Neutral Citation: [2024] UKFTT 00014 (TC)

Case Number: TC09019

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2019/05937
(encompassing TC/2019/08918 and TC/2020/01636)

VAT and CORPORATION TAX – admissibility of documents derived from a server as evidence – yes – whether off record sales – yes – whether presumption of continuity – yes – whether behaviour deliberate – yes – whether loan charges under section 455 CTA appropriate – yes – whether penalties involve Article 6 – no – appeal dismissed in principle but quantum to be re-determined by the parties which failing the appeal reverts to the Tribunal

Heard on: 30, 31 January and 1 & 2 February 2023
Judgment date: 04 January 2024

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER LESLIE BROWN

Between

NEW CLAIRE WINE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Geraint Jones, KC instructed by Rainer Hughes LLP

For the Respondents: Mrs Elizabeth McIntyre and Mrs Paula O'Reilly litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. These consolidated appeals concern substantially the same facts but the appeals relate to:-

(a) Five assessments being discovery assessments under Schedule 18 paragraph 41 Finance Act 1998 ("FA 1998") in respect of Accounting Periods Ending ("APE") 31 January 2013, 2014, 2015, 2016 and 2017. Together, those assessments for Corporation Tax total £250,654.68. We annex at Appendix 1 a breakdown of that total figure;

(b) VAT assessments totalling £176,656 under section 73 Value Added Tax Act 1994 ("VATA") for the VAT periods ending 06/2012 to 03/2017 inclusive by way of a Notice of Assessment dated 3 December 2018; and

(c) a penalty notice dated 6 November 2019 under Schedule 24 Finance Act 2007 ("FA 2007") for deliberate (but not concealed) inaccuracies in tax returns submitted to HMRC by way of a Notice of Penalty dated 6 November 2019.

There had been a Corporation Tax penalty but there was no appeal made in regard thereto.

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system.

3. The documents to which we were referred comprised a Hearing Bundle consisting of 906 pages, a supplemental Hearing Bundle extending to 250 pages, a supplementary Bundle relating to Mr Bhattachan (a director of the appellant) extending to 22 pages, a supplementary Bundle relating to Mr Paudel (the other director of the appellant) extending to 69 pages and an Authorities Bundle extending to 564 pages. At the hearing Mr Jones, KC lodged a copy of section 9 of the Civil Evidence Act 1995 ("CEA") and an extract from Chapter 30 - Hearsay in Criminal Proceedings, Section 3 - Hearsay Defined at 30-04 and 30-05 of Phipson on Evidence 20th Ed. At the end of the hearing Mr Jones lodged two further authorities.

4. We had a revised Skeleton Argument for the appellant, two Skeleton Arguments from HMRC, relating respectively to direct taxes and VAT, and a further supplementary Skeleton Argument covering both taxes. Mr Jones submitted a helpful Note in respect of his Closing Submissions. In addition, we had the documentation extending to 41 pages that had been produced by HMRC for the Case Management Hearing and which included the Letter of Request to the Italian Authorities in the original Italian with an English translation.

5. We heard evidence from HMRC Officers Barnsdale, Dyson and Maqsood and from Mr Paudel, a director of the appellant. We did not hear from Mr Bhattachan although there was a Bundle relating to his tax affairs.

6. The primary reason for the original substantive hearing in November 2021 being vacated was that it had been argued that a Nepalese interpreter was required. It had therefore been directed that an interpreter be booked but, on 25 January 2023, the appellant's solicitor confirmed that no interpretation was required. We raised that with Mr Jones as a matter of concern to us but the appellant opted to continue with no further request for an interpreter.

7. Whilst, when giving evidence, it was clear that Mr Paudel did speak English, I intervened frequently during cross-examination to ensure that he did comprehend what was being said. HMRC were granted a recess to enable them to rephrase their line of questioning.

8. In our view, it was far from optimal but the appellant was professionally advised and Mr Jones made no motion to adjourn for an interpreter.

9. Mrs O'Reilly very properly made it explicit to Mr Paudel that if there was anything that he did not understand then he should say so. He did so from time to time and I intervened where I thought that there might be a possible misunderstanding.

10. It did not assist that Mr Paudel only had the main Hearing Bundle. HMRC referred him to one page in the supplementary Bundle. He confirmed that he could not access it electronically (HMRC offered to email it to him). The problem was managed by that one page being read to him and by me thereafter summarising the contents (being the total of the alleged cash payments made by the appellant to The Italian Wine Company ("TIWC") in the period November 2012 to April 2013) and asking him to comment, which he did.

11. We had two substantive applications from Mr Jones in the course of the Hearing but our decisions on those only make sense if we explain the context. Therefore, although we set out detailed findings in fact hereafter we summarise here the main facts that are relevant to those applications.

The background

12. Officer Dyson was a very credible and straightforward witness, who, in our view, if anything, downplayed his concerns about the appellant. He explained that initially he had been looking at the Bottle Stop (which was sometimes referred to as the Bottle Shop but hereinafter as the Bottle Stop) which was a partnership involving Mr Paudel. He became aware that several teams in HMRC were looking at customers who had been identified in criminal investigations in the UK and Italy into TIWC. In the course of those investigations a server had been found in the attic of a key player in TIWC and that had been seized by the Italian authorities and the information shared with HMRC.

13. Details of customers of TIWC identified in the information in that server were circulated within HMRC to be risk assessed on the basis of their then current tax returns. The appellant was allocated to an HMRC team in Liverpool.

14. Officer Dyson sent the file that he was investigating for the Bottle Stop, because of the link with Mr Paudel who was a partner in that business, to that HMRC team. When, for operational reasons the Liverpool team was dispersed subsequently, the files for the appellant, the Bottle Stop and Mr Bhattachan's wife's interest in a business called BN Food and Wine which also operated as an off-licence, and which had also been referred to Liverpool, were all referred back to Officer Dyson.

15. At that stage the Officer had no information about TIWC beyond being asked to look at the taxpayers' current tax returns and explore the possibility of off record sales and purchases. Because of the criminal investigations in the two countries, the Officer, understandably, did not know whether any information emerging from those investigations and trials could ever be used in civil proceedings.

16. Therefore he opened tax enquiries in accordance with normal procedure and without any reliance on TIWC records. The relevance of the enquiries to the applications is that, based on information provided by the appellant's accountants, VKM Accounting Limited ("VKM"), Officer Dyson had completed a stock flow exercise. The outcome suggested inaccuracies in stock movements and record keeping and potential off record sales and purchases. Those were denied by the appellant. Officer Dyson had other evidence that pointed to cash transactions and unexplained deposits into bank accounts. A VAT enquiry was subsequently opened by Officer Maqsood who relied on the information provided by Officers Barnsdale and Dyson.

17. Ultimately the assessments and penalties which are the subject matter of these appeals were issued.

The Case Management Hearing

18. The substantive hearing listed for 6 and 7 December 2021 had been discharged, partly to accommodate the application for an interpreter as that would require a longer hearing and partly to consider two applications. Instead, there had been a Case Management Hearing on 6 December 2021 to consider the appellant's Application for Disclosure and the Application by HMRC that the witness statement of Officer Barnsdale with exhibits be admitted in evidence.

19. At paragraph 3C of his revised Skeleton Argument, Mr Jones stated that:

> "Whilst at the Directions hearing the Tribunal gave permission for HMRC to rely upon the witness statement of Sara Barnsdale … and granted permission for the documents referred to in her w/s to be adduced, it rightly made no ruling upon their admissibility as evidence of the facts stated therein. Logically that issue should have been decided prior to allowing them to be adduced; but that is not what happened".

20. Mr Jones said that his Skeleton Argument and his submissions in this hearing were based on his recollections of the Case Management Hearing.

21. At this hearing, after hearing the evidence of Officer Barnsdale, Mr Jones argued that HMRC had misled him, and the Tribunal, at that Case Management Hearing in relation to the information available to them. Mrs McIntyre vigorously disagreed. I too disagreed with Mr Jones, and still do.

22. I had to hand not only the Directions but my detailed notes from the Case Management Hearing and the parties' contemporaneous email exchanges. I pointed out that, in fact, at that hearing, it was by agreement of the parties that the witness statement with exhibits from Officer Barnsdale was admitted in evidence. The appellant's Application for Disclosure was not pursued and the reason for that was narrated in the Directions issued on 10 December 2021.

23. Insofar as relevant those Directions read:

> "(2) It was ultimately agreed that the officer's witness statement with exhibits would be admitted and the Application for Disclosure would not be pursued on the basis that HMRC had confirmed that:-
>
> > (a) There had been proceedings against officers of The Italian Wine Company ("TIWC") which had been pursued both in Italy and in the Crown Court at the Central Criminal Court. There is little detail about the Italian prosecution but it is understood to have focussed on misdescription of both wine and the export of wines. The prosecution in the UK related to the fraudulent evasion of Excise Duty in terms of Section 170(2) Customs and Excise Management Act 1979, the fraudulent evasion of VAT in terms of Section 72(1) Value Added Tax Act 1994 and money laundering in terms of Section 327(1) Proceeds of Crime Act 2002.
> >
> > (b) TIWC had retained physical records relating to trading activities which had been declared. There was no documentary evidence of off record sales.
> >
> > (c) In the course of the prosecutions a computer server, which had been in Italy, was seized and exported to the United Kingdom. A word search of a digital copy of the server was conducted. That server included Daily Delivery Sheets which were excel documents with a sheet for each working day labelled with the day and date. Redacted examples are annexed in the Appendix to the witness statement, one of which is at page 17 and entitled "Ford 1383". As far as the Daily Delivery Sheets are concerned that is all that HMRC hold.

(d) As far as cash is concerned the information was held in basic cash spreadsheets on an excel document detailing debits and credits and named "Livio Cassa" and a year such as 2013. The officer extracted details of every entry for the appellant and compiled a list of receipts taken from both that and the Ford documentation. HMRC have now produced a copy of the redacted spreadsheets, and made an application for admission of these documents, taken from the Italian server showing the cash payments made to and by TIWC. That is all the information that HMRC have in regard to cash payments."

24. Those Directions included the usual Direction to the effect that parties were at liberty to apply to the Tribunal for amendment etc but the Directions were not questioned by the appellant.

25. I read out my notes and the emails.

26. My notes recorded that Mrs McIntyre had explained that the exhibits to the Officer's witness statement were documents that were spreadsheets that the officer had produced from the server information. It was explained at that hearing precisely what had been available to HMRC.

27. In an email dated 9 December 2021, Mrs McIntyre then produced the opening comments ("the Comments") relating to the criminal prosecution of responsible persons of TIWC in the UK. The Comments were the version of the Crown's Opening Submissions that had been released to the Press.

28. She confirmed that the information relating to off record sales had been retrieved from the server seized by the Italian authorities and was the source of the delivery schedules and cash sheet information produced as exhibits by Officer Barnsdale. She went on to explain that, unbeknown to the litigators during the Case Management Hearing, the schedule relating to the cash sheets was only an extract. The extract showed the date, amount of cash received, and name of the person paying. She now produced redacted versions of the full cash sheets covering 2012 and 2013 and confirmed that those had been produced from the Italian server. The redactions related only to the names of other customers.

29. She requested that they be admitted as documents upon which HMRC wished to rely at hearing in terms of Rules 2(2) and 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"). The appellant's agents made <u>no</u> objection to that application.

30. Direction 2 is self-explanatory and was not challenged at any stage until the Skeleton Argument. Therefore we take the view that the exhibits were admitted at that stage. However, it was open to Mr Jones to make a new application to exclude the evidence and he did.

Applications from Mr Jones

Exclusion of evidence from the Italian Server

31. Paragraphs 3D *et seq* of Mr Jones' Skeleton Argument presaged this oral application to exclude the evidence derived from the contents of the server.

32. At the outset of the hearing, I had referred to paragraph 3G(a) of Mr Jones' Skeleton Argument where he had advanced an argument about hearsay in relation to the spreadsheets produced by Officer Barnsdale and derived from the server. I had pointed out that we had not been referred to *Edwards v HMRC* [2019] UKUT 131 (TCC) ("Edwards") but in addressing those arguments I would almost certainly reference *Edwards* at paragraph 50.

33. Because she had commitments elsewhere, we heard evidence from Officer Barnsdale on the first morning. Before she commenced giving evidence Mr Jones intimated that he would

be pursuing an argument on admissibility but that for the purposes of her evidence the exhibits should be admitted *de bene esse*. Hence why I have explained about the Case Management Hearing.

34. After having heard her evidence, Mr Jones requested a recess to read *Edwards*. The relevant paragraph to which I had referred him reads:-

> "50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> > 'In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.'"

The FTT case in question was a decision by Mr Jones when he was a Tribunal Judge (but that was not the reason that I had referred to *Edwards*!).

35. After that recess, Mr Jones stated that he wished to object to reliance on documents from the server which he considered to be "the start and finish" of HMRC's case.

36. Before turning to the arguments on the admissibility issues it is appropriate to provide further detail of the fraud and to consider Officer Barnsdale's evidence which gives the factual context in relation to the Italian server.

Overview of the fraud

37. TIWC carried out business with an Italian company S.B.F di Gastaldo Mauro S.R.L. ("SBF"). The owner of TIWC had previously been a director of SBF.

38. The business between TIWC and SBF related to the importation into the United Kingdom from Italy of wines and, in particular, wines branded under the "Villa Radiosa" label. TIWC was the registered owner of the trademark for that and another three brands.

39. TIWC was an approved registered consignee with HMRC between June 2008 and April 2013 and, as such, was able to import excisable goods under duty suspension arrangements. TIWC had to notify HMRC of each consignment and account for the excise duty prior to the goods being despatched onto the United Kingdom market. TIWC was registered for VAT from 22 May 1998 until 5 August 2013. VAT returns were filed with HMRC and VAT accounted for in the periods 06/08 to 12/12 inclusive.

40. The movement of excisable goods within the European Union was recorded by the Excise Movement and Control System ("EMCS"). SBF would generate an original Electronic Administration Document ("e-AD") at the point at which the movement of the wine commenced in Italy. The e-AD has a unique reference number being the Administrative Reference Code ("ARC"). The e-AD should relate to a single delivery and should accurately record the quantity of wine in any load or delivery. It should have been "closed" upon receipt of the wine at the TIWC premises.

41. TIWC supplied Villa Radiosa wines and other wines to a number of Cash & Carry businesses, wine suppliers and restaurant businesses within the UK. The Officer confirmed that HMRC's analysis of the e-ADs had identified the fact that TIWC had used each e-AD

between six and eight times. HMRC described that as using “mirror” loads whereby each e-AD was used several times.

42. The drivers from Italy were provided with two sets of documentation. One set would contain details of the quantity of wine declared to HMRC and the second set would contain details of the balance of the wine. When the quantities on the two sets of documentation were combined it equalled the total quantity of the load. An example of those were found when the vehicle was seized and searched on 17 April 2013.

43. On delivery of the wine to TIWC, where there was no delivery note or invoice, TIWC would hand the cash payments to the driver who would then return to Italy with those monies.

44. Each lorry carried 32.5 pallets of wine which amounted to thousands of cases of wine. Officer Barnsdale confirmed that HMRC had calculated that at least 70 or 80% of the known deliveries had no invoices or delivery notes. Where there were delivery notes HMRC could match every delivery note with a sales invoice which included VAT.

45. The Comments indicate that in the period May 2012 to January 2013, SBF issued e-ADs in respect of 419,960 bottles of wine sold to TIWC but the true amount of wine delivered was approximately 3.4 million bottles. The declared excise duty was £764,883 whereas the excise duty on the actual number of bottles imported was approximately £5.7 million.

46. The data on the Italian server contained in excess of seven million files and the Italian server was directly linked to the TIWC computers in the UK. The Italian server was used for all invoicing, stock control, accounting and transportation.

47. The Comments recorded that the excise duty and VAT returns and other business records were a “sham”. The true accounting records of TIWC were maintained on the server in Italy.

48. At the end of January 2013 TIWC became the subject of an HMRC criminal investigation.

49. There were convictions in both Italy and the UK.

Officer Barnsdale

50. She was a very straightforward and entirely credible witness.

51. She explained that she works as a criminal investigation officer as part of HMRC Fraud Investigation Service Organised Crime. Commencing in January 2013, she had been the case manager for the investigation of TIWC which had had a base in London. Italian Customs, who were investigating counterfeit wines and their supply chain involving suppliers and transport, bottling and labelling companies had contacted HMRC.

52. She had worked jointly with the Italian Customs and information had been shared. The UK investigation had focussed on the under-declaration of excise duty on wine (excise fraud), undeclared sales in the UK (VAT fraud) and money laundering.

53. On 17 April 2013, in a joint operation with the Italian authorities, HMRC conducted a number of arrests and searches which included the business premises in the UK of TIWC and a vehicle which was delivering wine. A large number of their trading documents, including sales, purchases and deliveries were seized together with digital media items. Furthermore, cash secreted in two locations in the building amounting to £300,000 in Euro and Sterling bank notes and approximately 110,000 litres of wine were seized under the provisions of the Proceeds of Crime Act 2002 and the Customs and Excise Management Act 1979.

54. Officer Barnsdale examined the trading records of TIWC and identified some sales invoices and delivery notes. Where there were no sales invoices there were no delivery notes. Amongst the many documents there were four sales invoices addressed to the appellant and

four matching delivery notes. That enabled her to confirm that the appellant had been a customer in both 2012 and 2013.

55. The Italian authorities had also seized a large amount of material including trading records and digital media from associated companies and persons involved in the fraud. That included a digital copy of a server found in the house of one of the main principals in Italy. It contained documents, emails and spreadsheets relating to the fraud, off record sales and cash movements.

56. Using the Crown Prosecution Service ("CPS") HMRC formally requested that material seized by the Italian authorities be used in the UK prosecution. That rogotary request was granted on 8 May 2015.

57. That server was provided to HMRC's digital forensics department and downloaded into a searchable format given the millions of files on that server.

58. Officer Barnsdale used key word searches and references to identify relevant and evidential material and the appellant's name was one such. Mr Jones confirmed that he did not challenge the methodology.

59. Officer Barnsdale and two other HMRC officers reviewed all of the material obtained as part of the Italian investigation. Officer Barnsdale confirmed that she had seen tens of thousands of documents.

60. The Officer identified the appellant in a number of "Daily Delivery Sheets" which are Excel documents with a sheet for each working day labelled with the day and date. Each sheet has a grid detailing the delivery vehicle registration, the name of the driver, maximum load, drop-offs (to a maximum of 16 in a day), customer information, number of cases of wine (six bottles in each case) and special instructions plus tick boxes for order, customer confirmation, picking note and delivery note.

61. The Daily Delivery Sheets that were included in the supplementary Bundle had been redacted to show only the entries for the appellant.

62. In the 2012 Daily Delivery Schedules there were nine separate deliveries listed for the appellant and on the 2013 Schedules there were 12 separate deliveries listed for the appellant.

63. In addition, the appellant was identified in two basic cash spreadsheets which were Excel documents detailing credits and debits. Those had a number of columns for dates, names, amounts, credits and debits with some notes. Those are the documents that Mrs McIntyre described as "cash sheets" (see paragraph 28 above). Those documents were entitled "Livio Cassa" and the year. Livio is the first name of the main defendant and owner of TIWC and the English translation for Cassa is cash. We observe that the Comments states that the Livio Cassa for each year details the cash receipts from UK customers, the expenses incurred in the UK and the monies sent to Italy.

64. In Livio Cassa 2012, the appellant is listed seven times with cash receipts totalling £33,420 and in Livio Cassa 2013 the appellant is listed ten times with cash receipts totalling £49,700. The last entry is on 11 April 2014 and there is no record of any cash receipts after 12 April 2014.

65. The Officer compiled her schedules utilising the information derived from the Daily Delivery Sheets, the Livio Cassa spreadsheets and the sales invoices.

66. The information relevant to the appellant, which was extracted by Officer Barnsdale from the server, can be summarised in the following tables. On the left-hand side are the details from the Daily Delivery Schedules (here "DDS") and on the right-hand side is the detail from

the “cash sheets”. As can be seen, the four deliveries where there were sales invoices are recorded in the former but not in the latter and where there are no sales invoices there are cash receipts.

67. The details for 2012 are:-

DDS							**CASH**	
Date	**Quantity (Cases)**	**Date**	**Sales Invoices**	**Quantity (Cases)**	**Net**	**VAT**	**Date**	**Cash Receipts**
15/10/2012	550	15/10/2012	24838	550	£9,438.00	£1,887.60		
06/11/2012	550		No invoice				06/11/2012	£4,400.00
15/11/2012	550		No invoice				15/11/2012	£4,670.00
21/11/2012	550		No invoice				21/11/2012	£5,670.00
26/11/2012	550		No invoice				26/11/2012	£4,670.00
05/12/2012	550		No invoice				05/12/2012	£4,670.00
07/12/2012	550	07/12/2012	24899	550	£9,713.00	£1,942.60		
17/12/2012	550		No invoice				17/12/2012	£4,670.00
22/12/2012	550		No invoice				22/12/2012	£4,670.00

68. The details for 2013 are:-

DDS							**CASH**	
Date	**Quantity (Cases)**	**Date**	**Sales Invoices**	**Quantity (Cases)**	**Net**	**VAT**	**Date**	**Cash Receipts**
11/01/2013	550		No invoice				11/01/2013	£4,670.00
18/01/2013	550		No invoice				18/01/2011	£4,670.00
28/01/2013	550		No invoice				25/01/2013	£4,670.00
01/02/2013	550		No invoice				01/02/2013	£4,670.00
07/02/2013	550	08/02/2013	24961	550	£9,713.00			
13/02/2013	600		No invoice				13/02/2013	£5,100.00
19/02/2013	600		No invoice				19/02/2013	£5,100.00
07/03/2013	600		No invoice				07/03/2013	£5,100.00
15/03/2013	600		No invoice				15/03/2013	£5,100.00
21/03/2013	600	21/03/2013	25013	600	£10,596.00	£2,119.20		
03/04/2013	600		No invoice				03/04/2013	£5,100.00
11/04/2013	650		No invoice				11/04/2013	£5.520.00

69. In summary, Officer Barnsdale stated that from her examination of the records of TIWC the key points were that she had concluded that:-

(a) Sales declared by TIWC for VAT always had both a corresponding sales invoice and delivery note.

(b) Undeclared sales had neither document but did have a corresponding entry for cash in the Livio Cassa Schedules.

(c) All deliveries, both declared and undeclared, were listed on the Daily Delivery Sheets.

70. She confirmed that three people had been charged in the UK and stood trial in 2017 with the owner, Livio Mazzarello and the financial controller being found guilty of evasion of excise duty and evasion of VAT. The owner was also found guilty of money laundering.

71. The Officer had been present throughout the trial. The estimated level of fraud perpetrated by TIWC was believed to be in excess of £46 million in tax, and £24 million in cash was believed to have been received for off record sales and those monies were moved out of the UK.

72. The Officer confirmed that the appellant had not been specifically named in the indictment but was mentioned in court because it had been identified on the spreadsheets. We observe from HMRC's letter to the appellant's then advisors, Croner Taxwise, dated 28 January 2019, that HMRC sent to them extracts of the TIWC records that had been used as evidence in the trial.

73. The Officer also confirmed that the Italian Courts had found SBF and others guilty.

74. Mr Jones had asked about the delivery notes for the four admitted deliveries to the appellant and the Officer agreed that those delivery notes were not in the Bundle. Mr Jones asked if they could be produced and the Officer stated that they would be amongst more than 300,000 PDFs. He went on to ask her what other documentation she had had because he said that he had understood from the Case Management Hearing that there was very little.

75. She confirmed that she had had sight of the letter of request from the CPS to the Italian authorities about the material that was held; that had been produced to the Case Management Hearing. She said that there had also been a great deal of other evidence relating to telephone calls, HGV movements, witness statements, interviews of suspects and so on. Those related to the entire fraud but there were also some hearing notes from the trial. She confirmed that those hearing notes were official court documents.

76. As far as the trial in the UK had been concerned, and it had been a jury trial, HMRC held copies of witness statements and there had been thousands of exhibits.

77. That led to Mr Jones' second application which we address anon.

78. He argued that no reliance should be placed on the documentation from the server or documents derived from it and that in any event the documentation was not admissible as a matter of law and the Tribunal should exercise its discretion to exclude it. He referenced Rules 15(2)(a) and (b)(iii) of the Rules which he described as being subject to section 9 of the CEA, the terms of which we have appended at Appendix 2.

79. We observe that section 1(2)(a) of the CEA reads:-

> "(a) 'hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated;".

We do not consider that the definition of hearsay in *Phipson on Evidence* is of any assistance not least because it relies on sections 114 and 115 of the Criminal Justice Act 2003.

80. Mr Jones argued that the existence of section 9 spoke to the difference between hearsay and business records. That was because until section 9 was enacted, business records to which no one could speak were not even hearsay. He argued, as he had done at paragraph 3Ga of his Skeleton Argument, that "hearsay must come from an identified source so as to give the other party the opportunity to require the witness to be called". It was for that reason that I had cited paragraph 50 of *Edwards*.

81. His ingenious argument was that the FTT decision was "not very distinguished" and that the Upper Tribunal had failed to notice that the Judge had erred in stating that documents would "often contain hearsay evidence, but often from a source of unknown or unspecified provenance". He said that the Upper Tribunal were wrong to approve that statement and that in any event, at its highest, it was simply an *obiter* observation.

82. Whilst he accepted that the question of admissibility of evidence was subject to the provisions of Rule 15 of the Rules, he argued that Rule 15 had to be read in the context of section 9 of the CEA. That was primary legislation, unlike the Rules, and it indicated the clear will of Parliament.

83. Insofar as relevant, Rule 15 reads:

"(2) The Tribunal may—

(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

(b) exclude evidence that would otherwise be admissible where—

… or

(iii) it would otherwise be unfair to admit the evidence."

84. On 18 May 2020, HMRC accepted Rainer Hughes' application dated 17 April 2020 to commit to the ADR process. An ADR meeting was arranged on 12 October 2020 but no one attended for the appellant. On 21 October 2020, HMRC wrote to Rainer Hughes asking for confirmation of the position and they responded on 22 October 2020 offering no explanation but simply stating that they were instructed to proceed with the appeals to the Tribunal.

Discussion and decision on admissibility

85. Whilst we note Mr Jones' arguments that we should be "heavily guided" by the CEA and that it was primary legislation we point out that paragraph 10(2), Schedule 5 of the Tribunal Courts and Enforcement Act 2007 ("TCEA") is also primary legislation and makes it explicit that Tribunal Rules "may modify any rules of evidence provided for elsewhere, so far as they would apply to proceedings before the First-tier Tribunal or Upper Tribunal".

86. As can be seen, Rule 15 is drafted in very wide terms. The CEA had been in existence for many years before the TCEA was promulgated and we find that it is self-evidently Parliament's intention that Tribunals do not have to be constrained by section 9 CEA.

87. However, of course, we have noted the provisions of section 9. Mrs McIntyre very fairly agreed that, although not orthodox business records, the documentation on the server amounted to business records for the organised criminal venture so would fall within the definition of business records in section 9.

88. She made the point, with which we agree, that section 9 does not specify legitimate or legal records, simply business records. We did not agree with Mr Jones' argument that the use of the word "regularly" in the definition of business in section 9(4) implied a business that was legitimately carried on. A business can be carried on over a period of time but not necessarily with regularity. That definition imports a requirement for regularity together with a period of time.

89. We can see from the Comments that "The server in Italy is central to the frauds alleged against the defendants in the United Kingdom". The Comments went on to state that the Italian server was used for all invoicing, stock control, accounting and transportation. That server was directly linked to the TIWC computers in the United Kingdom. It was the Crown's argument in that trial that the server concealed the "true accounting records and/or returns (both excise duty and VAT) from the authorities in the United Kingdom". Clearly, that prosecution was predicated on the basis that the server held the accurate business records of TIWC.

90. Whilst we accept Mr Jones' argument that we cannot know what the reasoning of the jury in the UK or the Court in Italy might have been, nevertheless that must have been established, given the convictions.

91. Mr Jones made much of the fact that HMRC had not produced a certificate in terms of section 9(2) CEA. In the circumstances we cannot conceive of a situation in which such a certificate could be produced. Ultimately that does not matter since, although we note the provisions of section 9 CEA, we rely on Rule 15 of the Rules.

92. Is information from the server admissible?

93. We were not referred to the case but in approaching the question of whether or not evidence should be admitted, our starting point is Mr Justice Lightman at paragraph 20 of *Mobile Export 365 Limited and Another v Commissioners for Revenue & Customs* [2007] EWHC 1737 (Ch) ("Mobile") where he stated:- "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary." We agree with that general principle.

94. In the Case Management Hearing, I had cited Judge Mosedale's analysis in *Masstech Corporation Limited (in administration) v HMRC* [2011] UKFTT 649 where she reviewed *Mobile* and also *O'Brien v Chief Constable of South Wales Police* [2005] 2 WLR 1038 where the House of Lords gave guidance on the approach and balancing exercise to take when considering admitting evidence generally. She said:-

> "8 The conclusions I draw from these cases and from general considerations of fair hearings are as follows:
>
> - Only relevant evidence should be admitted;
> - Such evidence should nevertheless be excluded where there is a compelling reason to do so;
> - Whether there is a compelling reason to do so will be a balancing exercise the object of which is to achieve a trial that reaches the correct decision by a process fair to all parties;
> - To conduct that balancing exercise the Tribunal must consider the likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor;
> - Unfair prejudice includes the factors listed by Lord Bingham which were particularly relevant in that case but in this case, not being a trial by jury, perhaps of less relevance. Unfair prejudice would include a party being ambushed so that it is strategically disadvantaged or put in a position that it has no time to bring evidence in rebuttal;
> - Considerations of good case management will include the need for a sanction against a party which adduces late evidence particularly where the evidence could have been produced earlier; it will recognise the desirability of adhering to trial dates and avoiding unnecessary costs.
>
> Simply put, we have a discretion and we take the view that it is a balancing exercise discouraging ambushes and surprises."

95. We agree with that analysis and we have adopted that approach.

96. Effectively what we are looking at here are the schedules or compilations produced by Officer Barnsdale based on the information from the server and at her evidence in that regard.

97. The first question is whether that evidence is relevant. We find that it is relevant because, taken in the context of the HMRC enquiries *ex facie,* this evidence suggests that there were cash transactions and off record purchases.

98. The primary issues then are the probative worth of the server evidence and whether to admit or exclude that evidence would be fair.

99. We accept that there is no means of independently verifying the source of the server documentation. The authors of the documentation have not been identified and, realistically, nor are they identifiable.

100. Mr Jones argued that the documents were created by fraudsters and it was therefore legitimate to suggest that one possible inference would be that they were created for the purposes of identity fraud. As we indicate below, we permitted Mr Jones to run that argument, albeit it had been unheralded.

101. Whilst we understand that identity fraud might conceivably be a possibility, we are simply not persuaded. The server documentation was hidden and was produced by the Crown as the record of the frauds which were subsequently proven. On the balance of probability the documentation was produced primarily, if not solely, for internal use by TIWC and SBF. These were not records that were produced voluntarily. In our view it is inherently improbable that the records were manufactured for identity fraud purposes. The sheer extent of the documentation on the server would mean that it would be an absolutely huge exercise to attempt anything like that. Indeed the Comments describe the fraud as being massive.

102. In relation to two other customers of TIWC, at paragraphs 18 to 32 of the Comments there are details of documentation from the server which, when compared with other evidence, purport to show that the evidence of cash sales could be verified. The inference from the convictions is that they were. Officer Barnsdale said that she attended the entire fraud trial and that the unredacted spreadsheets had been adduced in evidence. The appellant had been mentioned as it was identified in the spreadsheets.

103. Of course, we accept that the Comments are simply a *precis* of the Crown's Opening Submissions and submissions are not evidence. However, it is an indication of the evidence that was put before the jury and they found two of the defendants guilty.

104. The Officer had said that her spreadsheets had been used in the criminal proceedings and that evidence was not challenged.

105. Clearly, in the criminal trial, the information from the server, and the Officer's schedules did have probative value and, in our view it could do so also in these proceedings but the real issue is the weight and reliance that the Tribunal would give to it if it were admitted.

106. Would it be unfair to admit the evidence? Clearly, it would not be unfair to HMRC and they rely upon it.

107. Mr Jones argued that it would obviously be unfair to the appellant as it would be unable to cross-examine the authors.

108. As we have pointed out, the Tribunal has the discretion to admit evidence and, whether or not it is *obiter,* we agree with the Upper Tribunal in *Edwards* that documents of unknown provenance can be admitted. The provenance of the author(s) cannot be established but the actual provenance, being the business records of TIWC is known and has clearly been proven

beyond all reasonable doubt. Whether we should attach weight to that is a factor that has to be considered in the light of all of the evidence.

109. The appellant is not being ambushed as it has known of the existence of this evidence for many years.

110. We observe that at paragraph 16 of *Elbrook Cash and Carry Limited v HMRC* [2019] UKUT 0201 (TCC), having pointed out in the previous paragraph that Mr Jones' then submissions had "failed to recognise the importance of Rule 15(2)(a)", the Upper Tribunal stated:

> "16. The practical application of Rule 15(2)(a) in an MTIC appeal was considered by this Tribunal in another decision in the Megantic litigation: *Megantic Services Ltd v Revenue and Customs Commissioners* [2011] UKUT B2 (TCC). In that case, Mr Justice Arnold stated as follows:
>
> > '78. Megantic's second ground is that the [Bank] evidence is unreliable and that the judge made an error in law in admitting it. Megantic contends that the [Bank] evidence is unreliable for two reasons. First, because [HMRC Officer] Downer's evidence amounts to non-expert opinion. Secondly, because no positive evidence has been adduced by HMRC as to the authenticity, integrity or accuracy of the documents obtained from the [Bank] server. On the contrary, Mr Letherby has stated in three witness statements in other proceedings (only one of which was shown to me) that some of the records are missing and others are damaged.
> >
> > 79. In my judgment there are two short answers to these contentions. First, the judge's decision to admit the evidence discloses no error of law. It was a case management decision which was well within the ambit of his discretion. I agree with the view expressed by Norris J in Goldman Sachs that this tribunal should exercise extreme caution before interfering with the Tribunal's case management decisions.
> >
> > 80. Secondly, rule 15(2)(a) of the Tribunal Rules allows the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial. It follows that the Tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the Tribunal considers that it is worth. What weight should be given to the evidence is a matter for the Tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence being received by the Tribunal. As for the reliability of the [Bank] evidence, Mr Letherby's statement in these proceedings does contain some evidence as to the reliability of the [Bank] documents. Furthermore, I am quite unpersuaded that the other statement of Mr Letherby relied on by Megantic demonstrates beyond argument that the FCIB evidence is unreliable. It may well provide material for cross-examination of Mr Letherby in due course, but that is another matter.'"

111. We do find that the evidence is relevant and we do not find that there is a compelling reason to exclude it. Accordingly the Application to exclude it is refused.

Application for Specific Disclosure

112. On the evening of the first day of the hearing Mr Jones lodged an Application for Specific Disclosure which comprised four categories. After we heard Mrs McIntyre's oral response thereto, on the third day of the hearing Mr Jones confirmed that he wished to pursue only the second Application which sought a Direction for disclosure of:-

> "2. All and any delivery notes issued by or to TIWC in respect of deliveries to its customers (whether such customers are said to be on or off record customers) within the U.K., between 14 October 2012 – 12 April 2014."

113. The basis for that Application was that any such documents within the custody, power and control of HMRC would be capable of being relevant to the case advanced by HMRC and/or to undermining it.

114. Mrs McIntyre objected pointing out that the very clear evidence of Officer Barnsdale was that delivery notes only existed in respect of sales where there were sales invoices, as was the case with the appellant.

115. In the email correspondence (which had been read to the Tribunal) pertaining to the original Application for Disclosure which had been abandoned, Mrs O'Reilly had pointed out that there were multiple customers of TIWC and the material was voluminous. Therefore, she had argued that the Application was not proportionate and furthermore in terms of section 18(1) of Commissioners for Revenue and Customs Act 2005, HMRC owed a duty of confidentiality to those other customers.

116. Mr Jones' argument was that the delivery notes were relevant because a cross check might show that the records of TIWC were not reliable. If, for example, TIWC had been intent on identity fraud the delivery notes might confirm that. The word "might" is relevant because it could be argued that the Application could be described as a fishing exercise.

117. In relation to identity fraud, when that had first been raised by Mr Jones on the first day of the hearing, Mrs McIntyre had objected to that line of argument because it had never been raised previously and amounted to an ambush. Whilst we understood her argument on that, we were persuaded that it was implicit in Mr Jones' arguments in the revised Skeleton Argument so HMRC had had notice of it. On that basis we had allowed him to pursue it.

118. We do not understand the argument that delivery notes would be implicated in any identity fraud since the clear evidence of Officer Barnsdale, which we accept, was that having examined tens of thousands of documents, delivery notes only existed where there were invoices declared for VAT.

119. Furthermore, the Application for Disclosure is disproportionate since the directors were arrested on 17 April 2013 and TIWC was put into liquidation on 19 July 2013. There can be no delivery notes beyond either of those dates.

120. Even looking only at the period between 14 October 2012 and 18 April 2013, we agree with Mrs McIntyre that that would still be an extremely onerous task.

121. We know from Officer Dyson's evidence that details of TIWC's customers had been sent to a number of teams of HMRC officers in various locations in the UK. The objective was to risk assess those customers in the context of their current tax returns before selecting which of those customers should be selected for enquiry. That suggests a great many customers.

122. Quite apart from the fact that it is clear from what we know of the criminal trial that there were a large number of other customers of TIWC, the obvious inference is that some of those customers would have been competitors of the appellant.

123. On the balance of probability, trying to cross check delivery notes approximately ten years after the event is not likely to meet with much success even if those other customers had retained such records and/or were willing to co-operate.

124. For the avoidance of doubt, at all times we have had in mind Rule 2 of the Rules. The overriding objective requires the balancing of a number of (often competing) objectives, including dealing with cases in a proportionate way and avoiding delay.

125. We agree with HMRC that to disclose other customers' details and the purchases made by them would neither be appropriate nor proportionate. Further delay would not be appropriate.

126. The Application for Specific Disclosure is refused.

The Substantive Background

127. The appellant is a company and was incorporated in the United Kingdom ("UK") on 10 April 2012. On incorporation, the entire share capital of the appellant consisted of 100 ordinary shares which were held by two participators, namely, Mr Bhattachan and Mr Paudel who were also directors. Each of the directors held 50 ordinary shares.

128. Annual returns and Confirmation Statements filed by the appellant with Companies House confirm that those directors continue to be the only participators in, and directors of, the appellant. It is not in dispute that the appellant is a close company for Corporation Tax purposes.

129. Mr Paudel had been a partner in a business operating as an off-licence called the Bottle Stop between November 2011 and February 2014. In their letter of 12 December 2017, VKM confirmed that Mr Paudel purchased stock for the Bottle Stop using his own bank accounts and was reimbursed. Prior to becoming a director and participator of the appellant, Mr Bhattachan had no previous experience of working in the alcohol trade. His wife had been a partner in BN Food and Wine until May 2016. On occasion, Mr Bhattachan purchased stock for that business paying for it from his personal bank account. He was reimbursed in cash.

130. The appellant was registered for VAT on 1 May 2012 and the business activity was declared to be "retail sale of non-specialised stores with food, beverages or tobacco predominating (main activity)". The trading address was given as 19 Earl Rise, London and the VAT registration document was signed by Mr Bhattachan at the same address.

131. In his witness statement Mr Paudel stated that the appellant "trades in the wholesale of wine, beer, spirits and other alcoholic beverages [and] does business with many wholesalers and cash & carry shops".

132. On 18 May 2016, Officer Dyson gave notice of HMRC's intention to enquire into the appellant's Corporation Tax return for the APE 31 March 2015 pursuant to Schedule 18, paragraph 24 Finance Act 1998 ("Schedule 18"). A schedule was issued requesting the statutory records and other information. Officer Dyson's enquiries into the Bottle Stop and BN Food and Wine had established that there were at least two lines of stock where there was no evidence of purchases. There were brands where little or no stock had been found in the records for those two businesses. In Officer Dyson's words, the enquiry into the appellant "fed off" the enquiries for those businesses. Basically, he questioned whether those brands came from the appellant.

133. On the same date, HMRC gave notice of their intention to enquire into the income tax self-assessment returns of both directors in respect of the tax year ended 5 April 2015 pursuant to section 9A Taxes Management Act 1970 ("TMA"). Officer Dyson confirmed in evidence that that was because HMRC had noted that in evidence submitted to the Home Office relating to an application to stay in the UK, Mr Paudel had declared self-employment income for his delivery service for local off-licences of approximately £25,000 whereas his tax return had

stated “Nil”. Ultimately he declared taxable income of £29,413. The figure for the previous year had been £4,632.

134. Copies of all of the letters were sent to the appellant’s then advisors, VKM.

135. Correspondence ensued and on 25 January 2017, HMRC wrote to VKM pointing out that only two bank accounts (Lloyds and Halifax) had been disclosed but that they held information indicating that full disclosure had not been made. On 3 March 2017, VKM replied stating that Mr Paudel had confirmed that there were no other bank accounts or credit cards. As requested by HMRC, they enclosed a breakdown of stock figures as at 31 March 2014 and 2015 in the sums of £57,688 and £61,201 respectively.

136. There were a considerable number of product lines so Officer Dyson decided to limit the labour intensive process of scheduling stock records to just the wine and beers. His intention was to check whether the stock records for the APE 31 March 2015 were reliable. He added stock purchases, as identified by the purchase invoices, to the opening stock figures and then subtracted the sales of stock, as identified by the sales invoices. Had the records been accurate then the resulting figures of stock on hand should have been similar to the closing stock figures.

137. The Officer took into account credit notes for returned sales and purchases and the seizure by HMRC of non-duty paid stock which had occurred in March 2015. He cross-referenced the sales and purchase invoices and broke that down into details of customer, transaction date, invoice number, product, pack size, bottle or can size and purchase or selling price.

138. The outcome of that exercise was that he identified significant differences between the stock on hand reported in the accounts compared with the figures that should have been held. The expected stock on hand figures were both higher and lower than the recorded figures. There were also examples of product lines being sold for which either no purchase invoices could be found or where they were not included in the opening stock analysis. Officer Dyson calculated that the Potential Additional Sales amounted to £168,882 in respect of beer and £48,591 in respect of wine.

139. On 22 March 2017, Officer Dyson shared that information and his stock flow exercise with Officer Maqsood who was handling a parallel VAT enquiry. He told her that he would be meeting with the appellant to discuss those findings. She analysed the spreadsheets detailing the discrepancies doing sample checks against invoices. She agreed with his findings.

140. The review of the business records identified stock purchases made using debit or credit cards not linked to the accounts held by either the company or the directors. There were deposits into the directors’ private bank accounts from sources which had not been explained.

141. The result of HMRC’s enquiries was discussed with the directors and their representatives at a meeting on 16 May 2017. At the outset of the meeting Officer Dyson intimated that he would send notes of the meeting to VKM “to provide the opportunity to correct any mistakes or understandings”. A number of issues were canvassed and those included:

(a) The directors were asked to provide documentary evidence of the loans totalling £23,400 which were said to have been contributed to the initial investment in the appellant amounting to £50,000 or £60,000.

(b) The directors confirmed that capital had been accumulated for each director on a piece-meal basis by way of paying for business items out of private funds. That included items such as rent, service charges, fixtures and fittings, computers and stock purchases. The directors’ salary was not drawn but was added to the directors’ loan account. It was

confirmed that information would be provided to substantiate the amounts that had been credited to the directors' loan accounts.

(c) There were £11,400 of loans to Mr Paudel and £12,000 to Mr Bhattachan. In the former case, VKM confirmed that the £11,400 had been paid into a Lloyds account and the funds had then been used to make business purchases. Officer Dyson pointed out that that conflicted with information taken from the bank statements which suggested that £4,000 of that amount had been utilised for the purchase of the Bottle Stop. It was agreed that that matter would be explored further in correspondence. Mr Paudel said that there were no records kept by either himself or lenders detailing the amounts he had borrowed. As far as Mr Bhattachan was concerned, £6,000 had been used for purchases for the appellant and the other half had been used privately.

(d) VKM confirmed that the accounts had been prepared from purchase and sales invoices, bank statements and expense vouchers.

(e) The appellant operated a single bank account with Barclays. That was a hitherto undisclosed bank account.

(f) The two directors were responsible for buying stock and no one else made purchases on behalf of the appellant.

(g) The appellant did not operate a policy of buying cheaper stock near to the sell-by date so therefore did not have any problems with stock going past the sell-by date and becoming unsaleable.

(h) A record is kept of any stock that was sent back to suppliers as not required or damaged in transit.

(i) No records were kept of stock coming into the business and during the year to March 2015, no stock control records were maintained.

(j) The end of year stock figures were taken from a physical count taken by the directors who wrote down the numbers and then entered it into a computer and sent the details to VKM.

(k) During the course of the year fresh stock is purchased as and when required, based on the space available and having enough cash on hand to pay for the stock.

(l) A purchase invoice was always obtained for any stock bought by the appellant.

(m) No stock purchased by the appellant was passed to associated off-licenses, eg the Bottle Stop without a sales invoice being prepared and payment received.

(n) In the year to March 2015 there had been no significant problems with wastage and there had never been any thefts.

(o) The sales figure in the accounts is taken directly from the daily invoices. A sales invoice is raised in respect of every sale made and a copy retained by the appellant. Amounts due are received either in cash, cheque or by credit/debit card.

(p) Prior to October 2016 no cash handling records existed and staff were paid monthly in cash. Business records had been maintained in exactly the same way from the commencement of the trade until October 2016.

(q) A number of invoices to the Bottle Stop from Mr Paudel's business as a delivery and advisory service were not found in the Bottle Stop's records which suggested that those records were incomplete. Mr Paudel's self-assessment tax return for 2014 had been understated as the declared profit for that business had been stated as being nil but

accounts submitted in the course of the HMRC enquiry disclosed profits of £29,413. There were a number of unexplained deposits totalling £19,800 in the Barclays Bank account so that required further investigation.

(r) Officer Dyson had established that between 2011/12 and 2013/14, Mr Paudel had had access to at least approximately £80,000 but there was no evidence as to the source. Mr Bhattachan had appeared to have had access to only £9,800 in 2014/15 yet there was evidence of deposits of £23,346 and £15,200 to two bank accounts and payments totalling £430 per month to bank accounts that had not been disclosed. Further, Mr Bhattachan had obtained a mortgage of approximately £100,000 on a declared income of £7,800 and the repayments were £315 each month.

(s) Officer Dyson requested copies of further bank statements.

(t) Officer Dyson produced and explained the stock flow exercise pointing out the Potential Additional Sales of £168,882 for beer and £48,591 for wine. He pointed out that there were examples of stock being sold where there were no records of purchase or in the opening stock. It was put to the directors that the records provided to VKM were incomplete and the accounts understated the true level of profits by a considerable sum. He gave VKM and the directors a copy of the stock flow exercise. No comment was offered.

(u) The appellant denied any purchase of off record stock from TIWC.

The directors expressed a desire to reach an early settlement of the enquiries.

142. Officer Dyson sent the 13 page notes of that meeting to VKM on 23 May 2017 and requested that they be returned with confirmation that they were accurate or alternatively any amendments should be notified.

143. There was no reply.

144. On 4 September 2017, the Officer wrote again to VKM. He referred to the notes of the meeting and said that since he had not heard to the contrary, he assumed that the appellant was satisfied that it was a fair representation. He highlighted the concerns relating to the initial funding of the business, the stock flow exercise and the potential existence of further bank or credit card accounts used for business purposes. He also asked again about the unexplained deposits into the directors' private bank accounts which were in excess of their stated incomes. He reiterated that the stock flow exercise demonstrated that there must have been additional off record purchases and sales and that the products that were involved were the same products that were absent from the purchase records of the Bottle Stop and BN Food and Wine, ie it was additional stock that was neither recorded in the appellant's sales records nor taken to the directors' loan accounts. In summary, there were "clear indications of substantial off-record transactions".

145. On 11 December 2017, VKM wrote two letters to HMRC giving some information about banking for each director. In summary, those were vague and lacking in detail. We say vague, not least, because the letter for Mr Paudel said *inter alia* that he did not have records and that, referring to six, four figure deposits "he vaguely recalls that some of the deposits were made from cash reimbursement made either by the Bottle Stop or by [the appellant] as some purchases were paid by him personally. He did not have individual records for these transactions…".

146. On 12 December 2017, VKM wrote to HMRC stating that:

(a) The Officer had not considered the points put forward at the meeting or "through the post".

(b) The directors did not agree with HMRC. It was argued that HMRC's "assumptions" were "unsupported with correct facts".

(c) The directors had had to inject "working capital from their own sources" because of competition and a very small profit margin.

(d) The notes of the meeting were described as being "not in line with what they have explained to you in the meeting". It was not specified in what way.

(e) The directors stated that they disagreed with the Officer's calculations. They offered no detail beyond an assertion that the stock flow exercise had not taken into account out of date items, breakages, damaged items, unexplained items and returned items.

(f) From time to time the directors had withdrawn some of their capital and had reinvested it in the business on an as required basis. They had not required their original estimate of £50,000 or £60,000. (However, we observe that in his witness statement at paragraph 7, Mr Paudel contradicts that in some detail.)

(g) They provided an analysis of the director's loan account for APE 31 March 2013. There was only one consolidated loan account.

(h) From time to time the directors had used their savings and borrowings to buy stock so payments made by the directors were either credited to their current accounts or reimbursed to them. They had no documentary evidence so "they have estimated fair amount (sic) to be credited to directors' current account by mutually agreeing between themselves".

(i) There was no documentary evidence of sums borrowed or repaid.

(j) Mr Paudel's relatives in Nepal had assisted with repaying loans.

(k) Mr Paudel had left the Bottle Stop partnership in February 2014 and some of his investment therein was paid into the appellant when buying stock.

(l) Various suppliers were paid by the directors using their personal bank accounts and credits were made to their current account or loan account.

(m) It was stated that "Mainly directors would order/purchase stock using business and their personal bank accounts and debit/credit cards". They "occasionally" used the business card. They could not identify the five VISA debit cards, identified by HMRC, and assumed that they were old cards which had been replaced.

(n) The directors did not agree the calculation of the stock flow exercise. It was argued that the Officer may not have considered all of the sales invoices and out of date items, breakages, damaged items, thefts and returned items might not have been taken into account.

(o) The directors confirmed that they had not purchased any off record stock from TIWC and "All purchases made from this company were recorded and in their records if there were any".

(p) They had sent the bank statements the previous day and could not identify all of the entries. They considered that it was unreasonable that they should be asked to do so.

147. On 6 February 2018, having double checked the calculations in the stock flow exercise and made corrections where possible, Officer Dyson responded at length and in detail. In particular he stated that:-

(a) The directors had not identified which points that had been made at the meeting had allegedly been disregarded. There had been no correspondence since the meeting other than a letter from VKM asking for further time to respond.

(b) He referred to the analysis of the loan account pointing out that there should be separate accounts for each director and pointed out that no documentation had been provided to support any of the amounts credited to the loan account. There was no indication as to who had purchased the van and equipment, or if those already belonged to the directors and how those had been valued.

(c) He highlighted the lack of evidence in relation to both the initial funding of the appellant and the purchase of stock. There was no evidence to confirm whether either director had paid the rent, rates, service charges or PAYE on behalf of the appellant.

(d) He stated that the explanation about the VISA debit cards was not tenable since duplicate statements could be obtained.

(e) No evidence had been provided in relation to the unexplained deposits of £19,800. He pointed out that the Barclays bank account was used by both the appellant and the Bottle Stop.

(f) Having addressed various other issues in regard to the individual directors he went on to again explain how the stock flow exercise had been conducted. He made it explicit that his main cause for concern was the discrepancies in the sales records.

(g) He identified 11 bullet points covering points that had been carefully and deliberately established at the May 2017 meeting, in particular, addressing the points made at sub-paragraph (n) in the preceding paragraph, ie theft etc. He pointed out that in a letter dated 21 November 2016 to HMRC the appellant had stated that any goods broken in transit would be returned to the supplier and there were hardly any breakages.

(h) He had accounted for incidences where goods were returned and a credit note received. If a credit note was issued to a customer for returned goods, that value had been added to stock.

(i) The sales figures were based on sales invoices but where invoices had not been provided he had used a reasonable estimate.

(j) He pointed out that the stock flow exercise had been limited to beer and wine and it was entirely possible that the same deficiencies would arise in relation to cider, stout and spirits.

(k) He requested that the appellant review the stock flow exercise and forward their comments to him. He pointed out that the opening and closing stock figures, together with the sales and purchase figures, were based entirely on the business records and the information provided directly by the directors. Any amendment would need to be fully supported with appropriate documentary evidence.

148. He concluded by stating that it was HMRC's view that:-

(a) Amounts of cash had left the business which had not been recorded.

(b) An analysis of stock indicates that there were more sales made by the company than were provided for on sales invoices.

(c) Both directors had been asked to supply documentary evidence to support the source of deposits into their bank accounts and had not done so. There were further issues regarding the amounts of cash available to them for private spending. He asked for a response on or before 20 March 2018.

149. On 2 March 2018, the Officer was informed by telephone that, under the terms of an insurance policy, the appellant had instructed new agents, Croner Taxwise, to deal with the enquiry. They asked for an extension of time in order to investigate the matter further.

150. On 6 March 2018, Officer Dyson forwarded to them a copy of the bank analysis spreadsheets and a copy of the stock flow exercise.

151. At 14:00 hours on 16 May 2018, Officer Dyson had a telephone conversation with Croner Taxwise. That agent said that Mr Paudel had explicitly stated that the appellant had not dealt with TIWC. Officer Dyson explained that the criminal trial had established that off record sales had been made at half price to those customers for which invoices had been produced and that the details of the off record sales had been established via the Italian server. He explained that the appellant had certainly dealt with TIWC and had invoices.

152. Later that day, Officer Dyson emailed Croner Taxwise with copies of the evidence held regarding the recorded transactions between TIWC and the appellant and pointed out that the relevant sales invoices had been returned to VKM on 21 September 2015. He confirmed that HMRC were in correspondence with the Italian authorities regarding off record customer data.

153. That evidence included a letter from VKM dated 14 December 2015 who had written to HMRC's Liverpool team enclosing copy bank statements, vouching payments to TIWC for invoices dated 7 December and 15 October 2012 and 8 February and 21 March 2013. The bank statements which were enclosed were from the Barclays bank account which had not been disclosed to Officer Dyson until the May 2017 meeting.

154. On 16 July 2018, Officer Dyson wrote to Mr Paudel indicating that he intended to issue Information Notices in terms of Schedule 36 Finance Act 2008 to seven named individuals in order to establish whether in fact loans had been made.

155. On 17 July 2018, Officer Dyson wrote to Croner Taxwise confirming that HMRC were still in correspondence with the Italian authorities. He confirmed that there were indications that a substantial volume of the appellant's purchases from TIWC had been omitted from the accounts but he did not wish to comment further until the correct position had been established.

156. On 10 October 2018, Officer Dyson told Officer Maqsood that he had received no new information after December 2017 and therefore his calculation of the additional gross sales was £200,000 for APEs 31 March 2013 and 2014 and £220,000 for APEs 31 March 2015, 2016 and 2017.

157. On 11 October 2018, Officer Dyson wrote to Croner Taxwise stating he had received no further correspondence from the appellant, the directors or VKM and that Mr Paudel had not responded to the letter of 16 July 2018. He asked for a response to that letter in order to avoid having to approach the Tribunal. He advised that the Public Prosecutor's Office in Milan had now authorised HMRC to use the evidence from the criminal trial in the UK in any enquiries into the tax affairs of customers of TIWC. He stated that estimated VAT assessments would be raised to safeguard HMRC's interests.

158. On 18 October 2018, Croner Taxwise confirmed that if there had been off record sales the terms of the insurance policy would not cover the costs of the enquiry and they would probably resign agency. It was confirmed that Mr Paudel had not been in contact. In November 2018, Mr Paudel authorised the Information Notices.

159. In the interim, Officer Maqsood had adopted Officer Dyson's APE figures and divided them into VAT periods. She then excluded the VAT from the gross values in order to calculate additional output tax due on sales. She decided to divide the gross calculated sales equally as there was no evidence of any fluctuations that would have supported any other approach. The

outcome of that exercise was that for the VAT periods 06/12 to 03/17 inclusive, the tax on the additional sales amounted to £176,656. We annex at Appendix 3 the detailed breakdown of that.

160. She did consider whether there should be an allowance for purchases and expenses against the calculated output tax but she did not allow input tax against the sales values because there was no evidence that input tax had been charged or paid when the goods were purchased. She had asked for further evidence but nothing was provided. She was aware that goods had been seized by HMRC in the past because there had been no evidence that duty had been paid.

161. For the APE 31 March 2013, the assessment was made on the basis that there had been off record purchases from TIWC and those goods had subsequently been sold. No invoices had been issued for those and no output tax had been declared or paid in respect of those sales by TIWC.

162. For the APE 31 March 2014, the Officer stated that the assessment was based on the evidence from the Italian server and based on the actual sales, purchases and stock records provided by the appellant. There was no allowance for input tax as there was no evidence that input tax had been paid on those sales. It was not put to her that if she was adopting Officer Dyson's figures then it was not based on the stock flow exercise.

163. For the following three accounting periods, the additional sales were calculated using Officer Dyson's stock flow exercise. For product lines where there was more stock on hand than there should have been, the figures were based on the purchase invoices provided which would have included input VAT claimed by the appellant.

164. For product lines where the stock flow exercise showed less on hand than there should have been and there was no evidence of purchases or of VAT having been paid on purchases she did not allow for input tax. That was simply because in the absence of invoices or alternative evidence, the law does not permit input tax. She took the same approach to sales of stock which were not in the opening stock and for the same reason.

165. On 21 November 2018, Officer Maqsood issued a letter headed "Notification of Vat Assessment" for a total of £176,656 for the periods 06/12 to 03/17 based on the stock flow exercise. She indicated that if the appellant did not agree with the assessment then information should be provided within 30 days. She asked for full disclosure of all cash purchases from TIWC and enclosed factsheets about penalties.

166. On 3 December 2018, HMRC issued a "Notice of Assessments" VAT 655 notifying the amounts of the assessments by period. The assessments were appealed on 13 December 2018.

167. On 28 January 2019, Officer Dyson wrote to Croner Taxwise outlining the history of the Italian Customs' and HMRC's investigation of TIWC and his proposed course of action in that regard. In particular he confirmed that

(a) TIWC had directly supplied a number of cash and carry outlets in the UK of whom the appellant was one. The majority of the wine supplied was Villa Radiosa which was considered to be counterfeit. Those businesses had agreements in place with TIWC for payments and deliveries. Typically for every case of wine purchased at full price (£18 plus VAT) a further three cases of wine could be purchased at £8.50 per case. Full price wine would be invoiced and payment made by BACS or cheque. The half price wine would be paid cash in hand on delivery but no invoice or delivery note would be left with the customer. The van drivers would collect the cash payment in an envelope with a signed delivery note.

(b) TIWC retained records of all cash payments on their computer systems for purposes of making cash payments to their Italian suppliers.

(c) On 8 June 2017, the owner and financial controller had been found guilty and sentenced to a total of 17½ years.

(d) The records maintained by TIWC confirm that the cost of the invoiced stock supplied to the appellant equated to approximately £17.53 plus VAT per case and the cost of the un-invoiced stock equated to approximately £8.56 per case and that fitted the profile of the typical agreements.

(e) Extracts of the TIWC records relating to the appellant which were used as evidence in the trial were provided.

(f) The stock list for the appellant for the APE 31 March 2014 did not record any Villa Radiosa.

(g) A sales invoice dated 1 March 2013 shows that the appellant was selling Villa Radiosa at £17.99 plus VAT per case. Therefore the 9,700 off record purchases, per the TIWC records, would have raised additional sales of £209,423 gross or £174,503 net. The additional net profits on those goods alone would be assessable to Corporation Tax at £174,503 minus £83,120 which equals £91,383. VAT would be chargeable on all additional sales.

(h) Apart from disputing the stock flow exercise neither VKM nor the directors had provided any further information. Accordingly, unless some documentary evidence was provided to prove that there were not inaccuracies or off record sales, Corporation Tax assessments would be raised. Further, the director's loan account would be reviewed with a view to assessments being raised under section 455 Corporation Tax Act 2010 if it were to be found that the accounts became overdrawn at any time and were not brought back into credit. The directors would also be assessed on any beneficial loan charges.

(i) The Officer asked for a response by 15 March 2019.

168. On 25 March 2019, Croner Taxwise confirmed that the insurance company had withdrawn cover and that they were no longer acting.

169. On 27 March 2019, Officer Dyson wrote to VKM enclosing a copy of his letter of 28 January 2019 and asking for a response to that and to the letters of 4 September 2017 and 6 February 2018 as a matter of urgency and before 30 April 2019.

170. On 16 April 2019, a new agent, Vincent Curley & Co Ltd ("VC"), was appointed and requested an out of time review of the VAT assessments. After requesting various further extensions of time, on 4 June 2019, they intimated that they were working jointly with another new firm of tax advisers, Craggs & Co who would handle the direct tax matters. They requested another extension of time.

171. On 8 August 2019, the Review Conclusion letter was issued upholding the VAT assessments. That narrated the history. The reviewing officer pointed out in particular that:

(a) The opening stock of a Merlot wine was nil in 2014/15 but it was recorded that 60 cases had been purchased and six cases had been sold. However, the closing stock was also nil. Therefore the sale of 54 cases had not been recorded.

(b) The opening and closing stock for a Malbec wine was also nil in that year, yet sales records disclosed the sale of five cases of that wine.

(c) For 500 ml stocks of Grolsch lager the opening stock was 36 cases and a further 250 cases were recorded as having been purchased. Therefore only 286 cases should have been

available to be sold. However, there were recorded sales of 405 cases and the closing stock was 33 cases.

172. The results of the stock flow exercise taken with the TICW records led the Officer to find that a substantial amount of purchases and sales were missing from the records so the VAT returns were inaccurate. Accordingly best judgment assessments were appropriate.

173. The Officer explained that in calculating the assessments HMRC had erred in favour of the appellant in that:

(a) The 2013 and 2014 assessments were based on off record sales covering a period of only six months whereas a period of a year could have been used.

(b) The assessments for 2015, 2016 and 2017 had been based on only wine and beer whereas it would have been reasonable to have included cider, stout and spirits.

(c) In 2013 and 2014, only the TIWC sales were included and cider, stout and spirits had not been included.

174. On 17 September 2019, Officer Dyson wrote to the appellant, with a copy to VC, referring to the previous correspondence pointing out that no response had been received. He stated that if no response was received within 30 days he would issue a Closure Notice and Revenue Amendment for the APE 31 March 2015. Those would be accompanied by Revenue Assessments for APEs 31 March 2013, 2014, 2016 and 2017. Penalties would follow.

175. On 14 October 2019, VC emailed HMRC stating Craggs & Co were no longer acting.

176. On 15 October 2019, Officer Dyson spoke with VC explaining that Alternative Dispute Resolution would not be possible because of the lack of information from either the appellant or VKM. VC undertook to take instructions.

177. Ultimately, on 22 October 2019, in the absence of any further information, HMRC issued the Corporation Tax and section 455 assessments which are the discovery assessments in this appeal. The figures the Officer used in the Corporation Tax assessments for the 2013 and 2014 years were based on the estimated £200,000 additional sales used in the VAT assessments for each year, less a deduction of £33,332 in respect of the VAT charged less the £83,120 shown in the TIWC records as being paid in cash for the purchase of the goods. He applied that deduction in both years which was to the benefit of the appellant.

178. For the years ending 31 March 2015, 31 March 2016 and 31 March 2017 the amounts assessed were based on the £220,000 additional sales used in the VAT assessments less a deduction of £36,664 in respect of the VAT charged. As the figure of additional sales was taken from the records provided by the appellant there were no additional costs incurred by the appellant in respect of the purchase of goods.

179. As far as the charge under section 455 is concerned, the Officer had concluded that the figure of "Other Creditors" in the accounts was the combined balance of the two director's loan accounts. There was only one consolidated loan account but, in the absence of any evidence, the Officer split the balance equally. That has not been challenged. He subtracted the additional profits arising from the stock flow exercise from the closing balance on the director's loan account at 31 March 2013 to determine the revised balance. He then determined the revised balance in each year and the balance reported in the accounts was added back to the previous year's revised balance before the potential additional profits were then subtracted. The section 455 charge was then applied to the increase in the level that the account was overdrawn in each year.

180. On 15 November 2019, VC appealed those assessments and asked for a review.

181. On 25 November 2019, the penalty assessments were issued on the basis of deliberate behaviour in each of the years. The disclosure of inaccuracies was stated to be prompted. A full explanation was given in the Penalty Explanation letter issued on the same date. In summary, the level, frequency and nature of the omissions from the business records for which no adequate explanation had been provided, led the Officer to the conclusion that the understatements were deliberate. There was no reduction for telling as nothing had been disclosed or for helping as there had been no assistance in quantifying the understatements. There was a reduction of 30% for giving as the directors had provided some records and attended the meeting; that is the maximum possible reduction. The penalties totalled £149,139.72. No appeal has been lodged.

182. On 23 December 2019, Officer Dyson was notified that Rainer Hughes had been appointed to act for the appellant and confirmation was received on 14 January 2020.

183. Correspondence ensued and, on 7 February 2020, Officer Dyson wrote to Rainer Hughes summarising the position:

(a) The Corporation Tax inquiry had identified problems with the stock figures which indicated that there may have been additional unrecorded sales. VKM had been given time to review the stock flow exercise but never suggested any alternative figures.

(b) VAT assessments were raised prior to the expiry of the 12 month rule preventing issue.

(c) Croner Taxwise were appointed but subsequently withdrew and VC was appointed.

(d) VC submitted a request for a review of the VAT assessments and the review officer upheld the decision.

(e) The Officer had contacted VC and it was agreed that VC would review the figures in the stock flow exercise. No response was received so the Corporation Tax assessments were issued, followed by the penalty assessments.

(f) VC had submitted an appeal to HMRC against the Corporation Tax assessments only and requested a review by HMRC. VC undertook, again, to review the stock flow exercise.

(g) No appeals to the Tribunal had been made in respect of the Corporation Tax assessments.

184. The Officer requested that the assessments and penalties be appealed.

185. On 11 February 2020, an appeal was lodged against the Discovery Assessments and a statutory review of the decision was requested. The following day HMRC issued their View of the Matter letter pointing out the lack of response to the letters of 2 February 2018 and 28 January 2019. That correspondence was enclosed. Officer Dyson reiterated that in the absence of any responses ADR was not believed to be appropriate.

186. On 19 February 2020, HMRC wrote to Rainer Hughes asking that any representations be lodged by 29 February 2020. Nothing was lodged.

187. On 25 March 2020, the review was concluded and the reviewing officer upheld the Corporation Tax assessments and section 455 charges without amendment.

188. On 23 April 2020, the appeal was lodged with the Tribunal. The VAT assessments had been appealed on 4 September 2019 and the penalties on 15 November 2019. On 1 June 2020 the Tribunal directed that the Corporation Tax and VAT appeals be consolidated.

189. When compiling their Statement of Case, HMRC noted that they had made an error in the calculation of the section 455 charge for the APE 31 March 2017. They had raised the charge on 25% of the overdrawn accounts, as was the case in previous years, but the legislation stated that for that year the charge should be calculated at dividend upper rate of 32.5%. Accordingly, the correct amount of charge for APE 31 March 2017 is £49,108.47 being £151,103 x 32.5%.

The Law

190. We set out the relevant law at some length in relation to both Corporation Tax and VAT since it has repeatedly been 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.

191. In relation to the error in the calculation of the section 455 charge for APE 31 March 2017, HMRC argue, correctly, that they have apologised for the error but it does not affect the underlying liability to the charge.

192. That is because section 114(2) Taxes Management Act 1970 ("TMA") provides that:-

> "114(2) An assessment or determination shall not be impeached or affected –
>
> (a) by reason of a mistake therein as to –
>
> …
>
> (iii) The amount of the tax charged …".

193. If the Tribunal is satisfied that there has been an undercharge then in accordance with section 50(7)(c) TMA which reads:

> "If, on an appeal notified to the tribunal, the tribunal decides-
>
> …
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment
>
> the assessment or amounts shall be increased accordingly."

the Tribunal has the power to increase the section 455 charge to £49,108.47.

Corporation Tax

194. The relevant Corporation Tax provisions are:-

Schedule 18

"Paragraph 21

> (1) A company which may be required to deliver a company tax return for any period must –
>
> (a) Keep such records as may be needed to enable it to deliver a correct and complete return for the period, and
>
> (b) Preserve those records…

Paragraph 41

(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that –

(a) an amount which ought to have been assessed to tax has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given which is or has become excessive,

he may make an assessment (a 'discovery assessment') in the amount or further amount which ought in his opinion to be charged in order to make good to the Crown the loss of tax.

(2) If an officer of Revenue and Customs discovers that a company tax return delivered by a company for an accounting period incorrectly states –

(a) an amount that affects, or may affect, the tax payable by that company for another accounting period, or

(b) an amount that affects, or may affect, the tax liability of another company,

he may make a determination (a 'discovery determination') of the amount which in his opinion ought to have been stated in the return.

Paragraph 42

(1) The power to make –

(a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or

(b) a discovery determination,

is only excisable in the circumstances specified in paragraphs 43 or 44 and subject to paragraph 45 below.

(2) Those restrictions, do not apply to an assessment or determination which only gives effect to a discovery determination duly made with respect to an amount stated in another company's company tax return.

(2A) Those restrictions, other than the restriction in paragraph 45, do not apply so far as regards any income or chargeable gains of the company in relation to which the company has been given a notice within sub-paragraph (4) after any enquiries have been completed into the return (so far as relating to the matters to which the notice relates).

(3) Any objection to a discovery assessment or determination on the ground that those paragraphs have not been complied with can only be made on an appeal against the assessment or determination.

Paragraph 43

A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) or (2) was brought about carelessly or deliberately by –

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time.

Paragraph 44

(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs –

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) in a case where a notice of enquiry into the return was given –

(i) issued a partial closure notice as regards a matter to which the situation mentioned in paragraph 41(1) or (2) relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice.

he 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 paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to an officer of Revenue and Customs if –

(a) it is contained in a relevant return by the company or in documents accompanying any such return, or

(b) it is contained in a relevant claim made by the company or in any accounts, statements or documents accompanying any such claim, or

(c) it is contained in any documents, accounts or information produced or provided by the company to an officer of Revenue and Customs for the purposes of an enquiry into any such return or claim, or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1) or (2) –

(i) could reasonably be expected to be inferred by an officer of Revenue and Customs from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing to an officer of Revenue and Customs by the company or a person acting on its behalf.

(3) In sub-paragraph (2) –

"relevant return" means the company's company tax return for the period in question or either of the two immediately preceding accounting periods, and

"relevant claim" means a claim made by or on behalf of the company as regards the period in question or an application under section 751A of the Taxes Act 1988 made by or on behalf of the company which affects the company's tax return for the period in question.

…

Paragraph 46

(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.

(2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the

end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period.

(2A) An assessment in a case involving a loss of tax—

(a) brought about deliberately by the company (or a related person),

(b) attributable to a failure by the company to comply with an obligation under paragraph 2, …

(c) attributable to arrangements in respect of which the company has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the company was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promotor reference number) but failed to do so,

may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(2B) In this paragraph "related person", in relation to a company, means—

(a) a person acting on behalf of the company, or

(b) a person who was a partner of the company at the relevant time.

(3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment."

Section 455 CTA 2010

"455 Charge to tax in case of loan to participator

"(1) This section applies if a close company makes a loan or advances money to –

(a) a relevant person who is a participator in the company or an associate of such a participator,

(b) the trustees of a settlement one or more of the trustees or actual or potential beneficiaries of which is a participator in the company or an associate of such a participator, or

(c) a limited liability partnership or other partnership one or more of the partners in which is an individual who is –

(i) a participator in the company, or

(ii) an associate of an individual who is such a participator.

(2) There is due from the company, as if it were an amount of Corporation Tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to [such percentage of the amount of the loan or advance as corresponds to the dividend upper rate specified in section 8(2) of ITA 2007 for the tax year in which the loan or advance is made].

(3) Tax due under this section in relation to a loan or advance is due and payable in accordance with section 59D of TMA 1970 on the day following the end of the period

of 9 months from the end of the accounting period in which the loan or advance was made.

(4) For the purposes of this section and sections 456 to 459, the cases in which a close company is to be treated as making a loan to a person include a case where –

(a) that person incurs a debt to the close company, or

(b) a debt due from that person to a third party is assigned to the close company.

In such a case, the close company is to be treated as making a loan of an amount equal to the debt.

(5) If a company (C) controls another company (D), a participator in C is to be treated for the purposes of this section as being also a participator in D.

(6) In this Chapter, "relevant person" means –

(a) an individual, or

(b) a company receiving a loan or advance in a fiduciary or representative capacity.

(7) For exceptions to the charge under this section, see section 456.

(8) See also –

(a) section 458 (relief in case of repayment or release of loan),

(b) section 459 (loan treated as made to participator), and

(c) sections 460 to 462 (loan treated as made by close company).

195. The words in square brackets in subsection (2) were substituted by section 50(1) Finance Act 2016. The previous version read [25% of the amount of the loan or advance].

VAT

196. Insofar as relevant, Regulation 31 of The Value Added Tax Regulations 1995 reads:

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

(a) his business and accounting records,

(b) his VAT account,

(c) 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".

197. 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)

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

199. 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* [1981] STC 290 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."

200. HMRC relied upon that case and also relied upon the three further criteria which were identified in the case of *C A McCourtie* LON/92/191 where the Tribunal stated:

> "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."

201. We were not referred to the case but at paragraph 30 of his judgment in *Rahman (t/a Khayam Restaurant) v Commissioners of Customs and Excise* [2002] EWCA Civ 1881 ("Rahman") , Chadwick LJ cited the quotation from Woolf J in *Van Boeckel* that we have set out 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.'"

202. 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."

203. 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* [2004] EWCA Civ 1015.

204. At paragraph 10, Carnwarth LJ (as he then was) said:

> "It should be noted that the shorthand 'best judgment', as used in some of the cases, may be misleading, if it is taken to imply a higher standard than usual. The statutory words 'to the best of their judgment' are used in a context where the taxpayers' records may be incomplete, so that a fully informed assessment is unlikely to be possible. Thus the word 'best', rather than implying a higher than normal standard, is a recognition that the result may necessarily involve an element of guesswork. It means simply 'to the best of (their) judgment on the information available' (*Argosy Co v IRC* [1971] 1 WLR 514, 517 per Lord Donovan)."

205. He went on to say at paragraph 14 that:

> "Generally, 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)."

206. We observe that *Bi-Flex Caribbean* was a Corporation Tax case and thus is relevant to both taxes.

207. Having considered a number of Authorities, at paragraph 21, in the context of a finding by a Tribunal that HMRC had made a mistake, Carnwarth LJ confirmed what Chadwick LJ had said in *Rahman* highlighting the following, 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 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 the Tribunals.

208. 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." (Emphasis added)

Discussion

209. In his Closing Notes, whilst recognising that Mr Paudel had argued that his record keeping had been "satisfactory", Mr Jones conceded for the appellant that it had "poor record keeping". Indeed he argued that HMRC's own case was that the appellant's "record keeping and stock system was suboptimal" so it would be unfair to take any adverse inference from the stock flow exercise.

210. The starting point for the Tribunal is that we have no hesitation in finding that the appellant did not comply with its statutory obligations in relation to record keeping for either Corporation Tax or VAT purposes. It is obvious from the stock flow exercise that there are major omissions in the records. Mr Paudel is therefore incorrect in stating in his witness statement that he and his fellow director ensured that the appellant met its statutory obligations.

211. Therefore neither the Corporation Tax returns nor the VAT returns, as filed by the appellant, were accurate since they were based on those records.

212. The directors were clear that the record keeping and method of doing business had not changed from the date of incorporation until October 2016 and we accept that. HMRC rely on

the "presumption of continuity" as articulated in *Jonas v Bamford* 1973 51 TC where Walton J observed, at page 25, that:

> "… once the Inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

213. We were not referred to the case but *Jonas v Bamford* was considered by the Tribunal in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) where HMRC also sought to rely on the presumption of continuity. We agree with the observations of the Tribunal in *Syed* at paragraph 38 that:

> "In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."

214. Of course, the presumption of continuity is only a presumption which a taxpayer may rebut. As we will explain, we find that the appellant has failed to rebut the presumption of continuity.

215. Regrettably, notwithstanding numerous requests, as can be seen, not one of the appellant's five representatives has responded in any material detail to the numerous questions posed by HMRC. They have had every opportunity to have done so.

216. Mr Bhattachan chose not to give evidence. That is his right but, as we have found, Officer Dyson had identified a number of areas of concern in relation to him and his dealings with and for the appellant. Those are unanswered including the argument in HMRC's Skeleton Argument for Corporation Tax at paragraph 80 that the bank statements provided by Mr Bhattachan "showed no withdrawals and no day-to-day household expenditure other than utilities, loan and mortgage payments".

Mr Paudel

217. We did hear from Mr Paudel. Mr Jones asked us to find that Mr Paudel was a businessman of good character with no convictions. He said that HMRC had found him to be a fit and proper person for his alcohol licenses. In his Closing Notes he described his "direct evidence" as coming from a "man of good character".

218. Mr Jones had objected to Officer Dyson's evidence that the enquiry into Mr Paudel's self-assessment tax return had been triggered by information from the Home Office (see paragraph 133 above). We did not uphold that objection. The notes of the meeting with HMRC on 16 May 2017 record the significant discrepancy between the return for 2013/14 and the actual profits. In his evidence, which was heard later than that of Officer Dyson, Mr Paudel did not address the issue.

219. We can also see that Mr Paudel was warned long ago that a penalty would be imposed for that omission from his return. We do not know, and did not ask, whether that penalty was issued and, if so, whether it was on the basis of deliberate or careless behaviour.

220. No explanation whatsoever, beyond the suggestion in the notes that the omission had been a mistake, has been advanced for such a substantial omission from a tax return. Moving from a declaration of no income to income of in excess of £29,000 is certainly not a minor matter. That does not support the assertion that he was a "man of good character".

221. The confirmation from VKM in the letter of 3 March 2017 (see paragraph 135 above), that Mr Paudel had confirmed that the appellant used only the Lloyds and Halifax bank accounts did not assist him. Not only was there the Barclays account, which both the Bottle Stop and the appellant used, but HMRC had identified a number of other bank accounts to which payments had been made and he has failed to produce evidence of those.

222. In a similar vein, his bland assertion in his witness statement at paragraph 28(6) does not help him. He was referring to paragraph 17.4 of HMRC's Statement of Case which stated "there were instances on which goods were purchased using debit cards not associated with the Appellant's bank account". He said that "I have discussed this with my co-Director, and we have no knowledge of any other debit/credit cards being used for purchases" but that does not sit well with VKM's letter of 12 December 2017 (see paragraph 146(m) above).

223. Further, HMRC had given the appellant details of the numbers on the debit cards which had been identified from the appellant's records. VKM mention credit cards but Officer Dyson's evidence was that he did not know whether the appellant or the directors had credit cards since no information had been provided.

224. We have also identified the differing explanations about the initial funding (see paragraph 146(f) above) in relation to the letter of 12 December 2017 from VKM.

225. In Closing Submissions it was argued that there were only small differences between Mr Paudel's oral evidence and that letter. With respect we disagree and we find that Mr Paudel's evidence in that regard was not persuasive. Mr Jones asked him in re-examination if he had seen that letter before it was issued. Firstly, he said that he could not say but then he argued that his English was not good enough to have enabled him to understand it. That does not sit well with the choice to decline the services of an interpreter at the hearing. We find that that letter is an accurate description of the instructions given to VKM at the time.

226. Officer Dyson's evidence, and he was specifically asked about it, was that at the meeting in May 2017, Mr Paudel had understood everything and that Messrs Mehta and Khadka, the Chairman and Director of VKM, had participated. VKM's letters are very clear in their terms and explicit in stating that they have taken instructions.

227. In his Closing Notes, Mr Jones said that Mr Paudel had been criticised for his evidence to the effect that he had no recollection of seeing the notes of the May 2017 meeting or having discussed them with his agents. In re-examination, he had indeed repeatedly said that he could not remember when he saw the notes etc.

228. However, prior to that we have him noted as saying, when asked why he had not challenged the notes, that he had never seen the notes, then he said that he had never noticed and never read them. He then said that he had read them but he had missed the paragraphs that he now contested, being theft and wastage etc.

229. This is a specialist Tribunal and we are well aware that some taxpayers do not read such notes. To fail to do so is not the action of a prudent taxpayer. In this instance, all five of the appellant's agents would have been aware of the importance of those notes, the fact that Officer

Dyson's assessments, including the section 445 charges, were in large measure predicated on the information in those notes and the fact that the burden of proof when disputing the assessments lies with the taxpayer.

230. It was not only Officer Dyson who relied on the notes of that meeting. The Review Conclusion letter for VAT dated 8 August 2019 had no less than 21 bullet points which narrated the facts upon which HMRC relied that were derived from that meeting. HMRC's Statements of Case also referenced the notes of the meeting as did their Skeleton Arguments.

231. In his witness statement, at paragraph 15, Mr Paudel stated that, prior to the 16 May 2017 meeting, in March 2017, Officer Dyson had contacted the appellant "in regards to cash payments retained in records of TIWC". That is simply inaccurate. The first time that Officer Dyson asked about TIWC was at that meeting and it was at the very end of the meeting. It was restricted to:

(a) asking the directors if they had ever stocked Villa Radiosa and Mr Paudel replied in the affirmative and denied that there had been any purchases beyond the four purchases that had been identified from the delivery notes and invoices by HMRC, and

(b) Officer Dyson asked him to think carefully about that, referred to the penalty fact sheet and asked him to discuss the matter with VKM.

232. Mr Paudel's witness statement referenced the HMRC Statement of Case and disputed 11 paragraphs. One paragraph that was not disputed was paragraph 20 which narrated 21 facts that it was stated had been confirmed by the directors at the meeting.

233. Mr Paudel, and therefore the appellant, has been professionally advised throughout, so whether he read the notes or not, he was certainly on notice as to the contents. We do not find his explanation that he did not know the detail of the notes to be credible.

234. Mr Paudel told the Tribunal that "everything is recorded" and when taken to the spreadsheet with Potential Additional Sales he initially said that he did not accept that there were poor records or errors. Ultimately, he said that he accepted that there were errors in the records. When asked if that meant that there would be errors in the accounts, his response was that he did not have a clue about such things.

235. In his witness statement he had argued at paragraph 25 that the stock flow exercise had not taken account of stock that was damaged, lost, stolen, out of date or seized by HMRC (being what was challenged in relation to the records of the meeting). He confirmed that HMRC had seized 14 or 15 pallets in 2015 because duty had not been paid. In fact, the spreadsheet for the Potential Additional Sales had a column headed "Seized Stock" and the calculations added that back in so Officer Dyson certainly had taken that into account.

236. In summary, whilst we accept that there has been a considerable elapse of time, in his oral evidence there were numerous questions to which his answer was that he could not remember. However, he stated that he recalled what was said at the May 2017 meeting about theft and similar matters. He did remember that they shopped for stock every day and paid in cash most of the time because it was cheaper due to bank charges. When the appellant paid by cheque then they deposited money in the bank in order to cover the payment. In re-examination Mr Paudel said that records of all payments by debit cards should be placed in the "purchase file" and when asked if he was confident that all records would be there he said that there "could be mistakes" but he was not sure.

237. We were not persuaded that Mr Paudel was a credible witness.

Whether HMRC alleged fraudulent or dishonest behaviour?

238. We do not propose to address every argument that was advanced for the appellant in relation to the argument that HMRC had alleged fraudulent and dishonest behaviour. Mr Jones argued that it had not been put to Mr Paudel that he was fraudulent or dishonest and indeed it was not. However, we find that that was because, although HMRC certainly argued that the appellant's behaviour, through its directors, was deliberate and caused a loss of tax, they did not argue that it was either fraudulent or dishonest.

239. Mr Jones argued that HMRC had "rowed back" on the issue of fraudulent or dishonest behaviour but there was an "undercurrent" to that effect in the assessments and HMRC's case. The only inference to that effect that we found was at paragraph 73 of the VAT Statement of Case where HMRC had said that the behaviour was "at least deliberate". That was not repeated and Mrs McIntyre did not advance that argument at any stage.

240. In any event, in our view, that had not been Officer Dyson's approach. He made it very clear that he had relied on what had been said at the meeting on 16 May 2017 and had given VKM and others numerous opportunities to comment thereon and they simply had not responded in any satisfactory fashion. Officer Maqsood had adopted the same approach.

241. In summary, deliberate behaviour is not necessarily either fraudulent or dishonest and we do not accept that HMRC have argued fraudulent or dishonest behaviour.

TIWC

242. We do not accept Mr Jones' argument that this appeal turns on the evidence derived from the TIWC records.

243. Initially, the whole focus of Officer Dyson's enquiries had been the stock flow exercise looked at in the context of the evidence, or the lack of evidence, in relation to, for example,

(a) bank accounts and deposits,

(b) debit and credit cards,

(c) the Bottle Stop and BN Food and Wine enquiries and missing records therein,

(d) the funding of the director's lifestyles.

All of that is set out in the Officer's letter of 6 February 2018 to which there has been no response.

244. It has been argued for the appellant that the stock flow exercise was "tainted" by the information about TIWC but it was only in 2018 that the TIWC records came to the fore. We accept that Officer Dyson conducted the enquiry in the same way as any other enquiry where it is believed that the records are incomplete and therefore there is a risk that the returns will be inaccurate. That belief was rooted in what we have described in the preceding paragraph.

245. It was on 25 April 2018, that the Italian authorities authorised the use of their information in civil matters. As can be seen from paragraphs 155 and 157 above it was only later in 2018 that Officer Dyson became aware that the TIWC information could be utilised. In fact, far from tainting the stock flow exercise, in only using the TIWC records as the basis for the earlier two assessments, the charge to tax was reduced.

246. We reject the suggestion, which was repeated, that Officer Dyson was biased in his approach to the appellant because of the TIWC information.

247. At paragraphs 22 and 23 of the appellant's Skeleton Argument it is argued that in relation to VAT and the penalty assessments "HMRC's case is predicated upon it proving off record purchases from TIWC. That is in effect the beginning and end of its case." and the stock flow

exercise was an unreliable "second string to its bow". As far as Corporation Tax is concerned, it was argued that the taxes are inextricably linked and the issue was whether HMRC could prove that purchases of Villa Radiosa were made by the appellant for cash in the sums stated.

248. The first and obvious point is that the TIWC evidence is only relevant for the first two years being APEs 31 March 2013 and 2014 since those were the only two years in which there are alleged to have been any purchases and therefore sales.

249. The second point is that the Skeleton Argument at paragraph 39 is not accurate in stating that the same assumptions in relation to off record sales were made in respect of the later years as were made in respect of APE 31 March 2014. The later three years were based entirely on the stock flow exercise.

250. As can be seen from the Application for Specific Disclosure, it was argued by the appellant that TIWC might have been intent on identity fraud and created the records upon which HMRC rely for that purpose. We certainly do not accept the suggestion that it was for HMRC to prove that there was not identity fraud.

251. In his Closing Notes Mr Jones argues that it is essential for the Tribunal to ask what motive TIWC may have had when compiling their records in a situation where identity theft was an "obvious contender". As we have indicated at paragraph 101 above, we do not accept that identity fraud was a persuasive argument let alone an obvious contender. On the contrary, we find that Officer Barnsdale's evidence was a clear and measured account. She did not accept any suggestion of identity fraud. There were a great many customers of TIWC and the records were all in the same format.

252. She was very clear that TIWC's computers were linked to the server in Italy and, as we have found at paragraph 46 above, that is the source of all of the invoices and other information. We agree with the Comments that the true accounting records were on the server in Italy. We therefore find that those records are a sound foundation for Officer Barnsdale's schedules and therefore the other Officers' findings.

253. Having rejected the arguments about identity fraud in regard to the TIWC records we also reject the argument advanced in the Skeleton Argument at paragraphs 14 and 15 that TIWC sold the 9,700 cases, which HMRC state that the appellant had purchased, in Italy and that that wine never came to the UK.

254. Officer Barnstable's evidence was very clear. She explained the shipping arrangements and the abuse of e-Ads. For the avoidance of doubt, we find that on the balance of probability, the records recovered from the server are accurate, the goods were shipped to the UK and sold in the UK in the quantities and for the amounts recorded on the server. We do not need to rely upon the convictions in relation to TIWC but they support that finding.

Criticisms of the stock flow exercise and the enquiry generally

255. In his Skeleton Argument Mr Jones stated that "…the appellant will demonstrate that Mr Dyson's stock analyses contain fundamental errors". It was put to Officer Dyson that there was a mathematical error amounting to a 150% discrepancy in relation to the stock of Holsten Pils. Given that the stock flow exercise is extensive he was given time to check the number of cases involved.

256. After the lunchtime adjournment he confirmed that he had checked the arithmetic and there was a transposition error when he filtered and sorted the sales analysis and then manually input the results into the Potential Additional Sales spreadsheet. He apologised and said that that was precisely why he had asked the various agents acting for the appellant to let him have

their comments on the stock flow exercise. He said that it was disappointing that the error had not been identified as he would have amended the analysis (as he had amended other figures).

257. The sales analysis in question was the beer sales by invoice in date order and there were more than 4,100 invoices and numerous product lines. We accept that it was an innocent human error. We have not checked the arithmetic for the number of cases sold; Mr Jones said it was 540 and the Officer said that it was 521 instead of the original figure of 195. Either way, there are still significant discrepancies.

258. The consequence of this error is that, at best for the appellant, the Potential Additional Sales figure for beer of £168,882.32 (albeit it would appear that that may have been subsequently amended upwards) would fall by £7,862.55 and at worst, if the Officer is correct, by £7,429.54. That is not a material difference and, in our view, although it is unfortunate, it is certainly not a fundamental error.

259. We do not accept the argument that the analyses undertaken by HMRC were so flawed that they were unreliable. It was argued that the appellant did not accept that the inconsistencies in the appellant's stock records, when compared with the invoices, could support HMRC's conclusion that there were unrecorded purchases and/or sales.

260. In support of that argument, Mr Jones pointed to the discrepancies in relation to the Grolsch lager and the Malbec wine to which we have referred at paragraph 171 above and compared that with HMRC's reliance, in relation to VAT, on sales of Villa Radiosa. He argued that "…there is <u>no mention</u> of Villa Radiosa in any purchase or sales records maintained by the appellant". He suggested that HMRC could not argue that the appellant's record keeping was sufficiently contrived and managed to ensure that there was no mention of that but at the same time point to the lager and wine deficiencies as indications of off record purchases.

261. There certainly was mention of Villa Radiosa in the appellant's records as there were the four invoices marked by the appellant "Paid by Cheque" with the number of the cheque and, in three instances, the date.

262. Much play was made of the fact that the closing stock included no Villa Radiosa. Mr Jones asked the Tribunal to ponder the likely probability of 9,700 cases having been sold. Firstly, in terms of APE 31 March 2014, only 1,250 cases are recorded as having been sold to the appellant for cash and that was on 3 and 11 April 2013. We are not at all surprised that those were not in the closing stock figures. In cross-examination, Officer Dyson made the valid, and obvious, point that since the appellant was buying the wine at half price, that meant that the profit on resale would be significant. Clearly there would be an incentive to realise that profit as quickly as possible.

263. That leaves 8,450 cases for APE 31 March 2013. Of those, 3,850 had been purchased in 2012. Given that the evidence was that the appellant did not stockpile, it is not logical to suggest that they made another ten purchases including two invoiced purchases, one of which was ten days before the year end, if they did not have a market for the stock. We draw no inference, adverse or otherwise, from the fact that there was none of that wine in the closing stock. On the balance of probability it was sold.

264. We find that the analysis of the Grolsch lager and Malbec wine records do indicate very clearly that there were off record purchases. The fact that the appellant accounted for output tax in circumstances where input tax could not be reclaimed, does not affect that position. There is no evidence of the purchase price of either so the argument that the appellant was "the loser" because it accounted for VAT is simply an unsupported assertion. There is no evidence as to whether or not a profit was made overall.

265. Further, the paragraph to which Mr Jones referred in HMRC's Statement of Case for VAT in relation to that lager and wine also referred to the Merlot wine, to which we have also referred in paragraph 171, and that was an unrecorded sale.

266. Of the ten individuals who had allegedly lent money to Mr Paudel only three had replied in response to the mandate. The Officer was criticised for not accepting that those three had in fact made loans. He explained that there had been no detail or documentation. Shortly put, it is not for the Officer to prove the loans; it is for the appellant to provide the evidence. None was provided to the Tribunal beyond bare assertions that there had been loans.

267. It was put to the Officer that any sum under £1,000 in the director's bank accounts was trivial and should not have been included in the analyses. Officer Dyson, in our opinion correctly, responded stating that those figures all add up. Taking just one example, that is the case in regard to the analysis of Lloyds bank account for Mr Paudel.

Was there a discovery?

268. The issue for the Tribunal is whether Officer Dyson had made a discovery that there was a loss of tax. HMRC rightly argue that the Upper Tribunal in *Jerome Anderson v HMRC* [2018] UKUT 0159 (TCC) ("Anderson") stated that in deciding whether or not there has been a discovery there are two tests, namely the subjective and the objective tests.

269. They define the subjective test as being:

> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax".

270. The objective test is defined as being "The officer's belief is one which a reasonable officer could form".

271. For the avoidance of doubt, given that paragraph 38 of the Skeleton Argument for the appellant stated in relation to the Corporation Tax assessment for APE 31 March 2014 that it could not possibly be to best judgment, we agree with Mrs O'Reilly that it is the tests described in *Anderson* which applies to Corporation Tax; the concept of best judgment relates to VAT.

272. As we have said, Officer Dyson's evidence was straightforward. In summary, as a result of the stock flow exercise, he found there to be significant differences between the stock on hand reported in the accounts and that which should have been held. He found examples of the expected stock on hand figures being both higher and lower than the recorded figures.

273. In cross-examination he accepted that one possibility was that it was a result of "very poor record keeping" but he explained that he did not know why some figures were higher and some lower; that could happen for a number of reasons. He had no evidence that the stock figures provided by the appellant were either right or wrong. The appellant had said that each sale and purchase had an invoice and that all were recorded and they were not.

274. Officer Dyson came to the conclusion that there were unrecorded sales and that there were also unrecorded purchases of stock. He also found that there were examples of product lines being sold for which no purchase invoice could be found, or which did not feature in the opening stock analysis.

275. HMRC's repeated requests for evidence, as opposed to unsupported argument, have never been met to any relevant extent. Only very limited and general assertions have been made. An example is the argument advanced in relation to theft, out of date items, breakages etc.

276. In his calculations he had used the selling prices taken from sales invoices and where there was no sales invoice for that product he had used a reasonable estimate.

277. He explained that he had used the words "Potential Additional Sales" in the spreadsheet which was part of the stock flow exercise because he had expected input from the appellant or its agents but that did not transpire.

278. He had identified the fact that the total of deposits into the appellant's bank account during APE 31 March 2015 was significantly less than the turnover and in the absence of cash handling records that suggests that a large amount of cash received by the appellant was not banked. No payments to staff or directors remuneration were paid out of the bank.

279. He had concerns about significant numbers of cash transactions in a situation where there were no cash handling records.

280. He had identified accounts linked to debit cards for purchases. The appellant has never explained or provided statements linked to the various debit, and possible credit, card accounts that were referred to during the course of the enquiry and which had been used to make purchases on behalf of the appellant. The letter of 4 September 2017 set out the details of those that had been identified by HMRC. VKM seemed to be aware of credit card(s) for which details have not been provided to HMRC. There has never been any explanation as to why Mr Paudel has not even obtained duplicate debit card statements.

281. Despite repeated requests, the deposits into the directors' private bank accounts have not been adequately explained or supported by appropriate documentary evidence.

282. Evidence of other bank accounts which are known to exist have not been provided.

283. Having analysed the bank statements that he had received he had found transactions which were recorded in neither the appellant nor the Bottle Stop and the appellant had not provided any explanations.

284. The directors had not maintained records of personal drawings from the appellant (as had been claimed) and there were concerns about movements in their bank accounts.

285. As far as capital introduced was concerned, for example, it was argued that the introduction of a van was capital provided, but no explanation has been given as to which director provided it or how it was valued.

286. Officer Dyson came to the conclusion that the inaccuracies were such that the accounts and tax returns must have been inaccurate and that therefore there was a possible insufficiency of tax. We find that the prime records were very inaccurate and we agree with Officer Dyson that that raises a presumption that there might be a loss of tax.

287. We find that the first test in *Anderson* is met.

288. It was argued for HMRC that Officer Dyson had been fair and reasonable. He had not extended the stock flow exercise to other product lines where it would reasonably be expected that there would be similar issues.

289. He believed that the presumption of continuity applied because there had been no change in the business model from commencement of the business and so the results of the stock flow exercise could be extrapolated back to APE 31 March 2012. We agree with that. The appellant has produced nothing to rebut the presumption of continuity.

290. The figures resulting from that exercise were higher than the figures derived from the TIWC records so he had used the TWIC records in the two earlier years.

291. He readily admitted in cross-examination that he had made a mistake in that the assessment for APE 31 March 2014 had been based on the TIWC records. The last recorded sale to the appellant from TIWC was on 1 April 2013. So that assessment should have been based on the stock flow exercise. He explained that at the time he thought that there would be

a negotiated settlement and he was working to a deadline. It was his belief that the results of the stock flow exercise would have given rise to a higher assessment in both of the first two years and it was to the appellant's benefit to proceed on the basis of the TIWC records. As can be seen, the assessments based on the stock flow exercise are higher than those based on the TIWC records. Since he believed that the presumption of continuity applied both could have been included.

292. He had not included purchase invoices dated 4 April 2014 for 80 cases of beer because of the timing and he did not wish to double count.

293. He had rounded down his figures.

294. It was argued that HMRC could have adopted a different course, which was not specified, in the enquiry rather than the stock flow exercise. That is not the point. The only issue is whether objectively considered, Officer Dyson's belief that there was an insufficiency of tax was reasonable.

295. We find that Officer Dyson has looked at all of the known facts and made "fair" inferences therefrom. This is not simply a question of poor record keeping; that is only one aspect of the matter which should be looked at in the round. The Officer did make adjustments for the seized stock. He gave many opportunities to the appellant's various agents to make representations but in the absence of pertinent new information he had relied on the appellant's records and the answers given at the May 2017 meeting. We find that he had taken a conservative and reasonable approach.

296. Officer Dyson's explanation of his approach to the section 455 charges was straightforward which was that since the proceeds of the additional sales could not be traced, on the balance of probability, it was the directors who profited thereby. It is only they who had access to those funds which rightly belonged to the appellant. They controlled the appellant.

297. Mr Jones argued that HMRC have no right to decide whether monies are emoluments, dividends, loans or monies that are stolen.

298. The Officer made it clear that the monies could not have been either emoluments or dividends since they had not been treated as such. There has never been an argument, until the Closing Note, that there was any suggestion of the monies being stolen. Accordingly the monies must have been a loan.

299. He had argued that where directors use a company's funds, that should be treated as a debt due to the company, and therefore a loan. HMRC relied upon *TSD Design and Engineering Ltd v Customs* [2012] UKFTT 247 in support of their position. At paragraph 14 the Judge stated:

> "It is clear from the cases that a default by directors can and should be assessed to tax in a company. We are satisfied from the evidence before us that Mr and Mrs Drzymalski were aware that some of the company's income was not being paid to the Company's account and that such amounts withheld should be treated as loans under section 419 ICTA."

300. He argued that the directors were aware that the monies from the off record sales were not being lodged in the company account nor being debited to their director's loan account. Therefore the amounts are to be treated as loans under section 455(4) Schedule 18. The appellant argues that it is not open to HMRC to decide whether "real or imagined profits" are loans to directors in a situation where the appellant had not taken such a stance and denied that there were loans.

301. The Officer's argument is tenable, and we would uphold it if we are wrong in finding that the monies were advances, as we do.

302. We consider that it is more straightforward to proceed on the basis that advances were made because that does not involve addressing the arguments for the appellant about what constitutes a debt or a loan.

303. What section 455 says is that the "section applies if a close company makes a loan or advances money…". We find that the appellant, through the actions of the directors who diverted funds to themselves, advanced the monies to the directors. The wording of the section is quite clear; it is not restricted to loans.

304. As we have indicated, in the absence of any evidence, Officer Dyson treated both directors equally. We agree.

305. Each of those advances should be treated as attributed to the loan account of the relevant director so that loan account would have been overdrawn at the end of the APE. No repayments were made within nine months and one day of the end of the relevant APE. Therefore there is a charge to tax in terms of section 455.

306. Section 455(2) now refers to section 8(2) ITA 2007 which specifies the upper dividend rate for any given tax year. The rate was 32.5% from 6 April 2016. As can be seen from paragraph 193 above, the rate was 25% until 5 April 2016. For APEs that straddle 6 April the rate is applied by reference to the date the advance is made. We find that 32.5% would be the appropriate rate for the APE 31 March 2017.

307. In summary, we find that the Officer has been both fair and reasonable. In the words of the Upper Tribunal in *HMRC v Charlton* [2012] UKUT 770 (TCC) he has acted "honestly and reasonably". In all the circumstances his belief was one which a reasonable officer could form.

308. We find that the second test in *Anderson* is met.

The Discovery Assessments

309. Officer Dyson undoubtedly made a discovery that there was a loss of Corporation Tax and therefore paragraph 41 Schedule 18 is engaged.

310. In order to satisfy paragraph 43 Schedule 18 the loss of tax must have been brought about by the careless or deliberate behaviour of the appellant or someone acting on their behalf. HMRC have argued that the behaviour in this instance was deliberate. That is on the basis that both of the directors knew that income was payable to the appellant, albeit it had been collected by them ostensibly in their capacity as directors of the appellant, but that income was not reflected in the accounts or tax returns. It was the directors who made all of the purchases and sales so they would have known the large sums of money that were passing through their hands. The accounts simply did not reflect that.

311. In the words of HMRC, the appellant's record keeping arrangements were:

> "fundamentally inadequate and its business processes were not sufficiently robust to ensure that all income and associated expenses were brought into account in calculating its profits chargeable to corporation tax. That is not the behaviour of a prudent and reasonable taxpayer wishing to comply with their legislative requirements".

312. All of that is true but we would go further. This is not simply a case of lamentably poor record keeping which in itself was entirely caused by the directors. What was the appellant's intention? Having made the choice to use the appellant as a trading vehicle, nevertheless the directors chose to operate using their own debit and/or credit cards, and bank accounts. The Barclays account was used both for the appellant and the Bottle Stop. They knew that those

transactions were not in the accounts. They chose to buy and sell 9,700 cases of Villa Radiosa off record. The stock flow exercise identifies significant volumes of off record sales and purchases.

313. They were responsible for the appellant's accounts and tax returns and, not least because of the sheer volume of anomalies in the records, they must have known that they were not accurate. In our view, to paraphrase the Supreme Court in *HMRC v Tooth* [2021] UKSC 17, at every stage there was an intention to mislead the Revenue with the consequence that there was insufficiency of tax. Looking at the totality of the evidence we find that the behaviour was deliberate.

314. If we are wrong in that, we certainly agree with HMRC's default argument that the behaviour was careless at a minimum. HMRC relies on *David Collis v HMRC* [2011] UKFTT 588 (TC) at paragraph 29 where Judge Berner said:

> "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

315. We agree with HMRC that the combination of

(a) inadequate records, and

(b) the business processes that were not sufficiently robust to ensure that all income and associated expenses were brought into account in calculating the profits chargeable to corporation tax

meant that the appellant was not a prudent and reasonable taxpayer wishing to comply with legislative requirements. The failure to keep the statutory records, let alone declare the Villa Radiosa sales means that the appellant has neither been prudent nor reasonable and that at best the appellant's behaviour was careless.

316. Accordingly, paragraph 43 Schedule 18 is satisfied.

317. For the avoidance of doubt, we find that paragraph 44 Schedule 18 is also satisfied in that the last possible dates for opening an enquiry in relation to APEs 31 March 2013 and 2014 respectively, were 23 December 2014 and 10 October 2015. As can be seen from the findings in fact, HMRC had no reason to believe that there might be an insufficiency of tax on either date.

318. It is paragraph 44(1)(a) Schedule 18 which is satisfied.

319. Paragraph 46(1) Schedule 18 states an assessment may be made up to four years from the end of the accounting period to which it relates. The assessments for the APE's 31 March 2016 and 2017 fall within this timeframe so HMRC is entitled to issue assessments for those years.

320. Paragraph 46(2) Schedule 18 allows for an assessment to be made up to six years from the end of the accounting period if the loss was brought about by the careless behaviour of the company or a related person. If we are wrong in finding that the behaviour was deliberate, the assessments for the APE's 31 March 2014 and 2015 fall within this timeframe.

321. Paragraph 46(2A) Schedule 18 allows for an assessment to be made up to 20 years from the end of the accounting period if the behaviour leading to the shortfall was brought about by deliberate behaviour. We therefore find that the assessments for the APE's 31 March 2013, 2014 and 2015 fall within this time frame.

322. In summary we find that the assessments were all timeously and competently raised.

323. Mr Jones argues that since Officer Dyson conceded that he should not have based the assessment for APE 31 March 2013 on the TIWC information, that assessment is fatally flawed. He goes on to argue that the assessments for the following years also fall since HMRC had relied on the presumption of continuity based on the flawed assessment.

324. We have some difficulty with all of that argument. That latter argument is simply wrong. HMRC's argument on the presumption of continuity is entirely predicated on the results of the enquiry, ie the stock flow exercise and the fact that the business model had not changed between incorporation and October 2016. It had nothing to do with the TIWC information.

325. More pertinently, as we have pointed out, the Officer could have based his assessments for the first two years on both the stock flow exercise and the TIWC information. He chose not to do so.

326. In their Skeleton Argument, at paragraph 74, HMRC argued:

> "Should the Tribunal find that there were no off record purchases from TIWC then the Respondents contend that in accordance with the presumption of continuity adjustments to the returns for the APE's 31 March 2103 and 31 March 2014 are still required based on the stock flow exercise."

327. When opposing the Application to exclude the TIWC information, the HMRC litigators made it clear that if the Application were to be successful they would argue that they relied upon the stock flow exercise, the presumption of continuity and section 50(7)(c) TMA.

328. Officer Dyson did make a mistake in using the TIWC information as the basis for APE 31 March 2014. However, we have had regard to section 50(7) TMA. Since we find that the presumption of continuity applies, because the appellant has failed to rebut that presumption, we find that the appellant has been undercharged to tax in both of the first two accounting periods. The loss of tax should not have been restricted to only the sales of Villa Radiosa.

329. The other issue in terms of quantum is the error in relation to the Holsten Pils.

330. In summary, the appellant has almost entirely failed to discharge the burden of proof so the assessments for the later three years must stand, save only in regard to the error relating to the cases of Holsten Pils. Because of our finding on presumption of continuity, that error then affects the first two years in addition. It also applies to the section 455 charges, the VAT assessments and the penalties.

331. Mrs McIntyre very sensibly suggested that the decision be issued in principle and it be remitted to the parties to agree the quantum which failing the issue of quantum would revert to the Tribunal for decision. We agree.

Decision on Corporation Tax

332. For the reasons given, we find that:

(a) The conditions for making assessments under Schedule 18 have been met.

(b) The loss of tax was brought about deliberately by the appellant.

(c) The assessments have been timeously and competently issued.

(d) The presumption of continuity applies.

(e) The conditions to impose a charge under section 455 were met.

(f) The charges under section 455 will require to be amended to reflect what will be the revised quantum of the omitted sales but the methodology used is approved subject only to using 32% as the rate for the final year.

(g) The quantum of the discovery assessments including the section 455 charges fall to be amended; decreased in respect of the element relating to the Holsten Pils and increased in relation to the first two years.

(h) The amendment described in the preceding sub-paragraph is remitted to the parties to agree at their discretion within a period of three months following the issue of this decision which failing that aspect will revert to the Tribunal for decision.

VAT

Assessments

333. The VAT figures are derived from the Corporation Tax figures and those were adopted by Officer Maqsood.

334. Given the inadequacies of the records, section 73 VATA is engaged so HMRC had the power to issue assessments and the only issue is whether those are to "best judgment". We have cited the case law at some length.

335. In short, we find that, understandably, Officer Maqsood relied on the information given to her by the other officers whom she described as very experienced. From that she could see that they had both undertaken extensive detailed investigation and had taken into account all of the information that had been provided. She confirmed in cross-examination that she had read the notes of the May 2017 meeting and had been aware that the appellant had denied any off record activity.

336. We have found that Officer Dyson acted fairly and we make the same finding in regard to Officer Maqsood. She did review all of the available information. She did ask the appellant's agents for representations but nothing was forthcoming.

337. She divided Officer Dyson's figures equally which was reasonable since there was no evidence about any fluctuations.

338. The available information from the appellant can only be described as "limited".

339. Although Officer Dyson had made the two mistakes in relation to Holsten Pils and the 2014 use of TIWC, and that was perpetuated because she adopted his figures, we do not accept that those mistakes mean that the assessments were not to best judgment. That is very clear from *Rahman* (see paragraph 207 above).

340. We find that the VAT assessments were made to best judgment based on the information available at the time.

341. As far as timing of the VAT assessments is concerned, Officer Dyson presented his findings to the appellant and VKM on 16 May 2017. Further argument, which informed the making of the assessments, was finally provided in a letter from VKM dated 12 December 2017. That would have been the first point at which the assessments could have been made. Consequently, the assessments issued on 3 December 2018 by Officer Maqsood and intimated by letter dated 21 November 2018 were issued within the statutory timescale and are valid.

342. With the exception of these two errors the appellant has not established that the assessments are *prima facie* wrong.

343. The appellant has always argued that the VAT assessments and Corporation Tax assessments are closely linked, albeit the ensuing tax calculations are obviously very different. That is correct.

344. For Corporation Tax we have adopted Mrs McIntyre's pragmatic suggestion that the decision be issued in principle and it be remitted to the parties to agree the quantum which failing the issue of quantum would revert to the Tribunal for decision. We adopt it also for the VAT assessments and, indeed, the penalties.

Penalties

345. We were surprised when, at the end of the Hearing, Mr Jones quoted and relied upon two non-tax cases which referred to Articles 6 and 8 of the European Human Rights Convention ("EHCR"), namely *Re W* [20176] EWCA Civ 1140 and *Popely v Ayton* [2022] EWHC (CH) 3217.

346. We allowed HMRC time to read the cases since there had been no advance warning. The two cases to which Mr Jones referred were simply not in point. On reconvening we pointed out that, in regard to Article 6, we rely upon, and, pertinently we are bound by, the High Court in *R (oao ToTel Limited) v the FTT and another* [2011] EWHC 652 where Mr Justice Simon stated that:-

> "130…In *Jussila v Finland* (2006) (A/73053/01) the Court at [29], and by 13 votes to 4, made clear its views about the impact of the civil aspect of Article 6 in relation to taxes.
>
> The assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head (see *Ferrazzini v. Italy ...* §29).
>
> 131. In my view this provides the 'clear and common jurisprudence of the European Court of Human Rights' which should be followed in the absence of special circumstances, see Lord Slynn at [26] in *R v. Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2002] 2 AC 295. The view of both the framers of the European Convention on Human Rights and the European Court of Human Rights is that tax disputes are excluded from the civil aspect of Article 6.1 save in egregious cases."

347. Mr Jones made no argument on egregious cases and then said that he accepted that but said that he relied on the principles underlying Article 6 and, of course Article 8 but he did not expand upon that either. We pointed out that at every stage in this appeal we had had in mind the provisions of Rule 2 of the Rules.

348. We are aware that there are a number of Tribunal decisions which record various reservations expressed about *Ferrazzini.* However, we are also conscious that, in that regard, in *Walapu v HMRC* [2016] EWHC 658 (Admin) at paragraph 105 Mr Justice Green stated that although *Ferrazzini* is considered with "some caution" by the domestic courts, "Nonetheless *Ferrazzinni* is still treated as stating the law" and is "routinely endorsed by the Strasbourg Court".

349. Lastly, in this regard, we observe that in discussing Article 1 of the ECHR, Chadwick LJ pointed out at paragraph 38 of *Rahman* that, firstly, the power to make an assessment under section 73 VATA only arises where there has been a failing on the part of the taxpayer, and secondly, that an assertion that the legislation must be contrary to the United Kingdom's international obligations if an assessment, made to best judgment, is too high cannot be supported. The relevant question is simply whether the assessment has been made to best judgment. As in that case we have already addressed that issue.

350. We do not accept that there is any breach of the ECHR.

351. The penalties are predicated on the basis that the appellant's behaviour was deliberate. In their Skeleton Argument HMRC relied upon *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) ("Auxilium") at paragraph 63. That paragraph reads:

> "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."

352. We know nothing about Mr Bhattachan but Mr Paudel's evidence was that he and Mr Bhattachan worked very closely together.

353. It is argued for the appellant that Mr Paudel believed that the records were correct and therefore the VAT returns would have been correct. We do not accept that for the reasons given in relation to Corporation Tax. We have explained at paragraphs 310 and 311 above why we thought that the behaviour was deliberate for Corporation Tax purposes and we adopt that reasoning for VAT. We find that the behaviour was deliberate but not concealed.

354. If we are wrong in that, then we find that the behaviour was careless; it is not innocent.

355. HMRC have reduced the penalty for the quality of the disclosure by 30% in respect of giving HMRC information and documents because the appellant had provided business records and attended a meeting and provided bank statements and mandates. We find that that is an appropriate reduction.

356. There was no reduction for either telling or helping because there had been no assistance in quantifying the extent of any off record sales. Although the letter of 12 December 2017 criticised the stock flow exercise, no constructive comment has been made. There has been a failure to deliver the other information that was sought by HMRC. We find that that is appropriate.

357. HMRC have considered special circumstances and we agree with them that there are none.

358. The potential lost revenue against which the penalties have been applied is the value of the under-declared output tax. That will fall to be altered once the assessments are altered. It is for that reason that we have indicated that that is remitted to the parties in the first instance.

Decision on VAT

359. We find that the VAT assessments are reasonably calculated and were issued in the Officer's best judgment when raised.

360. The loss of tax was brought about deliberately by the appellant.

361. The quantum of both the assessments and the penalties is remitted to the parties to agree at their discretion within a period of three months following the issue of this decision which failing that aspect will revert to the Tribunal for decision.

Conclusion

362. In summary, subject to adjustment of the quantum to the limited extent that has been indicated, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

363. 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: 04th JANUARY 2024

Appendix 1

Detail of the Corporation Tax assessments

Accounts Period Ending	Date of Issue	Decision	Charge
31/03/13	22/10/19	The omitted sales	£16,709.60
31/03/14	22/10/19	The omitted sales	£16,709.60
31/03/15	22/10/19	The omitted sales	£36,667.20
31/03/16	22/10/19	The omitted sales	£36,667.20
31/03/17	22/10/19	The omitted sales	£36,667.20
31/03/13	22/10/19	Section 455 charge	£7,509.00
31/03/14	22/10/19	Section 455 charge	£5,850.50
31/03/15	22/10/19	Section 455 charge	£29,838.00
31/03/16	22/10/19	Section 455 charge	£26,261.00
31/03/17	22/10/19	Section 455 charge	£37,775.75

Appendix 2

CEA

Section 9 Proof of records of business or public authority

9.—*Proof of records of business or public authority*
(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong**.** For this purpose—

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of any entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section—

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

Appendix 3

Sales per year	VAT period	Gross calculated sales	VAT out of that value	rounded down to
March 2013 200,000	P06/12	£50,000.00	£8,333.33	£8,333
	P09/12	£50,000.00	£8,333.33	£8,333
	P12/12	£50,000.00	£8,333.33	£8,333
	P03/13	£50,000.00	£8,333.33	£8,333
March 2014 sales £200,000	P06/13	£50,000.00	£8,333.33	£8,333
	P09/13	£50,000.00	£8,333.33	£8,333
	P12/13	£50,000.00	£8,333.33	£8,333
	P03/14	£50,000.00	£8,333.33	£8,333
March 2015 sales £220,000	P06/14	£55,000.00	£9,166.67	£9,166
	P09/14	£55,000.00	£9,166.67	£9,166
	P12/14	£55,000.00	£9,166.67	£9,166
	P03/15	£55,000.00	£9,166.67	£9,166
March 2016 sales £220,000	P06/14	£55,000.00	£9,166.67	£9,166
	P09/15	£55,000.00	£9,166.67	£9,166
	P12/15	£55,000.00	£9,166.67	£9,166
	P03/16	£55,000.00	£9,166.67	£9,166
March 2017 sales £220,000	P06/16	£55,000.00	£9,166.67	£9,166
	P09/16	£55,000.00	£9,166.67	£9,166
	P12/16	£55,000.00	£9,166.67	£9,166
	P03/17	£55,000.00	£9,166.67	£9,166
			Total	**£176,656**