Neutral Citation: [2022] UKFTT 191 (TC)

Case Number: TC08516

FIRST-TIER TRIBUNAL
TAX CHAMBER

London

Appeal reference: TC/2018/08024
TC/2018/08246

VAT/CORPORATION TAX – whether sales suppressed – yes – whether assessments to best judgement – yes – whether chargeable as loan to director – yes – whether deliberate and concealed – yes – appeal dismissed

Heard on: 15-19 November 2021
Judgment date: 31 May 2022

Before

TRIBUNAL JUDGE ANNE FAIRPO
DR CHRISTINA HILL WILLIAMS DL

Between

JIN FU CHINESE TAKEAWAY LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Davé, accountant

For the Respondents: Mr Blakely, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

Introduction

1. This appeal concerns:

   (1) assessments made by HMRC under section 73 (1) Value added Tax Act 1984 issued on 4 April 2018 and associated penalties issued under paragraph 1 Schedule 24 of Finance Act 2007 on 12 June 2018;

   (2) a closure notice under paragraph 32(1A) of Schedule 18 of Finance Act 1998 issued on 21 June 2018;

   (3) discovery assessments made under paragraph 41(1) of Schedule 18 of Finance Act 1998 issued on 21 June 2018 and associated penalties under Schedule 24 of Finance Act 2007 issued on 21 August 2018.

2. The details of the assessments, closure notice, and penalties are set out in the appendix to this decision.

Background

3. The appellant is a Chinese takeaway. Following a period in which the takeaway operated as an unincorporated business, the business was incorporated on 4 June 2013 and began trading on 9 July 2013. It is based in Huntington in Suffolk. It has been registered for VAT since incorporation and operates on a cash only basis.

4. The matters under appeal arise as a result of a VAT visit in April 2015 into one of the appellant's suppliers, AMB Foods Ltd ('AMB'). During the visit, it appeared to HMRC that some of the supplier's customers, including the appellant, operated two accounts with the supplier. HMRC's records indicated that only purchases made on one of the accounts had been declared to HMRC by the appellant; HMRC concluded that the suppression of purchases indicated a suppression of sales by the appellant.

5. After enquiry and investigation, the disputed assessments, closure notice and penalties were raised. Following a review, the appellant appealed the direct and indirect assessments and penalties to this Tribunal. The appeals were joined and heard together.

AMB purchases

6. The origin of this appeal lies in a VAT visit by HMRC to AMB in April 2015. Officer Clarkson, who attended that visit, gave evidence that during the visit the director and accountant for AMB explained that they operated two accounts for a number of their customers, when so requested by customers. The primary account, identified in the format "JXXX" (where XXX is a number) was explicitly identified as belonging to the customer on the AMB system. The second account, in the format "ZPXXX", did not have a customer name attached but the director stated that it was linked to the customer's first account on the system so that AMB knew which customer had made which order. The appellant (and the predecessor unincorporated business) were one such client. The two numbers stated to be allocated to the appellant were J343 and ZP334. The appellant acknowledged that their account number was J343 but denied also making any purchases on another account.

7. AMB told HMRC that they did not ask the customers why they wanted two accounts as the reason would have no impact on their business. As they knew which customer to invoice for purchases on the ZP accounts, they were not concerned that there was any problem for AMB in agreeing to customer requests for two accounts. Officer Clarkson's evidence was that HMRC had requested a list of all customers with two accounts.

8. Subsequently, AMB complained to HMRC that their customers were unhappy that AMB had made these statements as HMRC were now investigating those customers. AMB also stated that they considered that HMRC had misunderstood the position and effectively put forward the explanation given in the director's witness statement: that the "ZP accounts" had been system-generated for various reasons and that they were used to record customer cash sale purchases. They were not allocated to any particular customer but, instead, after a "J account" invoice had been generated, if the next order was a cash sale purchase (by any customer) it would be recorded against the "ZP account" number connected to that "J account" number. It was not explained how the business knew which customer had placed which order on the ZP accounts in this scenario, although it was stated that the dispatch system was manual such that goods purchased on a ZP account number would be delivered to the correct customer.

9. The director of AMB provided a witness statement to the appellant but, at the start of the hearing, the Tribunal were advised that the director had declined to attend the hearing on the basis that they were too busy. The Tribunal have therefore taken into account the fact that the director was not available to be cross-examined by HMRC in considering the evidence overall.

10. The director stated in a letter to HMRC and in his witness statement that, given the way that invoices were generated on ZP accounts, he could not deny that some of the transactions on ZP334 may belong to the appellant but considered that not all of the purchases recorded against the ZP334 account would belong to the appellant.

11. The appellant provided HMRC with a mandate to obtain information, such as delivery notes, from AMB, to be able to determine where the purchases on the ZP334 account were delivered, which would confirm whether or not the purchases were delivered to the appellant. AMB refused to supply these or to cooperate with HMRC in general, having made a complaint to HMRC about the effect of the investigations into their customers. We note that AMB have not provided the appellant with any information which would support their second explanation as to the use of the ZP accounts and declined to appear at the hearing of this appeal despite having provided a witness statement.

12. We consider that the initial explanation given to HMRC by AMB is more likely to be correct: it was given to two HMRC officers, who both recorded the same information in their notes. There is a substantial difference between the explanations, and we consider that it is implausible that both officers could have misheard to such an extent, and in the same way. We note also the evidence was that HMRC had requested a list of customers with two accounts, which should have made it obvious to AMB how HMRC had interpreted their statements during the visit. We further note Officer Clarkson's evidence was that other taxpayers who were stated to have held two accounts have acknowledged that they did have two accounts with AMB. Whilst this is not evidence that the appellant held two accounts, we consider that it supported the initial explanation given by AMB for the existence of the ZP accounts.

13. The initial explanation was given at a time that the director had no reason to consider that the explanation would cause any problems and the evidence given was that the accountant present at the visit corroborated the explanation. The second explanation arose after customer complaints to AMB, when AMB began to bring a complaint against HMRC, as it was losing business.

14. Further, included in the appellant's documents in the bundle was an invoice on the ZP334 account dated 30 July 2012 and addressed to the unincorporated predecessor of the appellant. This invoice was confirmed to have been issued to the predecessor business and the account reference was stated to have had no significance to the business when received. This particular invoice has the name and address of the business stated on it; other ZP334 invoices obtained by the appellant from AMB had "new account" in the relevant box, with no purchase details.

15. The appellant made a number of submissions with regard to this invoice: firstly, that it showed a balance which was not consistent with a cash account. Secondly, it referred to settlement terms of 21 days, which was also not consistent with a cash account. Although these submissions were made with the intention of criticising the reliability of this ZP334 invoice (which was provided by the appellant), we note that the points raised would support the original AMB explanation - that the ZP334 account was a customer's second account - rather than the contention they later put forward, and which was contained in the witness statement provided by AMB to the appellant, that the ZP accounts were used for cash purchases.

16. In addition, not all of the invoice numbers on the ZP334 account sequentially follow an invoice number on the J343 account. If the AMB second explanation were to be correct, an invoice on the ZP334 account could only be generated as the next invoice after an invoice generated on the J343 account.

17. Further, it logically follows that, even if the director's explanation were to be correct, not only would some of the transactions on the ZP334 be attributable to the appellant (as the director states is likely to be the case) but purchases on other ZP accounts would be also be attributable to the appellant. This is because the evidence put forward by the appellant included, in a letter dated 15 May 2018, the information that purchases were made from AMB both by credit account and by cash purchase. That is, even on the evidence of AMB provided to this Tribunal by the appellant, cash purchases made by the appellant would not appear on the J343 account.

18. The appellant has only declared purchases made on the J343 account.

19. In addition, in his witness statement, Mr Xin Jin Zhou stated that "I also noticed that on occasions when I was not in the country and the takeaway was closed there were purchases listed on the ZP334 account. Is it possible that my son may have made the order but I cannot confirm that this is what happened." Mr Zhou's witness statement therefore does not deny that the ZP334 account was used by the business, but instead attempts to explain potentially anomalous entries in that account. In giving evidence, Mr Zhou initially stated that he did not know how the witness statement was drafted and denied knowing anything about the ZP334 account. He then stated that he remembered this, that they had been away for a week and AMB had called him to see if he wanted to place an order. Copy passports provided confirmed that Mr Zhou and his wife had been away from the UK from 3 April 2013 to 18 April 2013.

20. The appellant provided three weekly summary sheets for takings and purchases for the shop for this period; the first (for 31 March 2013 to 6 April 2013) shows no purchases, and the shop was closed from 3 April onwards. The second, for 7 April 2013 to 13 April 2013 also shows the shop as closed but records a purchase from AMB for £106.54 on 10 April 2013.

21. The list of purchases from AMB for that period in fact shows three purchases, all for the same amount (£106.54) on the same day (10 April 2013), two of which are placed on the ZP334 account (invoice numbers 326187 and 327807) and one of which is placed on the J343 account (invoice number 327806). The same spreadsheet includes an entry on 10 April 2013 against the ZP334 account for £213.08, with an 'invoice number' of 5 digits (24079) in contrast to the usual invoice numbers which are six digits. The AMB interview notes provided by HMRC indicate that AMB credit note numbers were generally five digits, whereas invoice numbers were six digits. We consider that it is probable that the entry for £213.08 is therefore a credit against the two ZP334 account entries made on that same day even though the figure is not indicated as a negative.

22. We consider, therefore, that it is likely that the explanation for the three identical orders is that AMB twice posted the order placed by the appellant against the ZP334 account as well as posting it against the J343 account, and then issued a credit note for two of the orders.

However, we consider that this shows that AMB associated the ZP334 account with the appellant as the invoice number for one of the ZP334 orders for £106.54 does not follow any J343 invoice number and indeed precedes the J343 invoice number for the order for this amount and so cannot have been generated in the manner contended for by AMB's second explanation. We also consider it inherently unlikely that there would have been two cash purchase orders made by unconnected third parties for the same amount on the same day as an order by the appellant, both orders then being cancelled in a single transaction.

23. The third summary sheet, for 14 April 2013 to 20 April 2013 shows the shop as open each day except for the usual closing day of Monday, even though (as set out above) Mr Zhou and his wife did not return to the UK until 18 April 2013. These summary sheets are for dates prior to the periods for which assessments have been made. No other weekly summary sheets were provided to the Tribunal by the appellant.

AMB data

24. HMRC produced data extracted from AMB for the J343 and ZP334 accounts. This had been taken from a backup of the SAGE database used by AMB, which had been tailored for their use by a third party company.

25. The backup included details for all of AMB's customers; HMRC's evidence was that this data was exported to an Excel spreadsheet which was then filtered to show only the J343 and ZP334 data for analysis in this case and to remove empty fields.

26. The spreadsheets produced by HMRC to the tribunal which are stated to be of the J343 and ZP334 accounts contain a number of fields, not all of which correspond to the labels for the fields. In particular, a field marked as "Del_address_1" contains in each case a date and what appears to be a time. The 'time' data is usually between 02:00:00 and 05:30:00. A field marked "Order_no" contains mostly the number 1, with occasionally other numbers instead. A field labelled "Cust_ordno" appears to contain information as to which round the order was delivered on, with entries such as "Mon Kings Lynn 2" and "Fri Norwich 1".

27. HMRC's evidence is that this is how the data was provided in the backup. The appellant submitted that the information was two steps removed from the original data and submitted that there would have been transposition errors, which might explain the mismatch, such that the data should not be relied upon. In addition, as the information had been gathered from AMB in April 2015 but only included information up to January 2015, this indicated a lack of reliability on the part of AMB such that, again, the data could not be relied upon.

28. There is nothing in the AMB director's witness statement indicating that the data extracted by HMRC might be inaccurate or unreliable as to the data fields and their contents. In a letter to the appellant's accountants, dated 23 March 2018, AMB confirmed that "the data comes from our database" and that they had "carefully studied" the "lists" produced by HMRC. The letter does not indicate that there is anything inaccurate in the data. It focusses instead the same explanation as that set out above (that the ZP accounts used to record cash purchases and that "some of the Z number transactions may well be cash sales for [the appellant], but not all of them".

29. We consider, therefore, that AMB had the opportunity to identify transposition or other errors in the data itself and have not identified any such errors. They state that HMRC have misinterpreted the way in which the ZP accounts were used by AMB but do not at any point say that the data in the spreadsheets for the J343 and ZP334 accounts is inaccurate.

30. On that basis, we find that the spreadsheets can be relied upon in respect of the data within them, albeit that some of the field labels do not reflect the contents of those fields. We note that the spreadsheet information covers only a period to January 2015, although the notes

of the VAT visit to AMB in April 2015 state that the backup covered the period to March 2015. We do not consider that this means that the data is unreliable, as AMB confirmed to the appellant that the data had come from their database.

31. Considering the data shown, various points were identified by HMRC.

32. Firstly, there is a "contact" field for each invoice number. On the J343 account invoice entries, the contents of this field is "334" in every case. On the ZP334 account invoice entries, the field is blank. HMRC contended that this indicated that the ZP334 account was connected to the J343 account. We noted that, although this was possible, it could also be explained by AMB's contention that the ZP accounts were connected such that a ZP account invoice was generated when a cash purchase, by any customer, was made following a purchase on the connected J account.

33. HMRC further contended that approximately 70% of the purchases on the ZP334 account were made at the same time as a purchase on the J343 account, as shown by the invoice date information and the information in the "del_address_1" field, where the time information for the ZP334 account purchases is either identical or within one or two seconds of the apparent time stamp for J343 account purchases made on the same date. There are a number of ZP334 account purchases which were not made at the same time as a J343 account, where the invoice number for the purchase does not follow a J343 account invoice number. As noted above, this indicates that the AMB second explanation, that the ZP account invoices are generated for the next cash purchase after an invoice is raised on a J account, is not reliable. If this were the case, there would be no ZP334 account invoices with numbers that did not immediately follow on from a J343 account invoice number.

34. As noted above, the time information is generally between 02:00:00 and 05:30:00. Mr Zhou stated that he did not place orders in the early hours of the morning and, given the consistently narrow range of times in the field, we do not consider that this field can be regarded as a reliable indication of the time the invoices were placed in order to establish any connection between them. We note that the date information is likely to be a reliable indicator that the purchases were made on the same dates as the invoice date (a separate field) is the same in each case.

35. Further, HMRC noted that, where a ZP334 account purchase invoice number immediately follows a J343 invoice number, the apparent delivery round information (in the "Cust_ordno" field) is identical in each case. There are a wide number of delivery rounds shown on these spreadsheets (there are, for example, apparently at least three 'Kings Lynn' rounds on a Monday, and at least three 'Norwich' rounds on a Friday, as well as other delivery rounds). The HMRC record of a visit to AMB indicates that there are at least four or five rounds each day. The information provided by AMB was that a delivery note was produced from the SAGE system for each order.

36. We consider it inherently improbable that, if the ZP account purchases were placed by random cash purchase customers, these deliveries would be placed on the same round as the delivery to the appellant in every case where the ZP334 invoice number immediately follows a J343 invoice number (that is, in approximately 70% of cases in the spreadsheet provided). This is particularly in the light of the correspondence from AMB to the appellant which does not indicate that there is any inaccuracy in the data itself.

Appellant evidence

37. The appellant's director, Mr Xin Jin Zhou (Mr Zhou), and his son, Baokong Zhou, provided witness statements and gave oral evidence at the hearing. The appellant's accountant, Ms Teck May Choo, also provided a witness statement and gave oral evidence.

38. Mr Zhou denied any knowledge of the ZP334 account and stated that he had never asked AMB to set up the account. However, in his witness statement he also stated that he had noticed that, whilst he was away and the shop was closed, there were purchases listed on the ZP334 account and speculated that these may have been purchases made by his son.

39. Baokong Zhou stated that he worked part time in the takeaway each day, initially after attending university and now after working at his full time job. He worked mainly behind the counter, taking orders from customers either over the phone or in person. He stated that he would use a "takeaway computer" to take the order, which would be printed and taken to the kitchen for the order to be cooked. Mr Zhou stated that, at the end of each day's business, Baokong Zhou would assist with calculation of the sales which Mr Zhou would then enter into a weekly takings sheet. These would then be given to the accountant, usually once every three months.

40. The accountant, Ms Choo, stated that her firm dealt with the appellant's booking and prepared VAT returns and accounts. These were based on the information supplied by the appellant; the firm did not independently audit the figures provided. She had only seen one invoice with the ZP334 account number on it, which had been issued to the unincorporated business, and this had only been noticed after HMRC's enquiries had begun. She did not consider that client suppliers' accounting systems had any relevance to clients.

41. Ms Choo had also prepared a summary of the Zhou family's assets and liabilities, which was included in the bundle. She confirmed that the information in this had been provided by the family. We noted the statement but, as we were not provided with any supporting evidence for the figures in this statement (such as bank statements), we consider that it is of limited assistance in deciding whether there have been suppressed sales.

Capacity

42. It was submitted that the appellant business could not support the level of turnover which HMRC had assessed.

43. Mr Zhou confirmed that he had run the takeaway business since the appellant company was formed, and had run it under his own name before that. He and his wife worked full time in the business, and his two sons assisted when they were not at college or university. Mr Zhou worked primarily in the kitchen, cooking. His wife assisted him, but Mr Zhou's evidence was that they could not do a lot of business between them.

44. Ms Choo had prepared an analysis of what she considered was the maximum level of turnover that could be achieved by the appellant; this was based on information provided by Mr Zhou and assumptions made by Ms Choo.

45. A chart had also been prepared on behalf of the appellant showing takings versus gas costs and it was submitted that this chart supported the contention that all sales had been declared. We did not find this chart particularly helpful: the chart was prepared from the amounts stated to have been paid by the appellant for gas. Without further information such as the price paid per unit, and the amount of gas used by the kitchen equipment at particular temperatures (for example), we consider that the cost of gas used by the appellant does not assist us in considering whether sales have been suppressed.

46. Ms Choo's analysis of the cooking capacity of the kitchen was, similarly, of little assistance. Ms Choo confirmed that she had not prepared such an analysis before, that she did not have any particular knowledge as to the time involved in such cooking, and that she had relied on information provided by Mr Zhou.

47. We noted that the analysis concluded that it would take 5 hours "non-stop cooking" to produce 60% of the orders placed on the evening of 23 July 2016, when HMRC had visited,

and the analysis stated that most of those orders were placed in a two hour period. From this it was concluded that the business could not achieve any higher turnover.

48. We considered that the analysis indicated that the business could not in fact achieve the declared turnover as it concluded that something in the order of five hours of cooking was required to be performed in a two hour period. As this was patently not the case, the analysis could not be regarded as providing us with any assistance as to whether the business could or could not support any particular level of turnover.

49. We also noted that Mr Zhou's evidence was that he and his wife had been in China from 3 April 2013 to 18 April 2013 yet the takeaway had been open from 14 April 2013 and had takings consistent with those shown for 31 March 2013 and 2 April 2013. It would appear therefore that, at least in 2013, Mr and Mrs Zhou were not the only staff who were able to undertake cooking functions in the appellant business.

50. Further, the appellant's declared turnover rose from approximately £25,000 for the VAT period to 30 June 2016, shortly before the date for which the analysis was produced, to approximately £46,000 for the third and fourth VAT periods for 2020-2021 (as shown on a chart produced by the appellant comparing the HMRC assessed turnover with declared turnover). There was no evidence to indicate that anything had changed with regard to the cooking capacity of the kitchen between 2016 and 2021, nor was there any evidence that this substantial increase in turnover was due to price rises alone. Accordingly, we consider that the contention that the appellant did not have the capacity to undertake any increased business has not been substantiated.

51. The appellant also stated that the area did not support high levels of turnover; a neighbouring fish and chip shop had closed, and the nearby RAF base was no longer home to a flight squadron. HMRC stated that the base continued to operate as an RAF regiment and RAF police station. We noted these statements but do not consider that they provided us with any useful assistance in reaching our decision: a takeaway may close for a number of reasons, and it was clear that the RAF base remains in operation even though there is no longer a squadron based there.

HMRC evidence

VAT visits to the appellant

52. HMRC carried out unannounced visits to the appellant's restaurant late in the evening, when they thought evening trading was largely complete, on each of 23 and 27 July 2016. The officers attending did not observe the takeaway for any period of time before entering. Such surveillance would require specific authorisation. Invigilation of the business was not undertaken as it was considered to have a negative impact on a takeaway business.

53. Officer Jones confirmed that two test purchases undertaken after the visits had been recorded in information provided to HMRC in March 2017 and that marked notes used for purchase were also noted to have been recorded. However, test purchases undertaken before the visits could not be confirmed as the appellant had not kept any records at that time. She did not consider that the records of two test purchases, and the marked notes, meant that the business could not be suppressing sales, given that the business was by then aware of HMRC's investigations.

54. On 23 July 2016, the HMRC officers observed the cashing up procedure. The appellant has a single till. This procedure resulted in a £4.40 discrepancy between the till and the takings.

55. On 27 July 2016, a further cashing up procedure was observed. There was a discrepancy of £37.70 between the till amount and the takings. The staff explained that £40 had been removed in notes, to be exchanged for coins, but they had forgotten to put the coins in the till.

Officer Jones' evidence was that, at this visit, there were two part-time members of staff as well as the family members. The takeaway has one till; if they are busy, orders are written on an order pad. Baokong Zhou stated that these written orders will be then rung through the till to obtain the price for the order.

56. In cross-examination, Officer Jones agreed that there would not have been time to change the till readings or remove cash from the till between their entering the takeaway and the cashing up procedure being undertaken. However, she considered that the appellant was aware that HMRC were investigating, as HMRC had written to them in May to say that they would be visiting. The correspondence had included a notice about keeping records. She considered that it was possible that some sales were not rung through the till, and the cash for those sales kept elsewhere: the takings and till would match in that case, but would not be an accurate record of the takings.

57. The till was noted to be set to record only that day's information and no data was available from the till for previous days' takings. HMRC had carried out test purchases on 28 May 2016 but, as the appellant did not keep any meal tickets at that time, it was not possible to check whether these had been declared in the recorded takings. In a discussion about the test purchases, the appellant advised that he did not give receipts to all customers. HMRC advised the appellant that meal bills should be retained and attached to the till readings for the day. Further test purchases carried out in November 2016 were noted to have been declared in the recorded takings.

58. On this occasion, the HMRC officers noticed a red cash box on the counter near the till. They were advised that this belonged to Baokong Zhou, who stated that it contained 50p pieces and tips and was not part of the business takings. He declined to allow HMRC to see the contents of the box, saying he did not want his father to see the contents. His evidence in the hearing was that the box contained his wallet and personal items, and tips of perhaps 10p or 20p per day, where he was told to keep the change. The box included special coins, which he would ask his father's permission to keep in exchange for the same amount from his own money. He stated that the box also held his cigarettes. He denied that the box was used to hold undeclared cash from sales made by the business. In the hearing, Officer Jones explained that she was unable to insist on seeing the contents of the box as this would have required a warrant.

Calculation of VAT assessments

59. Officer Jones explained that, given the information obtained from AMB during the visit and the analysis carried out on the AMB accounts backup data, she had concluded that the only reasonable explanation for the failure to declare the purchases on the ZP334 account was that there were undeclared sales being made, to which those purchases related. She did not consider that it would be difficult for the business to suppress takings, as this could be done by removing cash and destroying any corresponding meal bills. As food purchases are zero-rated, there would be little or no impact on VAT cost recovery if the purchases were suppressed. Her experience of dealing with similar businesses is that evidence is removed before any records are taken or kept, such that suppression cannot usually be established from the records.

60. AMB had been asked for information on the ZP334 account, including copy invoices and delivery notes for purchases on that account, but had refused to supply that information to HMRC and had refused to allow HMRC officers to visit to take copies. The possibility of issuing statutory information notices to AMB had been discussed, but the relevant HMRC manager had not considered that it would be appropriate.

61. As no other information was available, the gross profit rate in the appellant's accounts had been used to calculate undeclared sales, marking up the purchases on the ZP334 account

by that gross profit rate to establish the suppressed sales. The VAT assessments had been produced on this basis.

VAT Discussion

62. The appellant confirmed that there was no dispute as to whether the VAT assessments were made in time. The dispute was as to whether or not the appellant had made the purchases on the ZP334 account and whether HMRC's assessments had been made to best judgement.

Best judgement

63. The burden of proof as to whether a VAT assessment has been made to best judgment lies with HMRC. The decision in *Van Boekel v Customs & Excise Commissioners* [1981] STC 290 sets out three principles which apply in considering whether an assessment has been made to best judgment:

(1) HMRC should not be required to do the work of the taxpayer

(2) HMRC must perform their function honestly and above board

(3) HMRC should fairly consider the material before them and on that material come to a decision which is reasonable and not arbitrary, and there must be some material before the commissioners on which they can base their judgement .

64. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015, Carnwath LJ set out the following relevant guidance in relation to 'best judgment' (at [38]):

> "i) 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.
>
> ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
>
> iii) In particular the Tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The Tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done."

65. The appellant's contentions were, in summary, that there was no reliable evidence of suppression and that HMRC had not considered whether the business could sustain the level of turnover. The appellant contended that HMRC had used only one source of information (the AMB account) in calculating the quantum of the assessments, and that data had not been shown to be accurate. HMRC had ignored the fact that the two cashing up procedures which HMRC had attended had not shown significant difference between the till and the takings, and field reports had not indicated any suppressed sales. HMRC had not given any credence to written information from AMB that sales in the ZP334 account were not necessarily to the appellant.

66. With regard to the contention that HMRC had not considered whether the business could sustain the level of turnover, Officer Jones' evidence was that she had seen similar businesses with higher levels of turnover. We have set out above our view on the appellant's contentions as to the capacity of the business to generate the turnover assessed.

67. The appellant also contended that the present appeal was effectively the same as that brought in the case of *Wei Xian and Qiam Peng* [2020] UKFTT 0017, in which the Tribunal concluded that the assessments had not been made to best judgement. The appellant also made reference to the decision in *Kong's Restaurant Ltd* [2021] UKFTT 0220 (TC) as supporting their position.

68. We note that the facts in both cases are sufficiently different that neither case is of particular assistance. In *Wei Xian*, there was no allegation that purchases were being suppressed. The allegation of suppressed sales arose from invigilation of the business. The Tribunal's conclusions as to best judgement arose because the ratios used by HMRC did not correlate to the invigilation results. In *Kong's Restaurant*, the conclusions relating to best judgement in that case focussed on assumptions made in respect of till misreadings and a very small number of alleged suppressed purchases.

69. In this case, as we have already noted, both explanations given by AMB for the existence of the ZP accounts mean that cash purchases made by the appellant will not have been recorded on the J343 account because they were either recorded on the ZP334 account (under the original explanation), or on random ZP accounts which AMB noted could include the ZP334 account (under the second explanation). The appellant's accountant confirmed to HMRC that the appellant had made cash purchases from AMB as well as credit account purchases. AMB confirmed to the appellant that they had checked the data and confirmed that it was the data on their systems. We note that other AMB customers have confirmed to HMRC that they had a second account at AMB and that purchases on such account were not declared, and that they had accordingly suppressed sales in reporting to HMRC. Data protection rules mean that HMRC were unable to provide more specific information as to these customers.

70. Considering this information, we do not consider that it is unreasonable or arbitrary for HMRC to have concluded that purchases had not been declared by the appellant. For the reasons set out above, we consider that AMB's initial explanation of the ZP account at their HMRC visit is more likely to be accurate than their subsequent explanation and so do not consider that it is unreasonable or arbitrary for HMRC to have concluded that the purchases on the ZP334 account were made by the appellant. We also do not consider that it is unreasonable or arbitrary for HMRC to have concluded that undeclared purchases related to an under-declaration of sales.

71. We note HMRC's explanation that they did not place significant weight on the fact that the till and takings did not substantially differ at the two visits because they considered that both the till readings and the takings could have been suppressed in the same way. Given the wider evidence before us, we do not consider that this is an unreasonable approach for HMRC to have taken in their calculation of the assessment.

72. Officer Jones based the VAT assessments on an analysis of the AMB purchases on the ZP334 account, as she considered that the only reasonable explanation for failing to declare those purchases was that sales were also being omitted. The assessments were calculated by applying the mark up rate achieved in the accounts to the omitted sales amounts in the same periods.

73. For the periods ended 30 June 2016 and 30 June 2017, estimated amounts were used as no data was available from AMB. The average under-declaration of purchases for the periods ended 30 June 2014 and 30 June 2015 was used to establish figures for undeclared purchases, and the mark up rate achieved in the submitted tax computations was applied to those figures for those periods.

74. We consider that the calculation of the assessments therefore took account of the information available to HMRC. We note the appellant contention that HMRC could have

undertaken invigilations, and HMRC's explanation as to why these were not undertaken, but also note that *Van Boeckel* makes clear that the question is whether HMRC made the decision on the basis of the material available to them; they are not obliged to seek out additional material. We do not consider that HMRC acted unreasonably in making the assessment on the basis of the information available to them. We note that the appellant contended also that HMRC should have obtained further information from AMB, but also note AMB's refusal to cooperate with HMRC and also that the appellant was unable to obtain any such further information despite requesting assistance from AMB. As such, we do not consider that HMRC acted unreasonably in not taking further action to seek further information from AMB.

75. Considering the principles in *Van Boeckel*, and on the evidence before us, we find that HMRC have discharged the burden of proof on them and that the assessments were made to best judgment.

Presumption of continuity

76. In order to make assessments for the years ended 30 June 2016 and 30 June 2017, HMRC relied on the principle set out in *Jonas v Bamford* 51 TC 1 that the "situation will be presumed to go on until there is some change in the situation, the onus of proof which is clearly on the taxpayer". HMRC contended that there had been no such change as the margins achieved in the accounts for those two years were very similar to the margins achieved in the earlier years.

77. The appellant argued that, as the appellant was aware that it was under investigation by HMRC, it was inappropriate to apply the presumption of continuity to raise assessments for VAT periods after the enquiry started. We consider that, following Jonas v Bamford, a rebuttal of the presumption of continuity requires more than a statement that it would be inappropriate to apply that presumption following the start of a VAT enquiry.

78. The appellant also submitted that HMRC had accepted that any suppression had stopped once the enquiry started. We note that in a letter dated 2 June 2020, relating to the preparation of the bundles for the hearing, an HMRC litigator who was not involved in the hearing wrote "It is agreed that following the start of enquiries in to the business, takings were accurately recorded". The statement is made in response to a statement in a letter from the appellant which contends that details of takings between May 2016 and October proved that takings were accurately recorded.

79. Officer Jones stated that there was no basis for such a statement and that she did not agree with it, nor had she been asked whether such a statement could be made. We note that there is no reason given by the litigator for the statement and no other correspondence which supports the statement. The appellant did not apparently pursue the point in any subsequent correspondence.

80. We also note that the same litigator prepared one of the statements of case in this matter and did not make the same statement there. Given the importance of such a statement, we would have expected to see it in the statement of case or at least separately recorded with details. In the circumstances we consider that is not outside the realms of credibility that the word 'not' was inadvertently omitted after the word 'It' at the start of the sentence.

81. We therefore do not consider it appropriate to treat this sentence as binding HMRC with regard to the presumption of continuity.

82. The appellant also stated that there was no proof that the ZP334 account had continued to be operated after the data was extracted in 2015. However, we note that the appellant had been in correspondence with AMB, and there was no indication in that correspondence that the ZP account system (following either explanation) was no longer operated. There was also no

evidence that the appellant had ceased to make cash purchases which, following AMB's second explanation, would not appear on the J343 account.

83. We note also that the gas costs, which the appellant contended would be related to the level of turnover, did not vary significantly during the periods for which assessments were raised. As noted above we cannot conclude that the gas costs support a specific level of turnover without additional information which has not been made available. However, we do agree that consistent gas costs across a period of time would indicate that the amount of cooking, and therefore turnover, did not vary significantly during that period of time. We have noted that the declared turnover rose slightly from the VAT period ending 31 July 2016, but also note that the appellant's explanation for this was that the kebab shop next door had closed at the end of May 2016.

84. Considering the information above, we find that the taxpayer has not discharged the burden of proof on them to displace the presumption of continuity for the periods of assessment for which no AMB data is available.

Amount of the assessments

85. As made clear in *Pegasus Birds*, the burden of proof therefore falls on the appellant to demonstrate that the assessments do not reflect the correct amount of tax. The appellant has not in fact made any detailed submissions as to the correct amount of tax that should have been assessed and provided no evidence (such as bank statements) to rebut the amount of the assessments. This follows unsurprisingly from their contention that they did not make any under-declaration. We have considered the contentions made as to capacity and footfall in this context but, as noted above, do not consider that these are substantiated.

86. We find that the appellant has not discharged the burden of proof upon them in this context, and so the assessments are upheld in full.

Direct tax assessments

87. For direct tax purposes, the omitted profits were charged to tax under s455 Corporation Tax Act 2010. The charge was based on the calculations undertaken for VAT purposes. The appellant submitted that the quantum had not been proven by HMRC, for the same reasons as above in respect of VAT. We have concluded that the appellant has not discharged the burden of proof upon them to displace the amounts assessed and as noted by Officer Post, the corporation tax calculations take into account the VAT assessments and undeclared purchases. As such, we do not consider that the quantum of the assessments (as amended by Officer Post) has been shown to be incorrect.

88. Officer Post provided a witness statement and gave oral evidence at the hearing. The officer who had made the direct tax assessments had since retired from HMRC, but Officer Post stated that he would have drawn the same conclusions, based on his experience with similar businesses, that there had been an understatement of tax and that a discovery had been made which enabled the assessment to be made. The corporation tax calculations provided for deductions in respect of the undeclared purchases and the VAT assessments. He had reviewed the figures and made an amendment, in favour of the appellant, with regard to the calculation of the assessment. The penalties were also revised accordingly. The revised figures are set out in the appendix to this decision.

89. The skeleton argument for the appellant indicated that the appellant considered that the assessments might have been made out of time on the basis that a protective assessment could have been made earlier. In the hearing, it was accepted that the assessments had been made within the relevant time limits and that this point was not being pursued further.

90. HMRC contended that the discovery on which the assessments for the years ended 30 June 2014, 2016 and 2017 were based arose from the data provided by AMB Foods in 2015 when evaluated by HMRC officers from October 2016 onwards. The officers' evidence was that it was not until October 2017 that HMRC concluded that they had enough information to conclude that there had been a loss of tax relating to the appellant. The conclusion that there had been an insufficiency of tax was a reasonable conclusion from that evidence. The presumption of continuity means that this discovery extends to the tax years ended 30 June 2016 and 30 June 2017.

91. HMRC contended that the assessments for the years ended 30 June 2016 and 2017 were made within four years of the end of the relevant accounting periods and were, therefore, within the general time limits provided for in paragraph 46 of Schedule 18 of Finance Act 1998. The assessment for the accounting period ended 30 June 2014 had been made within six years of the end of the accounting period and, as HMRC considered that the loss of tax was brought about either carelessly or deliberately by the appellant or a related person as the director of the appellant would have known that sales had been under-declared, the assessment had been made in time under the time limits in paragraph 46 of Schedule 18.

92. Having considered the evidence and submissions before us, we find that there was a relevant discovery and that the assessments were made within the relevant time limits set out Schedule 18 of Finance Act 1998.

93. The appellant contended it was not appropriate for amounts to be assessed under s455, as there had been no intention to create a debt between the appellant and the director. It was submitted that the appellant should have the right to choose how to be taxed if HMRC considered that there had been an understatement.

94. Officer Post explained that the understatement of tax had been assessed under s455 rather than treated as a distribution as there was no evidence of distributions in the company records. It was normal practice to treat the amounts as a loan to a director in such circumstances. The alternative would have been to assess the amounts via PAYE as earnings of the director.

95. s455 CTA 2010 applies where "a close company makes a loan or advances money to … a relevant person who is a participator in the company or an associate of such a participator …". We have considered the parties' submissions and consider that the wording of s455, particularly the reference of an 'advance' of money, is wide enough to encompass an extraction of funds from a company by a participator which is not recorded in the accounts as either salary or a distribution. We do not consider that the appellant has the right to choose how amounts should be taxed in circumstances where the appellant has not under-declared amounts which are subject to tax.

96. Accordingly, we find that the corporation tax assessments were correctly raised and that the quantum of such assessments is also appropriately calculated.

Penalties

97. Paragraph 1 of Schedule 24 of Finance Act 2007 provides for a penalty to be paid where a person provides HMRC with a document, including VAT and corporation tax returns, which contains an inaccuracy which leads to an understatement of tax (inter alia). Where the behaviour which leads to the inaccuracy is deliberate and concealed the standard penalty is 100% of the potential lost tax. This may be reduced to a minimum possible penalty of 50% where the disclosure of the inaccuracy is prompted by HMRC action. The actual penalty depends on the quality of disclosure, with mitigation being given for telling HMRC about the inaccuracy, helping HMRC to understand it, and giving HMRC access to records to evaluate the inaccuracy.

98. HMRC submitted that knowingly omitting purchases and corresponding sales from records and tax returns cannot be anything other than deliberate behaviour and that the omission of such information from the records and return was an attempt to conceal the action. The maximum penalty would, therefore, be 100% and the minimum possible penalty 50%. HMRC gave 0% mitigation for telling, as the appellant has not admitted the inaccuracy; 40% for helping, as the appellant co-operated with the enquiries; and 30% for access to records. The total mitigation was, therefore, 70%. Applied to the difference between the maximum and minimum penalties, this gave a reduction of 35% so that the penalty charged was 65% of the potential lost revenue. The same penalty percentage was applied for all of the assessments.

99. At the hearing, the appellant stated that arguments as to penalties were academic as they contended that there had been no suppressed sales. The appellant nevertheless did not dispute the amount of mitigation in context.

100. Having considered the evidence and submissions and having upheld the assessments for the reasons given above, we consider that the behaviour which led to the understatements of tax can only be described as deliberate and concealed, and that any disclosure was prompted by HMRC action. The penalties are therefore correctly raised, and we see no reason to alter the mitigation allowed for by HMRC. The penalties are therefore upheld in full as set out in the appendix.

Conclusion

101. For the reasons set out above, we find that the appellant has understated turnover and profit for both VAT and direct tax purposes.

102. As requested by HMRC, we find that the appeals are upheld in part in respect of the amendments requested by HMRC. The appeals are otherwise dismissed. The assessments, closure notice and penalties are therefore upheld in the amounts stated in the appendix.

Right to apply for permission to appeal

103. 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 FAIRPO
TRIBUNAL JUDGE

Release date: 31 MAY 2022

Appendix - details of assessments, closure notice and penalties

VAT assessments and penalties

VAT period	*s73(1) VATA 1994 assessment*	*Schedule 24 penalty*
October 2013	£3,134.00	£2,037.10
January 2014	£2,546.00	£1,654.90
April 2014	£2,546.00	£1,654.90
July 2014	£2,546.00	£1,654.90
October 2014	£4,056.00	£2,636.40
January 2015	£4,056.00	£2,636.40
April 2015	£4,056.00	£2,636.40
July 2015	£4,056.00	£2,636.40
October 2015	£3,070.00	£1,995.50
January 216	£3,070.00	£1,995.50
April 2016	£3,070.00	£1,995.50
July 2016	£3,070.00	£1,995.50
October 2016	£3,087.50	£2,006.88
January 2017	£3,087.50	£2,006.88
April 2017	£3,087.50	£2,006.88
July 2017	£3,087.50	£2,006.88

Direct tax discovery assessments and closure notice

Accounting period	*Legislation*	*s2 CTA 2009 charge*	*s455 CTA 2010 charge*	*Sch 24 penalty charge*
30 June 2014	Para 41, Schedule 18 FA 1998	£9,387.27	£10,541.09	£12,953.44
30 June 2015	Para 32, Schedule 18 FA 1998	£15,039.20	£23,050.50	£24,758.31
30 June 2016	Para 41, Schedule 18 FA 1998	£10,065.60	£19.216.35	£19,033.27
30 June 2017	Para 41, Schedule 18 FA 1998	£10,655.13	£21,190.97	£20,699.97