



TC03492

Appeal number: TC/2012/10646

INCOME TAX – underdeclaration of takings – inadequacy of records – whether declared takings and other income insufficient to cover bank deposits and cash expenditure – agreed errors - presumption of continuity - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**IGNAZIO CARDAZZONE
t/a MEDITERRANEAN ICES**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
MR MARK BUFFERY**

Sitting in public in London on 25 November 2013

Mr Sohaib Akram and Mr Nazim Ali of Nazim Ali & Co, accountants, for the Appellant

Mr Paul O'Reilly, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Ignazio Cardazzone (“Mr Cardazzone”) against closure notices, discovery assessments and penalties for the years 2003-04 to 2007-08. The total tax assessed is £31,358.66 and the penalties amount to £14,111.39. The liability to tax and penalties arose because the Respondents (“HMRC”) took the view, following analysis of amounts paid into his bank accounts, that Mr Cardazzone had under declared his income for the year 2005-06 by approximately [£30,000]. HMRC then applied the under declaration to the two years before and the two years after 2005-06. Mr Cardazzone contended that, subject to some agreed adjustments for errors, he had correctly declared his business income in 2005-06 and, accordingly, the assessments were excessive and there was no liability to any penalty.

2. For the reasons set out below, we are satisfied that Mr Cardazzone did not underdeclare his business income for 2005-06. Accordingly, we allow Mr Cardazzone’s appeal.

Issue

3. The assessments for 2003-04, 2004-05, and 2007-08, the closure notices for 2006-7 and the penalties all turn on HMRC’s view that Mr Cardazzone underdeclared his income for 2005-06. The principal issue for the Tribunal to determine is whether Mr Cardazzone underdeclared his income for 2005-06. There is also a subsidiary issue of whether some of the agreed adjustments for 2005-06 are of a one-off nature and should not be used to calculate adjustments for other years.

Burden of proof

4. The burden is on the appellant to satisfy us that the amounts charged to tax by the amendments are wrong - see section 50(6) Taxes Management Act 1970 and *Brady v Group Lotus Car Companies plc* [1987] STC 635. The primary question for us is whether we are satisfied on the evidence we have heard and seen that the additional amounts chargeable to tax for the year 2005-06 as a result of the amendments are excessive. We must then consider whether any underdeclarations or errors in the tax return for the year 2005-06 support the adjustment and assessments for other years. We make our factual findings on those issues on the basis of the balance of probabilities.

Presumption of continuity

5. In relation to the years other than 2005-06, HMRC rely on “the presumption of continuity”. HMRC submitted that, in the absence of evidence that shows that the underdeclarations were one off events, the underdeclarations in the 2005-06 tax year are evidence that underdeclarations also occurred in other years. In support of their submission that a situation is presumed to go on until there is some change in the situation, HMRC referred to and relied on *Jonas v Bamford* 1973 51 TC 1, 1973 STC 519. In *Jonas v Bamford*, Walton J observed, at page 25, that

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

6. *Jonas v Bamford* was considered by the Tribunal in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) where HMRC also sought to rely on a principle of continuity. We agree with the observations of the Tribunal in *Syed* at paragraph 38 that:

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

25 7. The presumption of continuity is only a presumption which may be rebutted. In our view, if the evidence shows that an adjustment in 2005-06 was due to a one-off error or event then that is sufficient to rebut the presumption of continuity and any adjustments to returns or assessments for other years based on that error or event would be excessive.

30 **Evidence**

8. We received a witness statement and heard oral evidence from Mr Alexander Sutherland, the HMRC Higher Officer who conducted the enquiry. Mr Cardazzone did not provide a witness statement but gave oral evidence. Mr Cardazzone’s wife, Mrs Cardazzone, provided a brief witness statement but did not give evidence and so
35 could not be cross-examined on it. Nevertheless, we have read and accepted Mrs Cardazzone’s witness statement in so far as it relates to her purchases of ice cream from her husband. In addition, the bundles contained a comprehensive collection of correspondence and other documentation generated by the enquiry which we have taken into account in this decision. On the basis of that evidence we find the facts to
40 be as follows.

Facts

9. Mr Cardazzone is a manufacturer and wholesaler of ice cream and associated products, such as cones and chocolate flakes. He trades as Mediterranean Ices. He operates from premises in south west London. Mrs Cardazzone sells ice cream from

an ice cream van. Mrs Cardazzone buys her ice cream and other products from her husband.

10. In his tax return for 2005-06, Mr Cardazzone declared a turnover of £245,146 for his ice cream business which, after taking account of total expenses of £230,390, a disallowable expense of £13,488 and capital allowances of £20,007, produced a net profit of £8,237. The return also showed rental income from property of £12,300 which, after expenses of £9,547 and a 10% wear and tear allowance, produced a net profit of £1,523.

11. On 27 November 2008, Mr Sutherland opened an enquiry under section 9A of the Taxes Management Act 1970 into Mr Cardazzone's tax return for the year ended 5 April 2006. After some correspondence which is not material, Mr Sutherland was provided with business records and information relating to Mr Cardazzone's business income for 2005-06. Mr Sutherland reviewed the records and identified some concerns in relation to them. Mr Sutherland found that there were some missing invoices. He also identified some rental income from Catercool Refrigeration Limited ("Catercool") which he could not relate to the return. Mr Sutherland carried out an analysis of Mr Cardazzone's bank and sales records. From that analysis, it appeared to Mr Sutherland that more had been banked than was included in Mr Cardazzone's tax return. Mr Sutherland also found some credit notes that had been double entered and he identified some expenses that had been declared in error. Mr Cardazzone did not maintain a record of cash expenditure and, as a result, the accounts included a balancing figure. Mr Sutherland examined the bank statements for the joint bank account of Mr and Mrs Cardazzone and found a large number of deposits which could not be identified in the records of the business.

12. On 16 September 2009, Mr Sutherland had a meeting with Mr Cardazzone and his accountant, Mr Ali. At the meeting, Mr Cardazzone described his business. We were shown a note of meeting produced by HMRC. The contents of the note, which had been signed by Mr Cardazzone and his accountant, were not challenged by Mr Cardazzone and included the following information about his business and records.

(1) Mr Cardazzone works seven days a week, starting at 4 am and finishing between 9 pm and 11 pm. He owns the machinery required to manufacture the ice cream such as wrapping machines, lolly tanks, machines for soft and hard ice creams and freezers for storage. Every day, Mr Cardazzone starts the machines and makes ice cream. He also maintains the ice cream making machines. Mr Cardazzone serves customers from behind the sales counter, takes orders over the phone, prepares sales invoices and, on Tuesdays and Fridays, makes deliveries either early morning or late evening in a refrigerated van. Some 99% of his customers are ice cream vendors with ice cream vans and 1% of them are members of the general public as the sales counter is open to passing trade. None of his customers are shopkeepers. Customers either call at the counter or telephone with a list of items that they wish to buy. Mr Cardazzone takes the list and makes up the order. Mr Cardazzone records all sales on the computer which produces the sales invoice which is given to the customer. All orders are paid on delivery. All payments are either cash or

cheque. Mr Cardazzone does not accept debit or credit card payment and doesn't have the facility to do so and nor does he have or use a cash till. The date shown on the sales invoices is the date of sale and payment received. All payments received during trading hours are kept in a safe in the office. Mr Cardazzone does not give credit to customers and no customer has an account with him. He does not use any recommended retail prices for the items that he sells but constantly reviews his competitors' prices in order to remain competitive. He does not aim to achieve any specific mark-up on the goods that he sells as each product is different. Mr Cardazzone said that all sales were invoiced.

(2) Mr Cardazzone starts each day with a cash flow of between £80 and £100. Mr Cardazzone takes amounts of cash from the takings as wages as and when required to cover living and other private expenses. He does not take a regular amount on the same day of the week. Mr Cardazzone does not maintain any record of the cash drawings or cash income and expenses.

(3) Takings are banked by Mrs Cardazzone in the NatWest business account once or twice a week depending on the level of sales. Not all cash sales are banked as some are retained to cover purchases and expenses as well as Mr Cardazzone's drawings. Mr Cardazzone did not maintain any record of sales banked or retained. Mr Cardazzone used an old Sage computer software system to record and raise sales invoices. There is no record other than statements of maintained.

(4) The daily costs incurred in running the business consisted of utility bills, rates, insurance, machine property repairs, motoring costs and repairs. Mr Cardazzone orders most purchases by telephone although he obtains a few items from cash-and-carry or other suppliers. The majority of his purchases and expenses were paid by cheque although some cash and minimal credit card payments were made. Mr Cardazzone said that all expenses claimed would have been either receipted or invoiced and he had no on account suppliers. Mr Cardazzone maintained two trays marked "paid" and "unpaid" as a way of keeping a check on paid and unpaid invoices because he had no physical record or ledger system.

(5) Closing stock for 2005-06 was £55,000 which consisted of wholesale items and manufacturing ingredients. Mr Cardazzone did not keep any records of stock as he had a good idea of the value his stock when his storage was full.

(6) Mr Cardazzone said that the rental income that he put on his return related to the rental of office space to his sister-in-law who is a self-employed in the refrigeration and air conditioning business trading as Catercool. There was no agreement for the letting of the office space which commenced some time in 2003 or 2004.

(7) Mr Cardazzone confirmed that there had been no significant changes in how the business is operated over the three years prior to the meeting on 16 September 2009.

13. Following the meeting on 16 September 2009, there was considerable further correspondence in the course of which Mr Cardazzone agreed some adjustments to the figures for cost of goods sold which were confirmed by Mr Sutherland in his letter of 25 August 2010. Mr Sutherland considered that the main issue was the amount of deposits into the joint bank account of Mr and Mrs Cardazzone which were not substantiated. Mr Sutherland accepted Mr Cardazzone's explanation that he banked cash sales into his Barclays bank account before transferring the money to the NatWest account because of the favourable rate charged by Barclays for cash banking. Further correspondence followed but the parties could not reach agreement. On 22 March 2011, Mr Sutherland issued protective assessments relating to the 2003-04 and 2004-05 tax years based on agreed and proposed adjustments set out in his letter of 25 August 2010. After some more correspondence, Mr Sutherland issued formal closure notices, assessments and penalty determination notices to Mr Cardazzone on 25 January 2012. The adjustments in relation to the year 2005-06 were calculated on the basis of some items of expenditure which it was agreed were not allowable, further adjustments to expenditure which could not be agreed and a cash control analysis which compared Mr and Mrs Cardazzone's sales and other known income against deposits in the bank account and known cash expenditure. The assessments and amendments for the other years were extrapolated from the figures for 2005-06. Mr Cardazzone appealed the closure notices, assessments and penalties.

14. The cash control analysis for 2005-06 produced by Mr Sutherland was based on one provided by Mr Cardazzone's accountant. The analysis compared Mr and Mrs Cardazzone's declared income from their ice cream businesses, property rental and cheques cashed with their expenditure in the form of bank deposits, credit card payments and business cash expenses for the period 1 April 2005 to 31 March 2006. Mr Sutherland's cash control analysis showed that the expenditure exceeded the income by £29,860 calculated as follows:

Dr	Mr & Mrs Cardazzone Joint Cash Control		Cr
Opening Cash	£100	NWBank deposits	£271,260
		Mr C's Barclays deposits	£7,830
Takings (as declared)	£284,679	Joint Barclays Bank deposits	£66,944
Joint rental income	£24,600	Credit Card Payments	
		MBNA Europe Card	£6,188
Cheques cashed	£3,000	Capital One Platinum Card	£5,625
		Barclaycard Visa	£39
Wife's Takings declared	£49,000	Business Cash Expenses	
		Mr C's Cash Purchases	£2,183

		(COS)	
		Wife's Cash Purchases (COS)	£12,278
		Mr C's Cash Drawings	£9,642
		Mrs C's Cash Drawings	£7,286
		Cash Motor Expenses (Mr C)	£2,024
		Cash repairs/maintenance (Mr C)	£670
		Cash stationery/printing (Mr C)	£55
Additional Takings	£29,860		
		Closing Cash	£116
	£392,1339		£392,1339

15. Mr Sutherland said that he had taken the figure for the deposits into the NatWest account from the bank statements for the period. The payments in relation to the credit cards were not made from the bank accounts and so Mr Sutherland had assumed that they had been paid in cash. Mr Sutherland had taken the figures for the business cash expenses from the accounts and the closing cash figure from the balance sheet. Mr Sutherland said that he had identified Mrs Cardazzone's cash purchases from her records and tax return. Her purchases exactly matched Mr Cardazzone's invoices for sales but Mr Sutherland said that he could not identify any cash withdrawals or cheques to match the purchases so he assumed that Mrs Cardazzone must have used cash held back from her own takings to pay Mr Cardazzone for her purchases of ice cream and associated products. Mr Sutherland asked Mr and Mrs Cardazzone to comment on whether the additional takings calculated should be allocated to Mr Cardazzone or Mrs Cardazzone but they did not respond and so Mr Sutherland allocated all the additional takings to Mr Cardazzone. The additional amounts were recalculated to correct an error relating to the rate of VAT applied and communicated to Mr Cardazzone in a letter dated 12 February 2013. The total additional tax due for the five years was £31,358.66 and the penalty was £14,111.39. For the year 2005-06, the letter showed additional profits for Mr Cardazzone's ice cream business of £30,192 and additional rental income of £392 which gave rise to additional tax and NIC of £9,290.69 and a penalty of £4,180.81.

16. Mr Cardazzone gave evidence. He stated that he did not include names of customers on his invoices because he operated like a cash and carry. He produced an invoice for the customer on the computer at the time of the transaction. He gave the

customer a print out of the VAT invoice and kept a copy on the computer. If a customer ordered by telephone, Mr Cardazzone would write the order down and, after completing it, throw the paper away. Mr Cardazzone said his wife banked everything from her business into the couple's joint bank account with Barclays. That was how she paid for purchases of ice cream from him. He said that he did not keep a separate record of cash drawings. He did not need much cash for himself only for bills which he would pay with cash. He said that Mrs Cardazzone took cash from the business, some £60 – £75 per week for food and whatever the children needed. Mr Cardazzone was asked about the expenditure on the family holiday. Mr Cardazzone said that he put most of the expenditure on credit card. He said that he did not spend a lot as he liked simply to relax and he did not smoke or drink alcohol so expenses were mostly travel and accommodation. Mr Cardazzone said that he also attends an ice cream trade convention in Italy once a year at the end of January.

17. Mrs Cardazzone's witness statement said that she worked as a mobile ice cream vendor during the period 1 April 2005 to 31 March 2006. During that period she purchased ice cream from her husband for the sum of £12,278. She received invoices for the purchases and paid for them by paying into the joint bank account. Her witness statement said that whether she paid into the business bank account or the joint account, she paid for the supplies and the records were kept for all transactions.

20 **Summary of submissions**

18. Mr Paul O'Reilly, who presented the case on behalf of HMRC, submitted that Mr Cardazzone's business records in relation to cash expenditure and drawings were incomplete which required HMRC to recalculate the cash control account. Mr O'Reilly contended that the evidence showed that the business takings and other income were insufficient to cover both deposits into the bank account and cash expenditure by Mr Cardazzone and his wife. Mr O'Reilly submitted that the original cash account did not account for all known cash expenditure and there was no proper record of cash drawings but merely a balancing figure. Further the bank accounts did not account for the day to day living expenses of a family of two adults and two children. HMRC's case was that Mr Cardazzone had not included all of his takings in his tax return. In particular, Mr O'Reilly contended that there was no evidence to show that:

- (1) £13,000 paid into Mr Cardazzone's Barclays account on 6 April 2005 included any takings from the accounting period ending 31 March 2005; or that
- 35 (2) Mrs Cardazzone paid £12,278 from the Barclays account for ice cream purchased from Mr Cardazzone during 2005-06; or that
- (3) rent for the period ending 31 March 2006, was paid during that period and included in Mr Cardazzone's declared income for 2005-06.

19. Mr O'Reilly relied on the presumption of continuity to support the adjustment and assessments for other years on the basis that other errors and underdeclarations of income would have occurred in those years. Mr O'Reilly submitted that the burden of proof was on Mr Cardazzone to establish that the assessments were overstated.

20. Mr Sohaib Akram and Mr Nazim Ali, who appeared for Mr Cardazzone, submitted that:

- 5 (1) £10,143.75 of the £271,260 deposited in the NatWest bank account related to the previous accounting period ending 31st of March 2005 and should therefore be excluded from HMRC's calculation;
- (2) HMRC's revised cash control account effectively double counted the purchases of £12,278 by Mrs Cardazzone for her business from Mr Cardazzone;
- 10 (3) HMRC should not continue to rely on the historic balancing figure for cash drawings as set out in the balance sheet for the period ending 31 March 2006 as this had been reduced during the course of the enquiry;
- (4) all rents received from the letting to Catercool had been included as part of the turnover in the accounts even though the invoice was not issued until the following year; and
- 15 (5) some of the agreed adjustments for the year 2005-06 were of a one-off nature and should not be used to calculate adjustments for other years.

Discussion

Did a deposit in 2005-06 relate to 2004-05?

21. In a letter dated 15 June 2012 to HMRC, Mr Cardazzone's accountants stated that the last deposit for the year ending 31 March 2005 was £10,000 paid into Mr Cardazzone's Barclays bank account on 22 March. This was shown in the bank statements that were produced for the hearing. As stated above, Mr Cardazzone banked cash sales into his Barclays account before transferring the money to his NatWest account. Mr Cardazzone said in evidence that he transferred the money between the accounts by writing a cheque. On 22 March, Mr Cardazzone drew a cheque for £9,000 on his Barclays account and on the same day the bank statements for Mr Cardazzone's NatWest account showed that £10,481 was paid in. We accept that the credit to the NatWest account was the cheque for £9,000 and some cash.

22. The bank statements also showed that the next deposit into the Barclays account was £13,000 in cash on 6 April 2005. On the same day, £14,642.56 was credited to Mr Cardazzone's NatWest account. On 8 April 2005, a payment by cheque of £12,000 was debited to Mr Cardazzone's Barclays account. It appears that, notwithstanding the fact that the difference in the dates when the debits and credits were given effect, the cheque for £12,000 was included in the credit to NatWest of £14,642. The next deposit into the Barclays account was £8,000 on 15 April.

23. In the letter of 15 June 2012 to HMRC, Mr Cardazzone's accountants stated that the deposit of £13,000 on 6 April 2005 related to takings for the period 21 March to 3 April 2005 (we think this was a typographical error and should have been 23 March to 5 April), a period of 13 days, and, on a time apportionment basis, calculated that £10,000 related to the year ended 31 March 2005 and fell within the tax year 2004-05. Mr Cardazzone's accountants provided a schedule showing details of the invoices

over the period from 23 March to 31 March which supported a figure of £10,000 for sales during the period.

24. HMRC submitted that Mr Cardazzone had not provided any evidence to show that the amount of £13,000 paid into the Barclays account on 6 April 2005 included
5 takings from the previous accounting period. In cross examination, Mr Sutherland accepted that he did not identify sales of £13,000 in the period 1 – 5 April but maintained that Mr Cardazzone’s business could have generated that amount and there was nothing in the evidence to suggest that the amount deposited did not contain elements of recorded and unrecorded income.

10 25. We accept Mr Cardazzone’s evidence on this point. The pattern of payments into the bank accounts supports trading that is consistent with the invoices produced by Mr Cardazzone. If HMRC are correct then Mr Cardazzone generated turnover of £13,000
15 in five days, ie average takings of £2,600 per day. The bank deposits for the period show a figure that is less than £1,000 per day. Mr Cardazzone’ evidence, which we accept, was that he traded for most of the year, with only the one family holiday and another break to attend an annual trade conference. On the basis of HMRC’s figures, it might be expected that the business would have an annual turnover in excess of £750,000 (ie £2,600 x 300 days approximately). The bank statements do not support such a high level of turnover. We find that, on the balance of probabilities,
20 £10,143.75 of the amount of £13,000 deposited into the Barclays account on 6 April 2005 related to the year ended 31 March 2005. Accordingly, to the extent that the amendment to Mr Cardazzone’s tax return for 2005-06 included the £10,143.75, it was excessive.

Was inclusion of Mrs Cardazzone’s purchases from Mr Cardazzone double counting?

25 26. Mrs Cardazzone sold ice cream from an ice-cream van. She purchased ice-cream and related products from her husband. Mr Cardazzone issued invoices for the products that he sold to Mrs Cardazzone and recorded the sales and income in his business records and tax return. HMRC identified and reconciled those invoices. Mr Sutherland said that he had not seen any evidence that Mrs Cardazzone paid any
30 money into the Barclays bank account in respect of her purchases. HMRC then took the view that Mrs Cardazzone’s purchases were paid for in cash from undeclared takings. In the cash control analysis, HMRC included as credits all the deposits into the bank accounts and the payment of £12,278 by Mrs Cardazzone for her purchases of ice cream from Mr Cardazzone.

35 27. We find that Mrs Cardazzone did not make separate payments to Mr Cardazzone for the purchases of ice cream. We accept the evidence of Mrs Cardazzone that she paid all her takings into the joint Barclays account. We also accept that the purchase amounts were included in the amounts paid into the joint
40 account by Mrs Cardazzone. Any amounts that Mrs Cardazzone owed her husband were settled by way of an offset. This offset arrangement was not documented as it would have been between two third parties because Mr and Mrs Cardazzone were part of the same family unit. That does not mean, however, that Mrs Cardazzone was underdeclaring takings. It was simply a convenient way of settling the amount due

for the ice cream purchases, especially between husband and wife. The offset arrangement has exactly the same effect as if Mrs Cardazzone had made separate payments to Mr Cardazzone for the purchases and that Mrs Cardazzone was entitled to include those costs in her tax return. We hold that the inclusion of Mrs Cardazzone's purchases in the joint cash control analysis resulted in double counting of the amount of those purchases and, to that extent, the adjustment to the Mr Cardazzone's tax return for 2005-06 was excessive.

Cash and other drawings

28. It appeared to us that there was some confusion about the drawings figure included in Mr Cardazzone's self-assessment tax return and how that related to Mr and Mrs Cardazzone's lifestyle. HMRC took the view that drawings were all drawn in cash but this was disputed by Mr Cardazzone who said that the drawings related to cash, mortgage payments and credit card payments. The cash control analysis provided by HMRC showed cash drawings by Mr Cardazzone of £9,642 and by Mrs Cardazzone of £7,286. These amounts did not include the credit card payments amounting to £11,852. We consider that the credit card payments also represent drawings. Mr Cardazzone's accountants submitted that the accounts for Mr Cardazzone's business showed that, absent capital allowances, the profit would have been between £28,000 and £29,000. The income and expenditure account for Mrs Cardazzone's ice cream business showed a profit of £28,257. Mr Cardazzone's accountants submitted that the household had a disposable income of just under £60,000 which was sufficient for their needs. There were no separate records of cash drawings or business expenses paid in cash but we accepted the evidence of Mr Cardazzone that all such amounts had been recorded even though the cash drawings and non-allowable items of expenditure may have been shown as a balancing figure. We accepted Mr Cardazzone's evidence that he and his family had a modest lifestyle. The description of the family holiday, travel, weekly expenses of Mrs Cardazzone and the level of credit card expenditure all supported that analysis. We find that the level of Mr and Mrs Cardazzone's drawings as disclosed in the accounts was consistent with their lifestyle and did not show that they had underdeclared takings from their respective businesses.

Had the balancing figure been reduced during the course of the enquiry?

29. The balancing figure of £29,860 calculated by HMRC was the difference between the takings declared and the cash assumed to have been generated by the two businesses. Cut off errors accounted for £10,143.75, and the double counting of sales to Mrs Cardazzone accounted for a further £12,278. This left a difference of £7,438. We accepted Mr Cardazzone's evidence that he put most of his household expenditure (eg on holidays) on credit cards. Since cash payments were made to credit cards to cover this expenditure, and Mr Cardazzone took very little cash for himself from the business, we accept that payments identified to credit cards were also drawings and being considered otherwise would also result in double counting. Since the total paid during the year was £11,852, this more than eliminates the balancing figure calculated by HMRC.

Catercool rents

30. Mr Cardazzone let some of the office space at his ice cream factory to Catercool, a refrigeration and air conditioning business operated by his sister-in-law. Mr Cardazzone issued an invoice dated 19 April 2006 to Catercool for rent for the
5 period 7 October 2005 to 7 April 2006. The invoice was for a £1,750 plus VAT, giving a total of £2,056.25. It is clear from the documents that Mr Cardazzone did not issue invoices for the rental to Catercool on a regular basis. It appears that his next invoice to Catercool was issued on 6 December 2006 and related to two rental periods, namely:

- 10 (1) 1 February 2005 to 30 September 2005 for £2,000 plus VAT; and
(2) 1 April 2006 to 31 December 2006 for £2,250 plus VAT.

Mr Cardazzone contended that the rental payments for the year ended 31 March 2006 were received during that year and included in his tax return even though the invoices were not issued until the following year on 19 April and 6 December 2006.

15 31. In a letter to HMRC dated 25 February 2011, Mr Cardazzone's accountants stated that Mr Cardazzone had not thought that it was necessary to identify the Catercool rental income separately in his records. They maintained that the difference between the gross takings from the ice cream business records and the turnover figure in the accounts of £3,190 included rent of £3,000 paid by Catercool during the period.
20 Mr Cardazzone produced bank statements for his NatWest account that showed that Catercool paid £293.75, ie £250 plus VAT, between October 2005 and March 2006 by automated payment with the reference "CATERCOOL LTD RENT". In a letter to HMRC dated 15 June 2012, Mr Cardazzone's accountants explained that bank statements only show the monthly payments from when the standing order came into
25 effect but reiterated that difference of £3,000 between gross takings and the turnover in the accounts was the rent received from Catercool.

32. In a letter dated 3 August to Mr Cardazzone's accountants in response to their letter of 15 June, Mr Sutherland referred to his earlier letter of 8 April 2011 in which
30 he accepted that there was a difference between the VAT sales of ice cream etc and the turnover recorded in the Sage recorded sales invoiced income which was used for the turnover figure in the tax return for 2005-06 but did not accept that the rental income had been returned in either the 2005-06 or 2006-07 tax years. Mr Sutherland had already accepted, in his letter of 11 January 2011, that the original sales/turnover figure of £245,146 based on invoiced/banked cash sales and rental income returned
35 for VAT purposes had included rental income banked of £1,762.50 (ie 6 x £293.75). In the absence of any invoice or Mr Sutherland did not accept that any other amount had been received as rent. HMRC submitted that Mr Cardazzone had not provided any evidence that the rental income of £1,489 derived from the letting to Catercool for the period to 31 March 2006 and invoiced on 19 April 2006 had been paid by
40 Catercool in the earlier period and included in the accounts and tax return for 2005-06.

33. In our view, it is clear that the arrangements for the payment and invoicing of the rent in respect of the letting to Catercool were not all that they should have been in

2005-06. It was only from October 2005, when the standing order started, that there is a clear record of monthly payments of rent in the bank statements. Those bank statements establish that Catercool paid Mr Cardazzone rent of £250 plus VAT per month between October 2005 and April 2006. Those payments are consistent with the invoice of 19 April 2006. Having examined the bank statements, it is not possible to identify any earlier payments into the NatWest account that relate to rent. The invoice in relation to the letting for the period to 30 September 2005 was issued late on 6 December 2006. Nevertheless, on the basis of the evidence of Mr Cardazzone, the fact that amount of the surplus over takings in the accounts was just over the annual rent of £3,000 and the invoice of 6 December 2006, we accept that Catercool was a tenant between 1 February 2005 and 30 September 2005 paying £250 plus VAT per month. Accordingly, we find, on the balance of probabilities, that the turnover in Mr Cardazzone's accounts and tax return for 2005-06 included £3,000 in respect of rent, excluding VAT, received from Catercool during the period.

15 *One-off errors*

34. Mr Cardazzone's accountants accepted that there had been some errors in the accounts but submitted that they were not the sort of errors that could be repeated over a number of years. In the year 2005-06, Mr Cardazzone had incorrectly claimed £6,412 in relation to a credit note claimed twice, £561.75 by claiming two purchase invoices twice and £941.76 through using incorrect figures for purchases. In relation to premises costs, Mr Cardazzone had under claimed £3,507 in relation to rates and £1,400 on insurance. There were a couple of other, smaller errors. In summary, the errors netted off to between £3,000 and £4,000. Mr Sutherland recorded in the note of the meeting on 16 September 2009 that he had reviewed Mr Cardazzone's ice cream business accounts and property rental accounts and had found them to be relatively well maintained, although incomplete in areas ie the alleged underdeclaration.

35. We accept that the errors described in the previous paragraph were not deliberate. They do not appear to us to be the sort of errors that would be made by someone who was seeking to underdeclare takings (or overclaim expenses) systematically. While not in any way seeking to condone or excuse errors, we consider that these errors are typical of the sort of one-off errors that are often to be found in the accounts of small businesses, especially those without dedicated accounting support. In this case, we find that the evidence does not lead to a presumption of continuity such that errors in one year can be applied to other years. In conclusion, we hold that it would not be correct to use the agreed errors for the year 2005-06 to calculate adjustments and assessments for other years and, to the extent that the errors have been so applied, the adjustments and assessments for those other years are excessive. Further, as we have found that these errors were not deliberate, the time limits for the assessments in respect of 2003-04 and 2004-05 are not extended to 20 years by section 36 Taxes Management Act 1970 and so those assessments would be out of time even if the presumption of continuity applied.

Conclusion

36. We find that Mr Cardazzone did not underdeclare his takings for the tax year 2005-06. It follows that there was no evidence to support the assessments and closure notice for 2003-04, 2004-05, 2006-07 and 2007-08. We find that the assessments to tax are excessive. In view of our conclusion, the liability to penalties also falls away.

Decision

37. For the reasons set out above, we have decided that Mr Cardazzone's appeal is allowed.

Rights of appeal

38. 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.

20

**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 14 April 2014