[2021] UKFTT 0268 (TC)

TC08213

VAT – assessment under s 73 of the Value Added Tax Act 1994 – alleged suppression of cash sales – best judgment assessment – whether assessment displaced by Appellant – yes – assessment set aside and appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03948

BETWEEN

BROUGH EAST YORKSHIRE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA
MR LESLIE BROWN

The hearing took place on 15 & 16 June 2021. With the consent of the parties, the hearing was held remotely by video using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ms Charlotte Brown of Counsel, for the Appellant

Mr Andrew Cameron, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against an assessment of VAT ('the Assessment') in the sum of £34,486.00, as varied, which was issued pursuant to s 73 (1) of the Value Added Tax Act 1994 (hereinafter referred to as 'VATA') for the period 10/11 to 01/17 (inclusive). The Assessment was originally issued on 20 April 2018 ('the decision under appeal').

2. A penalty ('the Penalty') was issued on 22 June 2018, in the sum of £25,531.38. The parties are in agreement that the Penalty does not form part of the decision under appeal. The outcome of these proceedings will nevertheless have an impact on the imposition and quantum of the Penalty. HMRC have further imposed a Personal Liability Notice ('PLN') on the Director. The parties are also in agreement that this issue does not form part of the decision under appeal.

BACKGROUND FACTS

3. The Appellant was incorporated on 20 June 2011 and began its first week of trading during the week ending 6 August 2011. The Appellant is registered for VAT and its first VAT return was for the period ending 31 October 2011.

4. On 9 February 2017, HMRC carried out a test purchase at the Appellant's principal place of business in order to establish the type of till used by the Appellant. This was closely followed up by an invigilation exercise ('the Invigilation'), on 10 March 2017, which was a Friday evening. During the Invigilation, the Appellant's Daily Gross Takings ('DGT') were established to be £1,656.91.

5. Records provided by the Appellant showed that previous Friday takings over a three-year period were £1,082.00, which was considered by HMRC to be a significant difference between the DGT established during the invigilation exercise. On 16 June 2017, HMRC requested details of the bank account into which card payments were paid. The Appellant provided the details on 11 July 2017. On 8 September 2017, HMRC issued a letter providing an analysis of the Appellant's declared takings over a three-year period.

6. Following exchanges of correspondence, a VAT pre-assessment letter was issued by HMRC on 19 October 2017, detailing the proposed assessment for the period 10/11 to 01/17. The letter outlined HMRC's findings that there had been significant suppression of VAT.

7. Following further exchanges of correspondence, within which the calculations underlying the assessment were challenged by the Appellant and further records provided by the Appellant, HMRC issued a VAT pre-assessment letter on 9 February 2018. HMRC then issued the Assessment on 20 April 2018, initially in the sum of £41,684.00. The Assessment

was varied to £37,031.00 on 15 November 2018, following ADR, due to an error in the proportion of cash takings that HMRC had previously used.

8. Following the submission of further evidence by the Appellant and two adjournments, the Assessment was once again varied to £34,486.00.

Respondent's Case

9. HMRC's case, as set out in the Skeleton Argument, can be summarised as follows:

Suppression of cash sales by the Appellant

(1) The Invigilation undertaken on 10 March 2017 established a DGT of £1,656.91, which was reflective of the Appellant's normal level of sales for Fridays. An average DGT of £1,082.94 was shown in previous takings for Fridays, over a three-year period. This is reflective of a significant level of sales suppression by the Appellant.

(2) Although no irregularities were observed on the night of invigilation, the Appellant has failed to provide evidence to support the DGT claimed. Regulation 31(1) of the Value Added Tax Regulations 1995 ('the VAT Regulations') and Schedule 11 VATA provide that business records should be kept for a six-year period. VAT Public Notice 727 further provides, at paragraph 4.5, that the DGT is a record of all retail supplies and is a crucial part of retail records. The Appellant further failed to accurately record the split of cash and card payments.

Underlying methodology

(3) HMRC obtained Merchant Acquirer ('MA') card data and used secondary records to calculate a VAT assessment. HMRC have carried out a card/cash comparison to support their calculations.

(4) The Appellant declared higher DGT than post-invigilation than pre-invigilation. The percentage of cash takings pre-invigilation was 25.60% (3 May 2015 to 26 July 2015 and 1 November 2015 to 22 January 2017) and it was 36.33% post-invigilation. This supports HMRC's argument that cash was suppressed prior to the invigilation. Looking at the records 33 weeks post-invigilation and pre-invigilation, there was a 94.52% uplift in cash sales, compared with only 17.91% in card sales. The rise in cash takings therefore far exceeds the rise in card takings.

(5) HMRC have based their assessment on the belief that 25.60% of the Appellant's sales were cash. HMRC applied this to the gross sales declared by the Appellant to give the average cash figure for each of the periods 10/11 to 01/17. The revised assessment incorrectly applied a cash takings figure of 23.48%, but this error works in the Appellant's favour. This figure has been marked up by 76.61% and the VAT fraction (20%) has been applied for all of the periods, to give a VAT Assessment.

(6) The night of the Invigilation was confirmed as being 'normal' for a Friday night. The Appellant has not provided any evidence to show that the Hull *'City of Culture'* events in 2017, the change in menu, the leaflet drop in the area or the close of another takeaway, were responsible for the increased DGT on the night of invigilation.

Best Judgment

(7) Section 73 (1) VATA permits HMRC to make a VAT assessment to the best of judgment. HMRC rely on the principles established in case law in support of the Assessment.

(8) Section 77(4) VATA provides that an assessment can be made up to 20 years from the end of the prescribed accounting period if HMRC deem the Appellant's behaviour to be deliberate. The Assessment for the period 10/11 to 01/17 is within the 20-year period.

Appellant's Case

10. The Appellant's arguments, as set out in the Skeleton Argument, can be summarised as follows:

No reliable evidence of suppression of cash takings

(1) HMRC's assertions that the Appellant suppressed cash takings is based upon two observations: (i) DGT from the Invigilation being higher than the average DGT and maximum DGT recorded for Friday night takings for the period 2 April 2014 to 22 January 2017; and (ii) an increase in DGT following the Invigilation. HMRC's observations do not provide sufficient or conclusive evidence of suppression.

(2) HMRC have provided very little evidence of the invigilation itself. The DGT on the day of the Invigilation covers both cash and card takings and is only evidence of an increase in sales generally. It is disputed that declared cash takings increased as a result of the Invigilation. It is not clear how a comparison of total takings for every Friday from the week commencing 2 April 2014 to 22 January 2017 is a representative sample.

(3) The increased DGT has been explained by the Appellant as resulting from (i) a price increase of 28% introduced in February 2017; (ii) the delivery of 1000 menus to homes in the area ('the menu-drop'); (iii) the closure of competitors; and (iv) the opening of local pubs and bars.

(4) Card takings increased by 23.82% and cash takings increased by 10.86%. The Assessment is therefore flawed as there has been no reliable evidence of suppression.

(5) HMRC did not observe any irregularities in the procedures for taking and recording orders. There is no suggestion that there are any irregularities in the procedures for accepting payment from customers.

(6) No discrepancies have been found in the accountancy records and supporting documents provided by the Appellant and no challenges have been made to the bank deposits.

(7) HMRC have not provided any evidence of how the alleged suppression occurred. The figure of suppressed cash takings would have been difficult for the Appellant to conceal and Mr and Mrs Hua's lifestyle has not been questioned by HMRC.

HMRC's methodology flawed

(8) It is not clear how HMRC calculated the percentage of declared cash takings to be 23.48% of overall takings. For the periods in dispute, the percentage of declared cash takings was 39.63%.

(9) HMRC's calculations do not pass the 'credibility check' as per guidance in *VAEC1510 – Power of assessment: Best judgment: Determine the overall credibility of your assessment.*

(10) Even adjusting HMRC's estimated cash sales and uplifting by the estimated 76.61%, cash takings would be 35.15% of gross sales, which is less than the percentage of cash takings of 39.63% actually declared by the Appellant.

(11) HMRC's errors are clear from the number of amendments made to the Assessment. Therefore, HMRC's methodology is unreliable.

Assessment excessive

(12) The Assessment is excessive due to flaws in the underlying methodology applied and HMRC have further failed to prove that the Appellant acted dishonestly. The burden of proof is on HMRC to prove dishonest behaviour.

(13) HMRC should not be permitted to raise assessments going back to the Appellant's commencement of trading and should only be permitted to go back four years from the date of the assessment (i.e., 20 April 2014).

(14) The Assessment should be reduced to nil.

11. The Appeal was listed to be heard prior to the most recent variation in the Assessment and we therefore acknowledge that some of the above arguments have developed.

APPEAL HEARING

12. At the commencement of the appeal hearing, Ms Brown proceeded by opened the Appellant's case, as set out in the Skeleton Argument. She cross-referred us to various documents included in the Documents Bundle and the Authorities Bundle. We then heard evidence from Mr Gia Hua (Director), Mrs Sylvia Hua, Mr Chris Lambert-Dowell (Finance Manager) and Mr Roger Cameron (Accountant).

Evidence and Submissions

13. The first witness to be called was Mr Hua. In his oral evidence, he adopted the contents of his witness statement, dated 16 April 2019, as being true and accurate. Within that witness statement, he confirms that he is the sole director and majority shareholder of the Appellant business. He adds that he works as the chef and does not get involved in the recording of sales, relying on Mrs Hua to record sales. He further adds that he was not present on the day of the Invigilation. He concludes by saying that he left all dealings with HMRC in the hands of his accountant, Roger Cameron.

14. Under cross-examination by Mr Andrew Cameron, Mr Hua said that he did not meet with HMRC in person because English is not his first language. He confirmed however that he disagreed with the allegation that cash sales had been suppressed. He explained that orders are taken from customers and counter receipts are given. He did not however know which order belonged to which customer, as he was in the kitchen. He acknowledged that he is the Director and therefore has ultimate responsibility to ensure that VAT records were maintained. He concluded by saying that he was not aware that the DGT on the night of Invigilation was higher than that on previous Fridays.

15. We then heard from Mrs Hua. In her oral evidence, she adopted the contents of her witness statement, dated 16 April 2019, as being true and accurate. In her witness statement, she explains that her role is that of a sales manager. She adds that she assists with sales over the counter and completes the daily sales records. She explains that she was not present on the day of the Invigilation. She further explains that part of her role in the business is to ensure an increase in sales. She therefore commissioned Law Design & Print to print new menus in late 2016. She and her son then delivered around 1500 new menus in the week commencing 20 February 2017. She added that a couple of businesses had also closed nearby. She further added that she is not able to control whether customers pay by card or cash.

16. Under cross-examination by Mr Andrew Cameron, Mrs Hua said that she calculated the day's takings from individual order slips but she did not retain the order slips. She explained that she writes down the takings from the order slips and she passes the information on to Chris Lambert-Dowell, who then passes the information on to Roger Cameron. In terms of the menu-drop, she explained that she ordered 5000 menus and then delivered about 1500. The remaining menus were placed on the counter.

17. In re-examination, Mrs Hua said that she writes down the orders but the order slips often get covered in grease and she cannot therefore keep them.

18. The next witness to be called was Mr Chris Lambert-Dowell. In his oral evidence, he adopted the contents of his witness statement, dated 16 April 2019, as being true and accurate. In response to further questions in examination-in-chief by Ms Brown, he said that he is the Finance Manager for the Appellant. He identified the exhibits appended to his witness statement and explained that the procedure for completing bookkeeping records for the

Appellant was that Mrs Hua would provide a weekly summary report of daily takings, broken down between cash and card sales. This information was presented to him on a quarterly basis in order for the VAT returns to be completed.

19. He added that in the week after the Invigilation, he provided HMRC with the accounting records and he denied providing HMRC with any specific figure as being 'normal' for a Friday night.

20. He explained that the schedule that he prepared (exhibited to his witness statement) was with a view to working out the gross margin for the period of operation of the business, from his records, to see if there was a trend. He then explained the figures taken from raw data and explained that the Appellant had two main suppliers. He analysed the records to ascertain whether there had been any significant changes from 2011 to the period after the Invigilation, in order to understand what was happening with cash/card sales, particularly during the period when new menus were introduced (to see how this affected turnover). He explained that the figures from January 2017 would have been included in the VAT return submitted before the Invigilation. He concluded by saying that everything was comprehensively recorded in order to complete the Appellant's VAT returns.

21. Under cross-examination by Mr Andrew Cameron, Mr Lambert-Dowell repeated that he was provided with a sales report by Mrs Hua and that VAT returns were completed using the information provided by Mrs Hua. He clarified that individual sales records would be onerous and unusual, which is why total daily sales reports were provided instead. He repeated that he did not say that the sales for the Invigilation were normal.

22. The final witness to be called on behalf of the Appellant was Mr Roger Cameron. In his oral evidence, he adopted the contents of his witness statement, dated 23 March 2020, as being true and accurate. He identified and adopted the exhibits appended to his witness statement. In response to further questions in examination-in-chief by Ms Brown, he said that he prepared a schedule (exhibit RAC10) during the ADR process to show that actual declared cash takings were higher than those referred to by HMRC in the Assessment. He identified various arithmetical errors in HMRC's calculations and added that HMRC had not provided a detailed breakdown of their figures. He explained that he had used records obtained from Mrs Hua to calculate the figures.

23. He added that HMRC were informed of the price increase, which would have had an impact on the level of takings. In this respect, he explained that he used the new menu to calculate exhibit RAC14.

24. We then heard from Mr Andrew Cameron, on behalf of HMRC. In opening, Mr Cameron agreed with the chronology/procedural history set out by Ms Brown and he therefore did not repeat the background. We heard oral evidence from Officer Nicola Sutton.

25. In her oral evidence, Officer Sutton adopted the contents of her witness statement, dated 18 May 2021, as being true and accurate. She explained that she worked for HMRC's Fraud Investigation service as a Civil Recovery Officer and had been an Assurance Officer, at the time of the Invigilation. She explained that she varied the Assessment as a result of further VAT returns that had been submitted by the Appellant, leading to there being more records to review. She added that the records had not previously been broken down between cash and card sales. She therefore concluded that it was not right to use the records previously provided. She further added that she had been made aware of the menu drop but the menus had been printed early on in the review. She had requested the invoice relating to the menus on numerous occasions, but this had not been provided. She first had sight of the invoice in March 2020.

26. She further added that Mr Lambert-Dowell had based his schedule on the VAT return for 01/17, which was submitted in February 2017.

27. Under cross-examination by Ms Brown, Officer Sutton said that she had arrived at the Appellant's principal place of business at 17.47hrs on the day of the Invigilation and left at 17.55hrs. She accepted that this was therefore a period of eight minutes in total. The invigilation lasted a few hours and her colleagues had also attended. She accepted that there were no notes to suggest any irregularities in the taking of orders and the receipt of payment on the day of the Invigilation. She explained however that she would not expect to have seen any evidence of suppression on the day of the invigilation and added that the till was under the counter, so any irregularities would not have been clear in any event. She accepted that no officers had visited at lunchtime on the day of the Invigilation and that the Invigilation was on Friday evening only. Whilst this was not necessarily the standard approach, enough information had been obtained from the first night of the Invigilation not to warrant the need for a second night. She was prepared to accept that Friday night could possibly be busier, compared to other nights.

28. In respect of the notes from the Invigilation, she accepted that more information would have been recorded, such as a front cover page with the name of the officer and the officer's signature, but this was only if a face-to-face visit had taken place. She added that the notebook was completed by four officers, hence the different handwriting. She further added that the only information included in the notebook were points that were relevant to the Invigilation and the notebook is not necessarily used to record all observations during a visit. She is satisfied that the notebook is accurate.

29. In terms of takings, she explained that there was only a cash-up drawer and not a till. She is able to say this because she had personally checked to see if there was a till. She added however that the officers were trying to avoid alerting customers to their presence. She accepted that order slips were seen, as explained by Mrs Hua, but these were not taken away by HMRC as records on the day of the Invigilation because the member of staff on duty needed these for the purposes of cashing up.

30. In relation to the recent price increase, Officer Sutton's evidence was that she had been informed of this. She added that Mr Lambert-Dowell had said, in passing, that the takings were

normal for a Friday. She did not however have a note of this conversation with Mr Lambert-Dowell. She accepted that the Appellant's parties were co-operative in providing records.

31. In respect of Mr Roger Cameron's figures, Officer Sutton said that she had all of the information that she needed to reach her findings, despite Mr Cameron's figures suggesting increases in cash sales, as set out in the Appellant's historical VAT returns. She added that her initial findings were based on MA data. Officer Sutton also said that the Appellant had not provided any Z readings on tills, or other breakdown of figures. She explained gaps in the periods over which figures were included by saying that the card column was empty for certain dates, such as 2 August 2015 to 25 October 2015. She said that she would have asked why the card column was left blank if there had been a face-to-face meeting.

32. In terms of the best judgment assessment, Officer Sutton said that different periods had been used to calculate the suppression rate as a result of the varying information provided. She added that the Invigilation figures had not been disputed by the Appellant and the method she used was based on the information provided. She accepted that there had been no explanation for the percentages applied to cash takings pre-invigilation and post-invigilation, but she did not accept that the dates, figures and conclusions she arrived at were arbitrary. She also accepted that since the initial assessment, there had been three variations. She explained that these were necessary in light of the further information provided and not because of the criticisms made in the Skeleton Argument on behalf of the Appellant.

33. She added that any explanation relating to the conclusion that the Appellant's behaviour was deliberate would have been included in the Penalty explanation letter. She concluded by saying that she could not ask about whether there was anything different about Mr and Mrs Hua's lifestyle as that is something that would have been considered at a face-to-face meeting.

34. In his closing submissions, Mr Andrew Cameron relied on his skeleton argument. He further submitted that the takings recorded during the Invigilation were reflective of a typical Friday night. For the previous Friday nights, the Appellant's takings were declared to be £1,082.00. The difference between this figure and the night of the invigilation suggests significant suppression of sales. He added that the Appellant is required, by law, to keep records. The cash declared by the Appellant could not be checked because DGT were not maintained and no real explanation had been given as to why daily records were not retained. The explanation that the records were not in good condition is, in his submissions, not a good reason to fail to maintain records as other businesses maintain records that are, arguably, in a worse condition.

35. In reference to the case law, Mr Cameron submitted that the use of best judgment is not a high standard and it may include an element of guess-work. He added that the methodology applied by HMRC was based on the records provided by the Appellant. He referred to the records where no figures were input in the card sales column to explain the gaps and submitted that there was no suggestion from the Appellant that the card machine was not working during those periods. He submitted that Mr Roger Cameron's calculations were based on VAT returns that had already been submitted and that were not correctly declared. He further submitted that

the Appellant could not provide evidence to support the claimed DGT figure, which supports HMRC's case that cash sales had been suppressed prior to the Invigilation.

36. In relation to the menu-drop, Mr Cameron submitted that there had been a discrepancy in the evidence in relation to how many menus were delivered in the area. He also submitted that the evidence showed that the Appellant's sales dropped in the period after its competitors closed. He added that it was not HMRC's responsibility to check the situation relating to other businesses, or to do the taxpayer's work for the taxpayer.

37. In relation to the Appellant's bank statements, he submitted that these had never been seen by HMRC, contrary to the assertions made in the Appellant's skeleton argument.

38. He concluded by saying that although the previous assessments had not been well-explained, this does not invalidate the Assessment as the letter dated 4 May 2021 explains the figures in detail and acknowledges previous calculation errors, which have always worked in the Appellant's favour.

39. In closing and in reply, Ms Brown relied on her skeleton argument. She further submitted that (i) the Assessment should be withdrawn as a result of insufficient evidence of suppression of sales; (ii) alternatively, the Assessment is excessive and not made to best judgment; and/or (iii) the Assessment should be reduced in line with Mr Roger Cameron's calculations. In further amplification of these submissions, Ms Brown submitted that there were four headings to her arguments. Firstly, the allegation of suppression. Secondly, the issue of best judgment. Thirdly, the calculations provided by Mr Roger Cameron. Fourthly, the issue of deliberate behaviour. She flagged up the relevant legislation and the applicable case law.

40. In relation to the first heading, Ms Brown submitted that there was no evidence of suppression of cash takings by the Appellant. Mrs Hua recorded the daily takings and passed the information on to Mr Lambert-Dowell, who passed the information on to Mr Roger Cameron. The information was accurately recorded and it was split into cash and card sales, as recorded in the weekly report prepared. She further submitted that to take one day's takings and compare these to a three-year period was not a representative sample as the invigilation could merely have shown a good day's takings. She added that the menu increase should have been taken into consideration as this resulted in a 28% increase in sales, which would have had an effect on the business in monetary terms. She compared the schedule prepared by Mr Roger Cameron and the figures relied on by Officer Sutton. She submitted that the Appellant's actual declared cash takings were higher than the figures relied on by HMRC. There was, therefore, no logical basis for saying that there had been suppression of cash sales.

41. She submitted that the amount of cash the Appellant is said to have suppressed is significant and was not likely to have been received by a busines based on the outskirts of Hull. She added that there is no evidence of Mr and Mrs Hua having a lifestyle that did not match the declared takings. In her submissions, it was wholly unsatisfactory for Officer Sutton to say

that she did not consider this fact as a result of a lack of a face-to-face meeting. The reason for the lack of a face-to-face meeting was because it was easier for Mr and Mrs Hua to deal with correspondence, as a result of language difficulties.

42. In relation to the second heading, Ms Brown submitted that the Assessment was excessive and arbitrary and not made to best judgment. She highlighted the different percentages used and the different periods covered by the variations to the Assessment. She added that no underlying calculations were provided and no explanation was given for the underlying methodology. She further submitted that the first time any explanation was given was when the most recent variation was made to the Assessment. This, she noted, was after criticisms had been made to the Assessment in her skeleton argument. HMRC had failed to carry out a credibility check.

43. In relation to the third heading, Ms Brown submitted that Mr Roger Cameron's calculations were based upon the actual declared cash takings. This, she submitted, had the potential to reduce any figure of under-declared sales to about £3,780.00 which, in her submissions, is a much more reasonable figure in light of the type of business activity carried out by the Appellant. She added that Mr Roger Cameron's calculation is far more detailed than that provided by Officer Sutton. She further added that Mr Roger Cameron had not been cross-examined about the accuracy of the schedule that he had prepared. The evidence provided by the Appellant shows a higher percentage of declared sales than that relied on by HMRC.

44. In relation to the fourth heading, Ms Brown submitted that whilst it was accepted that the Penalty was not the subject of these proceedings, the burden of proof is on HMRC to show deliberate behaviour and that any assessment can only go back for a period of four years. In this respect, she submitted that HMRC had failed to provide any explanation for the conclusion that the Appellant's behaviour was deliberate.

APPLICABLE LAW

45. The relevant legislation, so far as is material to this appeal, is as follows:

Value Added Tax Act 1994

4 Scope of VAT on taxable supplies

(1)VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

73 Failure to make returns etc.

(1)Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

...

(6)An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a)2 years after the end of the prescribed accounting period; or

(b)one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

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

...

77 Assessments: time limits and supplementary assessments.

(1)Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—
(a)more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or

...

(4)In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).

(4A)Those cases are—

(a)a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),

...

(4B)In subsection (4A) the references to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by that person.

Schedule 11, section 6

6(1) Every taxable person shall keep such records as the Commissioners may by regulations require, and every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member State any goods which are subject to a duty of excise consists in a new means of transport shall keep such records with respect to the acquisition (if it is a taxable acquisition and is not in pursuance of a taxable supply) as the Commissioners may so require.

(2) Regulations under sub-paragraph (1) above make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases)

(4) The duty under this paragraph to preserve records may be discharged-

(a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for her Majesty's Revenue and Customs.

Value Added Tax Regulations 1995

Records

31. *—*

(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a)his business and accounting records,

(b)his VAT account,

(c)copies of all VAT invoices issued by him,

(d)all VAT invoices received by him,

(e)documentation received by him relating to acquisitions by him of any goods from other member States,

(f)copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g)documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h)documentation relating to importations and exportations by him, and

(i)all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him.

46. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

47. This is an appeal by the Appellant against an Assessment made by HMRC, in the sum of £34,486.00, following the decision that the Appellant had suppressed cash takings and had thereby under-declared output tax during the period 10/11 to 01/17 (inclusive). The issue raised in this appeal is whether the Assessment made by HMRC was made to best judgment.

48. The parties are in agreement about the background chronology, albeit that they differ in view as to the conclusions we should reach as a result.

49. We have derived considerable benefit from hearing the oral evidence given in this appeal. We have further had the benefit of considering all of the documents submitted in support of the appeal, which included a comprehensive collection of correspondence and other documentation relating to the Assessment. Having considered all of the documentary and oral evidence cumulatively, we make the following findings of fact and give our reasons for the decision:

Findings of fact

50. The Appellant trades as "Gia Hua", a Chinese takeaway providing a range of Chinese and English food. The business is open seven days a week. Lunchtime opening is between the hours of 11.30hrs to 13.30hrs (Wednesday to Saturday) and 17.00hrs to 23.00hrs (every evening during the week). The Appellant's principal place of business is known as, and situate at, 43 Skillings Lane.

51. At all material times, the Appellant's major shareholder and sole director was Mr Gia Hua, who is also the chef. His wife, Mrs Sylvia Hua, manages the business. As well as managing the business, Mrs Hua is responsible for completing the daily sales records. Sales are recorded on individual, numbered order slips. Once the daily turnover is calculated, the figures are included in a sales report, as follows (by way of example):

Brough East Yorkshire Ltd – Weekly Cash Report

Week Commencing			
Receipts			
Date	**Day**	**Credit card sales**	**Cash Sales**
	Sunday		
	Monday		
	Tuesday		
	Wednesday		
	Thursday		
	Friday		
	Saturday		
	Sub Total		
	Total Sales		
Payments			
Date	**Supplier**	**VAT**	**Total**
	Total Purchases	0	0
	Gross Profit for week		
	Gross Profit margin for the week		
	% purchases to sales		
	Other payments		
	Wages		
		Total Other Payments	

52. Prior to the Invigilation, Mrs Hua did not however retain copies of the individual order slips once she has completed the sales report.

53. The Appellant's Finance Manager is Mr Chris Lambert-Dowell. Mrs Hua provides the weekly summary reports to Mr Lambert-Dowell, who then uploads the information onto QuickBooks (an accountancy software package). Mr Lambert-Dowell also uploads purchase invoices and bank transactions onto QuickBooks. The information is then used to prepare the Appellant's VAT returns, company accounts and corporation tax computations. Mr Roger Cameron of Cameron, Ferriby & Co. Chartered Accountants has been the Accountant since April 2016.

54. Following the Invigilation, where the Appellant's DGT was established to be £1,656.91, Mr Lambert-Dowell provided HMRC with the sales records. HMRC then requested a face-to-face meeting with Mr and Mrs Hua. The meeting was due to take place on 9 May 2017, at Cameron, Ferriby & Co. On 8 May 2017, Mr Cameron called HMRC to cancel the scheduled meeting. The reason given for the cancellation was that English was not Mr and Mrs Hua's first language and that it would be easier to deal with HMRC's queries via correspondence.

55. On 16 June 2017, Officer Sutton wrote to the Appellant confirming that the business records submitted had been reviewed. Officer Sutton also requested the details of the bank account into which card payments were received by the Appellant. HMRC then informed the Appellant that records of daily takings (the order slips) were required to be retained in future.

56. Mr Lambert-Dowell provided the bank details on 11 July 2017 and he confirmed that the daily takings were calculated by reference to the individual numbered order slips, which he said would be retained going forward.

57. On 8 September 2017, Officer Sutton issued a letter providing an analysis of the declared takings across a three-year period, adding that any potential penalties could be reduced with co-operation.

58. Mr Cameron responded to HMRC on 13 October 2017, requesting further information from HMRC, in relation to the analysis of the takings that had been prepared. This was followed by a further letter from Mr Cameron, on 14 October 2017. The letter dated 14 October 2017 was in the following terms:

> *"The client has introduced a new menu with increased prices.*
> *Over a thousand copies of the new menu were hand delivered to houses including the new local housing estates.*
> *The Indian takeaway situated nearby has closed.*
>
> *Our client's views on a meeting have not changed and therefore this investigation will be dealt with by written correspondence."*

[Emphasis added both above and below]

59. Officer Sutton responded by a letter dated 19 October 2017, as follows:

> *"The results of the invigilation were that your takings on that day were £1656.90. From your records I have been able to establish that from the 2 April 2014 to 22 January 2017 your average takings on Fridays was £1082.94; taking one figure from the other (£1656.90 - £1082.94) leaves a difference of £573.96. I have taken this difference, £576.96, and divided it by the average figure, £1082.94, to give a rate of suppressed VAT of 53%.*
>
> *I have applied this fraction to all periods from the effective date of registration, I august 2011, to period 01/17, inclusive as I believe the behaviour displayed in providing inaccurate VAT returns to be deliberate.*
>
> *For periods 04/17 and 07/17 I have taken the average output tax declared for the periods 04/16 to 01/17, inclusive, which is £9440.42,* [times] *53% = £5003.42 and added these 2 figures together, £14443.84. I've looked at the output tax declared for theses 2 periods and as it is less I've adjusted the output tax for these periods too."* [sic]

60. The letter attached the following schedule of calculation of sales suppression between 10/11 to 07/17:

Period/Length	…	**Total**
Output Tax	…	£231,764.16
Input Tax	…	£27,893.88
Net Tax	…	£203,870.28
Outputs	…	£1,158,821.00
Inputs	…	£617,910.00
	…	
Declared output tax & sales	…	£1,390,585.16
Sales suppression (times 53%)	**…**	**£737,010.13**
VAT suppressed	**…**	**£114,073.52**

61. On 10 November 2017, Mr Cameron requested a response to the matters highlighted in his letters dated 13 October 2017 and 14 October 2017.

62. Officer Sutton responded by a letter dated 9 February 2018. The letter included the following observation:

> *"An analysis of your takings figures reveals that prior to the night of invigilation, your declared cash takings constituted 26.43% of your total takings and following the invigilation your declared cash takings have risen to 37.42% of your total takings.*
>
> *On the evening of our invigilation your manager mentioned that prices have very recently increased and an analysis of the cash/card split prior to and after the invigilation has revealed a 17.91% uplift in relation to the card takings. It would appear that this increase may indeed be due to those price increases but you will appreciate however that in the same period declared cash sales actually rose by 94.52%. It is our contention that the increase in declared cash sales results from the fact that prior to the invigilation a substantial portion of cash takings were being suppressed. A such this will inform the calculations in my revised assessment.*
>
> *In order to calculate the amount of sales previously suppressed I have worked on the basis that in the periods under review, during which suppression of cash takings clearly took place, 26.43% of your gross declared sales were cash. I have marked this up by 76.61% (being the difference between the 94.52% and 17.91% as above). I have then applied the VAT fraction to this figure.*
>
> *You will appreciate that in carrying out this calculation I have assumed that the suppression of sales extended to cash takings only."*

63. The letter was accompanied by a further schedule for the period 10/11 to 01/17, as follows:

Period	**…**	**Total**
Output Tax declared	**…**	**£205,923.98**
Net Sales declared	…	£1,029,620.00
Gross Sales	…	£1,253,543.98
Cash Takings at 26.43% of Gross Sales	…	£326,554.27
Cash Takings uplifted by 76.61%	…	£250,173.23
VAT under-declared	**…**	**£41,695.54**
Assessment	**…**	**£41,684.00**

64. On 10 April 2018, Mr Cameron responded requesting an explanation of the basis for HMRC's calculations, the sampling technique and the split of cash and card transactions. Mr Cameron highlighted that no irregularities had been detected in the Appellant's method for accepting payments and that no discrepancies had been observed between the accounting records and the supporting documents provided by the Appellant. Mr Cameron also referred to various factors that he highlighted as having affected the Appellant's turnover, as follows:

"Whilst in business our client has seen a number of issues affect his turnover and the Cash to card ratios and reacted accordingly.

Some of those issues were specific to his business and others affected by issues he had no control over. The list while not exhaustive included:-

1. *Introduction of minimum spend.*
2. *Internet connection problems.*
3. *Faulty card reader.*
4. *Closure of nearby Indian Restaurant.*
5. *Impact of delivering over 1,000 copies of the new menu to houses including the new local housing estates before and after your visit.*
6. *From the mid 2000's to 2015/16 significant change in UK customer spending habits from paying cash to paying by card.*
7. *In late 2016 the growth in cash advances from credit cards.*
8. *Lately, as with other small business having to accept the publics' desire to pay by debit card (Pin or Contactless)*

<u>Finally, with respect, we suggest that your uplift in cash sales is actually 38.82% of the revised gross sales which is greater than the 37.42% quoted in your letter dated 9 February 2018</u>"

65. Officer Sutton responded on 20 April 2018. The letter included the following observations:

"1. I did not observe any irregularities with the procedures adopted in taking or recording the customers' orders on the evening of the unannounced invigilation.

2. I did not suggest that there were any irregularities in accepting payments from the customers.

3. I enclose a copy of the split of takings between cash and card transactions for the evenings' invigilation.

4. I have provided you with copies of my schedules that are based on the evenings' invigilation. These schedules show that your clients' records are inaccurate in that not all cash takings were recorded prior to the exercise."

66. The Assessment was then issued, in the amount of £41,684.00.

67. On 15 November 2018, Officer Chris Elliott revised the Assessment by reducing it to £37,301.00, as follows:

"Your accountant advised in subsequent correspondence that the reason for the increased takings was a leaflet drop in the area and a price increase but while we accept that this may have led to an increase in takings, the argument is under-mined by the fact that whilst declared card takings have risen by only 17.91% declared cash takings have risen by 94.52%. (This comparison has been made between the declared figures for 17 July 2016 to 4 March 2017, prior to the invigilation, and for 12 March 2017 to 28 October 2017, after the invigilation.).

…

We previously wrote to you and advised that prior to the night of invigilation, your declared cash takings constituted 26.43% of your total takings. In fact having now worked through all of the figures as part of the ADR process I must advise that we accept that the figure should properly have been 23.48% of total takings. (Given that a number of card takings have not been provided I have had to use the figures in the weeks between 3 May 2015 and 26 July 2015, and between 1 November 2015 and 22 January 2017).

In order to clarify how the assessment has been calculated I can confirm that I have worked on the basis that in the periods under review, during which suppression of cash takings clearly took place, 23.48% of your gross declared sales were cash. I have marked this up by 76.61% (being the difference between 94.52% and 17.91% as above). I have then applied the VAT fraction to this figure. You will appreciate that in carrying out this calculation I have assumed that the suppression of sales extended to cash takings only."

68. On 4 May 2021, the Assessment was varied to £34,486.00. In her witness statement dated 18 May 2021, Officer Sutton explained that she had noticed an error in the calculation of cash takings pre-invigilation and post-invigilation, as well as the percentage used as the cash uplift figure.

69. Officer Sutton identified that the calculation should be as follows:

	3 May 2015 to 26 July 2015	**1 November 2015 to 22 January 2017**	**Total**
Cash takings	£20,645.40	£66,221.50	£86,866.90
Card takings	£37,223.30	£214,987.00	£252,210.30
Total	**£57,868.70**	**£281,208.50**	**£339,077.20**

70. She then divided the total cash and the total figure for card and cash, then multiplied this by 100, giving a percentage of 25.61%. Officer Sutton concluded that the error would have led to an increase in the Assessment issued and therefore no change was made to the error identified.

71. For the periods 17 July 2016 to 4 March 2017 and 12 March 2017 to 22 October 2017, Officer Sutton's calculation was as follows:

	17 July 2016 to 4 March 2017	**12 March 2017 to 22 October 2017**	**Difference**
Cash takings	£1,195.41	£2,262.45	**£1,067.04**
Card takings	£3,362.59	£3,964.52	**£601.93**

72. This therefore gave an uplift of 89.26% in cash takings and an uplift of 17.91% in card takings.

73. The Appellant now appeals to this Tribunal. The Appellant has appealed pursuant to s 83 VATA.

Consideration

74. The power given to HMRC under statute is to make an assessment to their best judgment, on such information as is available. Case law has established that this allows for a margin of error, as opposed to an educated guess. An assessment requires to be made to best judgment in the sense that it has to be prepared in good faith. This must be balanced against the well-established rule that the primary obligation is on the taxpayer and HMRC are not required to do the work for the taxpayer.

75. The burden is therefore on the Appellant to demonstrate that the Assessment is excessive. This is evident from the leading authority in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] STC 1509, where Carnwath LJ said this:

> "[14] Generally, the burden lies on the taxpayer to establish the correct amount of tax due:
>
> '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.'

76. This was also explained by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, at 642, as follows:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an

assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657"

77. The meaning of the phrase "to the best of their judgment" has been the subject of some adjudication. The starting point to the sphere of litigation that has arisen is the case of *Van Boeckel v Customs and Excise Comrs* [1981] STC 290, where the classic test was laid down by Woolf J (as he then was), at p 292, as follows:

> "…What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

78. He added this, at p 296:

> "If they do make investigations then they have got to take into account material disclosed by those investigations.

79. Woolf J drew three conclusions in relation to the obligation that is upon HMRC. Firstly, there must be some material before HMRC on which they can base their judgment. Secondly, HMRC are not required to do the work for the taxpayer in order to form a conclusion as to the amount of tax due. Thirdly, HMRC are required to exercise their powers in such a way that they make a value judgment on the material which is before them.

80. Lord Justice Carnwath cited the same passages in *Rahman v Customs and Excise Commissioners* [1998] STC 826. At p 835, he said this:

> "…the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment is missing; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles (see *Associated Provincial Picture Houses ltd v Wednesbury Corp* [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

81. The test to be applied in interpreting s73(1) VATA is now adequately set out in *Pegasus Birds Ltd*. At [38], Lord Justice Carnwath provided the following guidance:

> "38. In the light of the above discussion, I would make four points by way of guidance to the tribunal when faced with 'best of their judgment' arguments in future cases:

(i)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.
(ii)Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
(iii)In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.
(iv)There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing."

82. The threshold for making a "best judgment" assessment is therefore a low one. The correct test is whether there has been an honest and genuine attempt to make a reasoned assessment: *Pegasus Birds Ltd*, at [22] (per Carnwath LJ). This does not translate to meaning that whether an assessment could be said to be "wholly unreasonable" is irrelevant to determining that question: *Pegasus Birds Ltd*, at [77] (per Chadwick LJ). HMRC only need to consider the information before them in a fair way and come to a decision which is reasonable (and not arbitrary) as to the amount of tax due.

83. The Assessment in this appeal followed a test purchase on 9 February 2017 and an Invigilation on 10 March 2017. Officer Sutton, who took part in the Invigilation on 10 March 2017 and issued the Assessment in this appeal, gave evidence before us. Officer has worked for HMRC since September 1994. She was a VAT Assurance Officer from 2012 until 2018. Her witness statement provided detail about the events leading up to the Invigilation, as well as the events on the day of the Invigilation itself.

84. It is helpful to set out the various amendments that have been made, leading up to the Assessment:

85. Following the Invigilation and upon receipt of further information, such as MA data and records from the Appellant, Officer Sutton's position findings were that the DGT of £1,656.91 on the day of the Invigilation was higher than the average DGT for Fridays, over a three-year period, where the Appellant's DGT was £1,082.94, on average. The conclusion by HMRC was that this was indicative of a suppression of cash sales by the Appellant, prior to the Invigilation. We accept the submissions on behalf of the Appellant that little more was said about the reason for the allegation of suppression of cash takings, apart from the takings on the day of the Invigilation being higher than those previously declared over a three-year period between 2

February 2014 and 22 January 2017. We will return to consider this point later. An additional factor that HMRC referred to in support of the allegation of suppressed cash takings was the conclusion that the Appellant's DGT had increased after the Invigilation. HMRC believed that the reason for this was because the Appellant began to record all cash sales after the Invigilation as a result of HMRC's findings.

86. The initial assessment issued by HMRC after the Invigilation applied a flat rate of 53% to the Appellant's declared output tax and sales for the period 2 April 2014 to 22 January 2017. We find that this period is a different period from that to which the DGT had been compared (i.e., 2 February 2014 to 22 January 2017). We find, as submitted by Ms Brown on behalf of the Appellant, that there has been no real explanation for a different period being applied. We further find that the initial assessment was based on a combination of card and cash takings, as accepted by HMRC. The reason given for this by Officer Sutton was that there had been no distinction between cash and card takings from the records initially considered.

87. The first amendment to the initial assessment was based on a mark-up of 76.61%. The cash/card split prior to and after the Invigilation was considered to reveal a 17.91% uplift in relation to card takings and a 94.52% uplift in relation to cash sales. The mark-up was therefore based on the difference between the figure of 94.52% and 17.91%. The VAT fraction was then applied to this figure for the period 10/11 to 01/17. The assessment issued was in the sum of £41,684.00. We find, as submitted by Ms Brown, that no real explanation was provided for the decision to apply this to the Appellant's date of incorporation.

88. Following ADR, the assessment was revised again, based on cash takings constituting 23.48% of total takings, as a result of an error in the previous calculations. This was marked up by 76.61% and had the result of reducing the Assessment to £37,031.00. A comparison had been made between the declared figures for 17 July 2016 to 4 March 2017 (prior to the Invigilation) and for 12 March 2017 to 28 October 2017 (after the Invigilation).

89. The third revised assessment, which is the Assessment under appeal, was in the amount of £34,486.00. The revision was because a number of card takings had not been taken into consideration by HMRC. In her written evidence, Officer Sutton explained that she had noticed an error in the calculation of cash takings pre-invigilation and post-invigilation, as well as an error in the percentage used as the cash uplift figure. Officer Sutton said that the cash uplift should have been 89.26%, and not 94.52% as earlier identified, giving a mark-up of 71.35% and not 76.61%. Following the Invigilation, Officer Sutton had available to her records covering a period of 33 weeks from 12 March 2017 to 22 October 2017. She therefore also analysed the records for the 33 weeks prior to the Invigilation, which covered the period 17 July 2016 to 4 March 2017.

90. An assessment to best judgment may be shown to be inaccurate because later evidence from the Appellant shows a more accurate picture. It is not enough for the Appellant to show that the Assessment did not reach the standard required of a reasonably competent officer. The Appellant must satisfy the Tribunal that the Assessment was *"wholly unreasonable"*. This

means that the Assessment must be shown to be outside of the parameters of what could have been reasonable if all the material before HMRC had been fairly considered. Case law has established that if the officer making an assessment uses, or relies on, incorrect or flawed material provided by another officer, that must be relevant to his exercise of best judgment on behalf of HMRC.

91. The Appellant's case is, broadly, that no reliable evidence of suppression of cash has been given or relied on by HMRC. The Appellant further argues that HMRC's methodology is flawed.

92. Having considered all of the evidence, cumulatively, we find that there have been a number of accepted calculation errors in reaching a final Assessment and a lack of a clear explanation of the underlying methodology in the various revised assessments. In relation to the case advanced on behalf of the Appellant, we have had the benefit of seeing the schedules prepared by Mr Lambert-Dowell and Mr Roger Cameron, both of whom were examined-in-chief and cross-examined. We found that they both gave their evidence in a clear and straightforward manner, without equivocation. We accept their evidence as representing a truthful and accurate description of the Appellant's takings and accounting practices.

93. The figures included in the schedules prepared by Mr Lambert-Dowell and Mr Roger Cameron were not called into question or discredited during cross-examination, albeit that we acknowledge that HMRC's case is that the information considered by both came from the VAT returns that were considered by HMRC to be inaccurate, as a result of the alleged suppression of cash takings. We find however the Appellant has been forthcoming and co-operative in providing any requested information and responding to correspondence from HMRC.

94. Ms Brown submits that HMRC have taken the DGT from one Invigilation and compared it to the average DGT recorded for a Friday over a three-year period. These observations, she submitted, do not provide sufficient or conclusive evidence of suppression. We find that the DGT on the day of Invigilation covered both cash and card takings and is evidence of an increase in sales, which we will return to consider later. Officer Sutton accepted that Fridays would, arguably, be busier than other days of the week and we find that this is therefore a relevant consideration, in relation to the DGT on the day of the Invigilation.

95. We find that there is considerable force in Ms Brown's submission that HMRC have not provided any evidence of how the alleged suppression took place. Officer Sutton accepted that no anomalies had been observed in respect of the taking and recording of orders, or in the manner in which payment was taken from customers, during the Invigilation.

96. In respect of the night of Invigilation and how the suppression of cash could have occurred, Officer Sutton unequivocally stated that she did not expect to see evidence of suppression of cash sales on the night of the Invigilation. During cross-examination, Officer Sutton accepted that she was only present at the Appellant's principal place of business for a

few minutes, during the Invigilation. In explaining why there was not a lot of information included in the notebook prepared alongside the invigilation sheets, Officer Sutton's position was that only the points that were relevant to the Invigilation would have been recorded in the notebook.

97. In terms of how sales are made and recorded, we had the benefit of hearing Mr and Mrs Hua giving oral evidence. We found both Mr and Mrs Hua to be truthful witnesses. Whilst Mr Hua is the director, he does not appear to get involved with the takings as he is usually in the kitchen acting as the chef. As the director however, we agree that Mr Hua has a duty to ensure that the Appellant's sales and tax records are in order. We find that it simply is not satisfactory for his position to be one of detachment.

98. Mrs Hua is the person who deals with takings. She stated that sales were recorded on order slips, which were not retained after weekly summary reports were prepared. The Appellant does have a duty to maintain all records. The explanation that the order slips were greasy is not, we find, a good enough reason to destroy the order slips. Whilst we find that it was not prudent for Mrs Hua to simply discard the individual order slips after she completed the sales reports, we generally accept her evidence that sales were recorded on individual, numbered order slips, which were then added to a weekly summary report under daily totals. We accept, having had sight of copies of the weekly summary report, that there would be a breakdown down of the daily takings between cash sales and card sales. We further accept that the weekly summary reports were provided to Mr Lambert-Dowell on a quarterly basis, in order for the Appellant's VAT returns to be prepared.

99. In relation to the Invigilation, Officer Sutton confirmed that order slips were in use, as explained by Mrs Hua in her evidence. We find that this therefore supports Mrs Hua's description of the practice in place for recording takings. We further find that the employee who was on duty on the night of the Invigilation could not have pre-empted what the officers would have been looking out for. This strongly suggests that there was no change in approach to recording takings at the time of the Invigilation, or indeed after the Invigilation, save that the Appellant has now confirmed that the order slips would now be retained going forward.

100. Officer Sutton also confirmed that she did not take copies of the order slips away with her and the reason that she gave for this was that they were required by the employee on duty for the purposes of cashing up. We find that this too, suggests that the order slips were relevant to the practice in place for recording takings.

101. Although Mr and Mrs Hua did not take part in a face-to-face meeting. We find that if there were any concerns that needed to be brought to the attention of the Appellant, these could have been raised in the various correspondence that was sent to Mr and Mrs Hua. We find that the Appellant has always been proactive in providing HMRC with records and the Appellant has engaged with the process. The records provided by the Appellant included bank statements and accounting records. No challenge has been made to the records provided by the Appellant.

102. Whilst HMRC allege that the Appellant's cash sales increased after the Invigilation, the Appellant's case is that HMRC failed to consider various factors that contributed to the increase in cash sales, which Ms Brown submits began prior to the Invigilation, as reflected by the VAT returns already submitted by the Appellant and shown in the schedules prepared by Mr Lambert-Dowell and Mr Roger Cameron.

103. Mr Lambert-Dowell has provided a schedule of the Appellant's takings for the quarter ended 31 January 2017, as follows:

						Rolling 5 week
Week ending	**Week number**	**Card sales £**	**Cash Sales £**	**Total sales £**	**Cash as a % of sales**	**Cash sales/Sales %**
05 November 2016	275	2,984	854	3,837	77.75%	22.25%
12 November 2016	276	3,530	978	4,508	78.30%	21.70%
19 November 2016	277	3,867	806	4,673	82.75%	17.25%
26 November 2016	278	3,141	1,093	4,234	74.19%	25.81%
03 December 2016	279	3,772	952	4,724	79.85%	20.15%
10 December 2016	280	2,989	1,278	4,267	70.05%	29.95%
17 December 2016	281	3,539	872	4,411	80.23%	19.77%
24 December 2016	282	3,702	1,132	4,834	76.58%	23.42%
31 December 2016	283	3,334	930	4,264	78.19%	21.81%
07 January 2017	284	2,886	1,507	4,393	65.70%	34.30%
14 January 2017	285	2,834	1,242	4,076	69.53%	30.47%
21 January 2017	286	2,655	1,216	3,871	68.59%	31.41%
28 January 2017	287	3,179	1,127	4,306	73.83%	26.17%
Quarterly average		**3,263**	**1,076**	**4,388**	**75.20%**	**24.80%**
Monthly average		**2,889**	**1,273**	**4,162**	**69.41%**	**30.59%**

104. The VAT return for the quarter ended 31 January 2017, which was submitted to HMRC on 28 February 2017 and therefore prior to the Invigilation, showed an increase in cash sales. Taking the figures included in the schedule above, the average cash sales in the quarter up to 31 January 2017 amount to £1,076 per week, which is 24.80% of the total takings, and therefore higher than the percentage applied following the Invigilation. The average cash takings from the month of January 2017 rose to £1,273 per week, which is 30.59% of the total takings.

105. The schedule prepared by Mr Lambert-Dowell also includes takings for the quarter ended 30 April 2017, which covered the Invigilation, as follows:

						Rolling 5 week
Week ending	**Week number**	**Card sales £**	**Cash Sales £**	**Total sales £**	**Cash as a % of total sales**	**Cash sales/Sales %**
04 February 2017	288	2,946	1,834	4,779	61.62%	38.38%
11 February 2017	289	3,080	1,776	4,856	63.43%	36.57%
18 February 2017	290	3,570	2,181	5,751	62.08%	37.92%
25 February 2017	291	3,517	1,971	5,488	64.08%	35.92%
04 March 2017	292	3,491	1,952	5,443	64.14%	35.86%
11 March 2017	293	3,648	2,418	6,066	60.14%	39.86%
18 March 2017	294	3,774	2,188	5,962	63.30%	36.70%
25 March 2017	295	3,760	2,110	5,870	64.05%	35.95%
01 April 2017	296	4,928	1,943	6,870	71.13%	28.27%
08 April 2017	297	4,450	2,069	6,519	68.26%	31.74%
15 April 2017	298	3,646	2,459	6,105	59.72%	40.28%
22 April 2017	299	4,124	2,416	6,541	63.06%	36.94%
29 April 2017	300	4,071	2,157	6,229	65.37%	34.63%
		49,003	**27,474**	**76,477**		
Quarterly average		**3,769**	**2,113**	**5,883**	**64.08%**	**35.92%**

106. We find that a pattern clearly emerges from Mr Lambert-Dowell's analysis is an increase in cash takings, with intermittent peaks and troughs.

107. Mr Roger Cameron's evidence shows that the cash takings actually declared in the Appellant's submitted VAT returns were only below 23.48% for the VAT periods ending April 2016, July 2016 and October 2016. He provided a schedule for the period 10/11 to 10/17, which included the following total figures:

Period	Total	Average
Output Tax declared	£205,923.98	
Net Sales declared	£1,029,620.00	

Gross Sales	£1,235,543.98	
Cash takings at 23.48% of Gross Sales	£290,105.73	
Cash takings uplifted by 76.61%	£222,250.00	
VAT under-declared	£37,041.67	
Assessment	£37,031.00	
Cash Sales declared by Appellant		
Gross Sales per VAT return	£1,235,543.98	£56,161.00
Cash takings per Appellant's records	£489,678.04	£22,258.00
Actual cash takings % of gross sales	**39.63%**	**39.63%**
Revised cash sales (HMRC)	£512,355.72	
Per VAT returns	£1,235,543.98	
Cash takings uplift	£222,250.00	
Revised Gross Takings (HMRC)	£1,457,793.98	
Revised cash sales % of revised gross takings	35.15%	

108. The records analysed by Mr Cameron show that the actual cash takings as a percentage of gross sales was 39.63%. Officer Sutton accepted that the data showed that the percentage of declared cash was between 30% and 40%.

109. The Appellant's case is also that there was a menu increase, which had a domino effect on the Appellant's sales. We accept that if one considers the most recent spending pattern which followed the menu increase five weeks either side of the Invigilation, card takings increased by 23.82% and cash takings increased by 10%. Officer Sutton confirmed that the price increase and the new menu were brought to her attention. In her correspondence to the Appellant, Officer Sutton goes as far as saying that *"the price increase would have obviously affected the level of takings".* She does not however elaborate on why she concluded that she did not expect this to generate the rise in cash takings identified, except that her view is that there would be an expectation that card takings would also rise. In relation to how payment was made by customers, we find that the Appellant would not have had any control on the method of payment used by customers, except for minimum spends on cards.

110. We have had the benefit of seeing the comparison between the old menu and the new menu. The price increase was in respect of all items on the menu. The average price increase was 28.33%, which we are satisfied would have had an impact on the Appellant's sales figures and was therefore a relevant consideration. Whilst Officer Sutton's position was that she did not see any evidence of a menu-drop, she accepts that an invoice was provided by the Appellant, in relation to the menus that were printed; the majority of which were placed on the counter at the Appellant's principal place of business whilst the others were delivered to

various homes in the area. We accept Mrs Hua's evidence that her aim was to find ways to generate an income for the Appellant. It is not therefore surprising that there has been a growth in sales. We find that it is not uncommon for a business such as the Appellant to carry out a menu-drop to homes in the surrounding area.

111. The incontrovertible facts of this appeal are that the price increase and the menu drop were brought to HMRC's attention, but were rejected without further consideration. Furthermore, HMRC did not adequately explain how they thought the Appellant had suppressed sales and did not challenge the records provided by the Appellant. Whilst we do not criticise Officer Sutton, we find that further matters that would need to have been considered were the nature of the Appellant's business, known facts about the trading conditions (such as the competitors referred to by the Appellant). We also find that HMRC did not carry out a credibility check.

112. As set out in *Van Boeckel*, there are various underlying principles which must be observed in order for HMRC to arrive at a best judgment assessment. The Commissioners are required to consider all material placed before them and come to a decision which is reasonable. Officer Sutton's evidence was that some matters were not considered as a result of the lack of a face-to-face meeting. Despite not taking part in a face-to-face meeting, we find that the Appellant has provided a considerable amount of documentary evidence in the form of bank records, accounting records, weekly summary reports and VAT returns, over a significant period of time. We further find that the Appellant has also provided sufficient evidence of the cash/card split in relation to takings, the price increase and the new menu.

113. We find that there is considerable force in Ms Brown's submissions that the main reason put forward for HMRC's assertion that there has been a suppression of cash sales is the DGT from one Invigilation being higher than the average DGT and the maximum DGT recorded for a Friday night. In the circumstances of this appeal, we find that one night's Invigilation is not representative of the previous VAT periods, in light of the information provided by the Appellant. In her oral evidence, Officer Sutton accepted that a Friday may be a busier day of the week. The Invigilation in this appeal took place on a Friday.

114. In relation to the additional reason for the alleged suppression of cash sales; that relating to an increased DGT following the Invigilation, we have found that HMRC do not assert that there were any irregularities with the records provided by the Appellant and we are satisfied that there was a trend of increased sales prior to the Invigilation. We are fortified in our view that there was a trend of increased sales (and some downturns in sales) as a result of the schedules prepared by Mr Lambert-Dowell and Mr Roger Cameron, which we find to be reliable.

115. There is no suggestion that the Assessment had been reached dishonestly, vindictively or capriciously, but simply that the evidence of suppression before the Tribunal was inadequate for the Tribunal to be satisfied that suppression had, in fact, taken place. We have accepted the description given of the manner in which the sales were recorded. Having considered all of the

evidence, cumulatively, we find that the Assessment is unreasonable, inasmuch as it over-estimates the amount of under-declared output tax and as a result of the failure to consider matters which were clearly brought to HMRC's attention.

116. We are satisfied that the Appellant has met the burden of displacing the Assessment. Accordingly, we set aside the Assessment. According to the figures considered by Mr Roger Cameron, there has however been an under-declaration of tax. On the basis of HMRC's percentage of 23.48%, uplifted, cash sales amount to £512,355.72. The VAT returns submitted by the Appellant show cash takings of £489,678.09. This is therefore a difference of £22,677.68, or under-declared output tax of £3,780.00. We allow the appeal, in part, on the basis of the Appellant's figures and reduce the Assessment to £3,780.00.

117. Section 73(6)(a) VATA allows an assessment to be made within two years of a prescribed accounting period. The Assessment related to VAT accounting periods 10/11 to 01/17. The Penalty was not however before us. Although the Penalty did not form part of this appeal, we trust that HMRC will nevertheless take our conclusions into account before any action is taken in relation to the Penalty that has been imposed in this matter.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

118. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 20 JULY 2021