



**TC02361**

**Appeal number: TC/2009/11941**

*Income tax - amendments made to partnership profits for years before and after year of enquiry – poor record keeping by taxpayer – use of estimated turnover – presumption of continuity – use of best judgment by Tribunal.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PIZZA RANCH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE W D F COVERDALE  
MRS G PRATT**

**Sitting in public at Leeds on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> July 2010**

**Mr T Nawaz, Accountant, for the Appellant**

**Mr F Healey, Officer of HMRC, for the Respondents**

## DECISION

1. Pizza Ranch is a food retailing business operated by Mr S Hadi Banihashemian and Mr S Hassan Banihashemian in partnership from premises at 36 Ousegate, Selby. This is an appeal by the partnership against amendments made to the returned partnership profits for the five accounting years ending on 31.03.2002. The amendments were made following an enquiry into the partnership's 2001 tax return and the adjustments were as follows:

	<b>Returned profit</b>	<b>Increase</b>	<b>Revised profit</b>	<b>Legislation</b>
1998	34,226	51,000	85,266	S30B(1) TMA 1970
1999	42,778	52,000	94,778	S30B(1) TMA 1970
15 2000	33,768	54,000	87,768	S30B(1) TMA 1970
2001	24,604	55,000	79,604	S28B(1) & (2) TMA 1970 - year of enquiry
2002	14,603	55,000	69,603	S28B(1) & (2) TMA 1970

2. A procedural point has been taken by Mr Nawaz, for the appellants, at the outset of this appeal. He suggests that it might be appropriate for the Tribunal to adjourn today's hearing relating to HMRC's assessments because the matter of penalties may arise if the appeal is not wholly allowed and he submits that his clients can may be put at a disadvantage if they are not fully represented in respect of potential penalty issues. Indeed, he believes his clients might be entitled to Legal Aid and to have legal representation on the matter of penalties. He seeks "equality of arms"; he says that if penalties have to be considered then it would be more economical to have one hearing, relating to the assessments and penalties, rather than two separate hearings. He does not specifically request an adjournment but says that he would not object to an adjournment.

3. Mr Healey, for HMRC, submits that there is no good reason why matters of the assessments and any penalties should be heard together and there is no authority for such a proposition (although on occasions they are heard together). He observes that it takes time for penalty issues to be addressed, not least because the quantum of the assessment has to be determined before any penalty can be calculated. He submits that the assessment issues should be the subject of this Tribunal's determination and penalty matters should be considered separately when this appeal is concluded.

4. The Tribunal will not adjourn today's hearing; the matter will proceed to a determination of the assessment issues before the Tribunal at this time. If any penalties are imposed following the Tribunal's decision they can be appealed separately; the Tribunal would endeavour to reserve the case to the same two members who are sitting today, for the sake of continuity.

5. In making this decision the Tribunal is mindful of the length of time this case has been outstanding and the need to progress the matter bearing in mind the time

element of calculating and imposing any penalty and the time that would be taken to process any further appeal.

6. If any penalty should become a further issue for the Tribunal Legal Aid could be considered at the appropriate time and, if granted, it would be confined to the penalty matter only. The Tribunal today has no knowledge about whether Legal Aid would be available in any case; appeals against assessments are civil matters and there is no suggestion that Legal Aid could have been granted to the appellants for today's hearing; it is acknowledged that penalty matters may be deemed criminal, rather than civil, but the application of Legal Aid remains unknown.

7. Finally, on this issue, it is concluded that the presentation of the appellant's case today will not be prejudiced by not knowing whether penalties are likely to be raised.

8. Mr Nawaz then advises the Tribunal that he continues with today's hearing under protest; he repeats that he feels his clients will be prejudiced; he says that his client Mr Hadi Banihashemian struggles with the English language. The Tribunal takes the view that there has been ample time for Mr Hadi Banihashemian and his advisers to arrange for an interpreter to be present but they have not done so. The point has not been raised before today's hearing. In fact Mr Hassan Banihashemian is to give evidence to the Tribunal and Mr Nawaz acknowledges that this will be adequate for the purpose of adducing oral evidence.

9. Mr Nawaz has further taken issue over the absence from today's hearing of Mrs Bailey, an Inspector of taxes who had the conduct of this enquiry before her retirement some three years ago. The Tribunal acknowledges the answer given by Mr Healey, namely that if the appellants had wanted Mrs Bailey to attend this Tribunal hearing they could have requested this (with a witness summons if necessary) but they have not done so. In any case, as Mr Healey points out, the vast majority of the evidence comes from the appellants' own records. Mr Healey is obviously uninhibited by the absence of Mrs Bailey and clearly has a mastery of the issues in the case. At the request of Mr Nawaz, Mr Healey has given evidence on oath to the Tribunal. Mr Nawaz himself has also availed himself of the opportunity to give evidence on oath.

10. It has been correctly observed that any enquiries into the partners' individual tax returns are not before the Tribunal; it is only partnership matters that are for adjudication.

11. Returning, therefore, to the substance of today's appeal, an enquiry into the 2001 partnership tax return was opened on 27.12.2002 under the provisions of S12AC(1) Taxes Management Act 1970; the enquiry was closed on 03.09.2004.

12. The full accounts for the year ended 31.03.2001 had been produced and disclosed a turnover figure of £120,656, a figure that was replicated in the partnership tax return. During the course of the enquiry books and records from which the accounts had been prepared were requested and produced; the records were examined in detail as part of the enquiry.

13. None of the expenses in the accounts were disallowed by HMRC and there has been no suggestion that any of the expenses claimed should be increased. The only entry in the accounts that was not accepted by HMRC was the turnover figure. That is the issue before the Tribunal in this appeal.

5 14. The turnover figure could be reconciled to cash book entries and entries on the business's submitted VAT returns. Those entries show weekly (not daily) amounts and it was demonstrated that the weekly amounts had been calculated as the sum of the weekly recorded figures (in the cash book) for wages, drawings, cash expenses and cash deposited into the business bank account.

10 15. Included with the books and records were not only numerous daily "Z" readings from the till but also numerous daily individual sales receipts (which were capable of being reconciled exactly to the entries on the "Z" readings). Although individual sales records/"Z" readings were not held for every day of the year HMRC's inspector examined the records for sample periods throughout the year (15 separate weeks). Of  
15 the 107 days included in the sample period there were 25 days where the records were missing. Significantly, of those 25 days, 14 of the missing days were Fridays. In only one week in the sample period were sales records held for each day (including the Friday). The sales figure for that week, calculated using the business's own till readings, exceeds the corresponding figure recorded in the cash book by over £1,000  
20 (week ended 02.07.2000).

16. The Tribunal has sight of documents relating to six of the sample weeks and indeed there is a considerable volume of documentation that has been closely scrutinised during the course of this hearing.

25 17. HMRC has calculated that the sales figure for the 15 week sample period amounts to £39,449.48 compared to the sales figure of £43,009.70 for the same weeks as entered in the cash book. However the inclusion of what HMRC considers to be reasonable estimates for the missing days results in a calculated sales figure of £55,037.93 for the 15 week sample period compared to the sales figure of £43,009.70 as recorded in the cash book, a discrepancy of £12,038.23 for the 15 week sample  
30 period.

18. The appellants' explanation for the discrepancy between the till records and the cash book entries has always been that the till records do not reflect the numerous discounts given by the business. HMRC contend that the till records do contain evidence of both discounts given at the point of sale and discounts given manually  
35 and there is no evidence of other discounts being given as contended by the appellants.

19. Much of the Tribunal's time has been occupied with receiving evidence about the manner in which the appellants conducted their business and gave discounts. There were a number of mechanisms for discounts and the basis for discounts  
40 changed on at least one occasion. There has been the most detailed analysis of the appellants' working papers and individual till receipts have been scrutinised. The Tribunal has certainly grasped the finer detail of the everyday conduct of the

appellants' business of making and selling Pizzas to customers who call and collect them from the appellants' premises or have them delivered to their homes by the partners or their staff.

20. In the course of the hearing it has been alleged by Mr Nawaz that HMRC has  
5 deliberately destroyed items of evidence supplied by the appellants. Mr Healey  
vehemently denies this. The Tribunal certainly sees no evidence of such behaviour  
and finds that there has been no misconduct in the course of the enquiry by HMRC.  
Mr Healey maintains throughout that it is the appellants' own documentation, in the  
10 form of the "Z" readings, that has enabled HMRC to challenge the cash book entries;  
there would be no advantage to HMRC to destroy evidence and such behaviour would  
not, in any case, bolster HMRC's findings and conclusions. Mr Nawaz's allegations  
of "skulduggery" on the part of HMRC are inappropriate and unwarranted.

21. HMRC has never asked for working papers or till rolls in respect of any year  
15 other than the year ending 31.03.2001. The conclusions and assessments for the other  
years are based on the principle of continuity.

22. The appellants' business is a cash business. Mr Hassan Banihashemian has  
described, in his evidence to the Tribunal, how he uses the till and keeps records. He  
also describes the difficulties suffered by a take-away Pizza service and in particular  
20 the monies, ingredients and products that are written off or lost as a consequence of  
delinquent customers who change their minds or decline to accept and pay for  
delivered products. There is an element of malicious telephone orders that will  
inevitably lead to losses when they are not accepted. The Tribunal concludes that  
these are aggravating and confusing elements of this trade that will inevitably lead to  
a certain amount of deficient records. It is, however difficult, to quantify the level of  
25 discrepancies that have occurred in the appellants' record-keeping despite the large  
volume of written and oral evidence that has been considered in the course of this  
appeal.

23. It is correctly observed by HMRC that the keeping of accurate records removes  
the element of risk of potential omissions from the appellants' records; the poorer the  
30 records, the greater the risk. In this case if the sales figure is a balancing figure it is  
totally reliant on the accuracy of the four component parts which comprise it: the  
drawings figure, the wages figure, the expenses figure and the cash to bank figure. If,  
for example, the weekly drawings figure was, for whatever reason, understated, the  
business and partners would pay £32 less in VAT and income tax for every £100 of  
35 understatement. Moreover there would very likely be no way of detecting the  
omission even from a thorough examination of the business records. HMRC therefore  
seeks to establish a test to establish if the turnover figure is wrong. This is why the  
daily "Z" readings from the till are considered to be of such significance.

24. Perceived discrepancies arising from a scrutiny of "Z" readings may arise from  
40 the time when the readings are taken because the time of the last transaction triggers  
the date change on the till; if the last transaction was before midnight the "Z" reading  
will show the previous date; this has been demonstrated and illustrated to the Tribunal

by examining the documents in the bundles. This is one of several factors that can give rise to perceived discrepancies between the till and the cash book.

25. It has become apparent that the appellants have been operating two tills. There is documentary evidence of “Z” readings from a second till. This was disputed by the appellants at interview but the evidence is clear and Mr Hassan Banihashemian has accepted (after an initial denial), in his oral evidence to the Tribunal, that there was a second till. He has sought to explain that it was not used habitually but only if the main till was out of action or for training purposes. He suggests that it was used by staff without authority. He says that the second till would be used at busy times such as Bank Holidays; he then acknowledges that it was used “for a few months”. His evidence in this respect is unconvincing. The Tribunal certainly accepts that a second till was in operation at certain times but it is open to speculation as to the extent of its use. This has to be addressed by the Tribunal to the best of its ability and inevitably an adverse inference is drawn against the integrity of the appellants and their conduct of the business and the propriety of their record-keeping

26. It is HMRC’s contention that, given the evidence of the second till and the evidence obtained in the 15 week sample period and the fact that “Z” readings have so frequently not corresponded with the entries in the cash book, it was reasonable for the inspector to conclude that the turnover shown in the accounts to 31.03.2001 was unreliable and that the inspector was therefore justified in substituting an alternative turnover (and profit) figure utilising the appellants’ own till records and incorporating reasonable estimates. In view of the apparent size of the discrepancies discovered in the enquiry year HMRC do not consider the additions assessed by the inspector for the year ended 31.03.2001 (£55,000) to be unreasonable.

27. In view of the level of the discrepancies discovered in the enquiry year HMRC consider the inspector’s decision to assess similar amounts for the three earlier years and the year following the enquiry to be justified. The “presumption of continuity” principle has been adopted on the basis that, given the discrepancies in the year of enquiry, similar discrepancies are likely to have occurred in other years also.

28. Mr Hassan Banihashemian has given affirmed evidence to the Tribunal. He explains the operation of a till in the business and explains difficulties that can arise out of delivery problems, discounts and problems with drivers employed by the business. Offers to the public were changed from time to time and this is reflected on the till rolls and individual tickets. It seems to the Tribunal that there was much scope for confusion in this cash business and members of the public would sometimes take advantage (improperly) of the offers being given in the shop. Confusion was evidently particularly bad on Saturday nights which were the busiest nights of the week.

29. Mr Hassan Banihashemian has failed to give a satisfactory explanation for one specific discrepancy that is put to him: during the week ending 02.07.200 the “Z” readings from the till disclose takings as follows:

	26.06.2000	Monday	£328.65
	27.06.2000	Tuesday	£345.34
	28.06.2000	Wednesday	£377.55
	29.06.2000	Thursday	£478.90
5	30.06.2000	Friday	£903.29
	01.07.2000	Saturday	£1,221.70
	02.07.2000	Sunday	£577.85

30. The total of these daily takings is £4233.28. The cash book figure for that period is £3184.04: a difference of £1049.24 which is a sizeable sum for one week. There are  
10 discrepancies in other weeks also – some quite small – but the above week stands out as a major item which is not satisfactorily explained. It was largely on the basis of a discrepancy at this level that HMRC made its determination that there was a further £55,000 turnover and profit in the period covered by the 2001 accounts.

31. To be fair to the appellants the equivalent figures for another week – the week  
15 ending 17.12.2000 – were “Z” readings of

	11.12.2000	Monday/Tuesday	£592.82
	12.12.2000		
	13.12.2000	Wednesday	£360.64
	14.12.2000	Thursday	£342.37
20	15.12.2000	Friday	
	16.12.2000	Saturday	£870.11
	17.12.2000	Sunday	£449.70.

32. The total of these daily takings is £2,615.64; the cash book figure is £2,613.27; the discrepancy is only £2.37. However there appear to be no takings on the Friday  
25 which is curious. These figures demonstrate that some caution must be exercised in assessing a pattern of figures.

33. In his oral evidence to the Tribunal Mr Hassan Banihashemian has confirmed that the contents of his written statement dated 28.04.10 are correct. This statement is of some use to the Tribunal not least because it gives a background of personal  
30 matters affecting the partners in the business and the extent to which Mr Hassan Banihashemian was able to supervise and give attention to the business at material times and in particular during his absence in London.

34. Matters of particular note in Mr Banihashemian’s written statement are:

1) In June 2000 the business was not doing very well and Mr Banihashemian  
35 looked elsewhere to find a remunerative business activity. He went to live in London in order to venture into the buy-to-let market and purchased a number of properties there. This proved to be not altogether successful for him personally. In his absence the Pizza Ranch business in Selby was essentially run by his brother Hadi who was not in the best of health and  
40 supervision of the business suffered. He fears that there was a systemic

abuse of the discounts and offers: drivers may have been failing to pass on discounts to customers while keeping the discount money for themselves.

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- 2) Mr Banihashemian acknowledges that “There is something wrong with the z-readings or rather the interpretation being placed on them by HMRC ... the z-readings are not a reliable record”. He does not acknowledge that there may be something wrong with the cash book entries. He admits that in these respects “there is a degree of speculation on my part”.
- 3) The shop was a declining business as demonstrated by the returned profit figures listed in paragraph 1 of this Decision, certainly after the year 1999.
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- 4) The reason for this decline in business was the opening of a large number of other fast food establishments in Selby which is a small town and could not justify the existence of so many such businesses.
- 5) The declining nature of the business is evidenced by the fact that in 2008 the business was “sold for nothing” and “given away”. It had been advertised for a number of years without success; at one time the business could have been worth £50,000 (generating profits up to £42,778 per annum) but eventually it became obvious that it was not a paying proposition and despite inflation and increased prices the sales became less than £1,500 per week.
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35. HMRC’s computations have relied on estimates, both of perceived missing days’ takings and of the overall additions required for individual years. The use of estimates was considered in *Johnson v Scott* [1978] CA 383 in which it was said by Walton J at page 393:

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“... it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only – the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. When ... the Commissioners state that (with certain exceptions) the Inspector’s figures were “fair”, that is, in my judgment, precisely and exactly what they ought to be – fair.”

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36. HMRC’s case in respect of the years other than 2001 is based upon a presumption of continuity, namely that any discovered failures in the year selected for enquiry are unlikely to have occurred in that year only and are likely to have occurred in other years as well. The inspector has gone back to 1997/98 and forward to 2001/02. This principle was addressed by Walton J in *Jonas v Bamford* [1973] Ch 1 at page 25:

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

37. On the same issue it was said in *Brittain v Gibb (HM Inspector of Taxes)* 59 TC 374 at page 380:

5 One point made ... is that the Commissioners erred in principle in that they took [the appellant's] accounts for one year and satisfied themselves that those accounts were accurate and then proceeded to reject his accounts for all the other years., when they ought to have examined his accounts and given reasons for rejecting them in respect of that year. That I think rests on a misconception. The Inspector fastened, not exclusively but to a large extent, upon the accounts for one year in order to demonstrate to the Commissioners what the Inspector submitted was the unreliability of the appellant's accounts. The Commissioners, having heard all the evidence,  
10 were not satisfied with the accuracy of the accounts, and at that point they were entitled to make their own estimate for each year under appeal.

38. The Tribunal has carried out this exercise taking into account its findings and conclusions from the evidence, both written and oral, given over the course of a three day hearing of this appeal. Set out in paragraph 39 below are the conclusions as to the proper adjustments to be made to the appellants' accounts for the five years in question. It is right that there should be adjustments because the evidence discloses, on the balance of probabilities, that the turnover of the Pizza Ranch business was truly greater than that disclosed in the annual accounts. Matters of particular significance to the Tribunal are;

- 20 1.) Profits peaked in 1999 and in the following year Mr Hassan Banihashemian removed to London, Thereafter the business was not run efficiently and profits declined. This pattern is accepted by the Tribunal. Nevertheless it is the responsibility of the taxpayers to operate their business correctly and to keep proper records, particularly with a cash business.
- 25 2.) Prior to 1999 the business had been expanding year by year.
- 30 3.) During the year under scrutiny, 2001, the turnover has been proved to the satisfaction of the Tribunal to have been substantially understated; record keeping was unsatisfactory; the practice of using two tills is unacceptable; in that year an addition in turnover and profit of £55,000 is the best estimate of the true figure.
- 35 4.) In the three years preceding 2001 the pattern of increasing turnover and profitability should properly be reflected in the presumed increase in profit but the amounts can properly be stated to be less than HMRC's figures.
- 5.) There was a distinct decline in the business in 2002 (resulting in its eventual demise). This can properly be reflected in a significantly reduced addition to the declared turnover and profit figures.
- 6.) The above conclusions reflect a consistent pattern of defective record-keeping. The conclusions are considered to be fair to the taxpayer and fair to HMRC.

39. The Tribunal exercises its best judgment in substituting the following figures for HMRC's figures set out in paragraph 1 above:

	<b>Returned profit</b>	<b>Increase</b>	<b>Revised profit</b>
1998	34,226	10,000	44,226
1999	42,778	20,000	62,778
5 2000	33,768	40,000	73,768
2001	24,604	55,000	79,604
2002	14,603	10,000	24,603

10 40. HMRC will now need to carry out further calculations in order to assess the new amount of tax due from the appellants.

41. To the extent of the revised figures in paragraph 39 above, this appeal is allowed in part.

15 42. 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.

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**W D F COVERDALE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 9 November 2012**