery Assessment for 2016/17 should be cancelled.

(b) The Closure Notice for 2015/16 should be upheld.

(c) The Discovery Assessment for 2014/15 should be upheld.

(d) The Discovery Assessment for 2013/14 should be upheld.

(e) The penalty for 2016/17 should be cancelled.

(f) The penalties for all other years should be varied to careless and should be suspended.

90. On 19 July 2018, HMRC wrote to Mr Nasir advising the outcome of the statutory review for VAT matters and that resulted in the Best Judgment Assessment covering the periods 04/14 to 01/17 in the sum of £25,652 being upheld. As a concession period 04/17 was not included in the assessment. The penalty was cancelled as it had been issued under Schedule 41 instead of Sch 24.

91. On 16 August 2018, a Sch 24 penalty was issued in respect of the errors in the VAT returns.

92. On 17 and 18 August 2018, Mr Nawaz submitted appeals to the Tribunal Service in respect of Income Tax and VAT and respectively.

93. On 13 September 2018, Officer Harley wrote to the appellant pointing out that the Sch 24 penalties could be suspended if the suspension conditions were agreed. He also issued a Closure Notice for the tax year 2016/17 under Section 28A(1) and (2) TMA.

94. Mr Nawaz responded on 17 September 2018 submitting an appeal against the 2016/17 assessment and penalty.

95. On 19 September 2018, Officer Harley emailed Mr Nawaz in relation to the direct tax penalties setting out the option of agreeing conditions for the suspension of the Sch 24 penalties which failing the penalties would be issued. The email requested a response by 5 October 2018.

96. On 19 September 2018, Mr Nawaz emailed HMRC stating that any agreement to the suspension conditions would be an "… acceptance of wrong-doing which wouldn't be appropriate at this stage …".

97. On 3 October 2018, Officer Harley wrote to the appellant setting out the position covering all of the years involved in the direct tax matters and providing him with details of the options available to him.

98. On the same day he also issued the Notice of amended penalty assessment for the 2013/14 to 2015/16 tax years and a new penalty assessment for the 2016/17 tax year in accordance with HMRC's review conclusion letter of 18 July 2018.

99. On 7 October 2018, Mr Nawaz submitted an appeal to HMRC against the Closure Notice for 2016/17 and the associated penalties and requested a statutory review.

100. On 9 October 2018, HMRC issued their view of the matter of the letter in relation to 2016/17 and the following day Mr Nawaz emailed HMRC setting out his disappointment that the suspension conditions have not been left "open".

101. On 10 October 2018, Officer Harley emailed Mr Nawaz and stated that he did not consider that the appellant had "… refused to enter into penalty suspension conditions … I merely stated the fact that your client didn't deem suspension discussions appropriate at this time with a Tribunal pending …".

102. On 21 November 2018, HMRC issued their review conclusion letter in respect of 2016/17 concluding that the Closure Notice should be upheld and the penalty should also be upheld and suspended.

Appendix 2

Excerpts from *Kennedy v Cordia*

38. In our view four matters fall to be addressed in the use of expert evidence. They are (i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation. …

39. Skilled witnesses, unlike other witnesses, can give evidence of their opinions to assist the court. This gives rise to threshold questions of the admissibility of expert evidence. …

40. Experts can and often do give evidence of fact as well as opinion evidence. … There are no special rules governing the admissibility of such factual evidence from a skilled witness.

41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. …

42. … But Lord Hughes, in delivering the advice of the Board at para 58, warned that "care must be taken that simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise." To avoid this, the skilled witness must set out his qualifications, by training and experience, to give expert evidence and also say from where he has obtained information, if it is not based on his own observations and experience.
…

44. … As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;
(ii) whether the witness has the necessary knowledge and experience;
(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.
…

48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, … As Lord Prosser pithily stated in Dingley v Chief Constable, Strathclyde Police 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

52. The Scottish courts have adopted the guidance of Cresswell J on an expert's duties in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 in both civil and criminal matters: see Lord Caplan in *Elf Caledonia Ltd v London Bridge Engineering Ltd* September 2, 1997 (unreported) at pp 225-227 and *Wilson v Her Majesty's Advocate* (above) at paras 59 and 60. We quote Cresswell J's summary (at pp 81-82) omitting only case citations:

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. …".