TC05293

Appeal number: TC/2011/06687
TC/2012/03913
TC/2013/03817

INCOME TAX – alleged suppression of takings – quantum – whether officer's assumptions justified – VAT – assessments – penalty assessment – whether validly made – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MOHAMMAD AMIN **Appellant**
T/A NEWSBURY NEWS

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS RAYNA DEAN FCA

Sitting in public in Manchester on 20 and 21 January 2016

Mr Philip Rayner of Portcullis VAT Consultancy and Mr Martyn Arthur of Martyn F Arthur Ltd for the Appellant

Ms Pat Roberts of HM Revenue & Customs for the Respondents

DECISION

Background

1. The Appellant runs a newsagents business from premises in Farnworth near Bolton. He has appealed to the Tribunal in relation to both Income Tax and VAT matters. We shall refer to the appeals respectively as "the Tax Appeal" and "the VAT Appeals". The Tax appeal has proceeded under reference TC/2012/03913. The VAT Appeals have proceeded under references TC/2011/06687 and TC/2013/03817.

2. In the Tax Appeal the Appellant was represented by Mr Martyn Arthur. That appeal relates to income tax assessments for tax years 2002-03 to 2008-09 totalling £116,706 ("the Tax Assessments"). The Tax Assessments were made on 19 March 2010 and 7 April 2011 on the basis that the Appellant had allegedly understated his trading profits. Originally the Tax Assessments totalled £129,578 but they were reduced following a statutory review.

3. In the VAT Appeals the Appellant was represented by Mr Philip Rayner. Those appeals relate to assessments to VAT in the sum of £25,653 for periods 08/03 to 02/09 ("the VAT Assessments") and to a penalty for alleged dishonest evasion of VAT in the sum of £23,087 ("the Penalty Assessment").

4. The VAT Assessments were made on 20 June 2011 on the basis that the Appellant had allegedly understated output tax due on supplies in the periods indentified. The Penalty Assessment was made on 26 July 2011 on the basis of an allegation that the Appellant had dishonestly submitted incorrect VAT returns for those periods with the intention of evading VAT. The VAT Assessments and the Penalty Assessment originally totalled £27,951 and £25,138 respectively but they were reduced in January 2012 to the figures set out above. The VAT Assessments and the Penalty Assessment were made on the basis of what had started out as a direct tax enquiry into the Appellant's self assessment returns.

5. The issues raised by Mr Arthur on the Tax appeals are essentially factual issues. Broadly the grounds of appeal are that the Tax Assessments are excessive and unsustainable.

6. The issues raised by Mr Rayner on the VAT Appeals are what might be described as technical issues. Broadly, the grounds of appeal are that the VAT Assessments and the Penalty Assessment were invalid and/or out of time. He did not pursue the original grounds of appeal which were that the Appellant had not been dishonest and the amount of the VAT Assessments and the Penalty Assessment were wrong.

7. We set out below the relevant statutory provisions and our findings of fact made on the basis of the evidence before us. We then separately consider the issues arising in the Tax Appeal and the VAT Appeals. Before doing so we must refer to certain procedural matters that arose during the hearing.

Procedural Matters

8. On the first morning of the hearing Mr Arthur applied for an adjournment. We refused that application. In setting out our reasons for that refusal it is necessary to say something about the procedural history. For various reasons the appeals made slow progress. On 21 August 2015 all representatives were notified that the appeals would be heard on 13 and 14 October 2015. That listing took into account the availability of all representatives. The listing was vacated because subsequently Mr Arthur became unavailable due to another hearing taking place on the same dates. The appeals were then re-listed for 11 and 12 November 2015 but that was vacated because Mr Rayner was expecting to be recuperating from surgery.

9. The appeals were re-listed for 20 and 21 January 2016. Notification of the hearing was sent to the Respondents, to Mr Rayner and to the Appellant personally. Unfortunately no notification was sent to Mr Arthur, although he was made aware of the hearing by Mr Rayner on 7 January 2016.

10. On 11 January 2016 the Respondents applied to vacate the hearing on the basis that they had not received the Appellant's skeleton arguments. By this stage Mr Rayner had served a skeleton argument but Mr Arthur had not, because he had only just been made aware of the hearing date. HMRC's application to vacate was refused on paper, although the Tribunal acknowledged the possibility following further consideration at the hearing of one or both of the appeals not proceeding.

11. The Appellant was not present at the hearing. Mr Rayner confirmed to us that the Appellant was aware of the hearing and that his last contact with the Appellant had been some 7-10 days previously. Mr Rayner wanted the VAT Appeals to proceed on the basis that they did not require evidence from the Appellant.

12. Mr Arthur was originally instructed by the Appellant in 2011 prior to the Tax Appeal being notified to the Tribunal. He told us that he had not had any contact from the Appellant for several years but that he had been paid on a fixed fee basis. He therefore considered himself obliged to proceed with the Tax Appeal even though he had no recent instructions from the Appellant. At our invitation and with some reluctance Mr Arthur applied for an adjournment. He indicated that he would not be in a position to provide any substantive response to the Respondents' case on understated trading profits but wished to challenge the Respondents' witnesses. Having said that, Mr Arthur said that he was not sure an adjournment would help in any event.

13. We noted that as long ago as 26 October 2012 Mr Arthur had informed the Respondents and the Tribunal that the Appellant would not be relying on any witness evidence. As far as documents were concerned the Appellant was relying on the same documents as those contained in the Respondents' List of Documents.

14. We considered that Mr Arthur's application for an adjournment should be refused. The Appellant had been notified of the hearing date. He had spoken with Mr Rayner about the hearing. He had not taken any steps to contact Mr Arthur, either

directly or through Mr Rayner. The appeals had a history of previous postponements and we did not consider that another postponement was justified or would otherwise be in the interests of justice. The Appellant had already had plenty of opportunities to put forward his case on this appeal by way of witness evidence and to give instructions to Mr Arthur.

15. The appeal proceeded before us and Ms Roberts opened the case on behalf of HMRC. She called three witnesses whose evidence we set out below. Following cross-examination of the first witness, Mr Fernley, Mr Arthur again sought an adjournment to obtain evidence in rebuttal of that evidence. Mr Fernley was a specialist in the interrogation of electronic tills and Mr Arthur said that he could not answer that evidence without an independent analysis of it. We refused the application. The Respondents' case regarding the till evidence had been clearly set out in its Statements of Case and in its witness statements. The witness statements had been served on 31 October 2012. There was no good reason any evidence in rebuttal should not have been obtained and served previously.

16. Mr Arthur had already made his submissions about the assumptions made by HMRC in making the Tax Assessments. He told us that he did not feel he could contribute any further and had no questions for the other witnesses. In those circumstances he excused himself from the proceedings and took no further part in the hearing.

Relevant Statutory Provisions

17. In this section of our decision we deal specifically with the statutory provisions concerning VAT at the relevant dates. These provisions form the context for Mr Rayner's submissions on the technical validity of the VAT Assessments.

18. The Commissioners' power to assess VAT is contained in section 73(1) of the Value Added Tax Act 1994 ("VATA 1994"):

> "73(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
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> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following:
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

…

(9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

19. Civil evasion penalties were at the material times provided for by section 60 VATA 1994 which is headed "VAT evasion: conduct involving dishonesty":

"(1) In any case where

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct …

…

(3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person's conduct shall be construed—

(a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated; ...

…

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners."

20. The imposition of a civil evasion penalty is governed by section 76, which provides for the penalty to be imposed by an assessment. The relevant parts of the section are as follows:

"(1) Where any person is liable

(a) …

(b) to a penalty under any of sections 60 to 69B, or

(c) …

the Commissioners may, subject to subsection (2) below, assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly.

…
(3) In the case of the penalties, interest and surcharge referred to in the following paragraphs, the assessment under this section shall be of an amount due in respect of the prescribed accounting period which in the paragraph concerned is referred to as "the relevant period":

…

(b) in the case of a penalty under section 60 relating to the evasion of VAT, the relevant period is the prescribed accounting period for which the VAT evaded was due…

(5) Where a person is assessed under this section to an amount by way of any penalty, interest or surcharge falling within subsection (3) above and is also assessed under section 73(1), (2), (7), (7A) or (7B) for the prescribed accounting period which is the relevant period under subsection (3) above, the assessments may be combined and notified to him as one assessment, but the amount of the penalty, interest or surcharge shall be separately identified in the notice.

…

(9) If an amount is assessed and notified to any person under this section, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount shall be recoverable as if it were VAT due from him."

21. It is clear from sections 73(9) and 76(9) that assessments to VAT and to penalties can both be reduced without being withdrawn. The process of reducing an assessment amounts to amending the assessment.

22. Section 77 deals with time limits for assessments, including penalty assessments. In relation to tax assessments, section 73(6) also has to be considered. Section 77 provides as follows:

"(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or

(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.

(2) Subject to subsection (5) below, an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3) of that section may be made at any time before the expiry of the period of 2 years beginning … with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined.

…

(4) Subject to subsection (5) below, if VAT has been lost

(a) as a result of conduct falling within section 60(1) or for which a person has been convicted of fraud, or

(b) in circumstances giving rise to liability to a penalty under section 67,

an assessment may be made as if, in subsection (1) above, each reference to 4 years were a reference to 20 years."

23. The reference to 4 years in section 77(1) replaced a reference to 3 years with effect from 1 April 2009.

24. The provisions as to time limits for assessments are not altogether straightforward and they were helpfully summarised by Lloyd LJ in *Ali (t/a Vakas Balti) v Revenue & Customs Commissioners [2006] EWCA 1572* as follows:

> "24. As regards a tax assessment, first, this is subject to the time limits in section 77 and those in section 73(6), the latter, as it seems to me, overriding the former if there is any conflict. Under section 73(6) the time expires on the later of two dates: two years after the end of the relevant accounting period, and one year after the Commissioners acquire knowledge of evidence of facts sufficient to justify the making of the assessment. In the present instance it was possible to make a tax assessment within the two year period, but that might not be so in some cases of dishonest evasion.
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> 25. Under section 77, the basic provision is in subsection (1), which applies to any assessment under section 73 or section 76. So far as relevant to this case, it precludes an assessment being made more than three years after the end of the relevant accounting period. This is subject to the later provisions of the same section. Two of these are relevant for present purposes. Subsection (2), which applies to an assessment of a civil evasion penalty, not to an assessment of tax, allows a longer period, namely up to two years from the time when the amount of VAT due for the relevant accounting period "has been finally determined". Counsel offered rival versions of what is meant by that phrase, which appears nowhere else in the Act. In addition, subsection (4), which applies to both penalty and tax assessments, allows a period of 20 years after the end of the relevant accounting period, if VAT has been lost as a result of conduct falling within section 60(1) or for which a person has been convicted of fraud, or in another case not now relevant.
>
> 26. Thus, as regards tax, if an assessment is not made within 2 years after the end of the accounting period in question, it has to be made within one year of the Commissioners becoming aware of evidence sufficient in their opinion to justify the assessment, but that one year period is subject to the overall limit of three years from the end of the accounting period, unless tax has been lost by reason of dishonesty, in which case the three years is extended to 20 years. In practice, in a case of dishonest concealment, the effective limits are likely to be those laid down by section 73(6): either two years from the end of the accounting period, or (if later) one year from the date when the Commissioners had sufficient knowledge to make the assessment.
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> 27. In the case of a civil evasion penalty, section 73(6) does not apply, and it is necessary to form a view as to the effect of section 77(2). The basic rule is that set out in section 77(1)(a), already described. This is subject to section 77(4), also described above, if VAT has been lost by reason of dishonest conduct. It is also subject to subsection (2) which, so far as relevant, imposes a different time limit of two years after the amount of VAT due for the particular period has been finally determined. No question arose in the present case as to the application of the time limits: both tax and penalty assessments were well within time on any basis."

Findings of Fact

25. We heard oral evidence from Mr Fred Fernley and Ms Lisa Wyn Jones, both Higher Officers of HMRC, and from Mr Andrew Barton an officer of HMRC. All witnesses had previously made witness statements which had been served on the Appellant.

26. The Appellant runs a newsagents shop selling newspapers, confectionery, tobacco, groceries and small household items. It is situated in a row of houses in Farnworth near Bolton, in a busy area near a school.

27. On 25 October 2007 the Respondents commenced an enquiry into the Appellant's self assessment return for 2005-06. Daily gross takings were recorded manually in a diary. Having reviewed the business records Mrs Margaret Newlands, an Inspector of Taxes who has since retired, was concerned that the sales figures were unreliable. She had a meeting with the Appellant and his accountant on 22 August 2008 at which she obtained information about how the business was run and on 3 September 2008 she made a report to a VAT officer, Ms Lisa Wyn Jones.

28. On 15 October 2008 Ms Wyn Jones conducted an unannounced visit to the business premises and met the Appellant. She was accompanied by Mr Fernley who specialised in the interrogation of electronic tills. The Appellant operated a Casio till which Mr Fernley interrogated, producing various print outs and obtaining copies of the till roll. A second unannounced visit by Ms Wyn Jones and Mr Fernley was carried out on 2 December 2008 when a further interrogation of the till was carried out.

29. Following these visits Mr Fernley produced a report which set out his conclusion that the true sales of the business had been suppressed. He estimated that the suppression rate was 53.8% of declared sales. In other words, the Appellant had failed to declare more than half of the true sales. We set out the basis on which he reached that conclusion in more detail below.

30. On 16 February 2009 Ms Wyn Jones issued a VAT assessment for period 02/06 in the sum of £2,089. By reference to normal time limits in section 77(1) VATA 1994 this period was about to fall out of time for assessment purposes. In making the assessment Ms Wyn Jones used the suppression rate of 53.8% calculated by Mr Fernley.

31. By November 2009 the enquiry into the Appellant's VAT returns had been passed to Mr Andrew Barton. Consideration was being given to penalties for civil evasion and there was a meeting attended by Mr Barton, Mrs Newlands, the Appellant and his accountant on 16 December 2009.

32. In January 2010 Mrs Newlands started to look at the level of purchases declared by the Appellant. The Appellant's principal suppliers were Booker Cash and Carry, Bestway Cash and Carry and Warburtons the bakers. Mrs Newlands obtained account

documents from Booker indicating that there were two accounts in the Appellant's name. She obtained sample invoices from both accounts comprising 10 of the larger purchases from Booker which suggested that it was the Appellant using both accounts.

33. On 19 March 2010 Mrs Newlands issued protective income tax assessments for years 2002-03, 2003-04 and 2004-05 which were about to fall out of time for assessment. The assessments charged additional tax on sales as well as on motor expenses which she considered had been overstated and income from rental properties which she considered the Appellant had failed to declare.

34. Mrs Newlands continued her enquiries looking at purchases made from Bestway and Warburtons. The Appellant gave her a mandate to approach those suppliers. In the light of the documents provided she considered that purchases from both these suppliers had been understated by the Appellant. The documents indicated that VAT exclusive purchases of £27,304 were made by the Appellant from Bestway in the period 1 March 2005 to 28 February 2006 but that the Appellant's records only showed purchases of £4,397. There was also a small understatement of purchases from Warburtons of £455 in the period 1 October 2005 to 22 April 2006.

35. On 1 March 2011 Mrs Newlands wrote to the Appellant explaining how she proposed to close the enquiry and the detailed amendments and assessments she intended to make. She also provided figures to Mr Barton for the increase in gross profit for the years ended 29 February 2004 to 28 February 2009.

36. On 7 April 2011 Mrs Newlands issued closure notices and discovery assessments for all the tax years covered by this appeal. The Tax Assessments were based on an estimated gross profit ratio of 25% applied to what she considered to be the true cost of sales, including all purchases from Booker, Bestway and Warburtons. Mrs Newlands also included within the assessments income from "no sale" entries on the till which she considered were also undeclared sales.

37. Following an internal review, on 18 November 2011 the Tax Assessments were reduced by removing the amounts attributable to "no sales" which the review officer considered gave rise to double counting of undeclared sales.

38. The resulting Tax Assessments were as set out in the following table.

Tax Year	Additional Profits Assessed £	Undeclared Rental Income £	Additional Tax Chargeable £
2002-03	2,267		645
2003-04	43,032	3,600	15,677
2004-05	61,608	3,600	23,006
2005-06	51,511	1,760	18,036
2006-07	54,589		19,160
2007-08	56,219		20,574
2008-09	58,789		19,608
Total:	£ 328,015	£ 8,960	£ 116,706

39. The Tax Assessments were subsequently appealed on 8 March 2012 on the grounds that they were excessive and unsustainable.

40. Meanwhile, on 20 June 2011 Mr Barton issued the VAT Assessments which were based on the undeclared sales which Mrs Newlands felt she had identified. At that time the VAT Assessments totalled £27,951. Mr Barton wrote to the Appellant with a schedule of the assessments identifying the individual periods from 08/03 to 02/09 and the amount of VAT for each period. There was no reference to period 00/00 in that correspondence.

41. On the same date a form VAT 655 "Notice of Assessment(s) and/or Overdeclaration(s)" was sent to the Appellant showing a date of calculation of 20 June 2011. Most of the separate VAT periods were identified in the Notice, but periods 08/03 to 05/05 were grouped together and described as VAT period 00/00 with the total VAT assessed for that period being £9,808.

42. Mr Barton was content that the VAT Assessments had been made within the time limits set out in VATA 1994. In other words within one year of evidence sufficient to justify the assessments coming to the Commissioners knowledge. He considered that there had been dishonesty so he was entitled to go back up to 20 years.

43. On 26 July 2011 Mr Barton issued the Penalty Assessment and gave notice of it by way of letter. It was based on 90% of the tax sought to be evaded. Mr Barton allowed mitigation totalling 10% of the maximum penalty for disclosure and co-operation. The mitigation was broadly for attending meetings, but taking into account that the Appellant had continued to deny culpability. The penalty was calculated for each VAT period, the first period being described as period 00/00 as above. The letter gave a separate breakdown of each VAT accounting period included in period 00/00 and the penalty being charged for each VAT accounting period. In total the penalty

was £25,138. He also completed a Penalty Input Form VAT292 on the same date. This showed the penalty period as 00/00 and identified the start date of the period as 27 April 2003. There was no separate breakdown of the penalty on the input form.

44. On 23 August 2011 the Appellant appealed the VAT Assessments on the ground that there were no undeclared purchases or sales.

45. On 5 January 2012 Mr Barton took steps to amend the VAT Assessments and the Penalty Assessment to reflect the reduction which had been made to the Tax Assessments for double counting. On 5 January 2012 a "Notice of Amendment of Assessment" was sent to the Appellant showing a calculation date of 3 January 2012. The resulting VAT Assessments, which again included reference to period 00/00 rather than periods 08/03 to 05/05, were as follows:

VAT Period	**VAT Assessment £**		**VAT Period**	**VAT Assessment £**
00/00	9,211		05/07	1,005
08/05	846		08/07	1,241
11/05	976		11/07	935
02/06	1,115		02/08	1,163
05/06	982		05/08	1,334
08/06	978		08/08	1,185
11/06	1,192		11/08	1,272
02/07	1,264		02/09	954
			Total:	£ 25,653

46. In cross-examination by Mr Rayner, Mr Barton said that he was not sure why he had not assessed for periods after 02/09. He said that the references to periods 00/00 were included because the underlying VAT periods were outside the normal time limits for assessment. We are not sure that is right because there would be other accounting periods which were separately identified but which were also outside the normal time limit. However nothing turns on that point.

47. Mr Barton also amended the Penalty Assessment on 5 January 2012. He used a VAT651 "Penalty Amendment Input Document" which was authorised on the same date. It simply showed a reduction in the global penalty from £25,138 to £23,087 with a period reference 00/00. No notification of the Penalty Assessment was sent to the Appellant and Mr Barton did not himself take any steps to ensure that notification of the amended penalty was given to the Appellant. He understood that notification would be sent out automatically. In fact the reduced penalty was not notified to the Appellant until service of an Amended Statement of Case in this appeal on 18 November 2013.

48. On 23 May 2013 the Appellant appealed against the original Penalty Assessment on the ground that there was no dishonesty and the amount of the Penalty was wrong. He was not aware that the penalty had been reduced.

49. We turn now to consider the underlying facts on which the Tax Assessments, the VAT Assessments and the Penalty Assessment were based. In relation to the Tax Assessments Mr Arthur challenged some of the underlying assumptions and inferences drawn by Mrs Newlands. In relation to VAT matters Mr Rayner did not challenge the underlying facts. We make our findings of fact on the balance of probabilities and paying particular regard to the criticisms made by Mr Arthur.

50. We are conscious that the Appellant has chosen not to give evidence. There was no good reason for the Appellant not to give evidence in relation to the Tax Assessments and we draw an adverse inference from his absence.

51. We are satisfied that purchases from Booker were not included in the Appellant's business records. The documentation from Booker shows that in the period 1 March 2005 to 28 February 2006 Booker supplied goods to the value of £93,040 including VAT which were not included in the Appellant's business records.

52. During the course of the enquiry the Appellant offered an explanation for the unrecorded Booker purchases. He said that when he sold a previous business the purchaser had continued to use his account card when making purchases. In the absence of evidence from the Appellant we are unable to accept that explanation.

53. We accept Mr Fernley's evidence of the till interrogations that he carried out on 15 October 2008 and 2 December 2008. It included a complete record of till activity on 11-15 October 2008 and on 1-2 December 2008 although on the two dates visited the record only went up to the time of his interrogation of the till. The Appellant's till showed a high proportion of "no sales" entries. The results may be summarised as follows:

Date	**First and Last Transaction**	**No of Transactions**	**Total Sales £**	**"No Sales"**
11/10/08	06:08 – 19:49	470	1,245	170
12/10/08	07:00 – 17.03	348	960	116
13/10/08	05:38 – 18:48	377	770	153
14/10/08	05:38 – 18:10	341	847	111
15/10/08	05:37 – 15:08	244	688	74
1/12/08	08:10 – 19:58	305	848	92
2/12/08	06:55 – 14:49	141	486	65

54. Mr Fernley also obtained daily till totals for the periods of 31 days up to and including each visit. He was able to compare the till totals to the declared takings of the Appellant for these dates. By way of illustration, for the period 3 November 2008

to 14 November 2008 the comparison of daily till totals to daily gross takings declared by the Appellant was as follows:

Date	Till Total £	Declared £		Date	Till Total £	Declared £
3/11/08	808	540		9/11/08	767	535
4/11/08	2,206	510		10/11/08	963	550
5/11/08	941	630		11/11/08	802	545
6/11/08	721	525		12/11/08	1,008	675
7/11/08	935	590		13/11/08	795	560
8/11/08	1,101	690		14/11/08	992	625

55. Mr Arthur suggested in cross examination of Mr Fernley that he could not be sure of the dates in that table. We are satisfied that the till totals identified by Mr Fernley were for the dates identified and that it is appropriate to compare those totals to what the Appellant declared as the takings for those dates.

56. The evidence before us included the Appellant's record of daily gross takings in the period 1 March 2005 to 28 February 2006. In fact the record was contained in a 1995 diary. HMRC considered that the record was unreliable because there was little fluctuation in the day to day takings, the entries always ended in a "5" or a "0", several figures appeared to be repeated, the spine of the diary was not broken and the pages were not worn as might be expected from daily use.

57. Mrs Newlands was not available to give evidence and during the course of the hearing Ms Roberts and the officers attending the hearing had great difficulty explaining the basis on which the undeclared sales had been calculated. However we were eventually able to make sense of the documentary evidence in the bundles.

58. We are satisfied that Mrs Newland's calculation of the Tax Assessments based on a gross profit ratio of 25% was a reasonable way in which to identify the true level of sales. She used 25% because in 2003-04 the gross profit ratio was 24.62%. That was the Appellant's first full year of trading and the gross profit ratio declined in 2004-05 to 23.6%. In each of the following years it was approximately 20%.

59. The enquiry year was 2005-06. Ignoring for present purposes any undeclared sales arising from use of the "no sale" key which were later removed, undeclared purchases of £117,039 were identified. Together with the declared purchases this gave a total cost of sales of £252,527. Applying a gross profit rate of 25% gave a total gross profit of £84,172 compared to the declared gross profit of £35,101. The undeclared gross profit was therefore £49,071, which amounts to 140% of the declared gross profit. Overstated motor expenses of £2,491 were added back and an adjustment of £51 was made in relation to unclaimed capital allowances so that the additional profits chargeable to income tax were £51,511. Similar calculations were

carried out for the other tax years to give the additional profits assessed to tax which we have identified in the table above.

60. Mr Arthur challenged the underlying assumptions on which the calculations of undeclared profits were based. He submitted without going into any particularity as follows:

(1) There are no good grounds not to accept the Appellant's daily record of gross takings. The suspicions of HMRC are unwarranted.

(2) There were two accounts with Booker in the Appellant's name and it was wrong for HMRC to assume that the purchases on both accounts were by the Appellant.

(3) The Appellant had produced statements for his business current account with Nat West Bank and HMRC had identified no irregularities in relation to those statements.

(4) The Appellant's explanations at various meetings were cogent and consistent.

(5) HMRC were not entitled to use the gross profit ratio of 25% in the first year of trading as representative. In particular there was no evidence as to opening and closing stock levels when the business was purchased and at the end of the first year of trading.

(6) The Appellant could not be expected to prove a negative, that he had not suppressed his takings. The business did not sell alcohol and the mark ups on cigarettes, bread and confectionery were much less than 25%.

61. In the light of those criticisms, Mr Arthur submitted that it was not just or fair for HMRC to seek to maintain the Tax Assessments.

62. There was reference in the documentary evidence before us to what the Appellant had said during the course of HMRC's enquiries. For example at the meeting on 22 August 2008 he is recorded as having said that the record of daily gross takings was rounded down to the nearest £5 with any additional amounts being left in the till and accounted for the following day. He is recorded as saying that the "no sale" entries on the till were where a person in the shop asked for change and also that the till was used to record some lottery and paypoint takings when the shop was busy. These would later be taken out using the "no sale" button.

63. We gave little weight to these explanations because the Appellant had chosen not to attend or to give evidence. In the circumstances Mr Arthur could not make out any factual foundation for the criticisms he made of the inferences Mrs Newlands drew from the evidence.

64. On the basis of the evidence as a whole we are satisfied that the Appellant was understating his purchases and his sales to the extent reflected in the Tax Assessments. Given the scale of those understatements we are satisfied that the Appellant was deliberately and dishonestly understating his purchases and sales with

a view to evading tax, both income tax and VAT. We are not satisfied that the general criticisms made by Mr Arthur of Mrs Newland's inferences are made out.

65. The VAT Assessments were calculated using Mrs Newland's figures. For example in periods 05/05 to 02/06 the gross profit on undeclared sales was calculated as £49,071, again ignoring any undeclared sales calculated by reference to the "no sale" key. Mr Barton estimated the undeclared VAT by reference to the gross profit, in other words he assumed that the input tax on all purchases was deductible. He also assumed that the undeclared sales were taxable at the same effective rate of VAT as the declared sales and were split between VAT periods in the same proportion as the declared sales. For example in period 05/05 the undeclared sales resulted in an increase in gross profit of £12,908, 35% of which was taxable at the standard rate of 17½ %. This gave VAT of £790 assessed in that period.

66. There was no challenge to Mr Barton's judgment in assessing VAT in this way and we can see no reason to criticise his approach.

Reasons and Decision

67. We firstly consider the Tax Assessments. Having set out the basis on which the Tax Assessments were made and in the light of our findings of fact we can do so quite briefly.

68. There was no issue in relation to the timing of the Tax Assessments. Enquiries were opened into the Appellant's self assessment returns for 2005-06 and 2006-07 on 25 October 2007. Those enquiries were the subject of closure notices and amendments issued on 7 April 2011. On the same date assessments were issued in relation to tax years 2007-08 and 2008-09. At that time the ordinary time limit for making assessments was 4 years from the end of the year of assessment.

69. Assessments were made for tax years 2002-03, 2003-04 and 2004-05 on 19 March 2010. As at that date the ordinary time limit for making assessments was 5 years after the 31st January next following the year of assessment. Hence the assessments for 2002-03 and 2003-04 would have been out of time unless there was a loss of tax which was attributable to the taxpayer's fraudulent or negligent conduct, in which case the time limit was 20 years. The burden is on HMRC to establish fraudulent or negligent conduct.

70. We are satisfied on the basis of our findings of fact that the Appellant deliberately understated both his purchases and his sales in order to evade tax in all tax years from 2002-03 onwards. That amounted to fraudulent conduct and we are satisfied therefore that the tax assessments for 2002-03 and 2003-04 were in time.

71. The assessments, as distinct from the amendments for 2005-06 and 2006-07, were "discovery assessments". We were not referred to the conditions for discovery assessments contained in section 29(1) and (4) Taxes Management Act 1970. However we are satisfied in relation to all the assessments that there was a discovery

that income tax had not been assessed and that this was brought about by the Appellant's fraudulent conduct.

72. In the light of our findings we must dismiss the Tax Appeal.

73. We next turn to the VAT Appeals. Mr Rayner's case was that the VAT Assessments and the Penalty Assessment were invalid. His submissions as we understood them were as follows:

(1) Where the VAT Assessments and the Penalty Assessment referred to period 00/00 they did not specify the amounts of VAT due for each accounting period even though the amounts were known to HMRC. To that extent he submitted that they were invalid.

(2) The VAT Assessments for periods where reliance was placed on the 20 year time limit were invalid at the time they were made because there was no existing penalty assessment.

(3) The Penalty Assessment could not be valid if the VAT Assessments were invalid for any reason.

(4) Subject to those points, Mr Rayner accepted that the original VAT Assessments and the original Penalty Assessment would have been in time. However he submitted that invalid assessments could only be corrected by new assessments made in time and the VAT Assessments made on 5 January 2012 were out of time.

(5) The VAT Assessments made on 5 January 2012 were also invalid because at the time they were made the Penalty Assessment had been amended but not notified.

(6) No notification of the amended Penalty Assessment was given and it was therefore invalid.

74. At one stage in the proceedings Mr Rayner had alleged that the Respondents failed to set out any proper particulars of dishonesty alleged against the Appellant. However he accepted that any such deficiency was cured when a Re-Amended Statement of Case was served on 22 July 2014.

75. Ms Roberts' submissions were straightforward. She submitted that VAT Assessments were made by Mr Barton and properly notified to the Appellant. The correspondence and schedules sent to the Appellant clearly identified his name, the amount of tax due, the reason for the assessments and the period of time to which they related. Once the VAT Assessments had been made the officer was entitled to amend them, which he did, and the amended VAT Assessments were validly notified.

76. In relation to the Penalty Assessment, Ms Roberts submitted that it was justified by the dishonest conduct of the Appellant in understating his sales. The power to assess a penalty is contained in section 76(1). The Penalty Assessment was made in time by reference to section 77(1) and (2) and it was validly notified to the Appellant. Once the Penalty Assessment was validly made the officer was entitled to amend it. The amended assessment was validly notified in the Statement of Case.

77. Mr Barton made the VAT Assessments on 20 June 2011. We did not have a copy of the input document which would have been used to enter the VAT Assessments on HMRC's systems. In turn that would have generated the VAT 655 Notice of Assessment which was sent to the Appellant on 20 June 2011. It is generally when the input document is completed and authorised that an assessment is made: see *Courts Plc v Commissioners of Customs & Excise [2004] EWCA Civ 1527.*

78. The VAT 655 Notice of Assessment sent to the Appellant did not identify periods 08/03 to 05/05, but grouped them together as period 00/00. Mr Rayner says that is not permissible when the specific accounting periods are known and the amounts of VAT for each accounting period can be identified.

79. HMRC say that the notices of assessment taken together with the correspondence and accompanying schedules clearly identify the periods to which 00/00 refers. We accept that is the case. All periods were clearly identified in Mr Barton's letters dated 20 June 2011 and 26 July 2011. Indeed Mr Rayner acknowledged that the Appellant was aware that where the assessments referred to period 00/00 they related to periods 08/03 to 05/05. His case was that the failure to specify those periods in the VAT Assessments and the Penalty Assessment invalidated them.

80. Ms Roberts relied on the decision of the Upper Tribunal in *Queenspice Ltd v Revenue & Customs Commissioners [2010] UKUT 111 (TCC)*. That was a case concerning dishonest under-declarations of output tax by a restaurant business. One ground of appeal pursued by Queenspice was that an assessment for period 00/00 was invalid because it was not made by reference to defined accounting periods. Lord Pentland sitting in the Upper Tribunal held that the argument was untenable. He referred to the case of *House (t/a P&J Autos) v Customs & Excise Commissioners [1996] STC 154* where the Court of Appeal upheld a decision of May J. In particular Lord Pentland summarised the position as follows:

> "25. In my opinion, the following points may be taken from the judgment of May J in House.
>
> (i) Like its predecessor, section 73(1) of the 1994 Act lays down no particular formalities in relation to the form, or timing, of the notification of the assessment.
>
> (ii) A notification pursuant to section 73(1) can legitimately be given in more than one document.
>
> (iii) In judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates."

81. Lord Pentland held that notification was given in various documents including correspondence and schedules sent to the trader. Taken together the documents clearly identified the four matters referred to at paragraph 25(iii) of the decision. We are satisfied on the facts of the present case that the four matters referred to by Lord

Pentland were clearly notified to the Appellant in the letters dated 20 June 2011 and 26 July 2011. In particular the Appellant was aware of the amounts of tax and penalty being assessed and the accounting periods to which those amounts related.

82. It is well established that HMRC may make global assessments, in other words assessments covering more than one accounting period. It seems to us that the amounts for period 00/00 in the VAT Assessments and in the Penalty Assessment would be viewed as global assessments, although the point wasn't raised before us. They covered periods 08/03 to 05/05. In House, the Court of Appeal held that global assessments were not confined to cases where the tax claimed could not be attributed to specific accounting periods. In other words global assessments can be made notwithstanding the tax attributable to specific accounting periods is known by HMRC.

83. We do not accept therefore that the VAT Assessments and the Penalty Assessment or any of them were invalid because they included reference to period 00/00.

84. Mr Rayner relied on the Respondents' internal guidance to officers in relation to correction of errors in assessments. We were referred to various extracts from HMRC's manuals as follows:

(a) *VAEC8880 – How to assess and correct: Error correction procedures: VAT657 Assessment details by period.*

(b) *VAEC9090 – How to assess and correct: VAT Amendments: VAT656 details of period section.*

85. The guidance does not of course have force of law. The evidence before us included a copy of a VAT656 dated 5 January 2012 which is the Notice of Amendment of Assessment referred to in our findings of fact. We did not have any copy of a VAT657. The guidance referred to the requirement for a period reference 00/00 to have specific start and end dates and that failure to include those dates renders an assessment invalid. That is consistent with the law as described in Queenspice and does not affect our conclusion as to the validity of the VAT Assessments and the Penalty Assessment.

86. Mr Rayner argued that for a VAT Assessment to go back 20 years on the basis of dishonesty a penalty assessment must also have been made. He did not rely on any authority to support that proposition. There is no express provision in VATA 1994 to that effect. Section 77(4) extends the time limit for assessments to 20 years from the usual 3 or 4 years "if VAT has been lost ... as a result of conduct falling within section 60(1)...". It does not say as it could easily have done that the time limit is only extended were an assessment has been made under section 60(1). There is no practical reason why it should do so or why section 77(4) should be construed so restrictively and we reject Mr Rayner's argument.

87. Mr Rayner argued that a penalty assessment under section 60 cannot be imposed in respect of VAT which the trader has no liability to pay because there is no

VAT assessment or because an underlying VAT assessment is invalid for some reason. He relied on section 60(3)(a) as authority that a penalty relies on an assessment. To our minds these arguments are somewhat circular because as we have noted Mr Rayner also submitted that the VAT Assessments could only go back more than 3 or 4 years where there was a penalty assessment.

88. In any event, section 60(3)(a) defines "the amount of VAT evaded or sought to be evaded" as the amount by which output tax was falsely understated. It does not require any assessment to have been made for that VAT. Mr Rayner's argument is a rehearsal of arguments which were rejected by the Court of Appeal in Ali (t/a Vakas Balti) referred to above. In that case the trader was assessed to arrears of VAT of £6,971 in May 1999. In June 1999 the Commissioners purported to amend the assessment to £14,284. In November 1999 the Commissioners made and notified a penalty assessment in the sum of £14,284 less 10% mitigation. The trader appealed the VAT assessments and the penalty assessment. Before the tribunal the Commissioners accepted that the amended VAT assessment was invalid on the basis that there was no power to increase an assessment by way of amendment.

89. In those circumstances the Commissioners accepted that the trader's liability for VAT was defined by the original VAT assessment but contended that for the purposes of the penalty they could assess by reference to the higher sum sought to be evaded.

90. At [20] the Lloyd LJ referred to the trader's arguments in these terms:

> "20. The essence of Miss Lonsdale's contention is that liability to penalty is dependent on liability to tax, and that, if the taxpayer's liability to tax for a particular accounting period has been fixed as a result of an assessment, whether or not that assessment has been appealed, then the maximum amount of the penalty is the amount of tax so fixed. It is no answer to that contention that tax need not have been lost as a result of the conduct in question. **She did not contend that the issue of an assessment to tax was a precondition to the issue of a penalty assessment. Such an argument could not be based on any express provision in the Act, and it would not be a convenient or sensible result.**"
>
> (Emphasis added)

91. It was recognised in Ali that there was no express provision of VATA 1994 which required an assessment to tax as a pre-condition of a valid penalty assessment. The Court of Appeal further held that it was open to the Commissioners to assess a civil evasion penalty by reference to the tax sought to be evaded and was not limited to the tax which had been assessed.

92. In our view therefore Mr Rayner's arguments that a penalty assessment depends on the existence of a valid VAT assessment and that an extended time limit VAT assessment depends on the existence of a penalty assessment are untenable.

93. It is well established that the VATA 1994 makes provision for time limits within which assessments must be made whereas no provision is made for time limits in relation to notification of assessments to traders. However as a matter of published

policy HMRC do not rely on a date of assessment earlier than the date of notification for time limit purposes. The policy appears in their internal guidance at VAEC1120 – Powers of assessment: VAT assessment powers: An overview of time limits. Ms Roberts did not seek to go behind that policy.

94. Ms Roberts emphasised that the amended VAT Assessments and Penalty Assessment were just that, amendments to existing assessments. There was no question of them being out of time, indeed there were no time limits for making amendments to existing assessments. Any issues as to time limits were to be determined by reference to the original assessments. When the amendments were made, it was the amount of each assessment that was being reduced. There was no amendment to the periods of the assessments.

95. We accept those submissions. The VAT Assessments notified to the Appellant on 5 January 2012 were not new assessments. They were amended assessments which were not out of time or otherwise invalid. They were notified to the Appellant on the same date as the amendments were made.

96. The Penalty Assessment made on 5 January 2012 was also an amended assessment. As such, it was not out of time or otherwise invalid. HMRC are required to notify an amended assessment to the trader, however VATA 1994 prescribes no time limit for notification. Ms Roberts submits that notification of the amended Penalty Assessment was made in the amended Statement of Case served on 18 November 2013.

97. It was accepted by the Upper Tribunal in Queenspice that an assessment could be notified even after an appeal had been lodged. Lord Pentland quoted from *de Voil Indirect Tax service at V5.138* as follows:

> "An assessment is not invalidated, it is merely unenforceable unless and until it is duly notified, and a failure to notify can thus be rectified. Such rectification may take the form of the inclusion of a copy of the assessment in a statement of case sent to the appellant."

98. We are satisfied that statement of principle is correct and follows logically from the absence of any statutory time limit in which to notify an assessment. Notice of an assessment can be given by HMRC in a Statement of Case served in proceedings before the Tribunal.

99. Ms Roberts submitted in the alternative that even if the amended penalty had not been notified by the Statement of Case, the time for making a new penalty was 2 years from the date on which the VAT Assessment is finally determined. The VAT Assessment will not be finally determined until the present appeal has been finally concluded. Potentially therefore HMRC would still be in time to make a new Penalty Assessment. In the light of our findings it is not necessary for us to address that point.

100. In the circumstances we do not accept Mr Rayner's submissions and we dismiss the VAT Appeals.

Conclusion

101. For all the reasons given above we dismiss the Tax Appeal and the VAT Appeals.

102. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2016