



[2020] UKFTT 00143 (TC)

TC07636

VAT – assessment under s73(1) VAT Act 1994 – whether best judgment assessment – elements of judgment missing – wholly unreasonable assessment – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/05804

BETWEEN

FW SERVICES LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MISS SUSAN STOTT**

**Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street,
Belfast, BT1 3JF on Thursday 20 February 2020 at 10:30 AM**

Michael Forde BL for the Appellant instructed by Tiernans Solicitors

**Ms Siobhan Brown, litigator of HM Revenue and Customs' Solicitor's Office, for the
Respondents**

DECISION

INTRODUCTION

1. This was an appeal by FW Services Ltd (the Company) against assessments made pursuant to s73 Value Added Tax Act 1994 (VAT Act 1994) for the periods 08/15 to 10/17 totalling £686,054.00. The assessments were issued by HMRC on 6 June 2018 and were in respect of under-declared fuel sales.

2. By email dated 8 June 2018 the Company's accountant, Adrian Patterson of BHP Accountants Ltd, informed HMRC that the Company disagreed with the decision and were going to appeal it. HMRC informed the accountants by letter dated 5 July 2018 that they would carry out a review within 45 days of 19 June and requested any additional evidence within 10 days.

3. By letter dated 1 August 2018 the Company's solicitors, Tiernans, informed HMRC's Review Team that they wished to present additional evidence but that this would not be possible within the 45 day review period.

4. HMRC's Reviews and Litigation wrote to the Company on 2 August 2018 advising that they considered the decision to issue the assessments totalling £686,054.00 on 6 June 2018 was correct and should be upheld.

5. The Company appealed to this Tribunal by Notice of appeal dated 29 August 2018 on the following grounds:

“The Company denies that it owes any VAT to HMRC and denies that they underdeclared sales. The Returns made to HMRC for the periods 08/15 through to 10/17 by the Company are accurate and represent the true trading figures. The assessment is grossly inaccurate and is baseless.”

EVIDENCE ON BEHALF OF THE COMPANY

6. Mr Adrian Patterson, the Company's accountant had submitted a short statement dated 31 July 2019. Mr Patterson when giving his oral evidence to the Tribunal confirmed that he did not wish to change anything in his written statement and that everything stated therein was true and correct. In his written statement, after giving his qualifications, he said he had examined the Company's records and had prepared the accounts for the year ended 30 June 2017. He also prepared the Company's VAT returns. The accounts included in the bundle of documents before the Tribunal showed the Company had a gross turnover for the year ended 30 June 2017 of £1,551,556 and for the year ended 30 June 2016 a gross turnover of £1,262,947. The operating profit was £54,005 for 2017 and £22,727 for 2016.

7. Mr Patterson had prepared a schedule of all purchases of both diesel and unleaded petrol which was also included in the Tribunal's bundle. These schedules showed the ratio of unleaded petrol sales to diesel sales for the period 1 August 2015 to 31 December 2016 as 43.26% unleaded and 56.74% diesel.

8. Mr Patterson confirmed that the Company had provided him with any material which he had requested and that the Company's accounts were a true reflection of the material which he had reviewed. His dealings with the Company had not raised any suspicion of under declaring of fuel sales and having examined the systems in place for the sales and recording of fuels he did not see how any such under declaration could have been achieved without the co-operation of a cash paying general public and the willing participation of all staff at the service station.

9. Mr Fergal Woods also gave a written statement and gave oral evidence. Mr Woods is the sole director of the Company which operates the service station known as Trummery. As well as being a director of the Company he is also a mushroom contractor. Mr Woods maintained that extrapolating figures from the invigilation by HMRC of a constant sale of 350 litres per hour Monday to Saturday and 175 litres per hour on Sunday did not reflect the ebb and flow of trade. When HMRC had examined the recording of sales at the pumps they had found the sales were accurately reflected in the sales at the tills.

10. Mr Woods claimed that if HMRC's calculation of under declared diesel sales at 60% was correct, all such sales would have to have been in cash. This would require the assistance of the general public to purchase their fuel in cash. In his experience the use of debit/credit cards for the payment of goods and services has overtaken cash as a means of payment.

11. Mr Woods further claimed that the ratio of diesel sales to unleaded petrol sales claimed by HMRC was not supported by any statistical evidence. In his written statement he referred to Department for Transport statistics for 2016 which showed that petrol driven cars accounted for 59.7% and diesel driven cars accounted for 39.1%. The Tribunal noted that the actual figures for the United Kingdom were 59.2% and 39.6%.

12. Mr Woods had produced to HMRC copies of invoices for the purchase of fuel between October 2015 and December 2016. These were all from one company – Coole Fuels Ltd. During this period the Company purchased a total of 513,000 litres of diesel and 632,000 litres of petrol – a ratio of 44.8% diesel and 55.2% petrol.

13. In his oral evidence to the Tribunal Mr Woods explained that although he lived about 45 minutes from Trummery his mushroom business was located only about 10 minutes away. He did not visit Trummery every day but relied on his staff of which there were four. The staff worked in shifts – from 06:30 to 14:00 and from 14:00 to 21:00. There is usually only one member of staff on duty except around the changeover at 14:00. He confirmed there was an ATM on site so customers could obtain cash if they wished.

14. On being cross-examined by Ms Brown he confirmed that his pricing policy was to add a margin of between two pence and eight pence per litre over the purchase price. He explained that when a customer started to use a pump this was authorised by the member of staff on duty and upon completion the sale was registered at the till. There were two tills – one for fuel and one for groceries though they were both in the same till.

15. Mr Woods confirmed that he had had fuel seized on more than one occasion. He also explained that the locks on the fuel tanks were not in fact in operation and anyone could gain access. The locks were only there to act as a visual deterrent. He was unable to explain the lack of dip sticks as required by HMRC. He thought they were in fact in place.

16. Finally Mr Woods confirmed that all his employees earned the minimum hourly wage.

17. The last witness for the Company was Mr Noel McGeown who had submitted a written statement and also gave oral evidence. He confirmed that throughout his time working at Trummery since October 2015 all sales of fuel had been recorded and declared. He had been present on 17 January 2017 when HMRC had carried out oversight of the fuel sales and that the system for the sales and recording of fuel sales as occurred for the duration of the visit was precisely the same system at all times.

18. Mr McGeown confirmed that he had never received any direction from anyone and in particular his employer not to log sales in the tills or not to record or declare cash sales. His statement continued that no other employee had ever made any such comment or complaint to him in that regard.

19. On cross-examination by Ms Brown Mr McGeown stated that he had only seen fuel being delivered once or twice. He confirmed that when there was an excess of £200.00 cash in the till, the staff do a cash drop down a shoot beneath the counter into the safe. When someone finishes their shift they take the cash drawer up to the upstairs office, count the cash, leave £102.00 in the till and place the rest in a bag. An end of shift report is prepared with cash details. Mr Woods comes every other day and takes the cash away.

20. Ms Jade Megaw also made a written statement. She was unable to attend the hearing as she had recently given birth to a child. Her statement was in identical terms to that of Mr McGeown except that she had started to work at Trummery in January 2016.

EVIDENCE ON BEHALF OF HMRC

21. The first witness called by Ms Brown was Peter Cunningham, a VAT assurance officer with HMRC. He had written to the Company and their accountant on 11 April 2016 confirming his intention to conduct a VAT audit. On Tuesday 19 April 2016 he visited the Trummery premises and met with Mr Woods and Mr Patterson. He requested and was supplied with a copy of the fuel sales report from when Trummery opened on 19 April 2016 which confirmed that for the period from 06:30 to 11:40 a total of 1,861 litres of diesel had been sold which represented 79.2% of all fuel sales and 489 litres of unleaded petrol had been sold or 20.8% with an average sale of diesel of 360 litres per hour. He was given a copy of the sales for the previous day which confirmed 1,335 litres of diesel and 1,796 litres of unleaded had been sold for the period 06:30 to 21:00. This represented 42.6% diesel and 57.4% unleaded. Mr Cunningham stated that these percentages were not in line with the trend expected relating to fuel sales in Northern Ireland.

22. On Thursday 9 June 2016 Mr Cunningham accompanied by Officer Daly made an unannounced visit to Trummery and was given the sales printout for 8 June 2016 which showed 40.6% sales were diesel and 59.4% were unleaded. The figures represented an average throughput of 98.2 litres of diesel per hour. He was also given a printout of fuel sales for the morning of 9 June 2016 from 06:30 to 12:20 which confirmed 63.5% diesel sales and 36.2% unleaded. The diesel figures showed an average throughput of 205.37 litres per hour.

23. During the unannounced visit Mr Cunningham and Officer Davy carried out an invigilation of fuel sold between 10:35 and 14:35. This invigilation showed 81.2% of sales were diesel and 18.8% were unleaded with an average sale of diesel of 364.3 litres of diesel per hour.

24. Mr Cunningham carried out a further unannounced visit accompanied by Officer Daly on Thursday 16 June 2016 during which visit he established that during the period 06:30 to 07:50 on 16 June 2016 diesel sales accounted for 60.1% of sales with unleaded representing 39.9% and the average throughput of diesel at 107.51 litres per hour. The invigilation from 07:55 to 12:55 showed that sales were 74.6% diesel and 25.4% unleaded with the average diesel sale of 270 litres per hour.

25. A further unannounced visit was carried out by Mr Cunningham accompanied by Officer Daly on 28 June 2016. The Company's records showed that on 27 June 2016 diesel sales accounted for 45.88% and unleaded accounted for 54.12% with an average of 89.7 litres of diesel per hour. A printout for the period 06:30 to 13:35 showed diesel accounting for 50.5% and unleaded accounting for 49.5% with the average hourly sales of diesel being 108.78 litres. During the invigilation from 12:45 to 17:45 82.8% of diesel and 17.2% of unleaded were recorded with an average of 409 litres of diesel per hour.

26. In his statement Mr Cunningham indicated that as a result of the information provided by the Company and the invigilations he established that the average throughput of diesel was 360 litres per hour. He then calculated the declared diesel sales to the average throughput and where the declared sales figures were less than expected he deemed the shortfall was attributable to undeclared fuel sales. He calculated the total tax due in respect of undeclared sales amounted to £661,310.00. He had passed all the information obtained to Officer Bingham.

27. On being cross-examined by Mr Forde he informed the Tribunal that he was part of a team. While he conducted the investigation it had been for his manager to consider whether the three visits were sufficient. He explained that two consecutive Thursdays had been chosen (9 and 16 June) for visits as this was down to when they could be conducted and confirmed that his contract of employment restricted the hours during which he could carry out the visits.

28. When asked about his knowledge of Northern Ireland average fuel sales Mr Cunningham stated that he knew of one Belfast retailer which sold 65% diesel and 35% unleaded. He confirmed some retailers sold less than 60% diesel. He also confirmed that he did not speak to the supplier – Coole Fuels Ltd – as this was not HMRC’s normal practice. He also confirmed that he had looked at the Company’s bank statements which reflected the fuel purchased and did not give him any concern.

29. Mr Cunningham confirmed that Mr Woods had been on site some of the time and had been co-operative. He did not notice any till tampering. He agreed that an under-declaration of sales would require a significant manipulation of the cash though it was not impossible to also manipulate figures through card sales. He saw no evidence of a separate bank account and he saw no evidence of the pumps being tampered with.

30. Finally Mr Cunningham informed the Tribunal that the Department for Transport figures for diesel and unleaded registered vehicles related only to cars (referred to in paragraph 11 above). They did not include vans and lorries the vast majority of which were diesel. However during his visits he did not note the ratio of diesel cars to vans and lorries.

31. Mr Harold Kenneway then gave evidence in amplification of his written statement. He was an officer on HMRC’s Road Fuel Testing Unit (RFTU) and as such had made several visits to Trummery. On Wednesday 11 January 2017 accompanied by six other officers from RFTU, though not Officer Daly, he visited Trummery. His aide memoire of the visit elicited the information from Ms Jade Megaw and Mr Noel McGeown that deliveries of fuel were usually before the first shift at 06:30. From their invigilation he identified that sales of diesel accounted for 75% and unleaded sales accounted for 19% during the period 14:02 to 15:00. During this hour the total fuel sales amounted to £585.91 and multiplying this by the 97 hours that the station was open resulted in weekly fuel sales of £56,833.27.

32. Mr Kenneway’s aide memoire concluded that these results were roughly in line with filling station fuel sales in general. However sales of fuel as a percentage of total fuel sales sold in the three months October, November and December showed diesel at 45% and unleaded at 55%. For the month of December the purchase invoices showed a total of 37,500 litres of diesel was purchased but 45,509 litres were recorded as being sold. His aide memoire stated that there was a similar situation for petrol purchases and sales but overall the stock records supplied satisfied the supply. In total the visit on 11 January 2017 lasted for one hour 20 minutes from 13:55 to 15:15.

33. On Friday 3 March 2017 Mr Kenneway accompanied by three other officers from RFTU attended at Trummery from 09:30 to 10:50. He met with Eimear Woods, the sister of Feargal Woods to whom he spoke by telephone. Mr Woods informed Mr Kenneway that it would be over two hours before he could attend at Trummery but Mr Kenneway said he could not wait

that long. Mr Woods also informed Mr Kenneway that there were delivery dockets from Kelly Fuels in Belfast.

34. Finally Mr Kenneway noted that Trummery was extremely busy as they were having a promotional weekend. He noted that diesel and unleaded were being advertised for sale at 109.9 pence while other stations were selling diesel at 122.9 pence.

35. On Thursday 22 June 2017 Mr Kenneway accompanied by three officers from RFTU made another visit to the Trummery service station and again met with Jade Megaw. He noted the advertised selling price of diesel was 110.9 pence and unleaded petrol, 112.7 pence while another filling station on the same road half a mile away was selling diesel at 114 pence and unleaded at 116 pence. Ms Megaw gave Mr Kenneway details for the sales that morning from 06:30 to 11:00 which showed diesel sales accounting for 79% of sales and unleaded accounting for 21%. However RTFU officers carried out an invigilation for the period 19:25 to 12:03 which produced diesel sales at 92% and unleaded petrol at only 8%.

36. Ms Megaw gave Mr Kenneway supply invoices from Kelly Fuels covering the period 20 March 2017 to 16 June 2017. An analysis of these sales showed diesel as 47.65% of sales and unleaded as 52.35%. In addition there were purchases of 110,636 litres of red diesel and he thought this volume was very high and could signify that it is being sold illegally as road fuel.

37. Ms Megaw informed Mr Kenneway that she could not remember the name of the delivery driver but it was always either the same driver or Mr Woods. According to Mr Kenneway's note of the visit she said that all fuel was delivered by Woods Fuels Ltd which company has the same VAT registration number as Trummery Service Station. The delivery lorry's registration number was HHZ 8818 which lorry is owned by Mr Woods.

38. During Mr Kenneway's three visits his team were unable to obtain satisfactory dip readings of the fuel tanks as dip sticks were either not available or were calibrated for the wrong size of tank.

39. Mr George Bingham had provided a written statement and also gave oral evidence to the Tribunal. He is employed by HMRC as a VAT assurance officer and had prepared a schedule covering the five periods of invigilation. He met with Mr Woods and Mr Patterson on 13 December 2017 and afterwards forwarded a schedule detailing the split of sales between diesel and unleaded. After Mr Patterson had supplied further information Mr Bingham updated his schedule to include sales in March 2016. In the period 1 July 2015 to 31 March 2016 the total fuel sales amounted to £688,558.00 and the total declared sales amounted to £968,569.00 resulting in a fuel sales being a percentage of 71.9% of gross sales.

40. In his statement Mr Bingham explained that in order to calculate the amount of under-declared fuel sales he used the basis of 350 litres per hour from Monday to Saturday and 175 litres per hour on Sunday. As a result he calculated the income expected from fuel sales was £1,518,379.00 while the declared fuel income was £607,490.00. As a result only 40% of actual fuel sales had been declared. For any periods for which he did not have sales information he calculated the value of declared fuel sales as 71.9% of gross sales and the value of fuel under-declared as 40% of actual sales. He then applied the VAT fraction of 1/6th to calculate the VAT due on the under-declared sales. The outcome was that he sent the Company on 6 June a letter stating that as a result of his assessments the total under-declared Vat amounted to £686,054.00.

THE LEGISLATION

41. Section 73 of the Value Added Tax Act 1974 (VAT Act 1974) includes the following:

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.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

(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.

42. Section 77 of VAT Act 1974 contains provisions about time limits for issuing assessments by HMRC. Mr Forde did not take any issue on the time taken by HMRC to issue the amended assessment which was well within the time limits specified in the act.

43. Section 84(5) of the VAT Act 1974 states:

(5) Where, on an appeal against a decision with respect to any of the matters mentioned in section 83(1)(p) or (rb) —

(a) it is found that the amount specified in the assessment is less than it ought to have been, and

(b) the tribunal gives a direction specifying the correct amount,

the assessment shall have effect as an assessment of the amount specified in the direction, and that amount shall be deemed to have been notified to the appellant.

CASE LAW

44. Both Mr Forde and Ms Brown referred the Tribunal to Mr Justice Woolf's judgment in *Van Boeckel v Customs & Excise Commissioners* [1981] STC 290 where at page 292 he said:

“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.”

45. Mr Justice Woolf dismissed the taxpayer’s appeal as on balance HMRC had made the assessment to the best of their judgment.

46. Mr Forde referred the Tribunal to the judgment of Mr Justice Carnwath in *Rahman (t/a Khayam Restaurant) v Customs & Excise Commissioners* [1998] EWHC Admin 627 where at paragraph 25 he said:

“I have referred to the judgment [in Van Boeckel] in some detail, because there are dangers in taking Woolf J's analysis of the concept of "best judgment" out of context. The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree 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 are missing"; or is "wholly unreasonable". In substance those tests are indistinguishable from the familiar *Wednesbury* principles ([1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment.

47. Mr Justice Carnwath continued at paragraph 28:

“Once the grounds for making an assessment are established, then the Tribunal's primary function is to examine the amount. Since the assessment is the starting point for that exercise, the Tribunal will need to consider whether the judgment made by the Commissioners was sound or not. If it is shown to have been wholly unreasonable or not bona fide, there would be sufficient grounds for setting the assessment aside, because it would not be fair for the taxpayer to be required to answer a case which had been formulated in that way. However, that kind of case is likely to be extremely rare. In the normal case, it should be assumed that the Commissioners have made an honest and genuine attempt to reach a fair assessment. The debate before the Tribunal should be concentrated on seeing whether the amount of the assessment should be sustained in the light of the material then available.”

48. Mr Justice Carnwath allowed the taxpayer’s appeal as the tribunal had decided HMRC had used its best judgment only on the casting vote of the chairman and remitted the case for a rehearing before a differently constituted tribunal.

49. In *Rahman v Customs & Excise Commissioners (No 2)* [2002] EWCA Civ 1881 Lord Justice Chadwick stated at paragraph 45:

“It is in cases where the amount of tax found by the tribunal to be properly due is substantially different from the amount assessed by the commissioners that the tribunal may think it appropriate to investigate why there is that difference; and to seek an explanation. That investigation may – but, often (as in the present case) will not – lead to the conclusion that the commissioners did not exercise best judgment in making their assessment. The tribunal may take the view, in such cases, that the proper course is to discharge the assessment. But even in cases of that nature, as it seems to me, the tribunal could choose to give a direction specifying the correct amount – with the consequence that the assessment would have effect pursuant to section 84(5) of the 1994 Act. It could not be criticised for doing so. The underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax.”

50. The Court of Appeal dismissed the taxpayer's appeal even though the tribunal had described HMRC's calculation as 'rough and ready.' The tribunal had accepted that HMRC had made a mistake for which there was an innocent explanation. The fact that a different methodology would or might have led to a different result did not compel the conclusion that the methodology that had been adopted was so obviously flawed it could or should have had no place in an exercise in best judgment.

51. Mr Forde also referred the Tribunal to the judgment of Lord Justice Carnwath in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015 where at paragraph 38 he said:

"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. "

52. The Court of Appeal dismissed the taxpayer's appeal as in the absence of a finding that there had been no honest and genuine attempt to arrive at a reasoned assessment, HMRC had used its best judgment. The Court remitted the matter to the same tribunal for the determination of quantum.

53. In the First-tier Tax Chamber decision of *Thomas O'Rourke t/a Southgates UK* [2018] UKFTT 70 (TC) Judge Anne Fairpo said:

"36. Although we accept that HMRC were working with limited information we find that they considered only one aspect of that information and did not demonstrate whether that one aspect was supported by other information which they stated that they had in their possession. Whilst it is not up to HMRC to carry out exhaustive investigations in order to establish upon which to base an accurate assessment, they should not ignore material in their possession in determining whether their assessment is reasonable.

37. We find, therefore that HMRC's assessment was not made to best judgment; HMRC selected a particular entry from each of the accounts on which to base their assessment and did not use other material in their possession to confirm whether or not it was reasonable to base the assessment on that accounts entry.

38. We have borne in mind the caution in *Pegasus Birds* but consider that, in this case, HMRC have simply guessed that the losses in the accounts must be under-declared sales. Whilst some element of guess-work is inevitable in assessments, we consider that HMRC must, in exercising best judgment, use any other information available to them to consider whether that information supports that element of guess-work. They have not done so in this case and for the reasons set out above, the assessments to VAT are not to best judgement and so cannot stand as they are.”

54. Judge Fairpo allowed the appellant’s appeal but directed HMRC to consider whether, in the light of the evidence produced at the hearing, a new VAT assessment should be issued and in the absence of agreement between the parties the matter should be brought back before the Tribunal for determination.

55. In the First-tier Tribunal decision of *Golden Cube Limited v The Commissioners for Her Majesty’s Revenue and Customs* TC/2016/05440 Judge Jonathan Cannan stated at paragraph 4:

“4. In the light of *Pegasus Birds*, the principal issue on the appeal therefore is whether the Assessment is excessive. The burden is on the appellant to satisfy me on the balance of probabilities that the Assessment is excessive. The appellant contends that standard-rated and zero-rated supplies have been properly identified and output tax correctly accounted for. Mr Watson submits that the Assessment should therefore be reduced to nil. Mr Gareth Hilton who appears for the Respondents seeks to maintain the Assessment.

56. And at paragraph 32 he said:

“32. Mr Hilton for HMRC accepted that there may be three reasons for differences in the proportions of standard-rated sales between the invigilation days and the previous returns:

- (1) Deliberate manipulation of the records.
- (2) Mistakes in the recording of standard rated sales, either in the till entries, in the till programming or in the transfer of figures from the till records to the returns.
- (3) The three days of invigilation are not representative of the previous periods.

57. Judge Cannan allowed the appeal by the taxpayer being satisfied that the assessment was excessive and that there was no understatement of standard-rated sales by the Appellant.

58. In the First-tier Tribunal decision of *Sital Khimji* [2020] UKFTT 22 (TC) Judge Gething in allowing the Appellant’s appeal said at paragraph 15:

“15. We consider the assessment made by the Officer in this case cannot be regarded as a best judgment assessment which according to Woolf J in *Van Boekel* is one which requires an "*honest bona fide judgment by the Commissioners on the material before them of the amount of tax due*" and that the "*Commissioners will fairly consider all material placed before them and, on that material, come to a conclusion which is reasonable and not arbitrary as to the amount of tax which is due*". In a case such as this in our opinion would require the commissioners to take into account the nature of the Appellant's business, the known facts about the trading conditions including the date of commencement, the existence of any competitors, the split between standard and zero rated supplies, the split between card and cash sales and any other special factors brought out in the enquiry. A blanket approach can never be a best judgment assessment.”

59. Finally in *Wei Xian Peng and Qian Hong Peng t/a Zhu Guang Restaurant v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 0177 (TC) Judge Gething again sitting in the First-tier Tribunal made the following observations:

“32. The Appellants consider that the assessments cannot be best judgment assessments, because although there may have been grounds of suspicion of suppression there has been no reliable evidence of suppression, and rely on the case of *Hamid Forati & Patricia Forati (trading as Emilio's) v HMRC* [2001] FTT at [34] and [35] and invite the Tribunal to discharge the assessments in full.

33. In *Forati*, at [34] the Tribunal accepted that the officer of HMRC had grounds for suspicion of deliberate suppression of turnover. There was an admitted history of poor record keeping and consequential under declarations. The officer acted in good faith in observing the restaurant, carrying out those observations and subsequent calculation. The burden is on the appellant to show the Tribunal that the observations cannot stand. Tribunal found that the Appellants had discharged the burden. Judge Bishopp said at [35]:

" For the reasons we have already given, we cannot accept that the records of observation have the degree of reliability properly to be expected if they are to form the basis of an assessment. On the contrary, we have real doubts whether what the officers observed was accurately recorded. The limited or even sketchy amount of information the logs contained, the heavy reliance of memory to determine whether callers had remained on the premises for a long or short period, the absence of any annotations regarding staff members and the fact that the officers were simultaneously observing another restaurant, all give rise to significant misgivings about the reliability of the records. ... This is not a case in which we are satisfied that there was suppression, but of a lesser amount than that assessed, and in which we should endeavour to determine the correct amount ourselves. Rather we are satisfied that there is no reliable evidence of any suppression."

34. The totality of the HMRC's case involves:

- (1) A comparison of the card to cash ratio of sales on a very small sample of days with the same ratio in a prior period, and
- (2) Their own imperfect observations whilst dining in the restaurant.

35. The changed ratio is not evidence of anything other than sales ratios change. It is not evidence of suppression. To treat that as a basis to assess over £87,000 of under-declared VAT is absurd and would result, if taken to its ultimate conclusion, in every business with varying sales, to be guilty of suppression.

60. Judge Gething allowed the taxpayer's appeal in part after applying the *Wednesbury* reasonableness test to the best judgment assessment.

DISCUSSION

61. While the Tribunal had the benefit of having received skeleton arguments from both parties before the hearing we were only given the bundle of documents at the start of the hearing. We therefore had no time to study all 498 pages. During the evidence given by Mr Kenneway no reference was made to the invoices from Kelly Fuels referred to in paragraph 36 above or to the invoices from Woods Fuels Ltd referred to in paragraph 37 above. No copies of any of these invoices were in the bundle.

62. In his evidence Mr Bingham stated that he had calculated the under-declaration by assuming that there were sales of 350 litres of diesel per hour on each day from Monday to Saturday yet the filling station is only open for twelve and a half hours on Saturdays. His

calculations therefore immediately gave rise to an error even if his other assumptions were correct.

63. The filling station has four pumps. According to Mr Bingham's calculations the volume of diesel sold per hour was as follows:

9 June 2016	364.2500 litres per hour based on four hours' invigilation
16 June 2016	270.0000 litres per hour bases on four hours' 55 minutes invigilation
28 June 2016	409.1860 litres per hour based on five hours' invigilation
11 January 2017	375.2000 litres per hour based on 58 minutes' invigilation
22 June 2017	528.6563 litres per hour based on one hour 38 minutes' invigilation

64. Four of the five invigilations were carried out during the morning with only one in the afternoon. Three of the invigilations were carried out on the same day of the week – Thursday (9 and 16 June 2016 and 22 June 2017). No invigilations were carried out at the weekend. A total of 16 hours and 31 minutes was spent invigilating. The filling station was open for a total of 97 hours each week. It is situated on the main road from the city of Lisburn to the town of Moira relatively close to a junction with the M1 motorway.

65. HMRC's tax assessment of £686,054.00 implies sales of diesel totalling £4,116,324.00 over the assessed quarters 08/15 to 10/17 – a period of 29 months or 792 days. This would require the Company to receive an average of £5,197.38 every day in cash in addition to the declared takings.

DECISION

66. HMRC produced no evidence and made no claim that the Company operated any other bank accounts other than the Santander bank account and Bank of Ireland debit/credit card account included in the papers before the Tribunal. Mr Cunningham stated that he had seen no evidence of a separate bank account and had not seen any evidence of the pumps being tampered with

67. Mr Bingham did not explain why he calculated the average undeclared volume of diesel sales on the same basis for weekdays and Saturdays even though the filling station opens for a shorter period on Saturdays. Nor did he explain why he estimated Sunday sales were exactly half of weekday sales.

68. While the three witnesses for HMRC all indicated their contracts of employment did not allow them to work in the evenings or at weekends, this does not mean that HMRC can simply rely on their observations made during their permitted working hours. There was no evidence before the Tribunal in relation to evening and weekend sales.

69. Mr McGeown both in his oral testimony to the Tribunal and in his written statement confirmed that nobody had directed him not to log sales in the tills or not to record or declare cash sales. This was confirmed by Ms Megaw in her written statement though Ms Brown did state that HMRC did not accept her witness statement as she was not present to be cross-examined.

70. We note Mr Justice Carnwath in *Rahman* states that it is necessary for this Tribunal to find that HMRC's assessment is a "spurious estimate or guess in which all elements of judgment are missing; or is wholly unreasonable." As HMRC had no evidence for the volume of diesel sales during the evenings and at weekends we find that an important element of Mr Bingham's calculations was missing. This is not to criticise Mr Bingham – he could only work on the figures that he was given.

71. We follow Judge Cannan’s example in his *Golden Cube* decision that “the principal issue on the appeal therefore is whether the Assessment is excessive.” In the absence of any evidence that the Company’s receipts averaged an additional amount of almost £5,200.00 per day we have come to the conclusion that the assessment is excessive.

72. As Ms Brown did not ask us to consider a lower assessment and in the absence of any means of calculating a “best judgment” assessment for the reasons outlined above we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. 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.

**ALASTAIR J RANKIN
TRIBUNAL JUDGE**

RELEASE DATE: 12 MARCH 2020