[2016] UKFTT 0665 (TC)

TC05391

Appeal number: TC/2014/05929

VAT – assessment under s 73 VATA and deliberate penalties – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR JOHN CHU **Appellant**

- and -

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

TRIBUNAL: HARRIET MORGAN
NICHOLAS DEE

Sitting in public at the Royal Courts of Justice, the Strand, London on 23 and 24 November 2015

Mr Kevin Andrews of VAT Consultants Limited for the Appellant

Mr Bruce Robinson, an officer of HM Revenue and Customs, for the Respondents ("HMRC")

DECISION

1. The appellant appealed against assessments issued by HMRC under s 73 of the Value Added Tax Act 1994 ("**VATA**") on 6 November 2013 for VAT estimated by HMRC to be due in the period from 11/09 to 08/13 and on 6 December 2013 for VAT estimated to be due for the period from 1 September 2013 to 2 October 2013. The amounts of the assessment were initially £78,293 and £2,690 but the amounts were reduced on review to £60,482 and £1,496 respectively.

Facts

2. Our findings of fact are based on the bundles of documents produced to the tribunal, which included correspondence between the parties, HMRC's notes of visits and meetings (where available) and the evidence of the appellant and a number of HMRC officers.

3. The appellant registered for VAT with effect from 1 January 2005 and remained registered until 2 October 2013. Throughout this period the appellant was carrying out a business providing nail treatments at a nail bar trading as M.Y. Nails from 23 Quadrant Arcade, Romford, Essex. The hours of business at the relevant time were 9.00am to 6.00pm on Monday, Wednesday, Friday and Saturday, 9.00am to 8.00pm on Thursday and 10.00am to 4.00pm on Sunday.

4. Treatments typically take at least 15 to 20 minutes but some of the treatments could take an hour or a bit longer. Treatments may involve applying false nails, applying infills to false nails (where the natural nails have grown), filing and buffing of nails, applying oils to the cuticles, applying nail varnish in several layers with a top coat and then a drying process. The appellant offers services for feet as well as hands, waxing services and eyelash treatments. The prices for treatment start at £3 to £7 increasing to £20 to £30 with the most expensive treatment being £55 for a full set of false eyelashes.

5. We were not shown a layout of the nail bar but understand it comprised several booths where customers sit on one side with the member of staff performing the nail treatment on the other side with a separate bar for the drying process. There was a small area designated to customers waiting for treatments. There was a television which may be playing music.

6. As many of the treatments involve the customer having nail varnish or other gels/liquids applied, the final stage of the process is often drying the nails which is done at the drying bar. It is important for the customer not to use their hands very much until the drying is complete to avoid the risk of chipping or catching the intended smooth and even nail finish. For that reason customers often pay before their nail treatment is completed.

7. Mr Popoola of HMRC first made contact with the appellant in January 2013 to arrange a time for an assurance visit. Following this he and another HMRC officer,

Mrs Bramble, visited the business premises on 19 February 2013. The notes of the meeting record that:

> (1) The appellant said that weekdays (other than Fridays) and Sundays were slow for business. Fridays and Saturdays were the busiest days when takings could go up to as much as £300 for a day.
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> (2) The appellant said he had one staff member aside from his wife who worked part time only. The appellant said that the part time staff member had last been there a day before HMRC's visit and he worked for 3 hours occasionally when the appellant's wife was on the school run.
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> (3) Mr Popoola asked for the staff time table and the appellant said that he had written this in a diary. The appellant went downstairs to fetch this but he returned without it.
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> (4) Mr Chu was not keeping a record of the takings of the business on a daily basis but rather he kept all takings in a bag and he recorded them later.
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> (5) Mr Popoola carried out a cash reconciliation based on the appellant's information and banking record. The total takings were £2,660 which were not banked. The appellant said he had paid wages of £496.80 and that the personal takings were £800. This left a balance of £1,363.20 out of which £515 represented cash which was kept in a draw and the appellant said that there was another £580 in the draw which was kept by his wife.
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> (6) There were no records supporting the above position and Mr Popoola explained that Mr Chu would need to keep daily records of the takings of the business from then on and that an HMRC observation or invigilation exercise would be carried out at a later date.

8. On 21 February 2013 Mr Popoola wrote to the appellant advising he should adopt proper book keeping to record drawings and expenses as they occur. He advised the appellant to keep a staff schedule and a daily gross taking records. He noted that the appellant had been advised at the visit of 19 February 2013 that HMRC may carry out an unannounced invigilation of the business in the near future.

9. During a call to the appellant on 15 March 2013 Mr Popoola requested that the appellant carry out a self-invigilation or audit exercise by recording every transaction which took place immediately after it took place on each of 18, 21 and 23 March 2013. The results of this invigilation exercise were sent to HMRC by the appellant's advisers on 25 March 2013.

10. After this Mr Popoola arranged for "test purchase" visits to be carried out by an HMRC officer, Mrs Gray, on an under cover basis as set out below.

Test purchase visits

11. Mrs Gray gave evidence at the hearing and we found her to be a credible witness. Mrs Gray has worked at HMRC since 1979 in number of roles and at the time in

question worked as a personal assistant for the Head of Evasion in Small and Medium Sized Enterprises division. Mrs Gray had previously visited the nail bar in her personal capacity.

12. On each visit Mrs Gray paid for her treatment in cash which, in each case, she saw was placed in a drawer in the counter as was the cash paid by other customers

13. On the first visit on 21 March 2013, she entered the premises at 5.25pm and left at 6.15pm.

(1) She asked for the removal of a previous set of nails and a new set of nails for which she paid £32. She sat at the nail booth nearest to the counter.

(2) Two customers were already seated when she arrived. One was still receiving treatment and the other was at the nail drying bar.

(3) Whilst she was receiving her treatment she saw the 2 customers pay; 1 customer paid £19 at 5.35pm and the other paid £16 at 5.50pm.

(4) Five more customers entered the premises, 4 of whom requested a full set of nails, a take off and two sets of infills. Mrs Gray did not hear what the fifth customer requested.

(5) There were 2 staff working.

14. On the second visit on 20 April 2013 Mrs Gray arrived at 2.15pm and left at 3.12pm:

(1) There were 5 customers seated receiving treatment and 5 staff working.

(2) She asked for a pedicure for which she paid £30. She saw 1 customer paying with a voucher and 1 paying in cash which was also placed in the drawer by the counter. It seemed that the other 3 people had already paid as they simply left when their treatment had finished.

(3) A number of other customers came into the nail bar whilst Mrs Gray was seated requesting 1 toe paint and nail infill, 5 lots of infills, 1 nail polish, 2 full sets of nails and 1 pedicure and 1 infill.

(4) Mrs Gray did not see anyone making any written note of any treatments.

15. Mrs Gray visited for the third time on 11 May 2013 at 1.10pm and left at 1.50pm.

(1) There were 5 staff working and 5 customers receiving treatment. One customer was at the drying bar and 3 customers were waiting as Mrs Gray had to wait.

(2) She asked for a polish on her fingers and toe nails and paid £13 for the treatment at 1.25pm.

(3) A further 3 people entered and she overheard the followings amounts mentioned as regards customers' payments: £16 and £33 at 1.25pm, £10 at 1.28pm, £20 and £13 at 1.34pm, £36 at 1.42pm, £21 at 1.43pm and £16 at 1.47pm.

(4) She noticed an invigilation sheet on the counter and could see around 5 lines entered the last one being at 1.25pm but she could not see the price. As she left the premises she could see that another entry had been made at 1.45pm but she could not see the price entered.

16. She visited the nail bar for the final time on 12 June 2013 at 5.00pm and left at 5.40pm:

(1) There were 4 staff sitting at the booths but only 1 customer being treated.

(2) Mrs Gray asked for infills and a tip for which she paid £19.

(3) She could see an invigilation sheet on the desk but it was partly covered so she was not able to see if it had any entries. She did not see any payments entered on it.

(4) Three schoolgirls entered and requested a full sets of nails plus another female who asked for gel infills and toe nail polish. The school girls each paid but Mrs Gray could not hear the price. The money was again placed in the drawer.

17. When questioned as to how she could remember the prices and treatments Mrs Gray explained that she wrote them down on scraps of paper whilst in the nail bar, if she could, or kept repeating them in her head until she left when she would write them down straight away. We were shown copies of some of her handwritten notes which support this. She remembered background noise in the premises but it was not overwhelming and she had no difficulty hearing the matters she had noted. She was questioned as to how she could tell the difference between customers and staff and she said that the staff generally had masks and were sitting on the other side of the booths. She did not think it was possible to mistake a customer for a member of staff. She was asked if it was possible that some amounts she had heard on her visits could have been amounts stated by the staff whilst on the phone to potential customers. She said that she had no recollection of seeing anyone on the phone whilst the amounts she had recorded were being dealt with and she had seen customers handing over cash.

Visits by Mr Popoola and other HMRC officers

18. During April, May and June 2013 Mr Popoola and other HMRC officers made a number of visits to the appellant's premises as follows:

(1) On 18 April 2013 Mr Popoola and Mr Vaghela visited to inspect the records and again were not satisfied that sales were being recorded as and when they happened. Mr Vaghela thought that there were 4 staff present.

(2) On 25 April 2013 Mrs Bramble and Mr Clayton visited the appellant's premises and inspected the daily gross takings record which was produced by Mrs Chu. Mrs Bramble's note of the visit records that there were 3 staff there when she visited (including Mrs Chu), 3 customers having their nails done and 3 customers waiting to have their nails done. As she was leaving another customer arrived. Neither Mrs Bramble nor Mr Clayton recall that any cash up exercise was carried out in this visit. Mr Clayton said he had not kept a record of this visit as there did not seem to be any reason to do so as he was there as the second officer and Mrs Bramble was essentially in charge on that occasion.

(3) On 3 May 2013 Mr Popoola called on the appellant to collect the daily takings record but this was not possible as the appellant said he had no other means of recording the takings. Mr Popoola inspected the records as they were and asked for a photocopy to be sent of the remaining entries which needed to be completed up to 3 May 2013. He added all the taking together which came to £190. The note of the visit records that there were 2 staff present with 2 customers.

(4) On 7 May 2013 Mr Popoola and Mr Vaghela made a further visit and advised that the appellant must start to complete a self-invigilation sheet setting out each transaction and the funds received at the time it happened. Mr Vaghela gave evidence that there was no cash up exercise on that day or on the previous visit on 18 April 2013 and he did not remember the number of staff on the premises on that day.

(5) On 4 June 2013 Mr Popoola visited again to pick up invigilation sheets. The note records that Mrs Chu and one other employee were providing services to 2 customers. The note records that Mrs Chu said the appellant was sick and offered to call him but Mr Popoola wanted to see him in person. He left on instructing Mrs Chu to continue using the invigilation sheets

19. There is conflicting evidence as to what occurred these visits. Mr Vaghela, Mr Clayton and Mrs Bramble said that they did not recall any cash reconciliation exercise taking place on the visits of 18 April 2013, 25 April 2013 or 7 May 2013 and Mr Popoola also confirmed this as regards the occasions when he was present. There is no record of any cash reconciliation on those dates in the available notes prepared by the HMRC officers. The officers said that they were not instructed by Mr Popoola not to mention cash reconciliations which had taken place. The appellant gave evidence that HMRC officers had carried out a cash reconciliation exercise on each visit. We comment on this further in the discussion section.

Invigilation exercise on 15 June 2013

20. On 15 June 2013 HMRC officers attended the appellant's business premises throughout the hours of operation of the business to observe the operation of the business and record each transaction and payment when it occurred. The date of the visit was not announced to the appellant in advance although he had been alerted that

an invigilation exercise of this kind would take place on an unannounced basis. A number of officers attended over the course of the day in shifts as follows:

(1) Mr Vaghela and Ms Julie Wallace from around 9.50am until 11.00am and from 12.00pm to 1.00pm.

(2) Mr Clayton and Mrs Baptiste from 11.00am until 12.00pm and from 1.00pm until 2.00pm.

(3) Mr Biney and Mr Ahmed from 2.00pm to 3.00pm.

(4) Mr Popoola and Mrs Bramble from 3.00pm until around 6.30pm

21. There is conflicting evidence from the officers on when the appellant arrived at the nail bar that day and who spoke to him.

(1) Mr Vaghela and Ms Wallace gave evidence that, when they arrived at the appellant's premises, Mrs Chu was there but not the appellant. They said that Mr Vaghela explained the invigilation exercise to Mrs Chu and that she needed to let the HMRC officers know when she took money from the customers and service was provided. They stated that the appellant arrived for the first time that day later during this first shift and that Mr Vaghela introduced himself and explained the proposed exercise to him.

(2) However, Mr Clayton said that the appellant arrived for the first time when he was on the second shift of the day at around 11.15am. His witness statement records that at 11.15am "a gentleman arrived and asked who the officers were". Mr Clayton stated that, as he understood this was the owner, he asked him to go somewhere quiet. Mr Clayton said that he spoke to the appellant in the room to the rear of the premises and the appellant said he had no problem with HMRC being there but he would have preferred more notice. Mrs Baptiste confirmed Mr Clayton's account of events.

22. We note that Mr Clayton and Mrs Baptiste signed a note prepared shortly after the visit which states the position as set out above and accords with the information given in 25 below. Mr Vaghela did not make any note of his visit on 15 June 2013 or of any of his previous visits. He said that he had forgotten his note book on the invigilation day. He explained that he had not taken his note book on the previous occasions he had visited the premises, as he attended on those occasions only as the second officer with Mr Popoola as the primary officer; it is standard practice for the primary officer (Mr Popoola) to make notes

23. Mr Vaghela said that when he arrived there were 4 staff including Mrs Chu. He thought that there were 3 waiting seats. On his second stint he recalled 1 person was told a waiting time of 1 hour and went away or possibly as many as a handful of people were told that. It was just his recollection as he had not kept a notebook. He thought there were 3 staff on the second visit but he was not specifically tasked with recording that so could not be sure. It was not very noisy; he could hear what was going on. He thought about 3 people could sit at the drying bar.

24. Mrs Baptiste and Mr Clayton stated the following (as supported by their note of the visit) as regards what happened during their observation in their two shifts:

(1) The appellant replaced a member of staff when he arrived at around 11.20am.

(2) At 11.10am a customer mentioned to Mrs Baptiste that there were usually five staff working on Saturdays but there were only 3 there.

(3) At 1.20pm a member of staff left.

(4) At 1.30pm the member of staff who had left around 11.20am returned.

(5) At 1.40pm a customer asked where all the staff had gone and an employee who was receiving payment at the time said they were at lunch.

(6) At 1.30pm 3 staff were working including the appellant.

(7) Customers were told they would have to wait up to 1 hour to be seen. Mr Clayton thought 1 or 2 people were told that but he was not sure. Mrs Baptiste also thought that this applied to 1 or 2 people; she recalled 1 person left and came back but it was still busy. People were complaining about how long it was taking

(8) All payments were put in a draw by Mrs Chu and she wrote the payments down on a sheet.

25. Mr Clayton thought that there at least 5 chairs for customers waiting for treatments and he reported that during the invigilation he and his colleague were sitting on 2 of them. Mr Clayton also did not recall the shop being particularly noisy. Mr Biney reports that during his time at the premises he observed "customers being told they would have to wait up to 1 hour to be seen".

26. The written record of his attendance on that day made by Mr Popoola at the time notes the following:

(1) He observed 2 staff working when he arrived at 3.00pm.

(2) At 3.05pm a customer came in and asked if the appellant was short of staff and he replied they were on a break.

(3) At about 3.20pm the appellant's wife arrived and started working.

(4) There were 6 people waiting for treatment when a lady came in at about 3.10pm and said she had booked an appointment for 3.00pm. She was told to go shopping and come back later. She declined and wanted to speak to the appellant who said "we are not normally this busy - people come in to shelter because it is raining". Mrs Bramble also confirmed this.

(5) A couple came in and were given a waiting time of 1 hour.

(6) There was a notice on the window that showed that a full set of nails was £20 for those under 16 which is a large discount on the price in the price list.

(7) The appellant told a young girl that he did not do eyelashes but this was displayed on the price list.

27. In his witness statement Mr Popoola says in summary of the entire invigilation day visit that:

(1) The appellant was taking more than an hour on a customer.

(2) He gave discounts at will.

(3) He was giving customers 2 to 3 hours as waiting times.

(4) Many customers asked for the rest of the staff whilst the officers were on the premises.

(5) A lady that booked an appointment was asked to go shopping and come back later. That lady asked for how long and she was told 1 hour. This customer came back about an hour later to wait for more than 30 minutes before she received service. The appellant told the customer that they not usually busy like this but he did not reply to her question as regards other staff absence.

(6) Two staff members left during the busy period without returning throughout the invigilation period.

28. Mr Popoola also noted that when he was present no record was being taken by the appellant or his wife of takings. When Mr Popoola questioned this, the appellant said he thought he and his wife did not need to keep a record as that was what the HMRC officers were doing. Mr Popoola explained that the appellant needed to do the same and record every transaction.

29. Mr Popoola stated that he did a "cash up" or cash reconciliation exercise at the end of the day and recorded the takings as £475. Mrs Bramble said that she had no recollection of this taking place. Mrs Bramble was shown a note which she had signed recording that there was a cash reconciliation. Mrs Bramble confirmed that was her signature but she could not recall the cash up and could not really offer any explanation. Mr Popoola said that he did not carry out any cash reconciliation on any other day except on his first visit. It was put to Mr Popoola that he had done a cash reconciliation on other occasions but, as these were correct, he did not want to mention them in his evidence and that he had instructed the other HMRC officers not to mention them either. Mr Popoola said that this was not the case.

30. None of the officers recalled it being particularly noisy in the nail bar. They gave conflicting accounts of how many chairs there were in the waiting area.

Issue of assessments

31. On 11 July 2013 Mr Popoola had a meeting with the appellant and his adviser at which he informed them that he thought the appellant was not declaring all of the sales of the business for VAT purposes. He asked the appellant to provide the amount of takings which had not been declared within the next 5 working days. The adviser

later responded that the appellant was prepared to accept an increase in declared sales for the year ended 31 July 2011 of £5,000 and later of £10,000.

32. Following a letter of 1 August 2013 stating that he intended to issue VAT assessments on a best judgment basis, on 19 August 2013 Mr Popoola wrote again to the advisers explaining his calculations of additional takings of the business in the relevant periods. For all days other than Saturday, Mr Popoola calculated an estimate of the takings for 1 hour based on the actual takings noted by Mrs Gray when she had attended the premises. He multiplied the figure for 1 hour by the number of hours for which the nail bar was open for business on that day to give a daily takings figure. He noted that not every day would be the same in terms of the level of business and gave a reduction in the daily takings figure of 60%.

33. The calculations were as follows:

(1) For each Monday, Tuesday, Wednesday and Friday: £150 (of takings for 1 hour) x 9 (being the hours of operation) = £1,350 x 60% = £540. The £150 figure was based on the assumption that, according to Mrs Gray's observations on Wednesday 12 June, £100 had not been declared in a 40 minute period when she had visited on a weekday and therefore £50 could be expected to be earned in the remaining 20 minutes.

(2) For Thursday: £165 (of takings for 1 hour) x 11 (being the hours of operation) = £1,815 x 60% = £726. The £165 figure was based on the assumption that according to Mrs Gray's visit which took place on a Thursday 21 March the appellant failed to declare £138 within 50 minutes and therefore £27 could be expected to be earned in the remaining 10 minutes.

(3) For Sundays: £150 (of takings for 1 hour) x 6 (being the hours of operation) = £900 x 60% = £360. This was based on the takings for a week day.

34. As regards Saturday, Mr Popoola took the actual takings of £475 recorded on Saturday 15 June 2013 when the invigilation exercise took place. However, he considered that this should be increased as "two members of staff were sent home the takings should be increased to reflect those which would apply if the two additional staff were also working". He calculated that with 5 staff members the takings for each Saturday would be £790.

35. He noted that on the test purchase day, which took place on Saturday 11 May 2013, the appellant did not declare £152 within 40 minutes. On that basis the under declared takings were £228 per hour which multiplied by 9 hours of business gives a figure of £2,052. Allowing a 50% reduction gives under declared takings of £1,025 per Saturday. However, he concluded that in his assessment he proposed to use the lower £790 figure.

36. The appellant's own gross daily takings records showed takings for 21 March 2013 of £252, for 11 May 2013 of £310 and for 12 June 2013 of £218. The majority

of the payments made by Mrs Gray or observed by her as made by other customers were not included in the appellant's own records for these days.

37. On 8 November 2013 Mr Popoola wrote to the appellant notifying him of HMRC's decision on the VAT position and issuing an assessment under s 73(1) VATA for £78,293 for the VAT accounting periods 11/09 to 08/13 and an assessment for £2,690 for the period 1 September 2013 to the date of de-registration on 2 October 2013 as the VAT return for that period had not been received.

38. The appellant's VAT return for the final period was received on 2 January 2014. This showed output tax for that period of £1,084.18 and input tax of £948.84. The net VAT due was therefore £135.33. This displaced the assessment of 8 November 2013.

39. Mr Popoola arranged for a penalty explanation letter to be issued to the appellant on 31 January 2014 stating that the proposed penalty was £48,627.81 for the VAT accounting periods 08/09 to 05/13 calculated at 63% of the potential lost VAT due to under declared income. A penalty determination for that amount was issued on 28 February 2014.

40. The penalty was issued on the basis that the appellant had acted deliberately in suppressing sales as the appellant's records did not tally with the observations of Mrs Gray on the relevant days. HMRC assert that the appellant misdirected HMRC about the number of employees based at the premises. The disclosure was prompted because the appellant did not tell HMRC about the inaccuracy. This meant that the penalty was in the 35-70% range. HMRC gave no reduction in the penalty for "telling" or "helping". It was noted that the appellant had not admitted the inaccuracy or explained how it arose "You did not help to quantify this under error, you were passive and obstructing officers to carry out their duties sometimes. You failed to engage in quantifying the inaccuracy. Also you did not volunteer to give any evidence". HMRC gave a 20% reduction for "giving" on the basis that the appellant allowed officers to carry out the invigilation without hinderance and gave business records when requested.

41. The appellant's representatives, VAT Consultants Ltd, requested a review of the decisions on the assessments and penalty in a letter dated 13 March 2014.

HMRC review

42. HMRC upheld the decisions on review but varied the amount of the assessments:

> (1) The assessment for 11/09 to 08/13 was reduced to £60,489.69 by removing the amounts that Mrs Gray had paid for her treatments from the best judgment calculations on the basis that they artificially increased the turnover.
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> (2) The assessment for the final period was reduced to £1,496. This was based on estimated output tax figures for a 91 day quarterly period of £7,340.67 apportioned for 32 days from 1 September 2013 to 2 October 2013 less the actual output tax declared on the return.

43. HMRC have subsequently reduced the assessment for the final period further to £1,416 on the basis that the calculation should be taken to the day before the de-registration and not the date of de-registration as had been done previously.

44. In the review decision of 4 June 2014, Mrs Gibbs of HMRC looked at both whether the assessments had been made to the best of Mr Popoola's judgment and the amount of the assessment. Mrs Gibbs noted that:

> (1) The calculation of the VAT due was based on observations made during test purchases and a day of invigilation. By comparing the findings with the takings declared in the relevant periods, the officer found that takings from a significant number of customers had been omitted from the appellant's records. As there is no indication that similar suppression was not applied to other days and times, Mrs Gibbs considered the periods covered by the assessment to be reasonable.
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> (2) She concluded that the assessment had been made to the best judgement of the officer. She referred to the case of *Mohammed Hafizar Rahman (t/a Khayam Restaurant)* CO 2329/97 where the High Court decided that the tribunal should not treat an assessment as invalid merely because it disagrees as to how judgment should have much exercised. A much stronger finding is required such as that the assessment has been reached dishonestly, vindictively or capricious or the assessment is a spurious estimate or guess in which all elements of judgment are missing or the assessment is wholly unreasonable.
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> (3) She noted that the percentage reduction of 60% may seem arbitrary but that the assessment as a whole was not arbitrary. She was happy to maintain the 60% reduction as it was in favour of the appellant.
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> (4) She noted that the suppressed takings recorded for Thursday 21 March 2013 and Wednesday 21 June 2013 included payments for the treatments received by Mrs Gray who had made the test purchases. She thought that HMRC may be criticised for including such amounts in the calculations on the basis that they artificially increase the taxpayer's turnover. She did not consider that this affects the best judgment aspect of the case but that an amendment was needed to take these payments out of the calculations.
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> (5) She set out that the following adjustments were required:
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> > (a) For Mondays, Tuesdays, Wednesdays and Fridays £19 should be taken out of the hourly amount used. This gave a revised daily amount of under declared takings of £437.40 per day for those days.
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> > (b) As the calculations for Sunday was also based on the figure used for those weekdays, £19 should also be removed to give a revised daily amount of £291.60.
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> > (c) For Thursdays, £32 should be left out of account giving a revised figure of £559.68.

(d) The figure for Saturdays should remain the same.

45. For the final period assessment an adjustment was also required as set out above.

46. Mr Chu asserted that HMRC's account of what happened on the test purchase days is not correct. It would not be possible for a small family business to generate the amount claimed in such a short period time for which Mrs Gray was present. This was particularly so as Mrs Gray had visited on 2 occasions in the period around 5.00pm to 6.00pm when the shop was particularly quiet. There would not have been as many customers in the nail bar as Mrs Gray claims. He has never employed 5 staff. He cannot see that Mrs Gray could have heard the payments she claims to have heard given the noise in the shop such as music from the television and conversation between other customers and the staff and the sound of the door chime. He asserted that it was unbelievable that Mrs Gray was able to remember such specific details on some occasions but on others (such as on the 21 March 2013) she was not able apparently to hear everything. Moreover the treatments she claimed to have seen on 21 March 2013 would have taken much longer such that she cannot have seen them taking place when there were only 2 staff working.

47. He also asserted that the evidence put forward by HMRC as to what happened on the invigilation day was unreliable. He noted that there were discrepancies between HMRC's figures and his own but they themselves had recorded that Mrs Chu was writing everything down as it occurred.

48. He noted that Mr Popoola was assuming in the assessment he made that the purchases Mrs Gray alleges to have heard (which the appellant disputes in any event) all happened in the time period when she was in the shop. However, given the short times she was present and the number of transactions she claims to have seen or heard and the length the treatments take, it is not possible that they all took place within that time scale. Also Mr Popoola is assuming that the business has the same level of taking on each relevant day of the week but takings in fact fluctuate wildly.

49. In his oral evidence he stated that he always added up the cash takings at the end of each day and that he kept £80 as a float. He said that Mr Popoola had done a cash up on each occasion when he had visited the nail bar. He added up all the money and checked everywhere for money such as in Mrs Chu's wallet. Mr Popoola was never satisfied. He asked for the appellant's diary which the appellant had produced but Mr Popoola was not interested in that; he was only interested in the money. The appellant noted that he has to do everything himself so of course he keeps a staff timetable; it is important so that the appellant knows what is happening. The appellant was scared of upsetting Mr Popoola such as on the occasion on 18 April 2013 when there were two days takings missing from his taking book but he had written them down on separate pieces of paper which he would record in the book later.

50. On the invigilation day he had added up the figures he/his wife had recorded in front of Mr Popoola and Mrs Bramble and they did not quite tally with HMRC's figures but that was just small mistakes and nothing deliberate. He had not turned away customers telling them they would have to wait for an hour or more. He would

not do that. There are other nail bars within minutes of the appellant's premises and customers would just go to those other nail bars. He had not sent staff home on that day. He was simply acting in accordance with his normal working patterns. The maximum number of staff he has had is 3 other than he and his wife. There were not 5 staff other than the appellant and his wife on that day or on any other day. On that day also the HMRC officers were taking up seats in the waiting area which may have put customers off.

51. It was put to Mr Chu that his own records did not show the purchases which had been made by Mrs Gray. He agreed that the records did not show any such purchases and said that he could not provide any explanation for that. As set out it was not possible that the treatments which Mrs Gray said she saw took place in the time available. He said that it must be the case that they did not take place if they were not shown.

52. He said he had not been aware that his former accountant had made an offer to HMRC that he had under accounted for £5,000 and later £10,000 of takings. He has not under declared anything. He and his wife worked very hard to make a small family business successful.

53. The appellant said that he and his family had suffered great stress and anxiety due to the way in which he had been treated by HMRC and that he had been shocked by the way in which Mr Popoola had behaved. He had been inconsiderate, accusatory and aggressive and intimidating. The appellant's view is that Mr Popoola lacked integrity and professionalism.

Law

Assessments

54. Section 73(1) VATA provides that:

> "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 judgement and notify it to him."

55. Under s 73(6) VATA such an assessment has to be made no later than 2 years after the end of the prescribed accounting period or one year after evidence of fact, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

56. Section 83 VATA provides:

> "Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters..."

57. There is then set out in s 83 a series of actions, decisions, and other matters arising under VATA listed under paragraphs (a) to (z) which includes in (p):

> "An assessment -
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act....
> … or the amount of such an assessment."

Penalty provisions of schedule 24

58. The penalty provisions of schedule 24 work as follows (all references to paragraphs are to paragraphs of schedule 24):

(1) A penalty is payable by a person (P) who gives HMRC a VAT return and (a) the return contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and (b) the inaccuracy was careless within the meaning of para 3 or deliberate on P's part (para 1).

(2) The level of the penalty depends on whether the inaccuracy was careless or deliberate and, if deliberate, if it was concealed or not. Whether an accuracy is concealed or not depends on whether or not P makes arrangements to conceal it (for example by submitting false evidence in support of an inaccurate figure) (para 3).

(3) Where applicable the maximum penalty is 30% of the potential lost revenue for careless action, 70% of the potential lost revenue for deliberate but not concealed action and 100% of the potential lost revenue for deliberate and concealed action (para 4).

(4) The potential lost revenue in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment (para 5).

(5) There is a reduction in the penalty where a person discloses an inaccuracy by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. The level of reduction depends in part on whether the disclosure is "unprompted" or "prompted". The disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered it or are about to discover the inaccuracy and otherwise is prompted (para 9).

(6) Where a person has made a disclosure HMRC must reduce the percentage of penalty which would otherwise apply to a percentage that reflects the quality of the disclosure provided that it cannot be reduced below the specified minimum. Where the penalty is deliberate the minimum is specified as 20% where the disclosure is unprompted and 35% where it is prompted (para 10).

(7) HMRC may also reduce a penalty if they think it right because of "special circumstances" (under para 11).

(8) HMRC may suspend all or part of a careless inaccuracy penalty (under para 14).

59. Where a person is assessed to a penalty, he may appeal against HMRC's decision that a penalty is payable and/or against the amount of the penalty (para 15). On an appeal against the penalty the tribunal may affirm or cancel HMRC's decision. On an appeal as regards the amount of the penalty the tribunal may affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make.

Submissions

60. The appellant made the following submissions:

(1) The assessment was not made on a best judgment basis. The figures are grossly inflated for a business of this type and are not based on an honest assessment.

(2) The evidence given by Mrs Gray, on which the estimated assessments have principally been made, is wholly unreliable. It is unbelievable that Mrs Gray could have heard the conversations she claims to have heard in such a noisy environment. She claims to have been able to take notes whilst being treated which is not feasible given the nature of the treatments. Otherwise her notes were not made contemporaneously and are uncorroborated.

(3) Mr Popoola has extrapolated figures from the purchases Mrs Gray claims she observed in a wholly irrational way. There is no justification for the assumption that the business would have made the assumed level of profits per hour on the basis of the covert operations carried out by HMRC. The level of treatments which HMRC has assumed took place within the time span of 1 hour is simply not feasible given how long treatments may take. This is evidence of a dishonest and vindictive approach.

(4) The 60% and 50% reductions Mr Popoola has allowed are simply figures plucked out of the air.

(5) As regards the figures for Saturday, it is wholly capricious for HMRC to base their figures on the assumption that 5 staff were working. The evidence indicates that there was only ever a maximum of 4 people working in the nail bar. Also Mr Popoola has exaggerated what happened as regards customers being turned away. It is clear from the evidence that only 1 or 2 people decided not to wait.

(6) There is reason to believe that the HMRC officers involved have acted dishonestly as they have given inconsistent accounts as regards a number of matters.

(7) In particular, it appears that there is an agreement between the officers not to mention any cash reconciliation exercises which took place. For example Mrs Bramble claims to have no knowledge of a cash up which Mr Popoola carried out notwithstanding that she was there at the time. Mr

Clayton offered that he had no knowledge of cash ups before being expressly asked. Mr Chu is clear that cash ups were done on several occasions and he found Mr Popoola to be very forceful in carrying that out.

(8) The lack of proper note taking by many of the HMRC officers involved is further evidence of the lack of proper procedures. Some officers kept no notes and others wrote them on the back of envelopes which do not serve as satisfactory evidence. Moreover copies of the notebooks were not provided until a very late stage; they were not in the original evidence and HMRC refused to produce them over a long period.

(9) There is no reason for the imposition of a penalty. The appellant fully cooperated and did not conceal anything. He found Mr Popoola a difficult person to deal with describing him as a powerful, intimidating and aggressive person such that the appellant was frightened of him. The appellant found that he simply could not do anything to please or obtain the approval of Mr Popoola but did all he could to cooperate despite these problems.

61. HMRC's submissions are as follows:

(1) The 4 occasions on which test purchases were made in covert observations are representative of a general pattern of sales being unrecorded. Also the other visits by the officers, including the full day invigilation on 15 June 2013, gave great cause for concern that records were not being properly kept and that full taking were not being declared as set out in the evidence.

(2) It is reasonable for HMRC to base their calculations of unrecorded sales for the relevant period on the results of the test purchases and observations. It is reasonable to calculate the figure for Saturdays based on the invigilation day on the basis of 5 staff rather than 3 as the appellant turned away staff on that day so turning away customers. Moreover HMRC have allowed a substantial reduction of 60% for weekdays and 50% on Saturdays in acknowledgement that the business is unlikely to have the same level of custom all the time.

(3) In accordance with the case law the assessments should stand as made to the best judgment of the relevant officer provided that the officer acted honestly and reasonably, the amount assessed was not reached vindictively or capriciously, it was not based on a spurious estimate or guesswork and it was not wholly unreasonable (see the *Pegasus* case referred to below). Mr Popoola made such an honest assessment in this case.

(4) The penalty for a deliberate inaccuracy has been validly imposed. The appellant acted deliberately by not disclosing the full number of people working at the premises and sending away staff and turning customers away on the day of a full day invigilation on 15 June 2013. HMRC has allowed a 20% reduction for giving HMRC access to records.

Discussion - caselaw

62. The appeal is against an assessment to VAT made by HMRC under s 73 VATA on the basis of their best judgment of VAT due in the relevant period and a related penalty. The approach which the tribunal should take to an appeal against such an assessment is well established in the cases.

63. In an early case on this of *Van Boeckel v CEC* [1981] STC 290 Woolf J gave the following guidance (at page 292):

> "Clearly [HMRC] must perform that function [of exercising their powers in such a way that they make a value judgment on the material which is before them] honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment."

64. In the later case of in *Rahman (t/a Khayam Restaurant) v CEC* [1998] STC 826 Carnwath J expanded on this. He noted that a two stage approach is required as follows (at page 876)

> "… the practice is to consider these cases in two stages: (1) consideration whether the assessment was made according to the "best judgment of the Commissioners"; if not, the assessment fails, and stage (2) does not arise; (2) if the assessment survives stage (1), consideration whether the amount of the assessment should be reduced by reference to further evidence or further argument available to the Tribunal…"

65. He then commented on the approach taken by Woolf J in the *Van Boeckel* case as regards the first "best judgment" stage cautioning that the tribunal should not find that an assessment was invalid purely because it disagrees as to how judgment should have been exercised but that a much stronger finding is required:

> "…for example, that the assessment had been reached "dishonestly or vindictively or capriciously"; or is "spurious estimate or guess in which all elements of judgment are missing"; or is "wholly unreasonable""

66. He went on to say that, if he was right in his interpretation of *Van Boeckel*, it is only in a very exceptional case that an assessment will be upset because of a failure by the Commissioners to exercise "best judgment". In the normal case "the important issue will be the amount of the assessment". He concluded (at page 840) by warning against an "over-rigid adherence to the two-stage approach" and noting "it will be rare that the assessment can justifiably be rejected altogether on the ground of a failure to follow that guidance". In his view, the principal concern of the tribunal should be to ensure that "the amount of the assessment is fair, taking into account not only the

Commissioners' judgment but any other points that are raised before them by the appellant."

67. In *Rahman (trading as Khayam Restaurant) v Customs and Excise Commissioners (No 2)* [2003] STC 150, Chadwick LJ commented with approval on Carnwath J's judgment in the earlier case. He noted (at [6]) that the first part of two stage approach actually contains two elements: (i) whether the pre-condition to the exercise of the power is satisfied (in other words whether there is a valid case for the issue of an assessment) and (ii) whether the assessment made by the Commissioners was made "to the best of their judgment".

68. At [32]) he formulated the test as to whether "best judgment" has been exercised to be as follows:

> "In such cases - of which the present is one - the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary."

69. Chadwick LJ continued (at [43]) to give examples of cases where it may be apparent that the power to assess has not been exercised in accordance with "best judgment", such as where the Commissioners have not taken into account information which was made available to them by the taxpayer before the assessment was made, or can put forward no basis upon which the assessment can be supported. He said that he "suspected that those cases will be rare". At [44] he noted that in the usual case the tribunal "will have the material before it from which it can see why the Commissioners made the assessment which they did; and may have further material which was not available to the Commissioners when the assessment was made". In such cases "a tribunal would be well advised to concentrate on the question "what amount of tax is properly due from the taxpayer?"; taking the material before it as a whole and applying its own judgment. . . ."

70. He concluded at [45] that where there is a finding that "best judgment" has not been exercised, the tribunal could take the view that "the proper course is to discharge the assessment". But even in cases of that nature "the tribunal could choose to give a direction specifying the correct amount….The underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax."

71. In the Court of Appeal decision in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509, to which HMRC referred, the court set out an extensive analysis of the previous decisions. Carnwath LJ (as he had then become) noted at [10] that the term "best of their judgment" does not apply a "higher than normal standard but rather is a recognition that the result may necessarily involve an element of guesswork". It means simply "to the best of (their) judgment on the information available" (citing *Argosy Co v IRC* [1971] 1 WLR 514, 517 per Lord Donovan).

72. He continued to note that generally, the burden lies on the taxpayer to establish the correct amount of tax due citing from the case of *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC (per Lord Lowry):

> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right."

73. As regards the correct "best of their judgment" test he referred, in particular, to the statement by Chadwick LJ in *Rahman (No 2)* that what is required is "an honest and genuine attempt to make a reasoned assessment" (as set out in 68 above) which he considered to be an "authoritative statement of the law". He said that in the light of that statement he would "caution against attempts to refine or add to it, by reference to individual sentences or phrases from previous judgments".

74. At [23] and [24] he noted that even if it is established that there has been a breach of the "best of their judgment" requirement in relation to some element of the assessment, it does not follow that the whole assessment should be set aside. He noted that this point was touched on in *Rahman (No 2)* (referring to the comments set out at 70 above). He agreed with the views expressed in *Rahman (No 2)* that in such cases the tribunal has the power to set aside the assessment or to reduce it to the correct figure. At [29] he said:

> "Even if the process of assessment is found defective in some respect applying the *Rahman (2)* test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly."

75. At [38] he gave guidance to the tribunal when faced with "best of their judgment" arguments in future cases which included the following:

> "The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment."

76. Chadwick LJ agreed with Carnwath LJ's conclusions but added some observations of his own. He noted at [72] that the issue in the *Pegasus Birds* case was whether the exercise of "best judgment" required something more than an "honest and genuine attempt to make a reasoned assessment" on the basis of the material then

available and whether there was some "objective standard" against which the assessment must be measured.

77. At [75] he accepted that an assessment made "by an officer who had, consciously or unconsciously, "closed his mind" to any material which did not fit his case", would not be an assessment of an amount due to the best of his judgment. The exercise of judgment, "based on the evaluation of material, requires that the task be approached with an open mind". He continued that an officer "is entitled to reject material on the basis that, on evaluation, he does not regard it as credible; but he must not reject material on the basis that, before evaluation, he has closed his mind to the possibility that it might be credible."

78. However at [76] he rejected the proposition that it follows that, if an assessment is "wholly unreasonable", it is not the result of an "honest and genuine attempt" to assess the amount of VAT properly due:

> "All that can be said is that an assessment may be so far outside the bounds of what would have been reasonable that it calls into question whether there was, indeed, an honest and genuine attempt to assess the amount properly due.....But that is an evidential inference from the facts; it is not a finding that because (although doing his honest best) his assessment fell below an objective standard of reasonableness, he failed to exercise the power to assess to the best of his judgment as a matter of law."

79. Similarly at [84] he noted that if the tribunal finds that assumptions made by the Commissioners in making the assessments were wholly unreasonable that raises the same issue as to whether that "compels the conclusion that [the officer] was not doing his honest best". Accordingly he concluded (at [85]) that it is enough that the officer through whom the Commissioners act in making the assessment "does his honest best" or that he makes "an honest and genuine attempt to make a reasoned assessment of the VAT payable". In that case, therefore, the tribunal misdirected themselves as to the proper approach to the "best of judgment" requirement.

80. He also confirmed his views set out at [44] of *Rahman (No 2)* (see 69 above) and that as he had said at [45] of that case (see 70 above) even where it is found that best judgment has not been exercised the tribunal could give a direction specifying the correct amount. But he added that he suspected that:

> "the point……is unlikely to arise in practice. In a case where the Tribunal finds that the Commissioners have made no honest and genuine attempt to assess the amount of VAT properly due, the Commissioners are unlikely to seek to uphold the exercise of the power and the Tribunal is unlikely to be persuaded that justice does not require that the assessment be set aside. And, as I said in *Rahman (No 2)*, the cases in which a finding of no honest and genuine attempt can be made are likely to be rare."

81. This approach has been followed in numerous subsequent cases. For example, in *Mithras (Wine Bars) Ltd v Revenue and Customs Commissioners* [2010] UKUT 115 (TCC), [2010] STC 1370, Judge Oliver in the Upper Tribunal gave the following useful summary of the approach to stage 2 as follows:

> "The observations extracted from the decisions in *Koca* and *Rahman 1* emphasise the point that in an appeal against the amount of an assessment, the Tribunal is not restricted to any kind of quasi-supervisory function which involved referring to the Commissioners' judgment on quantum at the time the Commissioners made their assessment. The Tribunal's function is truly appellate, in that it can consider further information or argument at the hearing of the appeal and reduce the amount of the assessment, thereby substituting its own view on quantum for that of the Commissioners.
>
> However, as is clear from *Khan v HMRC*, the burden is on the Company to establish the correct amount of tax due and unless and until it can establish otherwise the assessments "remain right"……. the Company has not been able to establish that these assessments are wrong or positively show what corrections should be made to make them "right or more nearly right".

Discussion - decision

82. Following the approach in the cases the first question is whether HMRC was entitled to raise an assessment and, if so, if they have made an honest and genuine attempt to make a reasoned assessment of the VAT payable. It is only if these conditions are not satisfied, that the assessment can be found to be invalid in its entirety. If that is not the case, it is clear that the assessment cannot be rejected in its entirety but the tribunal can consider whether the amount of the assessment is correct or should be adjusted. The burden is then on the appellant to show that the amount of the assessments are wrong and also to show positively what corrections should be made in order to make the assessments right or more nearly right.

83. HMRC have raised the assessments essentially on the basis that Mrs Gray's visits to the nail bar established that the appellant has not been declaring the full takings of the business and therefore has not been accounting for sufficient VAT. This is on the basis that transactions with customers, which Mrs Gray says she witnessed taking place, were not recorded by the appellant. Much, therefore, turns on Mrs Gray's evidence.

84. We found Mrs Gray to be a credible witness. She had a good recollection of the events in question and was firm and consistent in her account of what happened. Her recollections are supported by written notes made shortly after she visited the appellant's business premises and some contemporaneous notes albeit that, understandably in the circumstances, these were limited to recording items such as the figures she heard. We accept her account that she did not have difficulty in hearing due to background noise; none of the officers who had visited found the premises

particularly noisy. We accept her evidence as to what happened on each of her visits to the appellant's business premises.

85. It is clear that nearly all of the transactions Mrs Gray recorded as having taken place in the nail bar were not recorded in the records of the daily takings of the business kept by the appellant. We note that the appellant accepted that those transactions were not shown in his records. He could not provide any explanation other than asserting that they must not have taken place as Mrs Gray says she witnessed. As set out, we accept Mrs Gray's evidence for the reasons given above.

86. We have concluded, therefore, that in the periods in question, the appellant has not declared all supplies made by the business for VAT purposes. On that basis it is clear that HMRC had a sound basis for seeking to impose additional VAT by assessing (under s 73(1)) the additional amounts of VAT due to the "best of their judgment".

87. Mr Popoola is the officer who made the relevant calculations on which the assessments were issued. The appellant submits that Mr Popoola was not acting honestly and nor were the other officers who attended his business premises on the fully day invigilation and other occasions. In particular the appellant asserts that:

> (1) Mr Popoola has no justification for the assumption that the business would have made the assumed level of profits per hour he asserts; the level of treatments which HMRC has assumed took place within the time span of 1 hour is simply not feasible given how long treatments may take. This is evidence of a dishonest and vindictive approach.
>
> (2) The 60% and 50% reductions Mr Popoola has allowed are simply figures plucked out of the air.
>
> (3) It is wholly capricious for HMRC to base their figures for Saturdays on the assumption that 5 staff were working. Mr Popoola has exaggerated what happened as regards customers being turned away.
>
> (4) The officers have given inconsistent evidence, in particular, as regards whether cash reconciliation exercises were carried out. The appellant claims that these were carried out on each visit and Mr Popoola did not want to reveal this as the results support the appellant's position.

88. We also note that the appellant said that he found Mr Popoola to be a frightening and intimidating person. The appellant also casts doubt on HMRC's evidence as, in some cases, notes were not taken by the officers involved and the appellant was not given such written documents as exist for some time which was also asserted to have hampered the preparation of his case. It appeared that the appellant's adviser had had the documents for sufficient time to prepare for the case such that there was no prejudice to the appellant in that respect. We do not see any reason to draw any adverse inference from any delay in copies being produced as to the reliability of such documents as evidence.

89. There are inconsistencies in the accounts of some of the officers who gave evidence, in particular, as regards what happened on the full day invigilation as

regards when the appellant arrived and who spoke to him, details about the premises and, as regards whether there was a cash reconciliation on that day. It appeared that these inconsistencies were due to the fading of memories given the elapse of time since these events occurred until the time the witness statements were made and the hearing subsequently took place.

90. That the officers could not remember full details of the premises as regards, for example, how many chairs there were in the waiting area or the precise layout of the premises, we find not surprising given the time that has passed. Such matters were not the focus of the visit or note taking which took place subsequently. As regards who first spoke with the appellant on the invigilation day, we prefer the evidence of Mr Clayton give that this was supported by notes prepared shortly after the visit. The fact that Mrs Bramble could not recall a cash reconciliation taking place that day but that she had signed a note confirming that was the case appears to demonstrate that she had very little, if any, actual recollection of the events in question.

91. These inconsistencies do cast doubt on the weight which can be attached to the evidence given by the officers as to certain aspects of what happened on the invigilation day and, in particular, we consider that the evidence of Mrs Bramble as regards that day cannot be relied on. However, overall we do not consider that they cast doubt on the honesty of the officers concerned or raise any suggestion that the assessment was raised otherwise than in an honest attempt to make an assessment of the VAT due. We note that the factual matters to which the discrepancies relate do not themselves have any material bearing on whether HMRC was entitled to issue an assessment; that is established by the fact that the appellant had been under declaring his takings for VAT purposes according to Mrs Gray's clear evidence and the appellant's own records.

92. As regards Mr Popoola, he appeared to have a good recollection of events which is perhaps consistent with him being the lead officer in this matter. In general his witness evidence was consistent with the quite detailed written notes that he had made at the time (or shortly after the relevant visits to the premises).

93. The appellant states that Mr Popoola is concealing that other cash reconciliations were carried out because that would support the appellant's case that he had correctly accounted for all VAT due. Mr Popoola was clear that he had carried out a cash reconciliation only on the occasions he said he had in his witness statement and that he had not instructed other officers to given incorrect information in that respect. The other relevant officers also said that they had not carried out other cash reconciliations and they had not received any such instructions from Mr Popoola. We note Mrs Bramble's evidence on which we have already commented. Whilst we found Mr Popoola to be a forceful person with firm views on the matters in dispute, we did not have any doubt from his evidence that he was acting other than honestly. We accept his evidence as regards the cash reconciliations. We note that, in any event, the suggestion that further cash reconciliations would have supported the appellant's position in any material way is wholly speculative. The evidence is clear that the appellant has not declared the full takings from his business for VAT purposes.

94. Looking at all the available evidence and the method of calculation which Mr Popoola adopted, we had no real doubt that his energies were focussed on ensuring that the appellant paid the right amount of VAT on the information available to him and that he made an honest and genuine attempt to make as reasoned an assessment of the VAT payable as he could. There is no evidence that Mr Popoola did anything other than attempt to assess the available information with a view to making such an assessment or that he closed his eyes to any relevant information.

95. Mr Popoola based his calculation of the VAT due for all days other than Saturday on the amount of takings which Mrs Gray's visits had exposed were missing from the declared takings for any given period of time. He then extrapolated from the amount of takings which were missing in a given period of time, an equivalent amount for the rest of the period of 1 hour and assumed takings at that same rate for each hour on which the business operated on the day in question. He then gave a 60% discount. For Saturdays he took the actual takings from the full day invigilation but increased to reflect what would be earned if 5 staff had been present instead of 3 as was actually the case. This was on the basis that he believed that the appellant was deliberately sending the staff away and taking measures to ensure the takings were kept low. For that day he gave a 50% reduction.

96. We note that Mr Popoola gave the appellant an opportunity to provide revised figures for the takings but the increases of £5,000 and £10,000 suggested by his accountants were clearly, in light of HMRC's findings, unrealistic.

97. In such circumstances, seeking to use the missing amounts, as established by Mrs Gray's visits, and the actual takings on the invigilation day, is not an unreasonable approach. We note that the percentage reductions given are somewhat arbitrary but they are intended to benefit the appellant and, in the absence of any further information provided by the appellant, an element of guesswork, as the courts recognise, is somewhat inevitable. We certainly cannot see that adopting this approach could be characterised as evidencing any vindictive or dishonest approach as the appellant has asserted. We note that, as set out below, we consider that increasing the figures for Saturdays on the assumption that 5 staff were working is not reasonable and the figures should be adjusted to reflect that. However, our view is that this does not undermine the validity of the entire assessment but rather goes to the correct amount of the assessment.

98. Overall, therefore, for all of the reasons set out above, we do not see any reason, from the approach taken by Mr Popoola, that would justify a decision that the assessments are not valid in their entirety. Accordingly, we have continued to consider whether the amount of the assessments should be subject to any adjustment bearing in mind that it is for the appellant to provide information as to what the correct amount of the assessment should be.

99. The appellant has essentially put forward two matters potentially affecting the amount of the assessments. The first is that it is wrong for the takings for Saturday to be increased on the assumption that 2 further staff were working. The second is that the appellant could not have provided the amount of services in an hour which HMRC

have assumed were provided in that time in their calculations. The appellant notes that it does not follow that because, for example, 5 lots of payment were received in 1 hour, that all of the treatments took place fully in that hour given the length that treatments take. So, for example, it could be the case that, at least some of the customers arrived before that 1 hour period or that other customer's treatments would be carried out over part of the following hour. So Mr Chu asserted that the figures for each hour should be lower than that assumed by HMRC although no calculations were produced to demonstrate that.

100. As regards the staff members working on Saturday, we consider that there is insufficient evidence to conclude that, on the balance of probabilities, there would usually be 5 staff working in the nail bar on a Saturday and that the appellant deliberately sent members of staff away on the invigilation day. We note that on some of Mrs Gray's visits she says there were 5 staff although it is not clear whether that includes the appellant and his wife. Otherwise most of the reports as regards the various visits by HMRC officers were of a maximum of 3 or 4 members of staff being present (again it not being clear whether that included the appellant and his wife). It is plausible that staff members left at certain points to take a break (and Mr Clayton and Mrs Baptiste described in their witness statements a member of staff as leaving and then returning on the invigilation day). We consider that the takings for Saturdays should be regarded as the actual takings on the invigilation day as recorded by HMRC and that the assessments and related penalty should be adjusted to that extent accordingly.

101. The position as regards the correct level of missing profits to be assumed for each hour, we find to be more difficult. The problem is that, other than saying that HMRC's calculation is not correct in this respect, the appellant has not put forward anything positive about what would be the correct number of treatments and profits (other than simply asserting the original figures are correct which we cannot accept given we have found takings have been under declared). As noted, it is clear in the case law that in these circumstances the burden of proof is on the appellant to demonstrate what the correct figure (or a more correct figure) should be to displace HMRC's assessment. We note that looking at the appellant's own figures as to the number of treatments in effect carried out per hour and those in effect assumed by HMRC's calculations, overall the position assumed by HMRC does not appear unreasonable in particular given the substantial discount then given by HMRC in the resulting figures (of 60% and 50%). In the absence of any further information from the appellant, we find that we are not able to make any adjustment to the assessments in this respect.

102. As regards the penalty, our view is that HMRC have correctly raised the penalty on the basis that the act which enables HMRC to assess the VAT as due from the appellant was "deliberate but not concealed". In our view, on its natural meaning, the use of the term "deliberate" in this context requires that the relevant person must to some extent have acted consciously or with intent as regards the circumstances which resulted in the inaccuracy in the VAT returns. We find that is the case given that it is clear that the appellant has not declared the full amount of takings which therefore gave rise to the under declaration of VAT due.

103. As set out in full above the penalty can be reduced where a person discloses an inaccuracy by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. The level of reduction depends in part on whether the disclosure is "unprompted" or "prompted". The disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered it or are about to discover the inaccuracy and otherwise is prompted. We agree that HMRC have correctly treated this as a prompted disclosure rather than an unprompted one given that HMRC established the under declaration only on carrying out their own investigation. HMRC have given only a reduction for the final category of allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. In these circumstances, we cannot see any basis for allowing for any reduction under the other categories or that there are any special circumstances which would justify a further reduction.

Conclusion

104. For all the reasons set out above, we have concluded that the appellant's appeal is not allowed except that the calculation of the VAT due for the relevant periods and the related penalty should be adjusted by HMRC to take into account our finding that the calculation of the takings of the appellant's business for Saturdays falling in the relevant period should be based on the actual takings of the business recorded by HMRC on 15 June 2013 as set out in 100 above.

105. 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.

HARRIET MORGAN

TRIBUNAL JUDGE
RELEASE DATE: 30 September 2016