[2019] UKFTT 343 (TC)

TC07171

Appeal number: TC/2017/04719

INCOME TAX – self-assessment – closure notices – discovery assessments – penalties – whether sales suppressed – onus of proof – presumption of continuity – Taxes Management Act 1970 ss. 9A, 12B, 28A, 29, 34, 36, 50 and 95; Finance Act 2007 Schedule 24 – whether 'threshold' conditions for discovery met – whether assessments stand good – whether penalties confirmed for 'negligent' and 'deliberate' conduct – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN YUEN KWAN HO **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
CHARLOTTE BARBOUR

Sitting in public at Eagle Building, Glasgow on 25 April 2018

Mr Ho in person for the Appellant

Mr J Nicholson, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Mr Ho, operated a Chinese restaurant. His appeal relates to the closure notice for 2010-11 issued under s28A of the Taxes Management Act 1970 ('TMA'), and discovery assessments issued under s29 of TMA for the four years from 2006-07 to 2009-10 and for the year 2011-12.

2. The related appeal is against penalties imposed in consequence of the closure notices and discovery assessments. Penalty determinations under s95 of TMA are issued for 2006-07 and 2007-08, and penalty assessments under Schedule 24 of the Finance Act 2007 ('FA 2007') for the years 2008-09 to 2011-12.

Evidence

3. Mr Nicholson led the evidence of Officer Felix Atabu, and was cross-examined by Mr Ho. Officer Atabu has been an investigation officer since 1999 and have worked as a Fraud Investigator since. He conducted the enquiry into Mr Ho's tax affairs under the COP9 procedure. We found Officer Atabu to be a credible and reliable witness. He spoke chiefly to the contemporaneous records obtained at the time of the enquiry, and assisted the Tribunal by explaining the basis on which he arrived at his conclusions. He was meticulous and conscientious in the preparation of his witness statement, and had a thorough command of the details of the facts in issue, which enabled him to answer questions with readiness, and in directing the Tribunal to the supporting documents with alacrity. We accept his evidence without qualification.

4. Mr Ho appeared in person; he gave evidence and was cross-examined by Mr Nicholson. We found Mr Ho to be an unreliable witness, in that his witness and oral evidence contradicted what he had stated in writing to his former advisers at the time of the enquiries. In evidence, Mr Ho was economical with the truth, which means the whole truth of the facts in issue cannot be ascertained from him as a witness.

Matters under appeal

5. The notices and assessments under appeal were all issued on 16 February 2017.

Year	**Additional Tax**	**Appealable decision**	**TMA section**
2006-07	£ 3,398.40	Assessment	S29 TMA
2007-08	£ 7,368.06	Assessment	S29 TMA
2008-09	£ 7,190.96	Assessment	S29 TMA
2009-10	£ 8,424.28	Assessment	S29 TMA
2010-11	£10,876.58	Closure Notice	S28A (1) & (2)
2011-12	£9,928.63	Assessment	S29 TMA
Total	**£47,186.91**		

6. The following penalty determinations and assessments under appeal were all issued on 6 August 2014.

Year	Additional Tax	Penalty Amount	Appealable decision	Legislation
2006-07	£3,398.40	£2,039	Penalty determination	S95(1)(a) TMA 1970
2007-08	£7,368.06	£4,420	Penalty determination	S95(1)(a) TMA 1970
2008-09	£7,190.96	£4,278.62	Penalty assessment	Sch 24 para 1(a) FA 2007
2009-10	£8,424.28	£5,012.44	Penalty assessment	Sch 24 para 1(a) FA 2007
2010-11	£10,876.58	£6,471.56	Penalty assessment	Sch 24 para 1(a) FA 2007
2011-12	£9,928.63	£ 5,907.53	Penalty assessment	Sch 24 para 1(a) FA 2007
	Total	**£28,129.15**		

The legislative framework

7. The statutory provisions relevant to this appeal are within the Taxes Management Act 1970 ('TMA'), with the exception of the penalty assessments for the years from 2008-09 onwards, which come under Sch 24 to FA 2007.

8. Section 9A TMA gives HMRC the power to enquire into a taxpayer's return, and notice was given within the statutory time limit in relation to the appellant self-assessment return ('SA return') filed for the year 2010-11, which covered the accounting period from 1 April 2010 to 31 March 2011.

9. Section 12B TMA requires a taxpayer such as the appellant to keep and preserve all such records as may be requisite for the purpose of enabling him to deliver a correct and complete return for the year or period of assessment.

10. Section 28A provides for the completion of an enquiry into a personal return by way of a closure notice, and s 29 provides for assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met. Under s 29(4), the requisite condition is that the loss of tax has been brought about 'carelessly or deliberately' by the taxpayer or his agent; this was previously stated as 'attributable to fraudulent or negligent conduct'[1].

11. Section 34 provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates. Section 36 TMA provides for different time limits for a s 29 assessment to be raised where the loss of tax has been brought about carelessly or deliberately. The time limit is 6 years after the end of the year of assessment to which it relates if the loss of tax

[1] The modification is by virtue of para 3 Sch 39 FA 2008.

has been brought about *carelessly*, and is extended to 20 years in a case where the loss of tax has been brought about *deliberately*.

12. The Tribunal's appellate jurisdiction is provided under s 50 TMA. On an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, *the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good* as provided by s 50(6). Conversely, s 50(7) provides that if the appellant is undercharged by an assessment, *the assessment or amounts shall be increased accordingly.*

13. Section 95 governs the penalties imposable in relation to the tax years up to 5 April 2008 inclusive. It provides that *where a person fraudulently or negligently delivers any incorrect return or accounts* for the purposes of assessing his tax liabilities, the penalty is the difference in the amount of tax payable had the return been correct, and the amount that has been paid, subject to mitigation.

14. The penalty regime governing the tax years from 6 April 2008 onwards is under Sch 24 to FA 2007. The new regime provides for the error penalty to be calculated as a percentage of the potential lost revenue ('PLR'), which is the difference of the tax payable (had the return been correct) and paid (per the incorrect return submitted). The penalty percentage is determined according to the relevant category of behaviour, with 35% for 'careless', 70% for 'deliberate but not concealed', and 100% for 'deliberate and concealed'. The penalty percentage can be reduced subject to disclosure, and factors to be taken into account concern (a) whether the disclosure is 'prompted' or 'unprompted', and (b) the 'quality' of disclosure in respect of 'timing, nature and extent'.

The facts

Background

15. Mr Ho operated a Chinese takeaway restaurant in the name of 'Brian's Peking Cantonese Cuisine' from premises at New Road Ayr, from 30 September 2006 to 31 January 2012 when he ceased to trade. The business had previously been operated for some years by his mother, who took it over again when Mr Ho ceased trading in 2012.

16. Mr Ho registered for self-assessment on 5 November 2006, and made SA returns declaring the following sums as turnover and gross profit for the relevant years. The profit margin was analysed by HMRC as follows:

Tax year	2006-07	2007-08	2008-09	2009-10	2010-11
Declared Turnover	21,862	68,741	68,940	73,032	78,224
Gross profit	13,749	39,414	37,853	39,215	45,102
Gross Profit Margin	62.8%	57.3%	54.9%	53.7%	57.6%

17. From 23 October 2006, Ho was registered for VAT, and returns were filed for quarters 01/07 to 03/12. Each return declared input tax as nil, and output tax ranged from £782 (for 03/07) at the lowest, to £2,657 (06/11) at the highest.

VAT inspection

18. A VAT inspection took place on 6 February 2011. It was found that the business did not operate a till, and had only a cash drawer. Meal order slips were not used; orders were written on scraps of paper and not retained. Arithmetical errors were identified in the VAT returns.

19. There were no employees in the business except Mr Ho's wife. No wages were paid. Mr Ho said he simply took whatever was left at the end of each week as drawings, said to be £150 per week. Monthly outgoings were said to be: £35 for mobile phone, £100 credit card repayment, £59 domestic gas bill, £300 to £350 paid into business account, £190 on a car loan.

20. On being prompted by the VAT officer, Mr Ho admitted to be making monthly repayments of £338 on a loan used to buy the business. The family (Mr Ho, his wife and their child) ate food from stock, as this was cheaper than buying food separately.

Section 9A enquiry

21. An enquiry into Mr Ho's tax return for 2010-11 was opened by Officer Murray under s 9A TMA by notice served on 10 April 2012. Mr Ho was an existing client of French Duncan, accountants at the time, and the firm represent him in relation to the enquiry. A series of meetings took place between Ho and Mr Mathieson (VAT Partner), and Ms McCaffray (VAT Senior Manager) of French Duncan ('FD') in their Glasgow office. Notes of these meetings taken by French Duncan were subsequently provided to HMRC in relation to the enquiry when it escalated to the COP9 procedure. The contents of these Notes of meetings provided by FD are as follows.

22. The first meeting was on 3 July 2012, Ho, Mathieson and McCaffray present:

(1) Ho paid FD £500 in cash and £1,000 by cheque, together with a signed letter of engagement in respect of the VAT inspection.

(2) Ho said his wife worked regularly in the business, and his brother and parents working occasionally. His brother received £100 per week, and Ho and his wife drew £150 per week.

(3) Purchases were paid for in cash; utilities paid from the business bank account, into which Ho paid £300 per week to cover the bills.

(4) Personal expenditure was funded by the business in addition to the weekly drawings: £300 per month for a loan; £70 per month for gas bills; £180 per month for a car loan; £15 to £30 per month for a mobile phone.

(5) Ho and his wife lived with his parents and do not have high levels of personal outgoings.

(6) Mathieson advised that in order for FD to act for him, Ho must be 100% honest in his replies; that 'he felt HMRC had genuine cause for concern' and McCaffray asked Ho if the turnover was wholly and truly accurate. Ho explicitly stated that the accounts were true and accurate.

(7) Mathieson explained that he did not believe that the accounts, and the few backing schedules, represented the true position. On this basis, Mathieson advised that he would be unable to assist Ho by representing him; and was to conclude the meeting on that note.

(8) However, Ho then asked Mathieson '*if*' suppression had in fact been taking place and if he did not respond to HMRC, what was likely to happen. Mathieson reiterated that Ho would only have *one* opportunity to approach HMRC with the truth, and if he failed to do so, he should expect the penalties to be severe.

(9) Ho then asked Mathieson what he considered to be a 'reasonable' level of suppression. Mathieson advised that the only reasonable level is the truth; that Mathieson suspected '*HMRC would be likely to propose a figure at least double the turnover shown in the accounts to be more representative of trade*' (ie a suppression rate of 50%).

(10) Ho stated that 'double' was definitely too high, and expressed his concern that he was possibly about to admit that he was guilty of suppressing income.

(11) Mathieson advised that if Ho and his family had been taking money from the till each night, then that would give him a figure to build on and approach HMRC with. However, Ho should be able to reasonably prove whatever level of suppression he estimated.

(12) Ho advised that he would need to return home to discuss this with his family before making a decision on how to proceed and asked Mathieson to contact him for a further meeting next week.

23. After the initial meeting, there followed a series of email exchanges between Ho and Mathieson, which contain the material disclosures relied upon by HMRC to form their best judgment assessments. These email exchanges are summarised as follows:

(1) Email from Ho to Mathieson on 4 July 2012 at 03.20 hours following the meeting of 3 July 2012:

> 'I had to discuss with the wife due to being a sort of joint venture and also know what we will be in for. I have decided to take the confession (or whatever term you may refer to as).
>
> My wife has taken four weekly wage off before making the VAT submission. That will be at an amount of £150 from the start of the business to end of the most recent return. Also I'm not so black and white about taxability of tips. Due delivering meals to customers there are tips collected. If tips are taxable then I would have to make an estimated due to tips being variable, would have to estimate tips at about £20 per week. If this is not an appropriate action, I'll discuss this matter further with you. Sent you this email to give you the soonest response. I give you a call sometime today to confirm this matter….'

(2) Email from Mathieson to Ho on 4 July 2012 at 12:07 hours:

> 'Many thanks for your email, I am pleased you are doing the right thing by wishing to disclose to HMRC your true VAT liability. As I said yesterday, we will get one shot to make a "full disclosure" to HMRC, therefore, if I was to make a disclosure which was not in its entirety, which HMRC could disprove or not deem credible then any chance of mitigation on penalties will disappear … Your admission approximately represents 10% suppression of declared turnover, based on past experience and looking at your historic accounts this is not credible. I would strongly suggest that you discuss this matter in full with your family and furnish me with the absolute truth. Yesterday, you mention that you pay your brother, have these amounts been declared? Is it also the case, that these payments be treated in the same way as your wife i.e. deducted before declaring daily takings? The same applies to any delivery drivers (as see substantial fuel costs are going through the business), in fact all staff.'

(3) On 4 July 2012 at 14:20 hours, Ho emailed Mathieson as follows:

> 'Try to make a call to you, you must have been busy. Yes my brother wages as well at £100 per week, but you will need to check the dates in the record, as it was only active in the first few years. You mention substantial fuel cost, do you mean by [sic] I have claim excessive fuel cost thru this business, as this I have taken an estimate of what is business fuel and what is personal fuel. I don't know I may have claim excessively? I'm not sure what substantial evidence hold to believe I would be making a turnover at double the amount may be if you shed some light we can discuss on those points?'

(4) On 5 July 2012 at 06:10 hours, Ho sent a long email to Mathieson, in which he stated the following:

(a) 'I do not actually know what the exact amount should be, I did not have a specific formulae or system';

(b) 'I tell all the money that has paid into my account on a weekly basis … pretty much means that is all the money that I have ever owned … an estimate what I may have used in case to buy things for the smaller items that we regularly use cash for … may be you can pull a figure from that';

(c) '*you may notice the earlier years, the turnover is much lower and the account looked bad … I have noticed this myself so I try to improve the figure over the years to make it look more credible*'; (emphasis added)

(d) 'the following detail is the true account even if inspector, you or me looking at the account':

> 'Main RBS account: regular weekly income into this account £300, only contain a few hundred pounds …
>
> [RBS] ISA savings account, no input into this account at all during my business ownership … (did not tell inspector about this account ..)

A Clydesdale bank account which did not tell the inspector about trying to disclose some case, approx regular weekly income to this account £100 …

+ an estimate of cash that I may have use to buy smaller things I would guess at approx. £100 a week.

A joint Clydesdale bank account with wife not told inspector about, I have never put money into this account…

Credit cards: I have told inspector I own 1 credit card and has balance of £7000 … I own another credit card but the balance on that was zero so I didn't bother telling them …

These figures will hold true reflection to my lifestyle and spending habbits [sic], due to the reason I do just about all my shopping online …

All bills are direct debit, even car insurance and car tax are purchased over the account or credit card … may be some other random amounts at times, to help family member buy things online or pay bills…'

(e) The long email continued by turning to the profit figure as stated in the accounts, which Ho said:

'my income is my profit sort of thing

add the wages I think that should reflect a very close amount to the true value (I say close to true value due the reason I had to take a guess at my cash spending habit)

wages is as it stands: at £150 for wife … £100 brothers wage and this is also thru out the entire business period, he's a part timer. I deducted this from the account within a certain period as I was trying to balance the account out to make myself look like making a profit …

(f) As to the self-supply of food, and fuel usage for business:

'please bare [sic] in mind we do consume our own food, so the profit margin will be slightly off

we live no more than 4 miles from work so our fuel bills are smaller…'

(g) After making the above disclosure to Mathieson, Ho then expressed his concern in relation to Mathieson's comment that HMRC would propose to double the turnover shown in the accounts:

'going by these figures I really don't think its double the amount of the turnover that you mention that it could be you suggested double the turnover, which I think it would give us quite a lavish lifestyle …

I do worry what if the inspector really insist [sic] we make double the turnover? *I have no evidence to prove them wrong.* What would happen then?' (emphasis added)

(5) On 4 July 2012 at 2:44pm Mathieson replied to Ho's long email by giving some examples of HMRC's approach in estimating the extent of sales suppression. Mathieson went on with his reply as follows:

> 'I will stress for the last time the importance of being 100% truthful on these matters. … this morning you claim it was your wife's wages which weren't declared, this afternoon it's also your brothers- this does not bode well. Therefore, please stop from just throwing figures around, as I have no doubt that you know the full extent of the cash suppression.
>
> If you are positive the figure isn't 100% suppression, then by all means tell me what the true figure is, only then I can start to help you.'

24. A second meeting took place on 6 July 2012, attended by Ho, Mathieson, McCaffray and Halligan from FD. Mathieson confirmed their services was in relation to the VAT investigation only. Ho made the following admissions to French Duncan:

(1) Personal drawings of £300 per week into his RBS account, another £100 per week into a Clydesdale account; lump sum drawings into joint account with wife (a couple of thousand); cash was lifted from business for small items; £150 per week paid to wife as her wages; brother was paid £150 per week.

(2) Suppression of sales by a percentage, giving as an example, that if he made £1,000 per week, he would declare say £600 leaving £400 undeclared.

(3) Ho admitted to the loss from the annual accounts was an error, and was being 'gradually corrected in recent years', as it would be 'too obvious if the loss was corrected immediately'.

(4) FD proposed the amount of add-back as sales to be £750 per week, taking into account personal drawings and brother's wages; Ho rejected as high.

(5) FD explained that £750 per week as suppressed sales was 'borderline' and if Ho said it was less than £750 per week, then FD could not help him, that French Duncan had to protect their reputation with HMRC.

(6) Ho asked to look at annual accounts. Agents explained that it was the amount of cash not gone on the VAT return that they need to establish, not the degree of manipulation of the gross profit.

(7) Ho then suggested a realistic turnover of £97,000 by adding purchases, plus overheads (minus the wages) plus VAT plus £750 per week.

(8) Agents calculated overall suppressed sales of £120,000 with maximum VAT of £20,000 plus penalties.

(9) Ho stated that the business used flat-rate scheme; agents explained that this behaviour is fraud and the FRS rate will be withdrawn.

25. The third meeting was on 12 July 2012 at French Duncan's Glasgow office attended by Ho, Mathieson and McCaffray.

(1) Ho paid £4,200 by cheque in full and final settlement for agents' fees.

(2) Ho had spoken with the family and determined that the true amount of suppression over the years amounted to 68% of takings declared, 32% withheld; that at the end of each night the total takings were cashed up, 32% was retained and 68% supplied to the bookkeeper as the figures for preparing accounts and VAT returns.

(3) Ho admitted to 'lying about the previous owner of the business being his aunt'; that the business was run for around 20 years by his parents. Agents remarked that 'this is the third occasion [FD] had met with [Ho] and it appears that this is the third time [Ho] had admitted lying'.

(4) Ho said the lying was to protect his parents from being pursued by HMRC and asked about the likelihood that it might happen.

(5) Ho previously had advised that he drove a Mazda and has two motorbikes; two loans for the vehicles come out of current accounts: £260 and £180 per month.

(6) At this meeting he advised that another car was registered to him in addition to what was disclosed: a Mercedes which was his father's at approximately £340 monthly.

(7) Ho explained that his wife had not been working in the business for 2.5 years and his brother has been more involved; that his parents wanted to retire, but have not taken control again and registered for VAT; when asked 'if his parents' VAT returns would show a significantly higher (i.e. truthful) figures', Ho confirmed that it would be.

26. On 13 July 2012, a meeting took place with Officer Murray of HMRC, and Mathieson and McCaffray of FD. The Note of meeting included in the bundle was by HMRC, and recorded the following:

(1) French Duncan representatives had met with Mr Ho the previous day, and 'had laid it on the line to him that it was essential that he was totally honest in what he said both to themselves [French Duncan] and to anyone from HMRC', failing which he would have to find alternative representation.

(2) On the matter of suppression of sales:

(a) Ho was suppressing 30% of his takings and declaring only 70%; but the odd suppliers were paid in cash with Ho admitting to suppressing 32% and returning sales of 68%.

(b) Mathieson said that he suspected the suppression was considerably more and could be as much as the actual returned takings; that he had told Ho that this would amount to fraud, and had detailed the various sanctions up to and including prosecution which might be imposed.

(c) The bookkeeper Ms Lee was mentioned and Mathieson explained that he did the bookkeeping and produced draft accounts for Ho to FSD for SA filing.

(3) On the matter of Ho's private residence:

(a) Ho confirmed that his house was bought in late 2010 for £193,000;

(b) The cost was met by a withdrawal of £130,000 from the Bank of China, said to have been a legacy from his late grandfather, £30,000 borrowed from relatives and friends, and £35,000 from Mrs Ho.

COP9 Investigation

27. In October 2012, Officer Murray referred the s 9A enquiry to the Fraud Investigation Service team in Glasgow. The case was allocated to Officer Atabu in January 2013.

28. Prior to the issue of the COP9 investigation letter, Officer Atabu carried out further review of the appellant's financial circumstances and found the following:

(1) Ho purchased the current home on with a Ms Pui Fun Shek (his wife) on 30 November 2010; the title number is AYR [4-digit number].

(2) For a consideration of £195,000;

(3) By cash with no mortgage taken on the property.

29. By letter dated 10 April 2013, Officer Atabu opened an enquiry under the COP9 procedure, being the Code of Practice for the Investigation of Fraud. Mr Ho was notified that the investigation would cover all of his tax affairs, and was invited to make a full disclosure under the Contractual Disclosure Facility ('the CDF'). Under this arrangement, HMRC would contractually undertake not to commence a criminal investigation with a view to prosecution for any tax fraud disclosed under CDF. The investigation would cover a 20-year period from the date of the offer and that it covered all tax frauds. Two forms were enclosed: (a) an 'Acceptance' letter, and (b) a 'Denial' letter; *either* to be signed and returned to indicate the taxpayer's intention.

30. On 16 April 2013, Officer Atabu held a meeting with Mathieson and McCaffray of French Duncan at HMRC's office; a second HMRC officer was present; Ho did not attend. Atabu explained in some detail the COP9 procedure to the Agents. The following matters were also discussed:

(1) Agents handed over an authority on form 64-8 signed by Stephen Ho, and dated 16 April 2013.

(2) An Outline Disclosure on the standard form, together with both the Acceptance and Denial letters, as Ho had signed and dated both on 16 April 2013. The Acceptance letter reads as follows:

> 'To: The Commissioners of Her Majesty's Revenue and Customs
>
> I accept your offer dated 10 April 2013 made under the Contractual Disclosure Facility.
>
> I confirm I have read, understood, and agree to the terms and conditions set out in the Code of Practice 9.
>
> I understand that the offer by HMRC is made in the expectation that at all stages throughout the CDF process my disclosures to HMRC will be full, open and honest and I will provide accurate, timely and complete information to the very best of my ability.'

(3) French Duncan advised that Ho intended to accept. HMRC advised that it would be necessary for Agents to annotate the Denial letter as having been 'submitted in error', and this was subsequently done by French Duncan. The Acceptance letter was retained.

(4) On checking the Outline Disclosure, it was noted that the date on the top half of the form on which the disclosure was made has not been entered, which rendered the disclosure invalid. The incomplete Outline Disclosure was returned to the Agents to be completed by Ho for re-submission. The first part of the form reads as follows:

> 'To the Commissioners of HM Revenue and Customs.
>
> As part of my Contractual Disclosure Facility undertaking, which I signed on … [no date inserted] I admit that I have deliberately brought about a loss of tax, through conduct which HMRC may suspect to be fraudulent in outline.

(5) Agents stated that Ho had changed his 'story' a few times during earlier meetings, and that HMRC should highlight the importance of the COP9 procedure to Ho for the truth to be ascertained.

(6) Agents raised concern regarding Ho's ability to pay for their work, the possibility of 'time to pay' arrangements to meet any liabilities assessed, and that late filing penalties had been imposed on Ho as his return for 2011-12 was still outstanding; the return could not be filed as HMRC had retained the books and records for the year. FD requested the records be returned for the SA return for 2011-12 to be completed.

(7) According to HMRC's letter dated 18 April 2013, Ho's books and records were returned accompanied by the covering letter, which stated that apart from , the bank statements, none of the items related to the tax year 2011-12.

31. On 23 April 2013, French Duncan called Officer Atabu to advise: (a) they could not reach an agreement with Ho and subsequently decided not to represent him anymore; (b) that Ho did not intend to engage a new agent, and would represent himself; and (c) the 2011-12 return would be ready for submission shortly.

32. On 28 May 2013, French Duncan confirmed by email (on request by Atabu) that the firm had ceased to act for Ho and that all records have been returned to him.

33. On 28 May 2013, Officer Atabu wrote directly to Ho concerning the Outline Disclosure, and advised why it was not valid; and that a valid disclosure needed to be returned within the 60 days of the original offer dated 10 April 2013. A photocopy of the Outline Disclosure that had been handed in by French Duncan at the 16 April 2013 meeting was enclosed, showing the following entries:

> '**Description of fraud**: Suppression of income; 32% of cash takings withheld and retained without being disclosed in business turnover.
>
> **Individuals and entities involved**: Stephen Y K Ho; VRN [number] and UTR [number].
>
> **The period of time over which the fraud took place**: Throughout period of VAT registration.'

34. There was no reply. On 24 June 2013, Officer Atabu wrote to advise that:

(1) There had not been a valid Outline Disclosure submitted, although there had been an Acceptance letter signed.

(2) Consequently, the COP9 procedure would proceed on that basis that Ho had chosen the 'non co-operation route', which meant HMRC could investigate Ho's tax affairs for the last 20 years with a view of recovering tax lost with interest and penalties.

(3) While HMRC can start a criminal investigation in Ho's tax affairs at any time, a civil investigation would be commenced in the first instance, and Ho was invited to attend a meeting with HMRC on 25 July 2013.

35. On 2 July 2013, Atabu telephoned Ho, who confirmed that he had received Atabu's letter of 24 June 2013 but would not be attending the meeting of 25 July 2013. In various ways, Ho confirmed his intention to take the 'non co-operation route' and that he did not therefore to attend any meeting and could not afford an agent.

The Information Notice

36. On 18 July 2013, Atabu wrote to Ho and advised that: (a) French Duncan had given HMRC copies of their notes of meetings held with Ho on 3, 6 and 12 July 2012, (enclosed for Ho's reference); (b) that 32% was the level of suppression of sales as admitted by Ho to French Duncan; and (c) that HMRC required more information by service of an Information Notice under Sch 36 to the Finance Act 2008.

37. The items of information request included 'Statutory Records' of the following:

(1) Royal Bank of Scotland business bank statements for the period from 1 August 2007 to 30 June 2012;

(2) Record of business expenditure and purchases as recorded in Simplex D book from 1 August 2007 to 30 June 2012;

(3) Business expenses and purchases: receipts for the period from 1/8/2007 to 30/6/2012;

(4) The meal slips on 'scrap paper' covering the period from 7/2/2011 to 30/6/2012, (advised to retain by HMRC on 6 February 2011);

(5) Record of sales income from 1/8/2007 to 30/6/2012.

38. Other documents requested included:

(1) all personal bank accounts and credit card accounts statements from 1 January 2008 to 31 December 2012;

(2) in relation to the capital to fund home purchase: (a) a copy of wife's bank account statements and documentary evidence to vouch the loan or gift for her contribution of £35,000; (b) evidence for the legacy of £130,000; (c) the gift or loan of £30,000 for the balance; (d) a copy of the Solicitors settlement account.

(3) Further information on how the sales suppression rate of 32% was arrived at for the period 2006-07 to 2011-12.

Response to Information Notice

39. In an undated letter, Ho replied to the Information Notice. The letter was addressed to Mr Atabu, and is cited here verbatim without any corrections:

> 'Thank you for your evidence. Your evidence leads to have reason for me to believe there has been fraudulent activities acted upon me.
>
> It was clearly stated that I had paid money to engage with HMRC until april 2013. At the end there has been no engagement with HMRC.
>
> However these evidence are not credible, since all evidence are given while under threat by French Duncan, threat include Prison, safety to family and refuse to do self assessment.
>
> The evidence is also heavily modified to misrepresent.
>
> Visiting HMRC officer on feb 2012 had mention there was possible errors, which lead me to believe there was errors, but I do not know what the error was. French Duncan asked for fees to fix these errors.
>
> They inform me that the only way to fix these errors were to admit to fraudulent activities while given threat to me about safety to family and prison.
>
> Due to the above reason I am giving the minimum cooperation and seek every opportunity to get my case reviewed by the Tribunal.
>
> Your best communication method with me is by snail postal mail, since I cannot afford an advisor and will have to seek free advice on the interweb, before every response.'

40. The letter was accompanied by the requested Statutory Records, while the request for the non-statutory records was all appealed. The grounds of appeal for most of the items are similar, and are as follows:

> 'No record or information retained/kept.
> Does not form a Statutory record.
> Does not involve in business purchase.
> May involve in 3rd party's confidentiality.
> HMRC officer informed me they have the powers to looked [sic] into my accounts anyway.'

41. By letter dated 4 September 2013, Officer Atabu replied and acknowledged the receipt of the statutory records, which included: (a) business bank statements for 14/11/2006 to 4/4/2012 with the period of 1/4/2010 to 5/4/2011 missing; (b) undated scrap paper meal slips written in Chinese script; (c) copy VAT returns plus weekly and quarterly record of daily takings and purchases invoices; (d) original quarterly and daily takings record made up of single pages.

Review of the statutory records provided

42. The following conclusions were drawn from a review of the records produced:

(1) The cash sheets used for recording takings are themselves photocopies and the copies have been made from different cash booklets. The daily takings

recorded on the cash sheets have been made in different ink pens. For example, on 30 January 2009 and 2 February 2009, the dates are shown in blue ink but the entry for cash sales shown in black ink. The different ink pens entries suggest that the dates were entered at different times from the takings.

(2) Only a proportion of the daily takings were banked to cover direct debits and standing orders. For example, excluding the missing bank statements, the appellant banked a total of £75,971.41 against the declared takings of £378,997 for the period under investigation.

(3) An analysis of the statutory records (cash sheets against bank statements) indicates that with the exception of the year 2010-11, only a quarter of the takings were banked.

(4) No reconciliation was carried out for takings against payments made for trading stock and other business expenditure, nor any actual record maintained for money that was banked.

(5) No record was maintained for cash drawings, or payments made to delivery drivers or wages paid out from daily takings.

(6) A set of unaudited accounts for the period to 31 March 2012 was provided, and the balance sheet shows the following details:

(a) Net current assets £18,788 (y.e. 2012) against £6,986 (y.e. 2011);

(b) Capital account £18,788 (y.e. 2012) against £6,986 (y.e. 2011).

(7) However, Officer Atabu reasoned that since the appellant had indicated to French Duncan that he drew around £150 per week from the business with no capital introduced, the capital account showing a net increase in capital on the balance sheet could not have been correct. Consequently, the unaudited accounts cannot be relied upon.

43. In relation to the Bank Statements provided covering the period from 1 February 2008 to 1 April 2010, Officer Atabu's Notes of Records Review made in January 2014 observed as follows:

(1) The deposit into the account are made from once a week to 4 times a week during this period. Amounts are usually around £300 to £500 and for the entire 26-month period, total deposits amount to £43,419.63, whereas total withdrawals amount to £34,640.30.

(2) The withdrawals are all for utilities and payments to accountants and Class 2 NIC by Direct Debit or Standing Order. There are a number of unknown withdrawals but the amounts are not round sums, and mostly include pence, and likely to be payments for business expenditure.

(3) The pattern confirms taxpayer's trading style whereby only sufficient money is deposited to cover the utilities and standing orders, and the balance of cash is retained by the taxpayer.

44. In relation to records for purchases and sales, Officer Atabu observed:

(1) Recorded sales figure matches Turnover declared.

(2) No meaningful analysis for purchases. This analysis was carried out by Officer Murray but no meaningful analysis resulted. Items are not easily identified from invoices.

(3) Cash flow analysis was attempted, which showed minus cash at the beginning, but as details of drawings and wages payments are unknown, there was most likely surplus cash for the remaining period.

Approach and methodology to quantify suppressed sales

45. A means test was carried out to determine the level of drawings, and to compare the amount of drawings with the suppressed sales of 32% as disclosed.

46. In the absence of any information being provided in this regard by Ho to gauge the reasonableness of the 32% as suppressed sales, Officer Atabu used the information disclosed in the notes of meetings that Ho had with French Duncan. These meeting notes are related earlier, and in addition, Officer Atabu also relied on the series of email replies from Ho to Mathieson on 4 July 2012 as detailed above.

47. Officer Atabu produced two schedules to test the reasonableness of a suppression rate of 32%. The first schedule was effectively a summary of what Ho had disclosed to French Duncan as his monthly expenditure. The second schedule was to revise the annual turnover as stated in the accounts upwards by taking into account 32% suppressed sales, and to compare the revised net profits for the relevant years with the estimated annual expenditure from the first schedule.

48. The figures on the Estimated Annual Expenditure are as follows:

	Item	**Monthly amount**	**Annual amount**
1	Mercedes repayment	340	4,080
2	Loan repayment	300	3,600
3	Parents' gas bill	70	840
4	Own gas bill (estimated)	70	840
5	Car loan	180	2,160
6	Mobile phone	20	240
7	HP per TPI (start 26/11/10)	168	2,016
8	Credit card (est from balance)	60	720
9	HP per TPI (start 11/5/2010)	259	3,108
10	Council tax band E (10 months)	189	1,890
11	Food/clothing/child costs plus normal living and savings – (estimated)	1,200	14,440
	Annual Total		**£33,894**

49. Office Atabu compared the revised annual turnover with the means test estimate, and noted at the bottom of the means test schedule the conclusion he drew therefrom, namely: '*Estimated annual expenditure of £33,894 compare favourably with the estimated taxable profits of circa £33,000 each year*.'

50. In evidence, Officer Atabu explained his methodology and his reasoning further; that he did not use the means test to quantify the assessment, but as a guide to gauge the amount of drawings required to fund personal expenditure. He reasoned that on the basis of a personal expenditure of £33,894, the suppression rate of 32% would result in additional profit of around £33,000 each year. On this basis, he concluded that the disclosed percentage of 32% by Mr Ho was a credible percentage.

51. The figures for the additional turnover liable to tax are calculated as follows:

Tax year	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**Total**
Accounting PE	31/3/07	31/3/08	31/3/09	31/3/10	31/3/11	31/3/12	
	£	£	£	£	£	£	£
Declared Turnover (68%)	21,862	68,741	68,940	73,032	78,224	68,198	378,997
Revised turnover (100%)	32,150	101,089	101,400	107,400	115,035	100,291	557,347
Additional taxable income	10,288	32,348	32,442	34,368	36,811	32,093	178,350
Add: Annual tips	1,040	1,040	1,040	1,040	1,040	1,040	6,240
Income liable to direct tax	**11,328**	**33,388**	**33,482**	**35,408**	**37,851**	**33,133**	**184,590**

Further correspondence and the COP9 decision letter

52. In September 2014, Officer Atabu wrote twice to Ho, on 9 and 17. The first letter was four pages long summarising the information available to HMRC as detailed in the meeting notes and email, and the second letter was to request for further information in relation to the sources of capital of £195,000 for the house purchase. There is no record of Ho having responded to either of these letters.

53. Consequently, by letter dated 9 December 2014, Officer Atabu wrote to Ho, stating the conclusions he drew from the information available to him:

> '(a) That in the period 2006/07 to 2011/12, you have only returned 68% of your sales and suppressed 32%. This is based on the disclosures that you made to your then taxation agents both during various meetings and also in writing.
>
> (b) That your business received tips of £20 per week which equate to £1040 per year and that these have not been subject to tax.

(c) That the source of the amount of £195,000 which was used in the purchase of your property has not been explained and I have concluded that this income has been derived from a taxable source of income over the 6 years from 2006/07 and 2011/12 at the rate of £32,500 per year.'

54. In the decision letter, Officer Atabu continued by stating that he therefore had 'discovered that income which ought to have been assessed to income tax for the years 2006-07 to 2011-12 have not been assessed' in accordance with s 29 of TMA, and this was due to Ho's 'fraudulent and deliberate conduct', and that the self-assessment returns for the years concerned were 'incorrect'.

55. In similar terms, references were made in relation to the incorrect VAT returns submitted, and the provisions under sub-ss 77(4) and 77(5)(a) of the VATA 1994.

56. Mr Ho was invited to contact Officer Atabu to provide an explanation as to why he should not prepare discovery assessments for the years from 2006-07 to 2011-12, or VAT assessments for all years of trading from 5 November 2006 until cessation on 5 April 2012. Officer Atabu also stated his intention to raise penalty notices at the same time as he issued the discovery assessments.

The penalty assessment and explanation

57. There was a gap of 21 months in the correspondence provided to the Tribunal, in that there was no record of any communications between the parties after the letter of 9 December 2014. It does not seem that Mr Ho had responded to Atabu's letter of 9 December 2014 to provide any further information to be taken into account in quantifying the extent of sales suppression.

58. The next pieces of correspondence were dated 14 September 2016 from Officer Atabu, and relate to the different categorises of penalties which HMRC sought to impose on Mr Ho in consequence of the incorrect returns submitted for self-assessment and for VAT. The summary of these penalties is as follows:

(1) For tax years 2006-07 and 2007-08, penalties are imposed under s 95(1) of TMA for negligently submitting incorrect returns. The penalties start at 100% of the sum of tax lost, and the overall 'abatement' was proposed at 30%, being 5% for disclosure, 10% for co-operation, and 15% for seriousness, giving a penalty percentage of 70%.

(2) Tax years 2008-09 to 2011-12, penalties are imposed under Sch 24 to FA 2007 for submitting inaccurate returns for self-assessment.

(a) The behaviour leading to the inaccurate return was 'deliberate' by failing to record 32% of the trading income plus tips, as confirmed by Ho in meetings and email correspondence with French Duncan.

(b) The penalty range was fixed at 35% to 70%.

(c) The disclosure was 'prompted', and mitigation of 30% was given for the quality of disclosure: (10% each for Telling, Helping and Giving access to records.)

(d) The 30% mitigation was applied to the difference in the upper and lower limits of the penalty range, i.e. 35%, being 70% minus 35%, to reach the penalty reduction rate of 10.5%.

(e) The penalty percentage was set at **59.5%,** being the difference of 70% less 10.5% reduction.

(3) Penalties under s 60 VATA (prior to 6 April 2008) and Sch 24 FA 2007 (for return periods after 6 April 2008) were also notified; (VAT assessments and penalties were not pursued in the end).

59. By letter dated 16 February 2017, Officer Atabu notified a change in the percentage for the s 95 TMA penalties, to be reduced from the 70% that had been notified to 60%, to keep in line with the Sch 24 penalties. The reduction was increased from the former 30% to 40% by increasing reduction for disclosure to 10% and for co-operation to 15%.

Closure notice, discovery assessments, and penalty notices

60. On 16 February 2017, Officer Atabu issued a closure notice for 2010-11, and raised discovery assessments for all other years, as summarised below:

Tax year	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**
	£	£	£	£	£	£
Profits/(losses) per SA rtn	9,063	(3,707)	(2,816)	928	14,186	11,804
Additional turnover	11,328	33,388	33,482	35,408	37,851	33,133
Revised profit for SA rtn	20,391	33,388	33,482	36,336	52,037	44,937
Additional tax sought	3,398.40	7,368.06	7,190.96	8,424.28	10,876.58	9,928.63

61. In evidence, Officer Atabu explained that he did not take into account the losses claimed for the two years for 2007-08 and 2008-09. He referred to the balance sheet page (p355 in bundle) of the submitted SA return for 2008-09, which showed an opening deficit of (£5,312), together with the losses claimed of £2,816 for the year, the balance sheet of the SA return showed a closing deficit of (£8,128). Officer Atabu said that it was not credible that a business of this kind would be making consecutive losses over two years, followed by a profit of just £928. The means test clearly indicated that there was around £33,000 of annual personal expenditure that the appellant had to fund.

62. The tax liabilities are re-calculated based on the set of figures for annual turnover with suppressed sales of 32% and the tips averaging £20 per week. The amounts of additional tax represent the income tax and Class IV NIC payable for each year in question, after giving credit for what has been paid on the assessed profits as declared in the submitted SA returns. The additional liabilities total £47,186.91.

63. On 21 February 2017, penalty determinations under s 95 TMA for 2006-07 and 2007-08 totalling £6,459, and penalty notices under Sch 24 FA 2007 for the four years from 2008-09 to 2011-12 totalling £21,670.15 were also issued. The amounts of penalties for the individual years are listed in the table at §6 above.

Appeal and review

64. By an undated letter received on 23 February 2017, Mr Ho appealed against the closure notice and all the discovery assessments on the following ground:

> 'Your assessment is based on false information. All information was given under threat and mislead by advisor.'

65. By letter dated 24 February 2017, Mr Ho appealed against all penalty determinations and notices. His stated grounds are:

> 'I disagree with your decision because your complete investigation is based on false information.
>
> There were no incorrect returns made. All information were [sic] given under misleading adviser.'

66. The review conclusion letter was dated 30 May 2017, and confirmed the amounts of income assessed in addition to what had been declared in the submitted SA returns. The closure notice for 2010-11 and the discovery assessments for other years were all upheld, together with the penalty determinations and notices.

The appellant's witness statement

67. Mr Ho submitted a three-page witness statement on 22 December 2007. His oral evidence in cross-examination kept closely to the substance of his witness statement, of which the material aspects are:

(1) Mr Ho confirmed that he was the 'owner of Brian's Peking and Cantonese Cuisine' at the premises address 'between 2007 to 2012'.

(2) Mr Mason was his accountant from French Duncan and contacted him in June 2012, advising that HMRC would be investigating his tax affairs, and that his case was transferred to Mr Mathieson as a result.

(3) On 3 July 2012, Ho confirmed that he met with Mathieson and Ms McCaffray, in which he explained 'that it was an error that was made'; that Mathieson explained to him that errors could not be repaired; that he 'should admit fraud to repair the errors'; that Ho had initially refused to admit fraud, and asked what action HMRC would take; that Mathieson explained:

> 'that HMRC would find me guilty of fraud and be imprison [sic]. Further investigation would be carried out into the family, including parents, relatives and previous owners of the business.'

(4) Ho stated that he suggested he would take the case to the tribunal, to which Ho claimed:

> '[Mathieson] clearly explain that I will lose in tribunal and no one will believe me reason being that he suggest [sic] everyone carry out fraud activity. Mr Mathieson suggest that HMRC will carry out an assessment of around 50%. I ask Mr Mathieson how this was possible. There was no clear answer, but from experience he express [sic]. Since French Duncan was a big company, there was no reason not to believe him. I had left the meeting undecided what to do.'

(5) In relation to the meeting on 13 July 2012, Ho stated the following:

> 'I had taken the offer to admit the fraud, reason not because I committed fraud. The reason being I did not want to be imprison [sic] and have further investigation into other members. Mr Mathieson explain that HMRC had evidence of the fraud and if I can submit a figure which matches HMRC's figure it would show my honesty and reduce my penalty. I express I do not know, as HMRC holds all my books and records. The meeting carried on into further interest in my life and meeting ended with no further progress in the figures to be submitted.'

(6) Mr Ho stated that he 'exchange[d] email with Mr Mathieson trying to establish a figure', and his statement continued by stating:

> 'I had first suggested that wages may not have been declared, reason being that the wages was [sic] not included in the books and records but submitted to French Duncan in the payroll. Mr Mathieson state that equal to 10% of suppression and was not credible.
>
> I had express to Mr Mathieson that I do not know what the figures should be. He repeated ask me to be honest. I had made further guesses with Mr Mathieson, but I can no longer remember what these figures were and the reason I made those guesses.
>
> Mr Mathieson also states that if the figure was not more than £750 per week that he can not [sic] help me. I was left very confused.'

(7) Mr Ho's explanation as to how he arrived at the 32% rate of suppression was as follows:

> 'In order to make further progress … I had to submit some sort of figure. I had suggested 32%, reason being that my accountant previously suggested that in my line of business I should have approx. 70% profit margin, therefore approx. increase of 32% will bring my profit margin to 70%.
>
> Mr Mathieson had accepted this figure and said he will submit it to HMRC and see what they say.'

(8) Mr Ho stated that he had no further communication with Mr Mathieson until April 2013 when HMRC issued him with the COP9 letter. Ho said that Mathieson advised him that:

> 'this was standard procedure and that he will fill it in and send it away and ask me to sign it.

> Mr Mathieson done some calculation and show me the amount of tax that I will be paying. I immediately question Mr Mathieson that I should be waiting for a response from HMRC.
>
> This is when I realise I was being misguided and lied to, therefore stop working with Mr Mathieson of French Duncan and refuse to co operate with HMRC since I assume HMRC was involved.

(9) On the letters from HMRC during the COP9 investigation, Ho stated:

> '… from my personal opinion they had concluded that I was guilty, all explanation [sic] were ignored by HMRC.'

(10) On the issue of evidence, Ho stated:

> 'HMRC fail to show any evidence for their figures, all figures base on guess with Mr Mathieson. Guess on trying to establish error. I still fail to see HMRC highlight the original error that was mention.'

68. In cross-examination, Mr Nicholson questioned Mr Ho as to the levels of assessable income declared in his SA returns for the relevant years: profits of £9,063 (for 2006-07); losses of £3,707 (2007-08); losses of £2,816 (2008-09); profits of £928 (2009-10); £14,186 (2011-12) and £11,804 (2011-12). For the three years from 2007-08 to 2009-10, the cumulative losses and the negligible profit of £928 meant that the appellant had practically no income to live on. Mr Ho replied that he lived on his parents. Mr Nicholson questioned what income had his parents got to support him, since he did not deny that he was paying £300 per month for his father's Mercedes, and that his mother had given over the business for him to run.

69. Mr Ho then replied that he had to get a loan for his father because his father's bad credit history meant that he did not qualify for a loan, and that was why the £300 per month was being shown as his commitment.

70. On being questioned why he had admitted to suppression in his discussion with French Duncan, Ho replied that he had relied on a bookkeeper to ensure that the records would be correct; that it was when HMRC questioned the records that he had doubts about the accuracy and therefore he 'could not fully deny the wrongdoing'; that he had been advised to admit to the wrongdoing by French Duncan in return for the promise that the penalties would be reduced.

71. Ho was referred to his first email reply (at 06:10 hours) to Mathieson on 5 July 2012, in which he told Mathieson:

> '… you may have notice [sic] the earlier years, the turnover is [sic] much lower and the account looked bad … I have noticed this myself so I try to improve the figure over the years to make it look more credible …'

Mr Nicholson asked Ho: 'You know you are at it'; that it was clear from the email that Ho was fully aware of the under-declaration of turnover; that he knew it was wrong to do so; and that French Duncan was of the view that the suppression was as high as 50%. In reply, Ho said he had engaged the service of French Duncan since 2006, and that they did not ask any questions about his profit level over the years.

72. Mr Nicholson then asked Ho a series of questions, which Ho did not answer:

(1) Why did Ho continue to run a shop if you had been making a loss continuously for the first three years (discounting the 2006-07 when Ho was trading part of the year)?

(2) Why did Ho tell the VAT Assurance Officer that it was his Aunt rather than his mother who had run the shop previously?

(3) Why would Ho's mother not take the shop from him if Ho had indeed been running the business at a loss three years in a row?

(4) What could have gone so badly wrong if Ho was simply taking over an existing business to run it at a loss continuously for years?

The appellant's case

73. The Notice of Appeal of 5 June 2017 stated the grounds of appeal as follows:

> (1) 'HMRC had accused me of suppression of income while all my records/books were retain [sic] by them.'
>
> (2) 'I was informed that if I deny any wrongdoing, HMRC would carry out an assessment with an increased turnover of 50%. Also repeat threat of imprisonment and further investigation into other family members and relatives, while aware my wife was pregnant at the time.'
>
> (3) 'I was informed that HMRC knows what the level of suppression was and if I could submit a figure which matches HMRC, I would receive a high reduction to penalty.'
>
> (4) 'Under those circumstances, I was merely playing a number guessing game. As a result, HMRC had used a guess figure to calculate an assessment with no form of evidence to support any of their figures.'
>
> (5) 'I deny any form of suppression of income.'

74. For 'Result' of his appeal, Mr Ho stated: 'No additional Taxes outstanding'.

HMRC's case

75. In relation to the basis of the assessments, Mr Nicholson submitted:

(1) That the closure notice under s 28 TMA and the assessments of the surrounding years under s 29 TMA are based on the appellant's own admission, with the supporting evidence in the form of the email exchange he had with his former representatives, French Duncan, and their notes of meetings.

(2) HMRC further contend that the level of profit returned could not possibly have supported the appellant's lifestyle. HMRC maintain that the appellant's lifestyle was supported by under declared sales from his business.

(3) Given the appellant's failure to co-operate, HMRC had little option but to use the information made available to them by French Duncan.

(4) HMRC do not accept the appellant's assertion that he had manufactured the figures as an attempt to match figures allegedly in the knowledge of HMRC. Nor is it accepted that this was done in response to threats made by his agents.

(5) HMRC consider that French Duncan had been engaged as the appellant's representatives to act on his behalf and to defend his interests and would have no reason to coerce the appellant into paying more tax than he should. From the meeting notes provided by French Duncan, it is apparent that their motives were to provide full co-operation to HMRC in order to mitigate any subsequent penalty, which would be in the appellant's favour.

76. In relation to the validity of the assessments, it was submitted:

(1) For tax year 2010-11, s 9A enquiry was opened on 10 April 2012, and sub-ss 28A(1) and (2) allow HMRC to amend the appellant's personal tax return on conclusion of the enquiry.

(2) HMRC assert that they have 'discovered', within the meaning of s 29(1) TMA, that income which ought to have been assessed had not been included for the years ended 5 April 2007, 2008, 2009, 2010, and 2012. Consequently, the tax charge was insufficient for these years, and HMRC are entitled to issue an assessment under s 29(1) TMA to recover the income tax due.

(3) HMRC contend that the inaccuracies were brought about 'deliberately' by the appellant, in that he had purposefully under declared his income in order to reduce his income tax liability. As such the conditions under s 29(4) and s 36(1A)(a) of TMA are satisfied.

(4) The appellant's records were poor and could not be tested to verify the sales declared. HMRC found that the appellant's outgoings exceeded the income declared. The appellant failed to engage with HRMC in any meaningful way, which left HMRC to conclude the extent of suppression based on the information provided by French Duncan.

(5) In the absence of clear details regarding the appellant's affairs, an element of guess work has been inevitable and necessary in arriving at the assessment figures. The assessments are valid and made to best judgment based on information available at the time of the assessments.

77. In relation to the penalties, it was submitted:

(1) The evidence shows that the appellant submitted his SA returns in the knowledge that his true income was significantly understated.

(2) For the two tax years 2006-07 and 2007-08, the appellant had fraudulently or negligently delivered an incorrect tax return, and as such is liable to a penalty under s 95(1) TMA. HMRC have determined the penalties in accordance with s 100 TMA, taking into account the appellant's co-operation, disclosure and the seriousness of the offence to arrive at a level of penalty of 60%.

(3) In respect of the four tax years ended 5 April 2009, 2010, 2011, and 2012, HMRC assert that the appellant has submitted a document (the SA return for each year) to HMRC in the full knowledge that it contained an inaccuracy which had led to an understatement of his income tax liability and that the

inaccuracy was deliberate. The appellant is liable to a penalty in accordance with Schedule 24 to FA 2007, and the penalty charge had been calculated at 59.5% having regard to the behaviour and the quality of disclosure.

Discussion

78. The issues for determination in this appeal are the following and in the order of:

(1) The first issue concerns whether the 'threshold' conditions for there to be valid discovery of a loss of tax for the years in question have been met. On this issue, HMRC bear the burden of proof. If the burden is not discharged, then the appeal in relation to the discovery assessments falls away.

(2) If HMRC discharge the burden on the 'threshold' issue, then the burden reverses to the taxpayer to establish the correct amount of tax due, otherwise the assessments stand good. The second issue in this appeal is whether the appellant has established to any extent why the 'best judgment' assessments should be displaced or varied.

(3) The third issue in this appeal concerns the quantum of the penalty assessments, which is pitched to the amounts of tax loss as quantified by the closure notice and the discovery assessments. The issue here is whether the amounts of the penalties are to be confirmed.

Whether threshold conditions met

79. In relation to the s 29 TMA discovery assessments, the onus of proof rests with HMRC to establish that the conditions under s 29(4) and (5) TMA have been met. These conditions are referred to as the competence and time limit issues in *Burgess and Brimheath v HMRC* (*'Burgess'*)[2].

80. The first condition as respects competence is under s 29(4), which concerns the proof that the loss of tax was brought about *carelessly or deliberately by the taxpayer or a person acting on his behalf*. The Acceptance letter for the Contractual Disclosure Facility was signed by Mr Ho, and included a declaration that there was a loss of tax brought deliberately by him as the taxpayer. By virtue of the Acceptance letter, the issue was conceded by the appellant. To that end, there seems to be a prime facie case that HMRC have discharged the onus of proof as respects the s 29(4) condition.

81. In evidence, Ho said that he had relied on his bookkeeper who prepared the accounts, and that it was only during the enquiry when he had doubts about the accuracy of the accounts for the first time; that these accounts were never questioned by French Duncan, and were used to form the basis of the SA returns filed by French Duncan. In other words, Mr Ho submitted that the loss of tax consequent to the filing of inaccurate returns was not brought by him, but by the bookkeeper, and by French Duncan not asking any questions.

[2] *Burgess and Brimheath Developments Ltd v R&C Comrs* [2015] UKUT 0578 (TCC)

82. We reject Mr Ho's evidence and his submission. As a matter of fact, we find Mr Ho's evidence in this respect differed significantly from the disclosures he made to French Duncan at the time of the s 9A enquiry. In particular, in the series of emails to Mathieson on 4 July 2012 after the initial meeting, Mr Ho himself made material disclosures which amount to being an admission that he was aware of the suppression of sales. The specific disclosures, such as how wages and drawings were taken out of the cash receipts without any records being maintained, were admissions of the extent of sales suppression. Reading those emails of 4 July 2012, it was apparent that Mr Ho was fully aware of the specific routine practices in his business that had resulted in sales being under declared.

83. Furthermore, we consider that Ho was fully aware of the fact that the accounts provided to French Duncan were inaccurate. In one of his emails to Mathieson on 4 July 2012, he had effectively admitted to what would appear to be manipulation of the turnover figure in the accounts provided to French Duncan year on year, when he said: 'in earlier years, the turnover is much lower and account looked bad', and that he tired 'to improve the figure over the years to make it look more credible'. We find therefore that there was a loss of tax brought deliberately by the action of the appellant for the condition under s 29(4) TMA to be met.

84. In any event, even if a taxpayer had relied on a third party to file an accurate return, that would not have removed the statutory obligation which rests on the taxpayer, who is ultimately responsible for ensuring that the filed document is accurate. A failure to ensure the accuracy of a return sets up a presumption in law that the consequential loss of tax is due to the 'careless' behaviour of the taxpayer for the condition under s 29(4) to be met. Not only do we reject, a matter of fact, this supposed reliance on third parties to be the real cause of the inaccurate returns, we conclude that Mr Ho's submission, staked on his reliance of third parties, did not assist him as a matter of law either.

85. The second condition in relation to the competence issue under s 29(5) is that HMRC have made a 'discovery' that there was a loss of tax. The key authority of *Cenlon Finance Co Ltd v Ellwood*[3] by the House of Lords sets out the threshold of a discovery in the following terms:

> 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.' (at p240)

86. The requisite threshold for there to be a discovery is therefore low, and is not dependent on any new information, of fact or law: 'All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment' (*Charlton*[4] at [37]). As stated by Walton J in the High

[3] *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176.

[4] *R&C Comrs v Charlton and others* [2012] UKUT 770 (TCC)

Court decision of *Jonas v Bamford*[5] (at p23): 'In law, indeed, very little is required to constitute a case of "discovery".'

87. In the present case, HMRC discovered that output VAT was understated in the appellant's business as a result of sales not being fully recorded. There was no till being operated; cash receipts were used to fund purchases that could not be readily reconciled; drawings and wages were taken directly from the cash receipts without any records being kept. Officer Atabu observed that the figures in the books matched the declared figures for turnover in the SA returns. However, since the books did not record all the sales, the declared turnover was accordingly understated.

88. The means test further supported that conclusion that the turnover could not have been fully declared. The losses reported in the earlier years of trading would mean that the appellant would have nothing to live on, while his personal expenditure clearly indicated funds being expended in the region of £33,000 per annum. The discrepancy between declared level of profit and the annual living expenditure suggested that the income declared for self-assessment purposes had been understated, leading to a loss of tax. The condition stipulated under s 29(5) as regards a discovery of a loss of tax is likewise met.

89. As to the time limit issue, the reference is to s 36(1A)(a) TMA in the present appeal, which provides that a discovery assessment 'may be made at any time not more than 20 years after the end of the year of assessment to which it relates' if a loss of tax was 'brought about deliberately by the person'. All discovery assessments were issued on 16 February 2017, and are within the time limit of 20 years allowed where the loss of tax was 'deliberately brought'.

Whether the assessments stand good

90. From Mr Ho's statement in the Notice of Appeal under 'Result', which stated that no additional tax liabilities should be due, we infer that his main contention in this appeal is that the quantum of the assessments should be reduced to nil.

91. Mr Ho's challenge is staked on the fact that HMRC have no evidence to prove that he had suppressed sales by 32%; that HMRC have used 32% as provided by Ho, but that was a figure provided under threat of imprisonment and to protect other family members from being investigated; that the figure of 32% was a guess.

92. In relation to the s 28A Closure Notice for 2010-11, the Tribunal's jurisdiction is provided under s 50(6) of TMA:

> 'If, on an appeal notified to the tribunal, the tribunal decides – ... that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.'

[5] *Jonas v Bamford* (1973) 51 TC 1.

93. The onus of proof rests with the appellant to prove that he has been overcharged by the s 28A closure notice, and the standard of proof is on the balance of probabilities. Similarly, where the burden of proof as regards the threshold issue has been met by HMRC (as in the present case), the discovery assessments are then validly made in terms of s 29 TMA, and the assessments stand good, unless the taxpayer can prove that he has been overcharged. The onus for any substantive issues in relation to a closure notice or a discovery assessment rests with the appellant.

94. Furthermore, once the threshold requirement is satisfied for there to be a 'discovery' of loss of tax, the presumption of continuity applies in the raising of assessments for the related years. The onus is on the taxpayer to rebut the presumption. The reasoning for the shift of onus from HMRC (once the requisite threshold of discovery is met) to the taxpayer (in rebutting the presumption of continuity) is set out by Walton J in *Jonas*:

> '… so far as the discovery point is concerned, once the Inspector comes to the conclusion that, upon the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.'[6]

95. Not only is the onus on the taxpayer to rebut the presumption of continuity, but also that on appeal against an assessment raised under s 28 or s 29 of TMA, the burden of proof is on the taxpayer to show that he has been overcharged by such an assessment pursuant to s 50(6) TMA.

96. Mr Ho has not provided any substantive evidence to displace the conclusions drawn in relation to the year of enquiry 2010-11, or to rebut the presumption that there had been an under declaration of turnover to the same extent for the related years. The principal argument he advanced was effectively to shift the burden to HMRC to prove the basis of the assessments. Case law authorities have repeatedly held that the burden lies on the taxpayer to establish the correct amount of tax due in an appeal against a 'best judgment' assessment:

(1) In *Norman v Golder*, the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion: 'The point really is not arguable'; the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'.[7]

(2) In *Haythornthwaite v Kelly*, Lord Hanworth MR similarly stated, that 'it is quite plain that the Commissioners are to hold the assessment standing good

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[6] *Jonas v Bamford* (1973) 51 TC 1, at page 25.

[7] *Norman v Golder* (1944) 26 TC 293, at page 297.

unless the … Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside'.[8]

(3) In *Johnson v Scott*, the High Court judgment by Walton J affirming the Commissioners' decision in favour of the Crown was upheld by the Court of Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer, because:

> '… it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only, the taxpayer himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, … what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences.'[9]

(4) In *Van Boeckel*, Woolf J stated that:

> '… unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations, then they have got to take into account the material disclosed by those investigations. …' [10]

(5) In *Bi-Flex Caribbean*, Lord Lowry stated that:

> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgement 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.' [11]

97. It is simply not arguable that HMRC can provide evidence for the basis of their assessments. The true facts are known, presumably, if known at all, to one person only, Mr Ho himself. However, Mr Ho has failed singularly to produce any evidence to support his position that no additional tax is due for the years in question. In the present case, a 'best judgment' assessment is needed precisely because the taxpayer has failed to keep proper records, so that positive proof in the sense required in ordinary civil proceedings is not possible. The lack of positive proof has in fact been acknowledge by Mr Ho himself in his email to Matheison, in which he expressed his concern in the words: '*I have no evidence to prove them wrong*'(§23(4)(g)).

98. In his witness statement, Mr Ho gave his explanation as to how he arrived at the 32% rate of suppression (see §67(7)). Mr Ho said he had suggested 32% because his accountants (presumably he meant French Duncan) had previously suggested that in

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[8] *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

[9] *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

[10] *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, at 296.

[11] *Bi-Flex Caribbean v The Board of Inland Revenue* [1990] 63 TC 515, at 522.

his 'line of business' the gross profit margin should be around 70%. Mr Ho had rejected French Duncan's suggestion that his rate of suppression could be as high as 50% and proposed the lower 32% as the representative level of suppression.

99. We consider the reasonableness of Mr Ho's proposed rate of 32% in accordance with his own explanation. We conclude that the rate of 32% is credible to deliver a gross profit of 70% comparable to the sector average, as illustrated by applying the following re-calculation to the figures as declared (see the table at §16) for the two years 2007-08 and 2008-09 (loss-making per SA returns).

(1) Gross profit = Turnover minus Costs of Sales ('CoS' being the direct food costs to make the sales); margin is gross profit as a percentage of turnover.

(2) SA return for 2007-08, declared turnover was £68,741; gross profit was £39,414; margin was 57.3% (see §16).

(3) Costs of sales for 2007-08 was £29,327, being £68,741 minus £39,414.

(4) If the suppression rate was 32%, the declared turnover represented 68% of the actual turnover; £68,741 multiplied by the fraction 100/68 gives the turnover at 100%; that is £101,089.

(5) Gross profit on the revised turnover = £101,089 minus £29,327 = £71,764.

(6) Uplifted profit margin revised to 70.98%, being £71,762 over £101,089.

(7) For 2008-09, the same calculation when applied to the declared figures for turnover of £68,940 and gross profit of £37,853 (with costs of sales being the difference i.e. £31,087) gives an uplifted turnover of £101,382, and a gross profit of £70,297. The revised profit margin is then at 69.33%.

100. When the same re-calculation is applied to the years 2009-10 and 2010-11, (which were not loss-making per the SA returns submitted), the results are:

(1) For 2009-10, costs of sales = £33,817, (being turnover of £73,032 minus gross profit of £39,215 per return); uplift turnover by 32% = £107,400; revised gross profit = £73,583; revised profit margin is 68.5% of the uplifted turnover.

(2) For 2010-11, costs of sales = £33,122, (being turnover of £78,224 minus gross profit of £45,102 per return); uplift turnover by 32% = £115,035; revised gross profit = £81,903; revised profit margin is 71.19% of the uplifted turnover.

101. In the present case, HMRC have taken into account the material disclosed by Mr Ho to his advisers during HMRC's enquiries, albeit that the appellant later sought to renege on the substance of those disclosures. The appellant had also been given the opportunity to provide substantive evidence under the COP9 procedure, and by the service of the Sch 36 Information Notice. Nothing has been produced to suggest an alternative basis for HMRC to quantify the extent of the loss of tax. In these circumstances, Officer Atabu could only rely on the disclosures made earlier by Mr Ho, and by carrying out means test to ascertain the reasonableness of the 32% as the suppression rate. The inferences drawn by Officer Atabu were fair, and the conclusions he reached were reasonable.

102. The proposed 32% rate of suppression was adopted by HMRC to re-calculate the profits for the relevant years. Mr Ho emphasised that the 32% was a guess. On reviewing the reasonableness of 32% as the rate of suppression in accordance with Mr Ho's own explanation, it appears to us that there is a remarkable consistency in bringing the profit margin of Mr Ho's business to the sector average for those years when Mr Ho was trading throughout the year (and not just part of the year).

103. Notwithstanding the fact that Mr Ho said that the proposed rate of 32% is a guess, in the present circumstances where primary records were absent or inadequate to ascertain the true extent of suppression, the proposed rate provides the only reasonable basis for the assessments to be raised. Consequently, we uphold the quantum of all assessments in full.

Whether all penalties to be confirmed

104. The question of 'negligence' is relevant to the purposes of imposing a penalty under s 95 TMA. The test for negligence as formulated in *Anderson v HMRC*[12] is to consider 'what a reasonable taxpayer, exercising due diligence in the completion and submission of the return, would have done'. The question of whether the conduct leading to the loss of tax was 'deliberate' is relevant to the imposition of Sch 24 FA 2007 penalties, and for setting the time limit to 20 years within which discovery assessments could be made.

105. From the disclosures made by Mr Ho at the meetings with French Duncan in July 2012, it is apparent that he had the oversight of the record keeping and banking for his business. He drew money direct from the sales receipts; he had knowledge that his brother and wife were paid wages out of the sales receipts; he paid (or allowed the routine practice) of paying suppliers direct from sales receipts; he would have oversight of the amounts of cash to be deposited into the business bank account to cover all standing orders and direct debits. From these disclosures, it is clear that Mr Ho was actively and closely involved in the day-to-day running of his business.

106. Furthermore, we do not accept that Ho's disclosures or his admission to have suppressed sales were made under duress from French Duncan. French Duncan is a professional firm of accountants; Mr Ho had paid £1,500 and £4,200 for their services in relation to the VAT and s 9A enquiries. He had not taken any legal action against French Duncan for acting improperly in advising him. From the notes of meetings, French Duncan was discharging their professional duty in advising Ho as a client that the best course of action was to make a full disclosure. French Duncan cast doubts on the completeness of the initial disclosures; that the extent of suppression was not credible; Mr Ho was encouraged to tell the whole truth; the discussions between French Duncan and Ho culminated in the proposed sales suppression rate of 32%.

107. It is immaterial to our consideration whether Ho might have felt that he had been threatened into making further and more detailed disclosures after his initial meeting with French Duncan on 3 July 2012. His personal perception of why he

[12] *Anderson v HMRC* [2009] UKFTT 206, at [22].

came to disclose certain facts makes no difference to the validity of those disclosures as the basis for the penalties to be imposed. The admission of having suppressed sales, of itself, formed the basis for the relevant penalties to be imposed: Mr Ho had been 'negligent' (in terms of s 95 TMA) and 'deliberate' (in terms of Sch 24 FA 2007) in causing incorrect returns to be delivered to HMRC for self-assessment purposes.

108. The tax fraud in this appeal involved a continuous course of conduct stretching over some 7 years, by a taxpayer who had been handed a running business formerly operated by his mother. Mr Ho did not seem to us a novice in the trade; he knew he was suppressing sales; he knew the accounts furnished to French Duncan for SA filing were incorrect; he sought to manipulate the profit level to make the accounts look more credible. The culpability of his behaviour has been categorised correctly according to the relevant legislation in imposing the penalties. Against the context of an operating business that he had taken over, and the extent of the tax fraud by a taxpayer who had access to the services of professional advisers, the mitigation given by HMRC is fair and reasonable. There is no justification for the Tribunal to reduce the penalty percentages further, either under s 95 TMA or Sch 24 FA 2007.

Decision

109. The closure notice under s 28A TMA and the assessments under s 29 TMA, for the years 2006-07 to 2011-12 inclusive, stand good; all amounts are confirmed in full.

110. All penalties imposed, under s 95 TMA and Sch 24 FA 2007 are likewise confirmed in full.

111. The appeal is accordingly dismissed.

112. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 31 MAY 2019