



Neutral Citation: [2024] UKFTT 00103 (TC)

Case Number: TC09054

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2018/04648
TC/2019/05278
TC/2019/06739

VAT—Appeal against best of judgment assessment

Heard on: 16 May 2023
Judgment date: 26 January 2024

Before

**TRIBUNAL JUDGE CHRISTOPHER STAKER
SUSAN STOTT**

Between

MR MARTIN PETER BYRNE AND MRS ELLENA BYRNE T/A EVA
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: M. Chong, accountant

For the Respondents: A. Cameron, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

The appeals are dismissed.

REASONS

INTRODUCTION

1. An oral decision dismissing these appeals was given at the public video hearing on 16 May 2023, followed by a short decision notice. The Appellants subsequently requested full written findings and reasons, which are now given.
2. The Appellants were registered for VAT from 1 December 2011 as a partnership trading as “Eva”. The business activity was “retail ladies fashions”.
3. The Appellants appeal against:
 - (1) a decision of HMRC of 22 January 2018, as upheld in a review conclusion letter dated 15 May 2018, to assess the business under s 73 of the Value Added Tax Act 1994 (“VATA”) for the periods 03/12 to 09/17 (inclusive) in relation to under-declared VAT;
 - (2) a decision of HMRC to amend the self-assessment partnership returns for tax years 2012-13 to 2015-16 under s 29 of the Taxes Management Act 1970 (“TMA”); and
 - (3) a closure notice for tax year 2016-17 issued under s 28B TMA.
4. Penalties were also imposed, but the Appellants withdrew their appeal against the penalties by notice dated 19 September 2020.
5. It was confirmed to the Tribunal by both parties at the outset of the hearing as follows. The outcome of the direct tax appeals (paragraph 3(2) and (3) above) will be determined automatically by the outcome of the VAT appeal (paragraph 3(1) above). As there is nothing further in the direct tax appeals that needs independent consideration by the Tribunal, only the VAT appeal needs to be considered by the Tribunal.
6. At the hearing, the Appellants’ representative, Mr Chong, furthermore accepted that the Appellants had underdeclared their cash sales in the VAT periods in question, and said that the vast majority of what HMRC says in this appeal is undisputed. The Appellants’ issue is with the quantum of the VAT assessment. Mr Chong said that the Appellants should expect to pay a substantial sum, but disputed that it should be anywhere near the figure assessed by HMRC.
7. As will be further explained below, the sole issue presented to the Tribunal at the hearing concerns the percentage of the business’s sales that were cash sales, as opposed to card sales.

THE BACKGROUND FACTS

8. HMRC selected the Appellants’ business for a VAT enquiry as merchant acquirer data available to HMRC showed that its card takings were 111% of the turnover declared in its VAT returns.
9. HMRC Officer Bebbington carried out a cash test purchase at the business on 25 May 2016, by purchasing a scarf for £15. There was no till, and she was given a handwritten receipt from a small Challenge duplicate book.
10. Officer Bebbington then carried out an unannounced visit to the business premises on 16 June 2018, where she spoke with Mrs Byrne. Officer Bebbington uplifted the current Challenge receipt book on the premises at the time of the visit. Mrs Byrne said that other Challenge books were not available as they were at home.

11. The uplifted Challenge receipt book when examined by HMRC was seen to span the period from Monday 13 June 2016 to Thursday 16 June 2016. The sales recorded in it are set out in paragraph 26 below.
12. From the information contained in this receipt book, Officer Bebbington calculated that 28% by value of the sales recorded in it were cash sales.
13. On 22 June 2016, HMRC requested Mr Byrne to arrange an inspection of the business's VAT records, and in particular, of further Challenge receipt books.
14. On 24 June 2016, HMRC instructed Mr Byrne to retain all Challenge receipt books going forward as it is a legal requirement to keep a record of every individual sale.
15. On 27 June 2016, HMRC carried out a further cash test sale, by purchasing an item for £15 from the business, and a receipt from a Challenge receipt book was given.
16. At a meeting with HMRC on 20 July 2016, Mr Chong, in his capacity as the Appellants' tax adviser in relation to the VAT enquiry, and Mr Byrne, accepted that the Appellants had not declared cash takings in the VAT returns. Mr Byrne said that they only had seven Challenge books covering the period 27 May 2016 to 16 July 2016, the rest having been destroyed in a flood.
17. HMRC's analysis of these Challenge notebooks revealed that they did not include the test purchase on 27 June 2016.
18. On 29 September 2016, HMRC carried out a further cash test sale, by purchasing an item for £15 from the business, and a receipt from a Challenge receipt book was given.
19. On 14 December 2016, after the business's VAT returns for 06/16 and 09/16 had been filed, HMRC uplifted the records and again analysed the Challenge books produced. These did not include the cash test sale on 29 September 2016. The cash figures amounted to 1.2% of sales overall.
20. Following further exchanges between the parties, HMRC issued the VAT assessment under appeal. The assessment determined the amount of undeclared cash takings by assuming that throughout the entire period to which the assessment related (03/12 to 09/17), cash takings were 28% of overall sales, as per the Challenge receipt book uplifted on 16 June 2018 (see paragraphs 10-12 above). The assessment was upheld in an HMRC review conclusion letter dated 15 May 2018.
21. On 27 June 2018, the Appellant commenced the present Tribunal proceedings, to appeal against the assessment.
22. On 23 October 2018, HMRC revised the assessment downwards, as a result of now being satisfied that cash takings were 22.4% of overall sales, rather than 28%. This was because further information showed that one of the payments in the Challenge receipt book uplifted on 16 June 2018 that had previously been treated as a cash payment was in fact a card payment.

THE APPELLANTS' WITNESS EVIDENCE

23. Mr Martin Byrne says in his witness statement amongst other matters as follows.
 - (1) The business was inherited from his wife's father and should have closed some years earlier, but it was seen as a family concern and logic was ignored.
 - (2) Mr Byrne accepts that VAT and partnership tax returns were submitted showing incorrect figures. He fully accepts that the business takings figure is not correct. He is happy to pay the correct amount of additional tax but considers the amounts assessed to be grossly overstated.

- (3) The two busiest days of the week for the business were Friday and Saturday.
- (4) As a general rule, the higher the sale, the greater the chance it was made by card. That seems to be common sense as most people do not wish to carry large amounts of cash with them.
- (5) In keeping with most shops on the high street, the business premises were rented. The business was potentially worth something as others would look at the value of the goodwill and the unexpired portion of the lease. Mr Byrne took advice on the value of the goodwill and was advised that this should be in the region of three times the profit. However, Mr Byrne accepts that there is no hard and fast rule, and that goodwill is only worth what someone is prepared to pay.
- (6) Mr Byrne attempted to sell the business for £75,000 to include the lease and goodwill, but had no interested parties in buying the goodwill. The only offer was to take over the lease which had a year plus a guarantee of a further 7 years. He received £35,000 for the lease alone.
- (7) There is nothing to suggest that the Appellants received the kind of money that they would have received if the HMRC figures were correct. Neither Mr Byrne nor his wife have children, neither has ever smoked, neither uses drugs, Mr Byrne drinks moderately and his wife is teetotal, they did not go on holiday at all in the period 2013 to 2017 and the business was at the top end of its overdraft limit.
- (8) Mr Byrne considers that a fairer figure for the cash sales would be 7% or 8%.

24. A witness statement dated 3 August 2021 of Mr Adrian Hughes, a partner in Batten Hughes Chartered Accountants, states as follows.

During 2016, the partners [Mr and Mrs Byrne] indicated their desire to dispose of their business interest in Eva, and advertised the business for sale with Jollys, an agent in the sale of businesses.

The partners advertised the business for the sale of goodwill, fixtures and lease for £75,000.

To my knowledge no offers for the sale of the business were received and the partners decided to close the shop and surrender their lease. I understand the shop ... now has an alternative use as a coffee shop.

The partners wished to leave the retail sector and start working in the care sector delivering services to people at home.

DOCUMENTARY EVIDENCE

25. A letter from Mr Adrian Hughes to Mr Byrne dated 14 July 2021 states as follows.

You [Mr Byrne] have provided me with revised partnership profit and loss accounts for the tax years ended 5 April 2013 to 5 April 2017 in respect of your former business trading as Eva.

Based on an estimated average profit in excess of £90,000 per annum before tax, I would suggest this gives a business valuation in excess of £300,000 on the assumption the business is a going concern with a continuing lease on existing or similar terms in respect of the retail trading premises.

26. The Challenge receipt book uplifted on 16 June 2018 (paragraphs 10-12 above) contains the following sales.

Date	No	Cash sales	Card sales
Monday, 13 June 2016	1	£15	

	2 (not issued)		
	3		£59
	4		£39
	5	£64	
Tuesday, 14 June 2016	6		£39
	7	£30	
	8		£21
	9	£117	
	10		£68
	11	£35	
	12		£78
	13		£117
	14		£39
	15		£35
Wednesday, 15 June 2016	16		£148
	17		£70
	18		£84
	19		£25
	20	£15	
	21		£59
	22		£35
	23		£25
	24		£12
	25		£20
	26		£25
	27	£15	
	28		£39
	29		£39
	30		£60
	31	£105	
	32	£130	
	33	£15	
Thursday, 16 June 2018	34		£35
	35		£32
	36		£25
	37		£45

	38	£35	
	39		£45
	40		£74
	41		£85
	TOTAL	£576	£1,477

27. In this table, the cash sales are some 28% of the total sales. As has been noted (paragraph 22 above), this percentage was revised downwards to 22.4% after HMRC were satisfied that one of the cash sales (number 9 in the table) was in fact a card sale.

28. The period of sales covered by this Challenge book is referred to below for convenience as a 4-day period. The Tribunal takes into account, as the Appellants insist, that it may not be four full days. Mr Chong referred to it as a three and a half day period.

APPLICABLE LEGISLATION

29. Section 73(1) VATA provides:

Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

APPLICATION OF LAW

30. In an appeal against a best of judgment assessment under 73(1) VATA, it is open to the Tribunal, in the exercise of a quasi-supervisory jurisdiction, to find that the assessment was not raised to the best of HMRC's judgment and should never have been made at all, for instance on the ground that it was reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing, or was wholly unreasonable (see *Mithras (Wine Bars) v HMRC* [2010] UKUT 115 (TCC) ("*Mithras*") at [9]-[11]).

31. In making a best of judgment assessment, HMRC are required to consider fairly all material put before them by the taxpayer, but are not required to make investigations so long as there is some material on which they could reasonably base an assessment. Nevertheless, if HMRC do make any investigations, they must take into account the material disclosed by that investigation. (*Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, 292g-293a.)

32. In cases where HMRC were entitled to make the assessment, and the challenge is to the quantum of the assessment, the Tribunal has a full appellate jurisdiction. It can consider any further evidence or arguments presented by the parties in the appeal and reduce the amount of the assessment, thereby substituting its own view on quantum for that of HMRC. (See *Mithras* at [7], [16]-[21]).

33. In an appeal against quantum, generally the burden lies on the taxpayer to establish the correct amount of tax due. The HMRC assessment is *prima facie* right, and remains right until the taxpayer shows not only that it is wrong, but also shows positively what corrections should be made in order to make the assessment right or more nearly right. There is an element of guess-work and an almost unavoidable inaccuracy in a properly made best of judgment assessment. It is therefore not enough for an appellant to show shortcomings in the HMRC methodology. The Appellant must by evidence and argument positively show a methodology

and/or figures that are more reliable than those used by HMRC in making the assessment, even if the Appellant's methodology and figures may also have their own inevitable shortcomings. (See *Khan v Revenue and Customs* [2006] EWCA Civ 89 at [69].)

HMRC GUIDANCE RELIED ON BY THE APPELLANTS

34. The Appellants rely on the following provisions of HMRC internal manuals:
- (1) internal manual on *VAT Assessments and Error Correction*, sections:
 - (a) VAEC1510 ("Power of assessment: Best judgment: Determine the overall credibility of your assessment");
 - (b) VAEC1540 ("Power of assessment: Best judgement: Helpful pointers");
 - (c) VAEC1420 ("Powers of assessment: Best judgement: Definition");
 - (2) internal *Enquiry Manual*, paragraph EM3502 ("Recalculating Profits: Business Models: General").

THE APPELLANTS' ARGUMENTS

35. The figures used by HMRC in this case are neither fair nor representative.
- (1) Figures used as the basis of a best of judgment assessment have to be fair and representative. It has long been accepted by Tribunals that review periods may be too short to be representative, and that in such cases, a longer review period can be substituted.
 - (2) It is not fair or representative to use figures from a period of only 4 days to make an assessment spanning 5 and a half years.
 - (3) Furthermore, the review period in this case included only the quietest business days of the week, Monday to Thursday, and excluded the busiest days, Friday and Saturday.
 - (4) One large cash sale in such a short review period would have a totally disproportionate effect on the overall percentage of sales that were cash sales. In the 4-day review period there were only four card sales over £100 but two cash sales over that figure. If these two sales had been card sales, the percentage of the sales that were cash would drop to 11.1%.
 - (5) In a ladies' fashion shop, one would expect most purchases to be by card, because items are not cheap, and it is a security risk for ladies to carry large amounts of cash in handbags. One would also expect cash payments to be for relatively small amounts. Consistently with this, only 10 of the sales in the 4-day review period were cash transactions, and the rest were card transactions. Of the 5 transactions in this review period that were for £15 or less, four were cash transactions.
 - (6) The two consecutive cash sales for £105 and £130 respectively following a period of no cash sales (items 31 and 32 in the table at paragraph 26 above, referred to below as "**items 31 and 32**") cannot be representative of what happened over all the years covered by the assessments under appeal.
36. The quantum of the assessment is not credible.
- (1) The quantum of a best of judgment assessment must be credible.
 - (2) To assess credibility, it is necessary to consider whether the business would have been capable of making the amounts of money alleged by HMRC. It is not credible

that the Appellants were making the amounts of money that they would have been making if the HMRC assessment was correct.

- (3) It is also incredible that someone earning that much money from the business would give it up. Yet the Appellants gave the business up in tax year 2016-2017.
- (4) An increase in the sales of a business leads to an increase in the value of its goodwill. If the business had been achieving the level of sales assumed in the HMRC assessment, the value of the business would have been some £300,000 (see paragraph 25 above). Despite this, the Appellants were unable to sell the business even when they advertised it for sale for £75,000, a mere fraction of that value (see paragraph 24 above). In the end, they closed the business without selling the goodwill, and merely sold the remaining period of the lease for some £30,000. The former business premises are now being used as a coffee shop. It is not credible that the Appellants would have given up in this way a business worth £300,000 which was generating profits for the partners at the level determined by HMRC.
- (5) Furthermore, the business was overdrawn by £25,000 in previous tax years. The average annual charge for overdraft interest was £3,500. No business person making that much money would allow the business to become so overdrawn.

37. Amendments can be made to the methodology applied by HMRC to achieve a fairer and more reliable figure for the assessment.

- (1) The Appellants accept that there is no longer period than the 4-day review period used by HMRC in making the assessment that would provide a reliable review period. The Appellants accept that this 4-day review period can be taken as the starting point for the assessment. However, the Appellants propose that the sales in this 4-day period be “tweaked” to remove the distortion caused by the two large cash sales in items 31 and 32.
- (2) Three alternative ways of doing this are identified by the Appellants.
 - (a) Items 31 and 32 and all subsequent sales in the review period could be ignored. If this is done, the review period would still cover a period of some 3 days. This would result in some 12% of sales being cash sales.
 - (b) Items 31 and 32 alone could be disregarded. This would result in a similar reduction in the percentage of sales that were cash sales. The fact that deleting only two of some 40 sales will have the effect of reducing by about a half the percentage of sales that were cash sales proves that the figures cannot be representative.
 - (c) A median figure rather than an average figure could be used to determine the percentage of sales that were cash sales. Use of a median figure removes from the equation large outlier figures that distort the equation if the average is used rather than the median. The median figure for the cash sales in the 4-day review period is £32.50, whereas the average figure is £49. This demonstrates again how one or two large amounts can distort the picture, making it an unsafe methodology to rely on average rather than median figures. Items 31 and 32 stick out like a sore thumb and are totally out of the ordinary.

THE HMRC SUBMISSIONS

38. While a 4-day period may not be an ideal review period, there is no more representative period that could have been used by HMRC as the review period for making the assessment.

- (1) Officer Bebbington recognised that a 4-day period was too short to be representative. She subsequently gave the Appellants a chance to keep and provide VAT records for 27 May 2016 to 7 October 2016 to establish an accurate and reflective cash percentage figure, on which a VAT assessment could be based. However, it became impossible to use the books for that longer period because the two test purchases made by HMRC on 27 June 2016 and 29 September 2016 had not been included in the records for that period, meaning that some of the records were missing (see paragraphs 14-19 above).
- (2) It was not possible to consider more historic records as the Appellants say that these records had been destroyed in a flood (see paragraph 16 above).
- (3) The 4-day review period used as the basis for the assessment was considered reliable as the Challenge notebook was uplifted in an unannounced visit, where HMRC had the element of surprise, and those in the business premises had no opportunity to hide books or suppress evidence.
- (4) The Appellants accept that no more reliable review period can be identified (see paragraph 37(1) above).

39. If the HMRC assessment was too high, the Appellants could have produced the missing books, so that the assessment could have been based on a full and accurate set of records for a longer test period. The Appellants were given ample opportunity to produce accurate figures going forward. HMRC question why they have not done so.

40. Without seeing a full and accurate set of records, it is not possible to say whether items 31 and 32 were unusual sales.

41. The assessment was based on the whole of the figures for the available review period. It is not disputed by the Appellant that all of the sales in the table at paragraph 26 above occurred, and that 22.4% by value of those sales were cash sales. In the absence of complete records for a longer period, HMRC can only act on the information that they have. The figures from the 4-day review period are what they are, and show what they show. Manipulating them to produce a different result does not make them more reliable.

42. In directions issued on 10 June 2021, the Tribunal required the Appellants by July 2021 to deliver a list of documents on which they intend to rely in the appeal, and to deliver a skeleton argument not later than 21 days before the hearing. Contrary to these directions, the Appellants have produced no skeleton argument. At the hearing, the Appellants are relying on claimed facts for which no evidence has been provided, and make arguments of which HMRC has not been given prior notice in a skeleton.

43. HMRC accept that the business was overdrawn, but is unable to accept other facts contended by the Appellant, such as the amount for which the business was sold, or the amount of the overdraft or overdraft interest, or the value of the business. The witness statement of Mr Hughes (paragraph 24 above) does not say what the lease for the business premises was sold for. The letter from Mr Hughes (paragraph 25 above) is not an actual valuation of the Appellants' business at the relevant time, but merely a general statement that a given level of profits would "suggest" that a business has a certain value.

44. It is not inherently incredible that the Appellants could have earned the amounts that the HMRC assessments conclude that they earned. Furthermore, businesses can be sold for any reason. The mere fact that a business is sold does not mean that it is not profitable.

45. The Appellants have not discharged their burden of establishing a more reliable figure for the assessment.

REASONS FOR DECISION

46. This is not one of those rare cases in which the Tribunal, in the exercise of a quasi-supervisory jurisdiction, can find that the assessment was not raised to the best of HMRC's judgment and should never have been made at all (see paragraph 30 above). The Tribunal is satisfied that HMRC when making the assessment acted in good faith, and sought to apply a reasonable methodology to determine quantum. The Appellants identify no other review period that could be used as the basis for the assessment (paragraphs 37(1) and 38(4) above). It is not disputed that the figure of 22.4% for cash sales correctly reflects the information from the review period.

47. That being the case, the HMRC assessment will stand, unless the Appellants discharge the burden of showing positively what corrections should be made to it in order to make it right or more nearly right (paragraphs 32-33 above).

48. The Appellants rely on the internal HMRC guidance at paragraph 34 above. HMRC internal policy and guidance is not binding on the Tribunal, but will be considered by it where appropriate, in the interests of consistency of treatment of different taxpayers. However, to the extent that the internal HMRC guidance merely reflects the case law at paragraphs 30-33 above, it adds nothing of substance. To the extent that it indicates how HMRC should conduct enquiries and make assessments, it deals with circumstances that are different to those pertaining in a Tribunal appeal against the quantum of an assessment. The Tribunal does not conduct enquiries and make assessments. It makes decisions based solely on the evidence and arguments put before it by the parties. It does not make an initial decision as to what the assessment should be, but rather determines whether an appellant has established a more reliable figure than that contained in an assessment that has already been made.

49. The Tribunal rejects the Appellants' argument that the 4-day review period on which the assessment was based was unfair and unrepresentative. Both sides agree that there is no other period that could have been used as the review period (paragraphs 37(1) and 38(4) above). Furthermore, the Appellants have not identified any other methodology for making the assessment. The Appellants' own proposed methodology takes as the starting point the same review period that was used by HMRC, and merely proposes modifications to it. The challenge based on HMRC's use of a review period of only 4 days therefore fails.

50. The Tribunal also rejects the Appellants' argument that items 31 and 32 stand out as obviously highly unusual cash transactions that must necessarily distort the percentage of cash sales in a way that makes the data unrepresentative unless an adjustment is made to remove this distortion.

51. The Appellants argue that cash transactions tend to be for smaller amounts, while larger sales tend to be card transactions. That may intuitively appear to make sense. However, there is no *evidence* before the Tribunal that this is in fact the case. Furthermore, even if it were to be assumed that this is generally true, there would still be some small payments that are made by card, and some large payments that are made by cash. It would be impossible to know, in the absence of evidence, what percentage of large payments are made by card or by cash, and what percentage of small payments are made by card or by cash.

52. There is no evidence before the Tribunal, for instance, of what percentage of sales of a business of this kind (or even of retail businesses generally) are typically paid by card or cash. There is also no evidence of the percentage of large payments that are typically paid by card or cash, or of the percentage of small payments that are typically paid by card or by cash.

53. The table at paragraph 26 above shows that more sales were made by card than by cash (both numerically and by value), and that the cash sales were on average for smaller amounts

than the card sales. Thus, without any modification at all, the table is consistent with any intuitive assumption that cash transactions tend to be for smaller amounts, while larger sales tend to be card transactions, and that more sales in a fashion shop would be by card than by cash.

54. However, this does not of itself mean that a business of this kind would never have any larger sales that are paid for by cash, or that two larger cash payments over the course of a 4-day period would be unusual or unrepresentative. Any such conclusions would need to be supported by specific evidence.

55. The Appellants argue that there is no other instance in the 4-day review period in which there have been two consecutive large cash payments, and that this in itself shows that they are wholly out of the ordinary. The Tribunal does not accept this. If a dice is rolled many times, and the number six appears twice in a row after a long period of no sixes being thrown, this does not prove that something wholly or unusual or exceptional has happened.

56. The Appellants argue that the review period does not include the busiest days of the week. However, even if it were to be assumed that there are more sales on other days of the week, there is no evidence that on those other days, a smaller percentage of sales are by cash.

57. The Tribunal accepts that items 31 and 32 have a very significant effect on the percentage figure of sales that are cash sales. However, in the absence of any relevant *evidence*, the Tribunal is unable to conclude, on the basis of mere intuition, that items 31 and 32 must necessarily have the effect of *distorting* the accuracy of that figure, or that removing items 31 and 32 would necessarily lead to a more accurate figure.

58. The figures from the 4-day review period may be of limited reliability. However, the Appellant has produced no evidence to establish the claim that removing items 31 and 32 would make the figures more reliable. An appeal to intuition cannot suffice.

59. The Tribunal also rejects the Appellants' argument that the amount of the HMRC assessment is not credible, in the sense that the Appellants could not possibly have been making as much money as they would have been if the HMRC assessment was correct.

60. At the hearing, Mr Chong gave various figures as to how much the Appellants would have been earning if the assessment was correct, and said that these would put both of the Appellants and their household income in the top few percentage points of earners in the UK.

61. The Tribunal questioned the basis for figures given by Mr Chong. This led to somewhat lengthy and unproductive exchanges between the parties and the Tribunal in relation to the amount of the Appellants' earnings.

62. HMRC accepted that on the HMRC figures, the revised taxable profits of the partnership (after payment of business expenses and VAT) were £87,837 in 2012-13, £99,161 in 2013-14, £88,138 in 2014-15, and £97,549 in 2015-16. The profits of each of the partners would have been half of those amounts.

63. However, there is no evidence before the Tribunal of kind of profits that might generally be generated by a business of the type owned by the Appellants. In the absence of evidence, the Tribunal cannot conclude that this level of profit by a business of this kind is inherently not credible.

64. The significance of the level of the Appellants' earnings indicated by the HMRC assessment is said by the Appellants to be as follows.

65. First, it is said that it is not credible that the Appellants were such high earners given that they led modest lifestyles (paragraph 23(7) above). It was argued in particular that prior to the

commencement of the HMRC enquiry, the Appellants were not paying tax on cash sales and were not paying the VAT on those sales to HMRC, such that the cash in their pockets would have been equivalent to a far higher gross income still. It is said that it is not credible that the Appellants were ever in receipt of such large amounts. The Tribunal does not accept this argument.

- (1) The only evidence of the Appellants' lifestyle is that contained in Mr Byrne's witness statement (paragraph 23(7) above). Even if everything he states is true, that would not of itself mean that the Appellants' lifestyle was necessarily modest. That evidence is general in nature. It does not set out in any detail why the Appellants could not in reality have been receiving incomes in the amounts suggested by the HMRC assessment.
- (2) In any event, it is possible even for very wealthy people to lead modest lifestyles.

66. Secondly, it is said that if the HMRC assessment was correct, the business would have had a value of some £300,000. It is said that if the business was worth this much, it is not credible that the Appellants would have closed it down, and sold the residual lease for £35,000 to someone who wanted to use the premises for an unrelated purpose, thereby receiving nothing for the goodwill. It is said that it is also not credible that the Appellants would have failed to find a buyer for a business worth £300,000 when it was advertised for sale for only £75,000. The Tribunal does not accept this argument.

- (1) The letter from Adrian Hughes dated 14 July 2021 (paragraph 25 above) is not an actual valuation of the business at the time that the Appellants were trying to sell it. The letter was written on a date several years after the business was closed down, for purposes of these proceedings. The letter appears simply to apply to the business's accounts a general proposition that a given level of annual profits will "suggest" that a business has a certain value. However, the actual value of a particular business at a particular time will be affected by many factors other than the average profits over a number of years. For instance, to give just one hypothetical example, the value of a hitherto profitable business may suddenly drop dramatically if it is announced that a much larger and more competitive competitor is about to open up next door. The Tribunal is not persuaded that this letter from Mr Hughes establishes that the Appellants' business actually had a value of £300,000 at the time that it was advertised for sale, or at the time that it was closed.
- (2) At the time that the business was advertised for sale, and at the time that the business ceased, HMRC had not yet made the assessment. The agents instructed for the sale and potential purchasers may not have been told about the undisclosed cash sales, in which case the agent and potential purchasers would have assessed the value of the business based on the sales and profits that the Appellants had declared to HMRC. That might explain why it was offered for sale for only £75,000.
- (3) The fact that a business advertised for sale does not attract anyone willing to buy it does not of itself prove anything about the level of sales or level of profits of the business. There may be businesses with high levels of sales and profits which, for any number of reasons, fail to attract interested purchasers when offered for sale even for a price far less than the price that the level of profits would suggest that it is worth. As Mr Byrne himself says in his witness statement, "There is no hard and fast rule [that the value of goodwill is in the region of three times the annual profit] and goodwill is only worth what someone is prepared to pay".

- (4) It may be assumed that a business owner would not close down a profitable business or sell it at an undervalued price unless there were sufficient reasons to do so. However, in practice, there will be business owners who do have sufficient reasons for doing so. Having been unable to find a buyer for the business, the Appellants were apparently faced with the choice of either continuing to run the business themselves, or of closing it down and simply selling the remainder of the lease to another business. There is insufficient evidence of the details of all of the surrounding circumstances to enable the Tribunal to conclude that it is simply not credible that the Appellants would have chosen the latter option if the business was generating the kind of profits indicated by the HMRC assessment.
- (5) Mr Byrne’s witness statement says that he received only £35,000 for the lease alone. However, no documentary evidence is provided by Mr Byrne in support of this statement. The witness statement of Adrian Hughes says only that “To my knowledge no offers for the sale of the business were received and the partners decided to close the shop and surrender their lease”, suggesting that Mr Hughes had no direct knowledge of this and was repeating what he had been told. Mr Chong said at the hearing that he personally did not have knowledge of the lease alone being sold for £35,000, and was not giving evidence as to this fact. Overall, the Tribunal considers that there is no evidence of the circumstances surrounding the termination of the Appellants’ business on the basis of which it could be concluded that it is simply not credible that events would have transpired as they did if the HMRC assessment was correct.
- (6) If someone owned a local fish and chip shop, and HMRC issued an assessment that said that its turnover was a billion pounds a year, then it might be said that that is just not credible. However, the evidence in this case does not establish that it is simply not credible that the Appellants’ business could have generated the level of profits indicated by the HMRC assessment.

67. The Appellants have therefore not discharged their burden of establishing by evidence a more reliable figure than the figure in the HMRC assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. 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.

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

Release date: 26th JANUARY 2024