



Neutral Citation: [2024] UKFTT 00544 (TC)

Case Number: TC09214

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Birmingham Tribunal Centre

Appeal reference: TC/2021/02514  
TC/2021/10471  
TC/2022/00751

*VAT – suppression of purchases, inferred suppression of sales – presumption of continuity – corporation tax assessments – penalties – penalty liability notices – appeal dismissed*

**Heard on:** 19-20 October 2023

**Judgment date:** 24 June 2024

**Before**

**TRIBUNAL JUDGE ANNE FAIRPO  
TRIBUNAL MEMBER TERRY BAYLISS**

**Between**

**GOOD CHOICE 2016 LIMITED  
MRS FANG BO GUO**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Poon, of SH88 Limited

For the Respondents: Ms Castle, litigator of HM Revenue and Customs’ Solicitor’s Office]

## DECISION

1. This matter was heard in a hybrid hearing, with Mrs Guo attending by video link, in October 2023. The parties provided written closing submissions which reached the panel in December 2023.

### Introduction

2. This is an appeal against the following HMRC decisions:

(1) to register the first appellant, Good Choice 2016 Limited (the Company), for VAT from an effective date of 1 July 2017. The decision was issued on 23 December 2020 under Schedule 1(1) Value Added Tax Act (VATA) 1994.

(2) to issue VAT assessments for the VAT periods 08/19 and 11/19, for £2,970 and £2,773 respectively. The assessments were issued under s73(1) VATA 1994 on 18 February 2021.

(3) to issue discovery assessments for the years ended 30 November 2017, 30 November 2018 and 30 November 2019 in the aggregate amount of £50,301.59. The decision was issued under paragraph 41, Schedule 18 Finance Act (FA) 1998 on 8 July 2021.

(4) to issue penalties to the Company on 25 March 2021 in respect of VAT under Schedule 41 FA 2008 (for failure to notify) and Schedule 24 FA 2007 (for inaccuracy) in the aggregate amount of £27,412.18

(5) to issue penalties to the Company on 31 July 2021 in respect of corporation tax under Schedule 24 FA 2007 (for inaccuracy) in the aggregate amount of £18,900.01.

(6) to issue the second appellant, Mrs Fang Bo Guo (Mrs Guo), the director of the Company, with Personal Liability Notices in respect of the penalties issued to the Company. These were issued under paragraph 19(1) Schedule 24 FA 2007 and paragraph 22(1) Schedule 41 FA 2008. The Notice in respect of the VAT penalty was issued on 21 April 2021; the Notice in respect of the corporation tax penalty was issued on 5 August 2021.

### Background

3. The Company was incorporated on 16 November 2016 and ceased trading on 8 March 2020. It carried on business as a Chinese takeaway under the trading name 'Oriental China'. Mrs Guo was the sole director of the Company.

4. An HMRC inspection visit was held on 23 May 2018 at which Mrs Guo was advised to ensure that the Company kept till records, as it was not retaining Z readings.

5. The Company registered for VAT with effect from 25 May 2019. HMRC began a VAT and corporation tax check on 8 November 2019 and requested business records. Records provided to HMRC consisted of purchase invoices, handwritten weekly sales figures, business bank accounts and WorldPay statements.

6. HMRC obtained purchase data for the period 4 July 2017 to 26 January 2018 from a supplier to the Company, Total Asia Food Limited (TAF). This data showed that the company made purchases using an invoice account also by way of cash account. Only the purchases ordered on the invoice account had been recorded in the Company's accounts. Mrs Guo stated that purchases made by cash account had been for family use only and had not kept the invoices for those purchases. However, the total shown in the data for purchases made by cash account in the seven-month period for which data had been provided by TAF

was £20,206.38, out of total purchases (both invoice and cash) made for the period was £33,190.37.

7. Following a meeting in February 2020 and correspondence, HMRC concluded that purchases and sales had been suppressed in the business. Revised gross sales figures for VAT purposes were calculated by using the suppression rate for cash purchases derived from the purchase data received from the supplier, applying that rate to the sales declared in the corporation tax accounts, and applying the presumption of continuity. The VAT information was reviewed and used to raise discovery assessments following on from corresponding amendments for corporation tax purposes.

### **Evidence**

8. In addition to documentary evidence we heard from Mrs Guo and HMRC Officers Samways and Eddy. We consider that HMRC's witnesses gave straightforward and honest evidence. However, we did not consider that Mrs Guo was a reliable witness: she answered many questions with hypothetical suggestions rather than providing a specific answer, and gave inconsistent evidence.

9. It was contended that any inconsistencies in Mrs Guo's evidence were due to health issues and side-effects. Mrs Guo's witness statement included details of medication being taken for depression and stated that this had affected her memory, and that she had difficulty remembering things. The side-effects of the medication meant that she felt dizzy and drunk and could not focus. It was also contended that these medical issues explained why the business paperwork was not properly kept, that Mrs Guo had had mental health issues and stress related to issues with her landlord, the rat infestation on the premises (which we note was stated to be in November 2018), and a flood at the premises in December 2018.

10. A redacted medication list was provided for Mrs Guo which shows prescriptions issued for one month's supply of medication in each of November 2016 (sertraline), October 2018 (amitriptyline), October 2021 (citalopram), and December 2021 (citalopram). That is, four months of medication in a period of over five years. No explanation was given for the redaction although in closing written submissions the representative contended that the redacted list meant there were other health issues. The bundle included NHS information about each of sertraline, amitriptyline and citalopram. The NHS information did not give any indication that memory issues could be a potential side effect of any of the medications.

11. A "to whom it may concern" letter was also provided by Mrs Guo's GP in August 2023 which was attached to an application for Mrs Guo to attend the hearing remotely. This letter stated that Mrs Guo had carpal tunnel syndrome which made it difficult for her to drive, and that she was on medication which made her sleepy and so it would be difficult for her to travel by train. The letter did not provide any details of the medication that Mrs Guo was taking at the date of the letter, nor what it was being taken for. The letter did not state that Mrs Guo would have any problems giving evidence.

12. Mrs Guo did not appear to have any particular problems with her memory in the hearing; she gave inconsistent explanations but did not state that she could not remember matters. In the absence of detailed evidence, and noting the burden of proof, we do not consider that Mrs Guo has established that there is any medical reason for her inconsistent evidence. We also do not consider that the evidence supports the contention that health issues were the reason for the consistently poor business record-keeping and other issues arising in this appeal.

13. Accordingly, where there was a conflict, we preferred the documentary evidence and the evidence of other witnesses to that of Mrs Guo.

## VAT assessments – whether made to best judgement

14. s73(1) of the Value Added Tax Act 1994 ("VATA 1994") provides that: "Where a person has failed ... 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."

15. The meaning of the phrase "to the best of their judgement" and the principles to be applied in exercising best judgement were considered in the cases of *Van Boeckel* [1981] STC 290 and *Rahman (trading as Khayam Restaurant)* [1998] STC 826. The principles from *Van Boeckel* are that:

- (1) the Commissioners should not be required to do the work of the taxpayer;
- (2) the Commissioners must perform their function honestly and above board;
- (3) the Commissioners should fairly consider all the material before them; and
- (4) on that material, come to a decision which is reasonable and not arbitrary, and
- (5) there must be some material before the Commissioners on which they can base their judgement.

16. The decision in *Rahman* concluded that the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached "dishonestly or vindictively or capriciously"; or is a spurious guess in which all elements of judgment are missing "or is "wholly unreasonable". Short of such a finding, there is no jurisdiction for setting aside the assessment".

17. We note also the comments of Carnwath LJ (as he then was) in *Khan (t/a Greyhound Dry Cleaners)* [2006] STC 1167 in respect of both the burden of proof and the concept of best judgement:

“[69] There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right (See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522–523 per Lord Lowry).'

That was confirmed by this court, after a detailed review of the authorities, in *Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509. We also cautioned (see [2004] STC 1509 at [38]) against allowing such an appeal routinely to become an investigation of the bona fides or rationality of the 'best of judgment' assessment made by Customs:

'Evidence to the tribunal

[38] ... (i) The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be

diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment ...”

### ***HMRC submissions and evidence***

18. HMRC stated that they had obtained information from a supplier to the Company which showed that a second account was used for purchases, in addition to the account for which purchases had been declared for tax purposes (further details in respect of this are set out later in this decision). Although the invoices for this second account did not show the Company's name and address (nor did they show Mrs Guo's name), the route number and drop number for the invoices were the same as for those on the invoices on the declared account. This route number and drop number were specific to the address of the business; orders for both accounts were delivered on the same day, to the same route and drop number, throughout the period covered by the information obtained.

19. Although it was contended that the second account was for personal use by Mrs Guo and her family, HMRC submitted that this was not a credible explanation as the purchases in the account amounted for over £20,000 between July 2017 and January 2018 alone. HMRC considered that the Company had suppressed purchases, and therefore sales, in an attempt to avoid tax liabilities.

20. HMRC also contended that the Company's record of daily takings did not add up to the amounts declared, and the record had been amended around 3 March 2016. The Company had also failed to keep Z readings to support their daily gross takings figures. A credibility evaluation of the Company records showed that the business would have had very limited ability to meet expenses.

21. HMRC contended that they were entitled to raise the VAT assessments on the basis of best judgement as HMRC had reason to consider that the VAT returns made were inaccurate and that the Company had failed to register for VAT on time, given the evidence of the second undisclosed purchase account from the appellant supplier. The inaccuracies had not been disclosed to HMRC at any time.

22. With regard to the presumption of continuity, HMRC contended that it was reasonable to apply a presumption that suppression of purchases, and therefore sales, was not confined to that supplier or that period of time. The period should be regarded as representative.

23. The suppressed purchases amounted to 61% of the total purchases from the supplier. HMRC applied this percentage to uplift the purchases declared by the Company for corporation tax purposes for the tax periods 2015/16, 2016/17 and 2017/18, to calculate the additional purchases that should have been declared.

24. The undeclared sales were calculated by applying the gross profit ratio of 67% established from the corporation tax returns for 2016/17 and 2017/18. The revised total sales were calculated by applying that ratio to the revised net cost of goods sold, after deductions for personal use of purchases.

25. These calculations showed that the Company had exceeded the VAT threshold in June 2017, and so HMRC contended that the effective date of registration should be 1 July 2017. Assessments were raised for the period from 1 July 2017 to 24 May 2019, the day before the appellant actually registered for VAT.

26. HMRC contended that the assessment had been based on all of the material available to them at the time of the assessment and that the assessment was reasonable. The assessments had been made honestly and reasonably, and was not a spurious estimate or guesswork. The assessments had therefore been made to best judgement. It was not disputed that the assessments had been made within the time limits in s73(6) and s77 VATA 1994.

### ***Appellant submissions and evidence***

27. For the Company it was contended that HMRC had:
- (1) failed to carry out any tests or observations of the business;
  - (2) not shown that any of the alleged cash was witnessed, counted or seized by HMRC; and
  - (3) not established how the alleged cash was used by the Company or Mrs Guo.
28. It was also submitted that HMRC had failed to:
- (1) obtain copies of delivery notes or other supporting evidence from the supplier to confirm the accuracy of the information as to the second purchase account;
  - (2) take into account the items on the second purchase account invoices which would not be sold by a Chinese takeaway to local customers. These items demonstrated either that the account was used for personal items or that the account belonged to someone else;
  - (3) take into account the fact that card/cash ratio in their assessment was the reverse of what would generally be expected in the industry
  - (4) take into account the fact that the Company ceased to use the supplier because of an alleged theft of a mobile and that the supplier's driver may have held a grudge as a result, and could have altered the account records;
  - (5) take into account whether the local demographics could sustain the level of turnover assessed;
  - (6) take into account that the business was unlikely to sustain the level of turnover required for the assessments after being temporarily closed to deal with a rat infestation; and
  - (7) obtain evidence from the appellants, by failing to arrange for the appellants' representative to be able to digitally upload information, and had rushed to make the assessments without this evidence.
29. It was alternatively suggested in correspondence that an unknown person may have placed the orders and intercepted them; this was not sustained in the hearing. Mrs Guo stated in evidence in the hearing that she did not think it was possible for someone else to have intercepted any such orders.
30. It was also contended that HMRC failed take into account Mrs Guo's family's lifestyle, which was stated not to be luxurious, and that they had not considered whether the energy usage of the Company was sufficient to support such sales.
31. It was further contended that it was inappropriate to apply a presumption of continuity from only seven months data from a supplier that had not been used throughout the period of assessment, as that required an assumption that the Company had made off-record purchases from other suppliers.

### ***Discussion***

32. We considered the case law and the evidence before us and noted in particular the caution in *Pegasus Birds* set out above that our "primary task is to find the correct amount of tax, so far as possible on the material properly available ..., the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and [we should not] be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment".

33. For the reasons set out below, we conclude that the VAT assessments were made to best judgement. The assessment was based on material available to HMRC and we consider that they had fairly considered all of the information before them when the assessments were made.

34. We find that HMRC had reason to consider that the returns were incomplete or inaccurate, given the evidence obtained from the supplier. We also find that HMRC had reason to consider that the Company had failed to keep required records, as they had been advised that Z records and invoices for purchases made on the second account were not kept.

35. *Van Boeckel* makes it clear that HMRC are not required to do the work of the taxpayer, such as undertaking investigations to confirm the accuracy of information provided. Some of the contentions raised by the appellants also relate to events after the assessments were raised which, obviously, could not have been taken into account by HMRC at the time that the assessments were raised. In particular, as set out below, the contentions with regard to possible motives to be ascribed to the supplier were not provided until after the appeal process had started.

36. With regard to HMRC's failure to provide a Dropbox link, we note that the correspondence in the bundle that it appears that this relates to a request for a Dropbox link in August 2020 which was not responded to. Time-limited Dropbox links had been previously provided for other uploads. HMRC had requested copies of business records from November 2018 to March 2020; the representative states that documents for December 2018 to May 2019 are missing but that they have scanned some of the documents and requested a Dropbox link whilst they search for the missing documents. The decision to register the Company for VAT from an earlier date was made in December 2020; the VAT assessments were issued in February 2021. The correspondence in the bundle does not suggest that the appellants' representative made any attempt to follow up on this until October 2022 or to provide the documents in any other way. Considering the principles set out in *Van Boeckel*, we do not consider that the failure to provide a Dropbox link is such that it means that the assessments were not made to best judgement.

37. On the first day of the hearing, Mrs Guo stated that she had sent a box of till data to HMRC in January 2020 and that this had been returned to her by HMRC a month or so later. HMRC's officer had no knowledge of this; it appears that the box may have been returned directly for some reason. At the start of the second day, the appellants' representative provided further information, stating that the till rolls had been difficult to scan as they had already faded and so Mrs Guo had sent them in physical format. It was stated that the reason that the summary information was handwritten into a separate book when it was printed was that the thermal paper on which the till reports were printed would fade over time. Mrs Guo's witness statement also refers to the reports having been sent to HMRC "as proof that some had already faded and so that is why a manual summary was needed instead".

38. It was not explained why, when all other documents were provided to HMRC by the appellants' representatives, Mrs Guo chose to send these directly to HMRC. HMRC also noted that, throughout the enquiry, Mrs Guo had stated that she did not keep any till records. There is no reference in the correspondence in the bundle to this information having been provided to HMRC. There were no clear submissions made that these reports should have been taken into account by HMRC; indeed, it seems to us from Mrs Guo's witness statement and the representative's comments that the purpose in sending the reports was to show that the reports were not readable rather than to provide evidence as to turnover and, accordingly, we consider that the existence of till reports does not mean that the assessments were not to best judgement.

39. The appellants' contentions that the calculations failed to take into account the lifestyle of the family and other factors such as potential use of the undeclared funds does not mean that the assessments were not made to best judgement. Whilst otherwise unexplained wealth might indicate that there has been suppression of takings we do not consider that the opposite is necessarily true.

40. The contentions as to energy use did not include any evidence (whether before or after the assessment was raised) as to the energy requirements of the equipment at the business.

41. As the assessments do not specify the form of the undeclared turnover, the contentions with regard to the card/cash ratio do not mean that the assessments were not made to best judgement.

42. The later suggestion that the supplier and/or its driver may have falsified records is also not sufficient to mean that the assessments were not made to best judgement.

43. We considered the submissions made regarding the principle of continuity. For Mrs Guo it was argued that it was unlikely that the business could sustain the level of trade indicated by the assessments due to reputational damage in a small town following the rats issue. We had no evidence that there had been any such reputational damage; the closure was stated to be due to problems with the location. We also note that, shortly after closing this restaurant, Mrs Guo's husband had opened another nearby in what was said to be a better location which does not suggest that there was any such reputational damage.

44. It was also argued that it was unfair to apply presumption of content as HMRC only had evidence of supplies through a cash account for a period of seven months and that to apply continuity presumed that Mrs Guo had another system of making off record purchases before and after doing so via TAF.

45. We consider that it is more likely than not that a person who makes off-record purchases with one supplier is capable of making off record purchasers with other suppliers and, as such, do not consider that the limited information means that the presumption of continuity cannot be applied. As such, we do not consider that the appellants have established that the use of the principle of continuity means that the assessments were not made to best judgement.

### **Quantum of the VAT assessments**

46. Having found that the assessment was made to best judgement and validly raised, we note that Carnwarth LJ stated in the decision in *Pegasus Birds* that the words

“...to the best of their judgement” are used in a context where the taxpayers' records may be incomplete, so that a fully informed assessment is likely to be possible. Thus, the word ‘best’, rather than implying a higher-than-normal standard, is a recognition that the result may be necessarily involve an element of guesswork. It means simply ‘to the best of (their) judgment on the information available’.” We also note that Carnwarth LJ went on to say, in *Khan* [2006] EWCA Civ 89, that “The element of guesswork 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”.

47. The burden of proof is therefore on the appellants to displace the amounts of the assessments. For the reasons set out below, we conclude that the appellants have not met the burden upon them and have therefore not displaced the quantum of the assessments.



### ***Turnover - general points***

48. The appellants' case was, in summary, that the VAT returns were accurate such that no adjustments were required. The turnover had been accurately recorded. If the Company had intended to underpay tax, it was contended that it would have been simpler to dissolve the Company after a year and transfer the business to a new company. The business had been operated by three different companies, each of which had employed Mrs Guo, in the three years before the Company took over the business. Each of these companies had been dissolved within two years of being incorporated.

49. HMRC contended, in summary, that the evidence of suppressed purchases meant that sales had also been suppressed. They also contended that the Company's record of daily takings did not add up to the amounts declared, and the record had been amended around 3 March 2016. A credibility evaluation of the Company records showed that the business would have had very limited ability to meet expenses. The absence of credible explanations for the significant undeclared purchases, HMRC submitted that the Company had suppressed both purchases and sales in a deliberate attempt to avoid tax liabilities and that it was reasonable to apply a presumption that this had continued throughout the time that the Company had traded.

50. We do not consider that the submissions as to the actions of previous companies are of any particular assistance; there are many varied ways in which businesses may operate - not all with the intention of evading tax liabilities - and the previous history of the business' owners is not directly relevant to this appeal. The fact that Mrs Guo has not perpetuated the cycle of incorporation, operation and dissolution does not mean that the VAT returns of the Company were accurate and complete.

51. We also conclude that the turnover was not accurately recorded. For the reasons set out below, we find that there was a second merchant acquirer account which was used for undeclared takings of the business of the Company and that undeclared purchases were made by the Company.

### ***Second merchant acquirer account***

52. The bundle of information provided to the Tribunal contained details of two merchant acquirer accounts registered to the appellant's address. One was in the name of the restaurant (Oriental China) and one was in the name of Miss F Zheng. The account information showed that each of the accounts received broadly similar per month for the period April 2016 to February 2019 (inclusive). No funds were processed in either account for the month of November 2018, when the business was closed initially due to the family's visit to China and subsequently due to a rat infestation.

53. HMRC stated that only the information from the account in the name of the restaurant (amounting to over £166,000) had been shown in the accounts; the second account receipts (amounting to over £143,000) were not included.

54. Mrs Guo confirmed in the hearing that Miss Zheng was her sister-in-law. When asked about the account, she said that she had never seen any statements or correspondence relating to this account.

55. She further explained that the restaurant was originally owned by her sister-in-law's ex-boyfriend, Mr Li, and that her sister-in-law had taken over the business before it was transferred to Mrs Guo. Mrs Guo said first that the ex-boyfriend had said that he was able to return the card machine and close the account but he must have taken the machine away; shortly after, she said that the card machine account had been opened by her sister-in-law after the ex-boyfriend had left.

56. However, in her witness statement Mrs Guo stated that her sister in law had no occupation other than helping in the business part-time and looking after the children. There was no indication that Miss Zheng had taken over the business at any time.

57. Further, in a meeting with HMRC, held at the business premises on 17 February 2020 with Mrs Guo's representatives in attendance, Mrs Guo had stated that she had taken over the business from her mother, on her mother's death in 2016. We note that, in the hearing, Mrs Guo stated that her mother had died in 2017. In the meeting, Mrs Guo stated that her mother had run the business via another company for about a year before Mrs Guo took over the business with the Company in 2016. Mrs Guo stated that she had helped her mother to run the business including setting up a bank account for the business when her mother ran it.

58. Mrs Guo was asked in the hearing about the inconsistency in the explanations as to ownership of the business, and replied that Mr Li had been thinking of selling the business to Mrs Guo's mother.

59. Mrs Guo could not explain why her sister-in-law's merchant acquirer account showed funds received of £2-3,000 per month. As noted above, she first suggested that the card machine might have been taken by the ex-boyfriend, and that her sister-in-law would not have known about this. She suggested that the ex-boyfriend might have his own shop now and be using the card machine for his business, to avoid having to pay tax. She also said that the merchant acquirer account had been opened after the ex-boyfriend left, but it had never been used in the shop. It was contended in closing submissions that this ex-boyfriend ran another restaurant which was, for some unexplained reason, registered at the address of the appellant premises but that Mrs Guo had not remembered in the hearing given her health issues.

60. It was put to Mrs Guo that the money from that merchant acquirer account would have been paid into Miss Zheng's bank statement, and she was asked whether the ex-boyfriend would also have access to the bank account. She replied that it was possible, if he had a card on the account he could withdraw money from a cash machine.

61. There was no evidence from Mrs Guo that Miss Zheng might have her own business that would involve the use of a merchant acquirer account; her evidence was that her sister-in-law generally looked after the children, and would sometime assist in the takeaway.

62. For Mrs Guo it was contended that, if there had been a second cash machine on the premises, it would have been discovered by HMRC during their visit. That visit was a standard VAT visit; there was no evidence that the HMRC officers had a warrant to conduct a search of the premises. The fact that one cash machine was observed by HMRC is not evidence that there was no second machine.

63. It was also contended that, as the funds were sent to someone else's bank account, Mrs Guo could not have access to those funds. The bank details on the second merchant acquirer account had been redacted as they related to a third party, although HMRC confirmed that the bank account was in Miss Zheng's name; it was submitted that there was no evidence that Mrs Guo used this machine or benefited from it.

64. It was contended that this second merchant acquirer account showed no activity for November 2019 onwards and that, if this account was intended to be hidden, it would have ceased to be used only when the enquiry was opened in early November 2019. We consider that it was not in fact clear that any records had been provided for those months by the merchant acquirer so that we attach no significance to the lack of data from November 2019 onwards.

65. We considered all of the submissions but we found Mrs Guo's evidence unreliable, with multiple inconsistent suggestions and attempted explanations for the existence of this account. We do not consider that it is credible that a second merchant acquirer account would have been operated for years by a third party at a different address, with the statements still going to the Company's address and payments going into Miss Zheng's bank account and then being removed from that account, without Mrs Guo having been aware of it. We also consider that it would strain the bounds of credibility for an unconnected second account to also be entirely unused in the month of November 2018 when the business was closed and when there was also no activity on the acknowledged merchant acquirer account. On balance, we conclude that this second merchant acquirer account was used in the business and reflects undeclared takings of the Company.

66. We note the submissions regarding the lack of evidence that Mrs Guo had access to the funds in the account; this does not mean that those funds were not takings from the business. The bank account into which they were paid, and the use of the funds thereafter, does not change the source of those funds.

### ***Second supplier account***

67. HMRC submitted that evidence showed that the Company had two accounts with a supplier, TAF, but had declared purchases from only one of those accounts.

68. In the grounds of appeal, Mrs Guo accepted that there had been two supplier accounts but stated that the undeclared account was used only to order products for personal consumption by the family. In the hearing, she said that she would buy Chinese snacks using the undeclared account for her children, such as peanuts and sunflower seeds.

69. In her witness statement, Mrs Guo did not state that she did not have an undeclared account with TAF, but denied that the amount ordered on the undeclared account was more than £20,000 as she had typically ordered around £200 per month for personal consumption.

70. At the February 2020 meeting with HMRC at the business premises, at which Mrs Guo's adviser acted as translator where necessary, Mrs Guo stated that she spent £50-100 every two weeks from this account with TAF and that the personal purchases were crisps, chocolates and staples such as rice, noodles, meat and vegetables. This part of the note was added following a request by Mrs Guo's advisers and uses the wording provided by Mrs Guo's adviser.

71. In an email dated 10 March 2020, Mrs Guo's adviser states that "for the avoidance of doubt we do not deny that there was another account for personal consumption with Total Asia Food".

72. HMRC's evidence (as also stated at the meeting in February 2020) was that TAF had provided a full list of all purchases made by the business since July 2107, with details of the dates of delivery, confirmation that delivery had been to the business premises, invoice amounts, invoice numbers, and payment method. TAF had stated that the business had two accounts, one 'cash' and one 'invoice'. Only the invoice account amounts were in the business records and declared to HMRC. All deliveries had been made on days which Mrs Guo had confirmed as being delivery days for TAF, and that two deliveries were made where two orders had been placed. The request to TAF had been for all business records relating to the Company only, and the invoice numbers for the undeclared 'cash' account purchases were either consecutive with or within one or two digits of the invoice account purchases; given that invoice numbers were chronological, HMRC submitted that the most likely explanation in context was that the purchases on the two accounts had been made by the same person.

73. HMRC stated that the route number and drop number for the undeclared purchase invoices was the same as that for the declared invoice account invoices, showing that these purchases had been delivered to the same place as the invoice account purchases, and that it had been confirmed that these purchases had been delivered to the same location as the invoice purchases.

74. The information received by HMRC showed that between July 2017 and January 2018 the amounts purchased through the two accounts amounted to £33,190.37; of this, £20,206.38 was through the undeclared account. Mrs Guo's response in the meeting was that this was family food and considered that the total purchases for this would have been closer to £3,000-£4,000 for that seven month period. She did not keep the invoices for these purchases.

*Whether there were cash account purchases made by the business*

75. Despite the references by the appellants to the existence of two accounts in correspondence and the groups of appeal, in the hearing Mrs Guo stated that she had always maintained that she had only one account with TAF. She said that she would occasionally buy personal items from them but did not know whether they had opened an account in relation to those purchases. She agreed that she had been provided with separate invoices for personal purchases from TAF. In closing written submissions it was stated that any inconsistency in this was due to communication issues, and that Mrs Guo had intended to say that the cash account invoices in the bundle were not hers. We note that there was an interpreter at the hearing and further that at least one of those representing Mrs Guo was able to communicate with Mrs Guo and the interpreter in their own language. Neither made any suggestion in the hearing that there were any such communication issues.

76. When asked why her grounds of appeal explained that the cash account was for personal consumption, Mrs Guo stated that she used cash to pay for all purchases whether personal or for business and that she did not admit that she had two accounts with TAF.

77. When asked about the second supplier account in the meeting in February 2020, Mrs Guo suggested that someone else could have placed orders on the account, suggesting that a relative might have placed orders without her being aware of this. However, as the items were delivered to the restaurant, any third party using the account without Mrs Guo's knowledge would have had to intercept them to retrieve their orders. There was no evidence to suggest that this might have occurred, and in the hearing Mrs Guo stated that she did not think this would be possible. We consider it implausible that such a course of action would or could take place regularly over the period of time involved.

78. It was subsequently contended that the supplier might have deliberately provided false information to HMRC because Mrs Guo had accused their driver of stealing a mobile phone. This explanation was first provided in amended grounds of appeal in 2023; there was no mention of it during the enquiry or in the meeting with HMRC in February 2020. Mrs Guo's explanation was that she had only recently remembered the incident as she was unable to find the police record, and her physical and mental problems, and stress relating to the landlord problems, meant that she had forgotten the incident.

79. Mrs Guo's evidence in the hearing was that she had accused the supplier of possibly employing someone who did not have the right to work in the UK, rather than that she had accused one of their drivers of stealing. This had followed an incident in which she was unable to find her phone after a delivery and thought that the driver might have taken it by accident. Mrs Guo said that the supplier would not provide the driver details, which she needed in order to report the matter to the police, and became angry. Mrs Guo said she was not sure why he was so angry and replied that maybe he was employing people who did not have the right to work.

80. In her witness statement, Mrs Guo stated that she had tried to call the supplier many times to seek a solution to the apparent theft of the phone as the police were unable to assist, but he shouted at her rudely and after a fierce quarrel she had cut all ties with the supplier. There was no mention that the police required her to provide the driver details.

81. After the incident she thought the management of this supplier was a mess and stopped ordering from them. She thought perhaps that TAF had provided false information to 'frame' her as a result of the dispute.

82. Mrs Guo was asked by her representative whether an invoice, on the invoice account, dated 9 February 2018 was the last purchase made with TAF. Mrs Guo replied that she had already stopped ordering from TAF before then; she thought the mobile phone incident was in November or December 2017 and she had stopped ordering from TAF by January 2018. The invoice, to which Mrs Guo was taken by her representative, is clearly addressed to the Company (as indeed are the two preceding invoices in the bundle, also dated in February 2018, and several before that in January 2018).

83. We do not consider that Mrs Guo's evidence regarding a dispute with TAF is credible; we do not accept that she would have entirely forgotten such a dispute for at least three years (between the HMRC visit in February 2020 and the application to amend the grounds of appeal in March 2023) and, as noted elsewhere in this decision, her medical records do not support the contention that she suffered from memory loss of that nature.

84. On 28 February 2020 Mrs Guo's advisers forwarded to HMRC an email from TAF which stated that they confirmed, as the advisers had requested, that Oriental China held only one account with TAF and that there were no other accounts matching the address of the business at any time. HMRC pointed out that only the invoice account had a consistent account number and the email did not state that cash purchases had not been made. Further, the connection between the purchases had been made by TAF identifying the cash purchases as having been made by Oriental China, by the sequential (or near sequential) numbering of cash account invoices with invoice account purchases and the route and drop number being the same as that for Oriental China. None of this was inconsistent with the contents of the email from TAF. No one from TAF was called to give evidence to the Tribunal and we do not consider that it is appropriate to give significant weight to their emailed confirmation although we do note that there is no indication in TAF's email to Mrs Guo's advisers in February 2020 that there was any dispute between Mrs Guo and TAF.

#### *Undeclared account purchases details*

85. It was submitted that the amounts ordered on the cash account invoices were not consistent with amounts that could be stored by Mrs Guo. We had no evidence as to the storage capacity of the business other than Mrs Guo's statement that there was not enough space to store various items.

86. HMRC requested copy invoices from TAF in respect of the cash account under a Schedule 36 Information Notice; these were provided in August 2020. HMRC contended that the orders placed on the second account were not consistent with personal orders, as they included orders for large quantities of containers and bags, and significant amounts of foodstuffs, such as 10kg of cinnamon sticks. HMRC also noted that the invoices did not include chocolate, crisps or other similar snacks for children, in contrast to Mrs Guo's evidence. HMRC accepted that some items would have been purchased for personal use and had allowed for £50 every 2-3 weeks. They considered that most of the items ordered were for business use.

87. The appellants contended that some of the items purchased would not have been used by the business. We had one example of the business menu, which states that it is “2017 new prices”. This, as usual, lists only the names of dishes and does not list all of the ingredients used to make each dish. It was accepted in the hearing that the menu did not include at least one item sold by the business (Coca-Cola). Mrs Guo also stated in the hearing that it was common sense that one would get drinks from a takeaway, but there are in fact no drinks listed on the menu. In closing submissions it was stated that there was a separate in-store menu; no details of this were provided to the Tribunal in the bundle or in the hearing.

88. Further, the appellants contended that there were price differences between items ordered on the Company named account and the second account, even where the same items were ordered on the same day. The submitted that this meant that the second account belonged to a different person, as the Company would have required the same price for all accounts. The order numbers and invoice numbers were also not always aligned, and the second account number varied on the invoices.

89. As already noted, the purchases on the second account were associated with the Company because they were dispatched on the route number and drop number which was used by the supplier for the Company alone; the variations in the account number on invoices do not affect that. Customers make pricing decisions for many reasons, and we had no evidence as to how the order numbers and invoice numbers were allocated by the supplier. On balance, we do not consider that the appellants have established that the relevant purchases cannot have been made by the Company.

90. HMRC also contended that the invoice account did not reflect all of the purchases. For example, the business gave away free poppadoms with orders over £12, but there was only one purchase of six packs of poppadoms shown on the invoice account in the period between July 2017 and January 2018. The cash account invoices showed a further three purchases of six packs each in that period. When asked about this in the hearing, Mrs Guo stated that the product was quite small, expanding on cooking. She also noted that the business sold poppadoms as well as giving them away.

91. The business also gave away free prawn crackers with purchases over £17. The business had purchased prawn crackers approximately twice per month from December 2016 to April 2017 but there had been no further purchases of prawn crackers on the acknowledged account thereafter. Mrs Guo suggested that perhaps she had bought them in bulk to use later if there had been a promotional offer. We reviewed the purchases and noted that there had been no change in quantities ordered to April 2017 and no significant price change.

92. The closing submissions speculated that perhaps the business had reduced the number of items given away to customers or that the poppadoms and prawn crackers had been padded out in some way. No evidence of this was given in the hearing and we do not consider that such speculation is of any assistance.

93. In closing submissions from Mrs Guo’s representative there was also a suggestion that items might have been given to others in the Chinese community in Wales when a business closed and that this would explain “any missing items not ordered”. It was not clear what the purpose of this submission was, although it would appear to be trying to explain why there might have been items which did not appear in the invoice account orders. This was a speculative submission for which no evidence was provided in the hearing or indeed prior to closing submissions.

94. It was contended for Mrs Guo that a few of the prices of items on the cash account were different to those on the invoice account on the same day and that some in particular were lower. It was suggested that the cash account purchases had been made by someone else who

had negotiated a lower price for the goods. Other anomalies were also pointed out, with differences between the order number sequence and the invoice number sequence. It was also suggested the software used by the supplier might have flaws (a comparison with the Post Office Horizon software was suggested). This was another speculative submission; there was no evidence from TAF to support any such contentions or suggestions.

95. We have taken the appellants' submissions into account where they are not speculative but balance these against the fact that Mrs Guo provided a series of conflicting suggestions and explanations as to why TAF have provided HMRC with details of significant undeclared purchases made by the business, and as to why the undeclared account purchases could not have been made by the business.

96. Given all of the inconsistencies and lack of clear answers, we do not consider that Mrs Guo was a reliable witness and, on the balance of probabilities looking at the evidence overall, noting the evidence that the purchases were all delivered to the same location, find that the undeclared account purchases detailed by TAF to HMRC were in fact ordered on behalf of the business.

### ***Lifestyle***

97. Mrs Guo's representative contended that Mrs Guo's lifestyle did not support the level of suppression argued for by HMRC, that no-one had seen any of the cash contended for by HMRC, and noted that she had claimed social security benefits for a period of time after the business closed. We do not consider that these submissions are of any particular assistance; whilst otherwise unexplained wealth might indicate suppression of takings we do not consider that the opposite is necessarily true. Similarly, the contention that there was no witness evidence as to any suppressed amounts being taken does not mean that suppression did not occur.

98. Mrs Guo's representative also submitted that Mrs Guo could have returned to China to avoid legal action by her landlord and this tax enquiry; she could have retired to China on the amounts alleged to have been suppressed. They submitted that her remaining in the UK was evidence that she had not suppressed takings. We consider that these contentions are of limited assistance; there are many reasons why people act in particular ways and we do not consider that remaining in the UK is conclusive evidence that takings were not suppressed.

### ***Other factors***

#### ***Low energy use***

99. It was submitted that the energy usage of the business would not support the level of turnover contended for by HMRC. We were not provided with any evidence as to (for example) the energy requirements of the cooking equipment of the business and, on that basis, do not give any particular weight to that unsupported submission.

#### ***Card to cash ratio***

100. Submissions were made that that HMRC's figures indicated a card:cash ratio of 22/78 and that this was incorrect, with Mrs Guo stating that she thought the business ratio was more likely to be the other way around, with card sales being 60-70% of takings (in her witness statement) or 78% (in the hearing).

101. HMRC confirmed in the hearing that their calculation of suppressed sales had not assumed that all additional sales were made in cash. As the business had closed by the time that the assessments were raised and as poor records had been kept, they had been unable to test the card:cash ratio. The decision had been based on the suppression of purchases rather than a card:cash ratio. The HMRC witness indicated that, taking into account both merchant

acquirer accounts, the ratio of card sales to cash would be higher than that shown by the declared card sales.

102. Given that the calculations were not based on the ratio of card sales to cash sales, and noting the second merchant acquirer account, we do not consider that the contentions regarding the card/cash ratio provide any particular assistance regarding the accuracy or otherwise of the returns and assessments.

#### *Lack of PAYE assessment*

103. The appellants contended that HMRC had not provided any reason for not raising PAYE assessments in respect of the additional kitchen staff that would have been needed to cook the meals which would have been made if the assessed turnover was correct. We do not consider that the lack of any PAYE assessment is sufficient to displace the quantum of VAT assessment in these circumstances, particularly as PAYE assessments cannot be raised on unnamed individuals.

#### **Corporation tax assessments**

104. HMRC contended that a relevant discovery of an insufficiency of tax had been made following the visit by HMRC in February 2020. No tax return was filed by the Company for the accounting period ended 30 November 2019 and so HMRC were entitled to raise an assessment for that year within the general time limits.

105. For the earlier accounting years, for which returns had been filed, HMRC contended that the conditions to raise an assessment had been met because they considered that the insufficiency of tax had been brought about deliberately, as one of the supplier accounts had been underdeclared in order to support an underdeclaration of sales whilst maintaining an apparently credible gross profit ratio. HMRC contended in the alternative that the behaviour which led to the insufficiency was at least careless. In either case, they submitted that the assessments had therefore been raised within the extended period time limits in Schedule 18 Finance Act 1998.

106. As we have concluded that the appellants have not met the burden of proof on them to displace the quantum of the assessments, and have concluded that there was a second undeclared supplier account used by the Company, we agree that the behaviour which led to the insufficiency was at least careless and that the assessments were therefore raised within the relevant time limits.

107. HMRC also contended that they were permitted to infer from evidence of omissions in one year's return that those omissions occurred in other years unless the Company could prove otherwise (*Jonas v Bamford (H.M. Inspector of Taxes)* (1) (1973-1978) 51 TC 1). As the officer had reasonable grounds to believe that takings had been suppressed, and there was an established pattern of suppression from July 2017 to January 2018, he was entitled to apply the principle of continuity.

108. HMRC included charges under s455 CTA 2010 in the assessments as the additional profits calculated had been removed from the company without being declared as either salary or dividends. In the absence of any explanation, HMRC had treated the extracted money as a loan to the director and made the assessments accordingly.

109. The appellants made no particular submissions with regard to the corporation tax assessments other than to contend generally that the assessments should be limited to the period for which evidence had been obtained from the supplier, and such that the principle of continuity should not apply. As noted above, we consider that it is appropriate to apply the principle of continuity in the circumstances of this case.



110. The assessments were based on the amounts calculated for VAT purposes, to arrive at additional net taxable profits. As we have concluded that the quantum of the VAT assessments stands good, and no submissions were made on behalf of the appellants the the corporation tax assessments were incorrectly calculated, we conclude that the corporation tax returns were correctly issued and that the quantum of the corporation tax assessments is correct as calculated by HMRC.

### **Penalties**

111. As set out above, penalties have been issued to the Company as follows:

- (1) failure to notify liability to VAT (Schedule 41 FA 2008);
- (2) VAT inaccuracies (Schedule 24 FA 2007); and
- (3) corporation tax inaccuracies (Schedule 24 FA 2007)

112. HMRC contended that the behaviour which led to each of these matters was deliberate, for the following reasons (in summary):

- (1) the Company was aware that it was making undeclared sales;
- (2) the Company was aware that it was trading above the VAT threshold before registering for VAT;
- (3) the Company chose not to retain records from the till to evidence business transactions;
- (4) purchases were not declared and records relating to those purchases were not kept;
- (5) the Company knew that there were inaccuracies in its returns; and
- (6) no disclosure was made to HMRC of these matters although opportunity was provided.

113. HMRC therefore assessed the penalties on the basis of deliberate behaviour and any disclosure being prompted by HMRC. A total of 35% mitigation was given in respect of each of the penalties, providing 10% for telling, 10% for helping and 15% for giving access to records. HMRC considered that there were no grounds for making a special reduction in the penalties.

114. The appellants' representative contended that there had been no deliberate behaviour, that if the Company had intended to default on tax, Mrs Guo would have dissolved the Company (as previous companies carrying on the business had been dissolved). It was also suggested that Mrs Guo would have returned to China to avoid the tax enquiry in such a scenario.

115. A deliberate act is generally one done consciously. The Supreme Court recently considered the meaning of 'deliberate' in relation to whether there was a deliberate inaccuracy in a document (*Tooth* [2021] UKSC 2017 at [47]). For there to be a 'deliberate' inaccuracy, HMRC have to establish that there was "an intention to mislead the Revenue on the part of the taxpayer as to the truth ... or, perhaps ... reckless as to whether it would do so".

116. The suggestions put by the appellants' representative do not particularly assist; there are many reasons why actions may or not be taken and hypothetical actions not taken are not indicative either for or against a particular action having been taken.

117. Considering the evidence above, and in particular our findings that there was a second undeclared merchant acquirer account used in the business and that there were undeclared purchases made by the Company, we find that the appellants knew that the tax returns of the Company were inaccurate. Mrs Guo had been involved with the previous incarnations of the business, as an employee and supporting her mother, and those incarnations were VAT registered. We conclude that the appellants knew, or chose not to find out for certain, that the Company was trading above the VAT threshold for some time before the VAT registration was submitted, and that therefore we find that behaviour which led to the failure to notify and the inaccuracies in returns was deliberate.

118. We do not consider that there is any reason to amend HMRC's mitigation and so find that the penalties were properly raised in the correct amounts.

### **Personal liability notices (PLN)**

119. Where penalties are assessed to a company for deliberate inaccuracies or failures which are attributable to a director, HMRC may specify by written notice (personal liability notice) that the director shall pay the some or all of the penalty (para 19, Schedule 24 FA 2007; para 22, Schedule 41 FA 2008).

120. HMRC contended that Mrs Guo was the sole director and controlling mind of the Company and so the behaviour giving rise to the penalties could be directly attributable to her. As the Company had ceased trading on 8 March 2020 and HMRC believed that the Company was either insolvent or about to enter insolvency, they issued the PLN to her.

121. Mrs Guo's representative contended that she should not be held liable due to her health issues, family life and the stress caused by her landlord as well as the impact of covid on the enquiry.

122. It was not disputed that Mrs Guo was the sole director and controlling mind of the Company. We conclude that the deliberate inaccuracies and failure which under lie the penalties were attributable to her.

123. We do not consider that the fact that the enquiry took place during the covid pandemic provides any grounds for reducing the PLN. For the reasons set out above, we do not consider that any health issues suffered by Mrs Guo provide a reason for the failures and inaccuracies that might merit a reduction in the PLN. Similarly, any problems between Mrs Guo and the landlord of the premises does not explain the inaccuracies and failure. The evidence provided to us indicated that the issues with the landlord arose when the lease was ended shortly before the business ceased; this does not explain the inaccuracies and failures, which substantially took place before that. The submissions did not specify why Mrs Guo's family life meant that she should not be considered to be liable to the PLN.

124. For these reasons, we find that the PLN was correctly issued in the assessed amount on Mrs Guo.

### **Conclusion**

125. For the reasons set out above, the appeals are dismissed and the assessments, penalties, and penalty liability notices are upheld in full.

### **Right to apply for permission to appeal**

126. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**Release date: 24<sup>th</sup> JUNE 2024**