[2016] UKFTT 0596 (TC)

TC05332

Appeal number: TC/2015/05163

VALUE ADDED TAX – whether return incomplete or incorrect – yes — whether assessment made by HMRC to the best of their judgment – yes – assessment to penalties upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

KYRIAKOS KAROULLA t/a/ BROCKLEY'S ROCK **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MRS RUTH WATTS DAVIES

Sitting in public at the Royal Courts of Justice, The Strand, London WC2A 2LL on 3 August 2016

Mr Dhiren Doshi of Doshi & Co for the Appellant

Mrs Rita Pavely, for the Respondents

DECISION

1. This appeal relates to an assessment by the Respondents on 20 March 2015 in the amount of £28,323.00 and the associated penalty of £26,913.18 charged by the Respondents on 20 April 2015.

2. The Appellant carries on a fish and chip shop trading under the name of Brockley's Rock and the assessment relates to under-declarations of value added tax ("VAT") for the period 1 December 2011 (when the Appellant registered for VAT) to 31 October 2014. The assessment has been made under Section 73 Value Added Tax Act 1994 ("VATA") on the grounds that the Appellant suppressed sales over that period. The associated penalty has been charged under Schedule 24 Finance Act 2007 (the "FA 2007") on the basis that the inaccuracies in the Appellant's VAT returns were "deliberate and concealed", that the disclosure by the Appellant in relation to those inaccuracies encompassed only the third limb of the disclosure definition (allowing access to records) and was "prompted" and that there were no "special circumstances" which would justify an additional reduction in the penalty.

3. We should note at the outset that the notice of appeal given by the Appellant in this case was given a few days after the expiry of the period within which the appeal was required to be made. The Appellant effectively acknowledged that fact in section 6 of his notice of appeal because it states that the latest time by which the appeal ought to have been made or notified was 23 July 2015 and the appeal is dated 31 July 2015. However, for some inexplicable reason, in the part of section 6 which requires the Appellant to request permission to make or notify the appeal outside the relevant time limit, the Appellant has checked "No". In addition, the Appellant has not completed the box for setting out reasons why the appeal is made or notified late. Under sub-section 83G(6) VATA, it is possible for an appeal to be made out of time with the permission of the Tribunal. However, sub-paragraph 20(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") states that, if a notice of an appeal is provided after the end of any period specified in an enactment but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal:-

> "(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal".

In this case, the Appellant has clearly not complied with sub-paragraph 20(4)(a) of the Tribunal Rules. However, at the hearing, the Respondents said that they had no objection to our admitting the appeal out of time. Sub-paragraph 7(2)(a) of the Tribunal Rules provides that, if a party has failed to comply with a requirement in the Tribunal Rules, the Tribunal may take such action as it considers just, which may include waiving the requirement. As the delay in this case was not material and the Respondents expressed no objection to our admitting the appeal out of time, we agreed to waive that requirement and to permit the appeal to proceed.

Background

4. There is no dispute between the parties in this case as to the meaning and application of the relevant law. The only issues in dispute relate to the pertinent facts.

5. As regards the facts, there is no dispute between the parties in relation to the following:-

(a) the Appellant registered for VAT with effect from 1 December 2011;

(b) at the end of each day, the Appellant compared the aggregate of the cash in the till and the credit card receipts with the Z reading;

(c) Mrs Susan Bush, an officer of the Respondents ("Mrs Bush") visited the Appellant on 4 September 2013 and examined the Appellant's VAT records;

(d) this examination gave rise to certain concerns for Mrs Bush and she therefore returned to the Appellant's premises on 4 October 2013, at which time she took various reports from the till and changed the print settings on the till to enable her to collect further records at a later date;

(e) Mrs Bush returned to the Appellant's premises on 7 January 2014 to re-examine the till and collect those further records;

(f) based on the information obtained from her visits, Mrs Bush invited the Appellant to attend an interview with her to discuss her findings;

(g) the Appellant failed to attend appointments arranged for 8 April 2014 and 1 May 2014;

(h) on 16 May 2014, Doshi & Co. informed the Respondents that it had been appointed as the Appellant's VAT adviser in place of the Appellant's original VAT adviser, Chelepis Watson;

(i) on 22 July 2014, Mrs Bush wrote to Doshi & Co. to inform it that she had requested the Appellant's attendance at a meeting on 5 August 2014;

(j) on 7 August 2014, after the Appellant had failed to attend that meeting, Mrs Bush requested a meeting with the Appellant (along with Doshi & Co.) on 11 September 2014;

(k) on 28 August 2014, Doshi & Co. wrote to Mrs Bush requesting that that meeting be rescheduled to the end of October 2014 as it was still waiting for some accounting information from the Appellant;

(l) in an email exchange between Mrs Bush and Rafiq at Doshi & Co. between 5 September 2015 and 8 September 2014, Mrs Bush declined to accept the request for a further deferral of the meeting on the basis that the Appellant had by then had six months to collate all relevant information;

(m) on 27 October 2014, Mrs Bush sent a letter to the Appellant (with a copy to Doshi & Co.) enclosing a copy of the notes of her original meeting with the Appellant on 4 September 2013;

(n) on 23 December 2014, Mrs Bush wrote to the Appellant (with a copy to Doshi & Co.) setting out her reasons for believing that there were serious inaccuracies in the Appellant's VAT returns;

(o) on 9 February 2015, Mrs Bush wrote to the Appellant requesting a further meeting with the Appellant on 24 February 2015 and making it clear that a protracted further exchange of correspondence was not acceptable to the Respondents and that a failure to attend the meeting would lead to an assessment; and

(p) further correspondence passed between the parties prior to the issue of the assessment on 20 March 2015.

6. There is a dispute between the parties as to whether, when Mrs Bush took readings from the till and changed the print settings on the till on 4 October 2013 (and subsequently printed off further readings on her return to the Appellant's premises on 7 January 2014), she did so with the agreement of the Appellant. Mrs Bush gave evidence to the effect that she had asked for (and received) the Appellant's permission before doing so. The Appellant maintained in his evidence that he had not agreed to Mrs Bush's actions. His position was that:-

(a) Mrs Bush did not ask his permission before taking those actions; and

(b) he did not express any objection at the time because Mrs Bush was an officer of the Respondents and he thought that he was required by law to accede to any request made by the Respondents.

The relevant law

7. Given that the only issues in dispute in this case relate to the facts, we will confine ourselves to a brief summary of the relevant law. This is as follows:-

(a) under Section 73 VATA, where it appears to the Commissioners of HMRC that a VAT return is incomplete or incorrect, the Commissioners may assess the amount of VAT due from that person "to the best of their judgment" and notify it to that person;

(b) under Section 83(1)(p) VATA, the taxpayer may appeal to the Tribunal in respect of an assessment under Section 73 VATA (or the amount of any such assessment);

(c) under paragraph 1 Schedule 24 FA 2007, a person is liable to a penalty if he gives to the Respondents a VAT return containing an inaccuracy which amounts to, or leads to, an understatement of a liability to VAT and that inaccuracy was "careless" or "deliberate";

(d) under paragraph 3 Schedule 24 FA 2007, an inaccuracy in a document given by a person to the Respondents is "careless" if the inaccuracy is due to failure by the person to take responsible care, "deliberate but not concealed" if the inaccuracy is deliberate on that person's part but that person does not make arrangements to conceal it and "deliberate and concealed" if the inaccuracy is

deliberate on that person's part and that person makes arrangements to conceal it;

(e) under paragraphs 4 and 4A Schedule 24 FA 2007, an inaccuracy that relates wholly to a matter which is domestic to the UK (which is the case here) is subject to a penalty of 30% of the "potential lost revenue" (where the inaccuracy is "careless"), 70% of the "potential lost revenue" (where the inaccuracy is "deliberate but not concealed") and 100% of the "potential lost revenue" (where the inaccuracy is "deliberate and concealed");

(f) under paragraph 5 Schedule 24 FA 2007, the "potential lost revenue" in respect of an inaccuracy is stated to be the additional amount due or payable in respect of tax as a result of correcting the inaccuracy;

(g) paragraphs 9 and 10 Schedule 24 FA 2007 provide for a reduction in a penalty under paragraph 1 of the Schedule where a person "discloses" an inaccuracy;

(h) a person is said to "disclose" an inaccuracy by:-

(i) telling the Respondents about it;

(ii) giving the Respondents reasonable help in quantifying the inaccuracy; and

(iii) allowing the Respondents access to records for the purpose of ensuring that the inaccuracy is fully corrected;

(i) the level of the reduction which is given for disclosure depends on whether the disclosure is "unprompted" – ie made at a time when the person making it has no reason to believe that the Respondents have discovered or are about to discover the inaccuracy – or "prompted" – ie any other case;

(j) in a case where the penalty would otherwise be 30%, the Respondents must reduce the percentage to one that reflects the quality of the disclosure but the percentage may not be reduced to below 15% (in the case a "prompted" disclosure) and 0% (in the case of an "unprompted" disclosure);

(k) in a case where the penalty would otherwise be 70%, the Respondents must reduce the percentage to one that reflects the quality of the disclosure but the percentage may not be reduced to below 35% (in the case of a "prompted" disclosure) and 20% (in the case of an "unprompted" disclosure);

(l) in a case where the penalty would otherwise be 100%, the Respondents must reduce the percentage to one that reflects the quality of the disclosure but the percentage may not be reduced to below 50% (in the case of a "prompted" disclosure) and 30% (in the case of an "unprompted" disclosure);

(m) under paragraph 11 Schedule 24 FA 2007, the Respondents are empowered to reduce a penalty under paragraph 1 of the Schedule if there are "special circumstances";

(n) under paragraphs 15 et seq. Schedule 24 FA 2007, a person may appeal against a decision of HMRC that a penalty is payable (or against the amount of the relevant penalty) and, in the appeal, the Tribunal may substitute for the

Respondents' decision another decision that the Respondents had power to make. This includes relying on paragraph 11 Schedule 24 FA 2007 to the same extent as the Respondents; and

(o) under paragraph 10 Schedule 36 Finance Act 2008 (the "FA 2008"), an officer of the Respondents is entitled to enter a person's business premises and inspect (inter alia) business documents that are on the premises if the inspection is reasonably required for the purpose of checking that person's tax position. However, under paragraph 12 Schedule 36 FA 2008, such inspection may be carried out only at a time agreed to by the occupier of the premises or (provided that the occupier of the premises has been given at least seven days' notice of the time of the inspection or the inspection is carried out, by, or with the agreement of, an authorised officer of the Respondents) at any reasonable time.

The issues

8. Given the above, the questions which we potentially need to consider in the context of this appeal are as follows:-

(a) have the Respondents assessed the amount of VAT due from the Appellant during the period 1 December 2011 to 31 October 2014 to the "best of their judgment" (because, otherwise, the assessment is invalid)?

(b) if the assessment is valid, are there any facts which have been brought to our attention which would lead us to change the amount of the assessment?

(c) if the assessment is upheld, were the inaccuracies in the Appellant's VAT returns "deliberate and concealed"?

(d) if the answer to question (c) above is "yes", what did the disclosure made by the Appellant in relation to the inaccuracies encompass and was that disclosure "prompted" or "unprompted"? and

(e) should the Respondents have reduced the penalty on the basis that "special circumstances" existed?

9. Before answering each of the above questions, we set out below a brief summary of the contentions of each party.

The Respondents' submissions

10. The Respondents seek to justify the assessment to VAT and the penalty by reference to the following:

(a) the Appellant based its daily gross takings - and, hence, its VAT output tax liabilities - on the Z readings on its till. These readings were inaccurate because:

(i) some sales were recorded while the till was in training mode and those sales were not reflected in the Z readings;

(ii) some credit card sales were not reflected in the Z readings; and

(iii) certain purchases and observations made by test purchasers were not reflected in the Z readings;

(b) records obtained from one of the suppliers to the Appellant from April 2012 indicated that the Appellant was understating its purchases and the Respondents allege that this was to enable the profit ratio of the business, after the suppression of sales, to be consistent with the profit ratios of similar businesses;

(c) the penalty assessed on the Appellant – which was equal to 95% of the tax in issue - was justified because:

(i) the inaccuracies in the Appellant's returns were "deliberate and concealed" as the Appellant must have noticed the discrepancies between, on the one hand, the cash in the till and the credit card receipts and, on the other hand, the Z readings and he knew that the Z readings were the basis on which his VAT returns were being made;

(ii) although the Appellant had "disclosed" the inaccuracies to the Respondents, that disclosure was limited to the third limb of the disclosure definition - ie allowing the Respondents access to records for the purpose of ensuring that the inaccuracies were fully corrected – and was not "unprompted" – ie the Appellant made his disclosure at a time when he had reason to believe that the Respondents had discovered or were about to discover the inaccuracies; and

(iii) there are no circumstances in this case that would warrant a "special reduction" in the penalty. In particular, the Respondent ceased to co-operate with the Respondents as soon as the Respondents stated that they had evidence that suppression had occurred.

The Appellant's submissions

11. Mr Doshi, on behalf of the Appellant, conceded that, if the Appellant had understated its VAT output tax because of thefts by members of staff, then the Appellant was still liable for the VAT in question. He retracted the submissions that had been made in correspondence prior to the hearing to the effect that the Appellant should be able to claim bad debt relief or rely on the terms of the cash accounting scheme to which he was subject to avoid being accountable for VAT on the amount stolen.

12. However, in the course of his submission and his lengthy cross-examination of Mrs Bush, as witness for the Respondents, Mr Doshi sought to challenge the assessment to VAT and the related penalty on the following grounds:

(a) the material which Mrs Bush obtained as a result of taking readings from the till and changing the print settings on the till on 4 October 2013 and taking further readings from the till on 7 January 2014 - which included the training mode readings - was inadmissible as the Appellant did not consent to those

actions and, under paragraph 12 Schedule 11 FA 2008, his agreement was required before the Respondents could exercise their powers under paragraph 10 of that Schedule;

(b) none of the test purchasers had stated in their reports that the Appellant himself was at the till when they visited, Mrs Bush's visits to the premises had generally been outside opening hours and therefore she had not seen the Appellant operating the till and the Appellant had testified that he was rarely at the till during opening hours because he was generally in the kitchen. It followed that the Respondents had not proffered any evidence to the effect that the Appellant himself was suppressing his takings. If there were any difference between the daily gross takings of the business and the amount reported, a more likely explanation would be that one of the Appellant's employees was stealing from the business. It was suggested that a Mr Snow, whose employment by the business encompassed the period in which the test purchases and related observations were made, might well have been the person doing so;

(c) the reports made by the test purchasers were in any event insufficient as an evidential matter because the Respondents had not provided to the Appellant or the Tribunal the till rolls in which the relevant transactions would have appeared. Instead, the Respondents had simply provided schedules, setting out the entries from the till rolls at the relevant times, to evidence that absence. Those schedules might very well be inaccurate. Indeed, Mr Doshi pointed us to a clear error in the schedule at page G88 in the documents bundle, where the figures recorded in the test purchaser report by Ms Denise Gauntlett on 24 October 2013 at page G16 in the documents bundle had been transposed. Mr Doshi submitted that, if that schedule could contain errors like that, then that must inevitably cast doubt on the accuracy of all of the schedules;

(d) the evidence given by Mrs Bush to the effect that the Appellant had understated its purchases from an unidentified supplier of fish to the Appellant was also inadmissible because, without knowing the name of the supplier, it was impossible for the Appellant to rebut the evidence in question;

(e) the fact that certain credit card purchases did not appear in the Z report did not mean that the Appellant had not accounted for VAT on those sales because credit card payments went into the Appellant's bank account directly and the Appellant's accountant would thus automatically have included the relevant amounts when completing the Appellant's VAT returns;

(f) the Respondents had produced no evidence to show where the amounts allegedly removed from the business had gone;

(g) the till readings on which the Respondents had based their calculation of the suppression rate all dated to the three months between 7 October 2013 and 7 January 2014. So how could the Respondents be sure that any observations made in relation to the three months should be extrapolated over the rest of the period to which the assessment related? Mr Doshi pointed out in this regard that the three months in question coincided with the employment of the previously-mentioned Mr Snow and also that the Appellant's reported VAT output tax liability in the VAT quarter which closely matched that 3 month period had

dropped when compared to a generally rising trend in the VAT quarters comprising the period to which the assessment related;

(h) consistent with his view that any discrepancy between the actual daily gross takings of the business and the amounts taken into account in calculating the VAT output tax liabilities of the business could be referable only to an employee and not to the Appellant himself, any penalty should be calculated on the basis that any inaccuracies in the VAT returns had been "careless" and not "deliberate and concealed"; and

(i) the penalty should in any event be reduced because of the existence of "special circumstances" – those being the fact that the Appellant had co-operated with the Respondents at all times. In particular, Mr Doshi maintained that the Respondents were unreasonable in objecting to the request to defer until the end of October 2014 the meeting scheduled for 11 September 2014 and he invited the Tribunal to exercise its power under paragraph 17 Schedule 24 FA 2007 to make a "special reduction" in the penalty.

Discussion

The VAT assessment

13. In the course of the hearing, we were referred to a number of cases relating to assessments made under Section 73 VATA (and its statutory predecessor) – *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290 ("*Van Boeckel*"), *WH Smith Limited v Customs & Excise Commissioners (*Decision No. 16505/1999) and *Rahman v Customs & Excise Commissioners (No. 2)* [2003] STC 150. As there was no dispute between the parties as to the meaning or effect of any of the above cases, we do not propose to summarise them but there are certain principles set out in the cases which are worth mentioning in this context.

14. Those principles are as follows:

(a) there are two distinct questions which arise in this context because Section 83(1)(p) VATA envisages that an appeal in relation to an assessment under Section 73 VATA can be made both in respect of the validity of the assessment – ie have the Respondents made the assessment to the "best of their judgment" – and, if the assessment is valid, in respect of the quantum of the assessment;

(b) a Tribunal should not treat an assessment as invalid merely because it disagrees as to how the Respondents have exercised their judgment. In order for an assessment to be invalid, a much stronger finding is required, such as the Respondents' having acted dishonestly, vindictively or capriciously or being wholly unreasonable;

(c) so, all that is necessary for the relevant assessment to be valid is that the Respondents should have acted honestly and in good faith;

(d) clearly, in order for that to be the case, there must be some material before the Respondents on which they can base their judgment as, if there is no material at all, it would be impossible to form a judgment;

(e) however, the Respondents should not be required to do the work of a taxpayer in order to form their conclusion. Frequently, it will be very difficult for the Respondents to obtain the necessary information without carrying out exhaustive investigations and the words "best of their judgment" do not envisage that. Instead, the relevant words envisage that the Respondents should fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due; and

(f) an assessment cannot be treated as being invalid solely on the ground that it relates to a period which is longer than the period in relation to which the Respondents have information. For example, in *Van Boeckel*, the relevant assessment spanned a period of three years but the information on which the assessment was based was obtained over a five week period within that three year period. In reaching his decision, Woolf J noted that a challenge made on that basis was "entirely without foundation. It is perfectly proper for the commissioners, if they choose to do so, to make a test over a limited period such as five weeks, and take the results which are thrown up by that test period of five weeks into account in performing their task of making an assessment in accordance with the requirements of [Section 73 VATA]".

15. Bearing the above principles in mind, we now turn to examine the two questions which potentially arise in relation to the VAT assessment – namely, have the Respondents made the assessment to the "best of their judgment" and, if so, do we have any grounds for changing the quantum of the assessment?

(a) Have the Respondents assessed the amount of VAT due from the Appellant to the "best of their judgment"?

16. On the basis of the above principles, and the facts as presented to us at the hearing, we consider that the Respondents have made the relevant assessment to the "best of their judgment". Our reasons for saying this are as follows.

17. We consider that, although the till readings on which the Respondents based their calculation of the suppression rate related to only part of the period that is covered by the assessment, there is sufficient evidence in those readings and the readings which Mrs Bush took on her visit to the Appellant's premises on 4 October 2013 to suggest that the Appellant was suppressing his daily gross takings throughout the period in question.

18. The Respondents sought to rely on three distinct matters to justify their assessment. These were as follows:

(a) some sales were recorded while the till was in training mode and those sales were not reflected in the Z readings;

(b) some credit card sales were not reflected in the Z readings; and

(c) certain purchases and observations made by test purchasers were not reflected in the Z readings.

19. As further support for their conclusion, the Respondents cited the under-declaration of purchases from a fish supplier to the Appellant although this was not a primary basis for their assessment.

20. As regards the first of the above matters, Mr Doshi challenged the admissibility of the evidence on the basis that it was obtained without the Appellant's agreement. His position was that, although Mrs Bush may have thought that the Appellant was consenting to her collection of readings from the till on 4 October 2013 and 7 January 2014 and to the changes which she made to the print settings on 4 October 2013, the Appellant did not in fact provide that consent. He maintained that Mrs Bush did not actually ask the Appellant for his permission before taking those actions and that the Appellant did not express any objection to Mrs Bush's taking those actions because she was an officer of the Respondents and he thought that he was required by law to accede to any request made by the Respondents. On the other hand, Mrs Bush gave evidence to the effect that she made it clear to the Appellant what she was doing and that the Appellant did not demur. We listened intently to the evidence given by both the Appellant and Mrs Bush in this regard and our conclusion is that the Appellant did in fact agree to the actions taken by Mrs Bush. We do not believe that Mrs Bush would simply have gone to the till to extract readings and make changes to the print settings without asking for the Appellant's permission to do so. And, as for the argument that the Appellant thought he had no option but to agree to whatever it was that Mrs Bush was asking to do, that does not mean that he did not agree to Mrs Bush's requests. It merely means that he was not aware that he had the right not to agree to the requests and force the Respondents to pursue other avenues to obtain the relevant information. So, we are satisfied that the Appellant did agree to Mrs Bush's actions.

21. The material obtained by Mrs Bush as a result of those actions included the training mode record. It is that record which forms a fundamental part of the Respondents' case because the Appellant has at all times maintained that he was not aware of the existence of the training mode and that he has never used the training mode when working the till. Since he has also stated that he was the person responsible at the end of the day for comparing the aggregate of the cash in the till and the credit card receipts with the Z reading and that that comparison generally gave rise to only a de minimis difference of no more than £10, the only conclusion that we can draw is that either:-

(a) an employee, unbeknown to the Appellant, managed to work out how to use the training mode and made sure to pocket an amount which was exactly equal to all cash that was recorded under that mode – so that the Appellant was able to match up the aggregate of the cash in the till and the credit card receipts with the Z reading in blissful ignorance of what was going on; or

(b) the Appellant himself must have been aware of the training mode and either used it himself or instructed others to do so.

22. We think that the latter explanation is more plausible than the former. We say this because:

(a) the amount of the training mode readings were so significant that it would have been difficult, if not impossible, for an employee to remove so much cash without the Appellant's knowledge or for an employee to remove exactly the right amount of cash to ensure that, when the Appellant conducted his comparison at the end of the day, the aggregate of the amount of cash in the till and the credit card receipts matched the Z reading to within the £10 de minimis margin to which the Appellant referred in his testimony;

(b) the Appellant has not reported any such theft to the police; and

(c) the fact that certain credit card purchases were being omitted from the Z readings in any event (see below) means that it must have been apparent to the Appellant when he compared the aggregate of the cash in the till and the credit card receipts with the Z reading that there were significant discrepancies. Since he has consistently maintained that any daily discrepancies were generally within a £10 margin either way, that does cast doubt on his evidence in this area.

23. Turning to the credit card sales that were not reflected in the Z readings, we do not accept Mr Doshi's argument that the credit card purchases that were missing from the Z readings were taken into account in calculating the Appellant's VAT output tax liabilities in any event. This is because:

(a) Mr Doshi advanced no evidence to that effect;

(b) until that allegation was made, very late in the hearing, it had been accepted by both sides that the Appellant's VAT output tax liabilities were at all times based solely on the Z readings and not supplemented by anything else. Thus, that allegation by Mr Doshi was not only unsupported by any evidence but was contrary to the evidence that was actually provided to us; and

(c) the fact that certain credit card sales were included in the Z readings strongly suggests that the Z readings were meant to be determinative. If credit card purchases were a separate heading in calculating the Appellant's VAT output tax liabilities, then there would have been a duplication of entries to the extent that a credit card purchase was included in the Z readings and that would have required considerable effort on the part of the Appellant's accountants to unravel. Indeed, the Appellant himself in giving his evidence stated that his daily check involved comparing the aggregate of the cash in the till and the credit card receipts against the Z reading and this process would have been fatally flawed if the credit card receipts were being taken into account in calculating the Appellant's VAT output tax liabilities regardless of whether or not they appeared in the Z readings.

24. Just pausing there, even if the only matters which had been taken into account by the Respondents in making their assessment were the matters described in sub-paragraphs 18(a) and 18(b) above, we would consider that the Respondents made the assessment which they did to the "best of their judgment". The fact that the till

readings on which the Respondents based their calculation of the suppression rates related to a period which was only three months does not in our view mean that the Respondents did not make the assessment to the "best of their judgment" – the decision in *Van Boeckel* establishes that it is perfectly proper for the Respondents to make a test over a limited period and extrapolate from that in determining the VAT liabilities over a longer period. Moreover, the till readings taken by Mrs Bush on 4 October 2013 indicated that suppression in the form of the use of the training mode and the failure to account for all credit card sales had been occurring in the period prior to the three months in question.

25. There were some additional matters which the Respondents took into account in making their assessment. For the reasons which follow, we have accorded slightly less weight to those matters as an evidential matter in considering question (b) below but we do not doubt that, in relying on that evidence in reaching their conclusion, the Respondents acted in good faith and in a reasonable manner. Accordingly, we think that that evidence also tends to support the conclusion that the Respondents have made the assessment to the "best of their judgment".

26. The first of these matters is the fact that certain purchases and observations made by test purchasers during the three months from 7 October 2013 to 7 January 2014 were not reflected in the Z readings.

27. We think that, from the Respondents' perspective, it is unfortunate, to say the least, that they did not produce as evidence before the Tribunal the actual till rolls upon which the allegations based on the purchases made and observed by the various test purchasers are founded. That, coupled with the error in the schedule to which we allude in sub-paragraph 12(c) above, means that we must inevitably place less weight on this evidence than on the evidence described above in considering question (b) below. Nevertheless, we have no doubt that the Respondents were acting in good faith in taking this evidence into account in making their assessment.

28. The Respondents also took into account the fact that their enquiries in relation to supplies to the Appellant by a particular supplier in April 2012 showed that the Appellant was understating his purchases from that supplier. We agree with Mr Doshi that, from the Respondents' perspective, it is unfortunate that, for reasons of taxpayer confidentiality, the supplier in question could not be named, with the inevitable result that the Appellant could not rebut that evidence. We consider that, in relation to question (b) below, the Appellant's inability to challenge the evidence is a relevant factor in calculating the weight that should be attached to the evidence. However, so far as concerns this question (a), we have no doubt that the Respondents acted in good faith in making their enquiries of that supplier and in using the results of those enquiries to reach their conclusion in relation to the assessment.

29. The way in which the Respondents calculated the suppression percentage of 16.68% was to use the average of the suppression percentage relating to the use of the training mode (18.39%) and the suppression percentage relating to the purchases and observations made by the test purchasers (17.74%). They did not take into account the suppression percentage relating to the credit card sales that were missing from the

Z readings (26.92%). At the hearing, Mrs Bush explained that this was because it was difficult to be sure about the latter percentage given that it depended on consistency of sales during the relevant day and so, given that it was a higher figure, she had effectively given the Appellant the benefit of ignoring it entirely in reaching the average suppression percentage. We do not see how the fact that the higher suppression percentage potentially arising out of the missing credit card sales was not taken into account in calculating the average suppression percentage in any way vitiates the conclusion that the Respondents made the assessment to the "best of their judgment". The mere fact that the Respondents adopted the conservative approach of disregarding the higher suppression percentage relating to the credit card sales on the logical ground that credit card usage might be inconsistent does not call into question their good faith in reaching their conclusion. If anything, it rather tends to support the proposition that the Respondents have acted in a responsible and reasonable manner.

30. We have noted that the VAT output tax liabilities declared by the Appellant in respect of the VAT quarter which closely corresponded to the three months on which the Respondents based their calculation of the suppression percentage fell slightly as compared to the previous quarter and that this contrasts with the general trend over the three year period in question. We can see how this could be alleged to be indirect evidence that one of the Appellant's employees was stealing from the Appellant over the three months on which the Respondents based their calculation of the suppression percentage and that the Respondents should have taken that into account in making their assessment. However, for the reasons set out in paragraph 22 above, we do not consider the "rogue employee" explanation to be plausible. Once that explanation is rejected, there would seem to be no basis for concluding that the rate of suppression discovered by the Respondents in respect of the relevant three month period should not have been continuing throughout the period of the assessment. We would add that the till readings obtained by Mrs Bush on 4 October 2013 (which indicated that average daily sales were greater than the amount indicated in the VAT returns and the extensive use of the training mode), together with the evidence obtained by the Respondents from the unnamed supplier to the Appellant, tend to support this conclusion. These all relate to a different part of the period from the three months on which the Respondents based their calculation of the suppression percentage and suggest that the suppression observed during the three months on which the calculation was based went on throughout the period of the assessment.

31. In this context, we would add that, in our view, Respondents adopted a responsible and measured approach throughout their period of investigation, as exemplified by the fact that they provided the Appellant with ample opportunity to attend a meeting with them in order to explain why their calculation was incorrect.

32. Finally on this question (a), we agree with the Respondents that there is no need for the Respondents to trace the cash representing the suppressed takings or show how that cash was used in order for the Respondents to establish that they exercised the "best of their judgment" in making their assessment. In the absence of any plausible explanation for the matters described above, we consider that the Respondents used their best judgment in assessing the level of suppression that occurred and in making their assessment.

(b) Is the amount of the assessment correct?

33. As the prior case law makes clear, an additional question for the Tribunal to consider in each case involving an appeal against an assessment under Section 73 VATA is whether, notwithstanding the fact that the Respondents have made the relevant assessment to the "best of their judgment" (so that the assessment is valid), the quantum of the assessment should be upheld. We have a duty to evaluate the evidence ourselves in order to decide whether the Respondents have gone wrong in some way, either by taking into account matters which they should not have taken into account, failing to take into account matters which they should have taken into account, simply drawing the wrong conclusions from the matters which they took into account or for any other reason.

34. After considering the evidence which has been put to us by both parties, we can see no logical basis for disturbing the quantum of the assessment in this case. This is because of the reasons set out at some length in relation to question (a) above. Even if very little evidential weight is accorded to the purchases and observations made by the test purchasers and to the purchases made by the Appellant from the unnamed supplier which the Appellant was unable to challenge at the hearing for reasons of confidentiality, we think that the evidence submitted by the Respondents in relation to the use of the training mode and the credit card receipts which were excluded from the Z readings are sufficient to justify the quantum of the assessment in this case.

Conclusion in relation to the VAT assessment

35. We accordingly consider that the appeal in relation to the VAT assessment should be dismissed.

Penalty

(c) Were the inaccuracies in the Appellant's VAT returns "deliberate and concealed"?

36. Paragraph 3 Schedule 24 FA 2007 defines the meaning of the various words relating to culpability. An inaccuracy is "careless" if the inaccuracy is due to a failure to take reasonable care. An inaccuracy is "deliberate but not concealed" if the inaccuracy is deliberate but the taxpayer does not make arrangements to conceal the inaccuracy. And an inaccuracy is "deliberate and concealed" if the inaccuracy is deliberate and the taxpayer makes arrangements to conceal it.

37. On the basis of those definitions, we do not accept that the Appellant was simply "careless". That would have been the case if the inaccuracies arose as a result of a failure by the Appellant to take reasonable care in monitoring the position – for instance, if he was truly unaware that there was any suppression occurring and the amounts of cash in the till and credit card sales on each day matched up with the Z reading to within the de minimis £10 limit because one of his employees was using the training mode and pocketing exactly the amount recorded in the training mode. But, as we have noted above, we do not accept that this is plausible. Instead, we consider that the Appellant was aware that the daily gross takings were being

suppressed and sought to conceal that from the Respondents. It follows that, in our view, the inaccuracies were "deliberate and concealed".

(d) What was the extent of the disclosure made by the Appellant and was that disclosure "prompted" or "unprompted?"

38. Paragraph 9(1) Schedule 24 FA 2007 states that a person discloses an inaccuracy by:-

(a) telling the Respondents about it;

(b) giving the Respondents reasonable help in quantifying the inaccuracy; and

(c) allowing the Respondents access to records for the purpose of ensuring that the inaccuracy is fully corrected.

39. It further provides that any such disclosure is "prompted" unless it is made at a time when the person making it has no reason to believe that the Respondents have discovered or are about to discover the inaccuracy.

40. The Respondents have reached the conclusion that the Appellant satisfied the third limb of the disclosure definition set out above (but not the first two limbs) and that that disclosure was not "unprompted" because the Appellant did not tell them about the inaccuracy before he had reason to believe that they had discovered it or were about to discover it.

41. On our understanding of the salient facts, we think that this is a generous interpretation of the Appellant's behaviour. We agree with the Respondents that the Appellant did not tell the Respondents about the inaccuracies or give the Respondents reasonable help in quantifying the inaccuracies. On the contrary, the Appellant is continuing to maintain that there are no such inaccuracies. So there is no basis for concluding that the Appellant satisfied either of the first two limbs of the disclosure definition.

42. It is true that, until the Respondents raised their concerns with the Appellant in 2014, the Appellant had been helpful and co-operative and it is true that the Appellant willingly made available the information from his till (although the Appellant is now disputing that he agreed to this). However, the relevant limb of the disclosure definition does not refer to the provision of access to records in general but instead refers to the provision of access to records "for the purpose of ensuring that the inaccuracy …. is fully corrected". It is a generous interpretation of the Appellant's behaviour that he provided access to his records for that purpose as the Appellant continues to maintain that such inaccuracies do not exist. The Respondents have been able to correct the inaccuracies by reference to the records provided by the Appellant but we would question whether that was the "purpose" for which the records were provided by the Appellant.

43. Having said that, as the Respondents have conceded that the Appellant satisfied the third limb of the disclosure definition, and as the provision by the Appellant of

access to his records can be said to have "served the purpose" of enabling the Respondents to correct the inaccuracies, we are inclined not to disturb the conclusion drawn by the Respondents on this point.

44. The information provided by the Appellant was provided at a time when the Respondents had already identified certain concerns. That was the reason why Mrs Bush returned to the Appellant's premises on 4 October 2013 following her meeting with the Appellant on 4 September 2013. So, at the time when the Appellant provided the information, he did have reason to believe that the Respondents had discovered or were about to discover the relevant inaccuracies. We therefore agree with the Respondents that his disclosure was "prompted" and therefore that the appropriate discount should be 5% (ie 10% of the maximum discount of 50%).

(e) Were there "special circumstances"?

45. Finally, we agree with the Respondents that, in the light of the failure of the Appellant to co-operate with the Respondents once the Respondents had notified him that there were issues arising in connection with his VAT returns, there are no "special circumstances" which would justify a reduction in the penalty beyond the 5% referred to above.

46. We should record that, in making this statement, we have taken into account the offers made by Doshi & Co. in its letter of 28 August 2014 and email of 8 September 2014 to meet with the Respondents at the end of October 2014. Those offers were made at a time when the Respondents had been seeking a meeting with the Appellant and his advisers for a considerable period of time. There had been previous postponements of meetings scheduled for 8 April 2014, 1 May 2014 and 5 August 2014. So the postponement of the meeting that had been booked for 11 September 2014 was effectively the fourth postponement by the Appellant of the meeting requested by the Respondents. Even allowing for the change in the Appellant's VAT adviser, which we would point out had by then occurred several months before the requested further postponement, we think that the Respondents were entitled to decline the request. We certainly do not consider that the offer to meet at the end of October constitutes "special circumstances" which would justify a further reduction in the penalty. We are reinforced in this view by the fact that the Appellant failed to attend the meeting on 24 February 2015 which was offered to him earlier that month. If the Appellant was prepared to meet the Respondents at the end of October 2014, why did he not attend the meeting that was offered to him four months later?

Conclusion in relation to the penalty

47. We accordingly consider that the appeal in relation to the penalty should also be dismissed.

48. 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 paragraph 39 of the Tribunal Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 17 AUGUST 2016