



Neutral citation number: [2022] UKFTT 326 (TC)
Case number: TC08587

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London Taylor House

Appeal reference: TC/2019/04045
TC/2019/04575
TC/2019/04573
TC/2019/04574

CORPORATION TAX – discovery assessment, VALUE ADDED TAX – best judgment assessment – in each case whether suppressed cash sales – yes – PENALTIES – whether due and attributable to the deliberate conduct of the director – yes – appeal REFUSED

**Heard on: 11th and 12th August 2022
Judgment date: 05th September 2022**

Before

**TRIBUNAL JUDGE AMANDA BROWN QC
MR DEREK ROBERTSON**

Between

**YUMMY YUMMY TAKEAWAY LIMITED
PAUL DONALDSON**

Appellant

and

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

Representation:

For the Appellant: Mr Donaldson

For the Respondents: Mr Asuelimen, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal in respect of the following decisions of HM Revenue & Customs (**HMRC**):

(1) Discovery assessments issued in respect of corporation tax said to have been inaccurately returned by Yummy Yummy Takeaway Limited (**Yummy**) in respect of accounting periods ended 28 February 2015 in the sum of £14,729.31), 2016 (in the sum of (17,923.57) and 2017 (in the sum of £17,668.81);

(2) Associated inaccuracy penalties for each year issued on the basis that the inaccuracies were deliberate but not concealed and promoted. In respect of which a 45% mitigation was permitted.

(3) Best judgment assessments to value added tax under recorded by Yummy for VAT for prescribed accounting periods 06/14 – 12/16 (in the sum of £34,806.00).

(4) Associated inaccuracy penalties for each period issued on the basis that the inaccuracies were deliberate but not concealed and promoted. In respect of which a 45% mitigation was permitted.

(5) Personal liability notices issued to Mr Paul Donaldson (**PD**) in respect of each of the penalties referenced at (2) and (4) above.

2. In this judgment, where appropriate Yummy and PD are collectively referred to as the Appellants.

3. There was no dispute between the parties as to the relevant law or legal principles to be applied in this case. The dispute centred on the Appellants challenge to HMRC's conclusion that cash sales were not fully recorded.

SUMMARY OF DECISION

4. There is evidence that cash sales were under recorded for both VAT and corporation tax purposes. On the days of the two unannounced visits cash sales were materially greater than on any other day. No reasoned explanation was provided by the Appellants for that discrepancy which, on the balance of probability, arose as a consequence of deliberate suppression of cash sales.

5. By reference to such unexplained discrepancy HMRC discovered that Yummy's corporation tax returns were inaccurate and otherwise met the test for discovery assessments to be issued. Similarly, HMRC were entitled to conclude that Yummy's VAT returns were incorrect. HMRC's decision to assess for both corporation tax and VAT was justified.

6. On the evidence the assessments are each marginally over-stated. The assessments should be recalculated on the basis that card sales represented 44% of total takings and not 43.68%.

7. The behaviours of Yummy which led to the inaccuracy in its corporation tax return and the rendering of incorrect VAT returns justifies the imposition of penalties on the basis that the errors were deliberate (but not concealed) and prompted.

8. On the evidence mitigation should have been permitted as to 0% for telling, 35% for helping, and 25% for giving.

9. It is appropriate to attribute the penalties to PD in accordance with the personal liability notice.

BACKGROUND

10. Yummy was incorporated on 30 July 2013 and traded as a Chinese takeaway food provider until 14 March 2017 from premises in Lewes. Shares in Yummy were held in equal proportions by PD and Ms Guohua Jiang. PD was a director of Yummy and was solely responsible for the running of the business. The premises was licenced for the sale of alcohol.

11. Yummy was selected for a compliance intervention in 2016 as part of a regional initiative. The Tribunal were told that covert test purchases were authorised. There was a dispute as to whether such test purchases were carried out and the voracity of the evidence obtained. This is considered below in paragraphs [39] to [45].

12. On Thursday 15 September, HMRC made an unannounced visit to Yummy's premises arriving at 10:35pm. PD was asked to perform his normal cashing up routine. The recorded sales for that evening were £770.40 with card sales representing 44% of total sales and cash sales the remaining 56%.

13. A further unannounced visit was carried out on Friday 25 November 2016. Again PD was requested to perform his normal cashing up routine. Recorded sales on this occasion were £1,531.00 with card sales representing 43.40% and cash sales 56.6%.

14. A further visit was made on Thursday 27 July 2017 to the premises from which Yummy had operated. By the time of this visit Yummy had ceased to trade. The premises continued to operate as a Chinese takeaway under the trading style of Yummy Yummy. The business was, at that time, operated by New Yummy Food Limited, a company the director of which was said to be a friend of Ms Jiang (though also with the name Jiang). HMRC officers observed the cashing up process and noted that recorded sales for the evening were £781.30 of which card transactions represented only 28.8% and cash 71.2%.

15. Yummy was required to produce their business records to HMRC. They were not initially provided voluntarily and HMRC therefore issued a notice requiring their production. Such records were provided pursuant to that notice. There is a dispute between the parties as to when such records were reviewed, or adequately reviewed, by HMRC which is dealt with below at paragraphs [54] to [57]. However, ultimately, HMRC produced a schedule of daily takings split between card and cash sales for the period 1 July 2016 to 31 December 2016. This schedule was accepted by the Appellants as an accurate distillation of his daily takings' records.

16. That schedule confirmed that there was a material discrepancy between the proportion of card transactions on 15 September 2016 and 25 November 2016 as compared to the other days in that period.

17. At a meeting on 7 September 2017, attended by PD, Yummy was given the opportunity to explain the discrepancy and to provide additional documents/records. PD considered that all relevant records had been provided. He contended that the higher takings for the two unannounced visits had been caused by the recent closure of both his competitors and, on 25 November 2016, as a consequence of a large group of teenagers who had been "in and out" that evening. No further documentation was provided by Yummy to explain the discrepancy.

18. HMRC did not consider that an adequate explanation had been provided for the discrepancies recorded and considered it more likely that the reason for higher cash sales on the two nights was that HMRC officers had observed cashing up and, as a consequence, PD did not have the opportunity to suppress the cash sales for those evenings.

19. Having so concluded, HMRC used data provided by Worldpay and grossed up the card sales assuming they represented 44% of total sales. The corporation tax discovery assessments were issued on 25 June 2018. Additional VAT due was calculated, consistently with Yummy

accounting for VAT under the fix rate scheme, by reference to the recalculated turnover were issued on 17 August 2018.

20. The penalty assessments were issued on 30 January 2019 in respect of the corporation tax errors and 1 February 2019 in respect of the VAT errors. In each case the maximum 70% penalty was mitigated by 45% by reference to a 25% (out of a maximum 40%) for helping HMRC to understand the error, and 20% (of a maximum 30%) for giving access to records, 0% (of a maximum of 30%) was given for telling HMRC about the errors.

21. The penalties were considered attributed to the conduct of PD and on 27 March 2019 HMRC issued a personal liability notice to him requiring payment by him of 100% of the penalties incurred by Yummy.

ISSUES

22. As indicated there is no dispute on the legal principles to be applied in determining the outcome of this case.

23. A discovery assessment may be issued by HMRC, pursuant to paragraph 41 Schedule 18 Finance Act 1998 where they discover that an amount which ought to have been assessed has not been assessed or an assessment has become insufficient in circumstances in which they have not opened an enquiry into the relevant tax return, provided that certain conditions are met. So far as relevant in this appeal those conditions are that the inaccuracy arose deliberately.

24. HMRC may raise discovery assessments at any time within 4 years after the end of the relevant accounting period. .

25. The burden of proof rests with HMRC to establish, on the balance of probabilities, that they made a discovery that the returned assessments were insufficient and that the error arose as a consequence of deliberate conduct. If HMRC establish a prima face case of inaccuracy it is for Yummy to show that there was no insufficiency or that the assessments are overstated.

26. In this appeal Yummy asserts that there is no insufficiency in the amounts assessed by way of their tax returns for the relevant years. There was no pleaded or articulated position that if it were determined that there was such an insufficiency that HMRC had not discovered it or that it was not brought about by way of a deliberately

27. For the discovery assessments therefore the only issue for determination is whether there was an insufficiency.

28. A VAT assessment may be made, pursuant to section 73 Value Added Taxes Act 1994, where HMRC become aware, within the relevant time limits, that the VAT returns rendered are incorrect. Where they become so aware their assessment must be made in exercise of their best judgment. By reference to the relevant case law acting in best judgment simply requires HMRC to act with bona fides and by reference to all of the information available to them, taking account of relevant information and without reference to irrelevant information. They need not do the work of the taxpayer in order to establish the true amount of tax simply reasonably base the calculations on the information available.

29. The burden of proof rests with the Appellant in respect of the VAT assessments. By reference to case law, establishing that assessments have not been raised in exercise of HMRC's best judgement, is a high hurdle. In essence an assessment will usually be raised in exercise of best judgement absent mal fides by HMRC. However, where a best judgement assessment shown, on the balance of probabilities, to be overstated the Tribunal may amend the assessment.

30. As with the corporation tax assessments Yummy asserts that the VAT returns were not incorrect. PD did, however, also attack the bona fides of HMRC in making the assessments.

31. Schedule 24 Finance Act 2007 provides that where HMRC establish that there an error has been identified un a document provided to HMRC including VAT and CT returns HMRC may assess for penalties. Where HMRC can establish, on the balance of probabilities that the error was bought about deliberately and that its discovery was prompted by HMRC the penalty is assessable at a maximum of 70% of the potential lost revenue (i.e. in this case, the amounts assessed). The maximum penalty may be mitigated (in the case of deliberate and prompted conduct to a minimum of 35%). Mitigation is given in respect of the activities of the taxpayer in telling HMRC about the error, giving of documents and information and helping HMRC in their enquiries into the errors.

32. Finally, paragraph 19 of Schedule 24 Finance Act 2007 provides that where a company has been held liable to a penalty under paragraph 1 of that schedule in connection with deliberate errors HMRC may issue a personal liability notice to a director or officer of the company where they can establish that the deliberate error was attributable to that officer. They must show, on the balance of probabilities that the deliberate conduct was that of the director/officer.

EVIDENCE

33. The Tribunal had evidence in the form of a bundle of documents, including witness statements from Derek Padgham, Nicholas Hilton (both officers of HMRC) and PD. Each of those witnesses also gave oral evidence and was subject to cross examination.

34. Mr Padgham was the assessing officer for the corporation tax assessments relying substantially on the calculations prepared by Mr Hilton (despite the corporation tax assessments being made prior to the VAT assessments). He was also one of the officers said to have undertaken a covert test purchase. He had very little recollection of key events. He held an adamant position on some of the more contentious issues but with little evidential substance to support his position. The Tribunal did not consider Mr Padgham to be a compelling witness, as set out below there were areas in which Mr Padgham's evidence was incomplete which had the potential to mislead the Tribunal, but the Tribunal takes the view that, in making the corporation tax assessment and in his evidence, he was not dishonest.

35. Mr Hilton was responsible for making the VAT assessments and was very familiar with the requirements for raising best judgment assessments. He was clear as to the evidence available to him when making the assessments and why, where evidence had been discounted, that was so. His evidence was credible and has, subject to the point raised in paragraph 57 been accepted by the Tribunal.

36. PD had become overly concerned about matters which were essentially irrelevant to the issues before the Tribunal. He made some very serious accusations against individual officers and of HMRC more generally which were evidentially unfounded. PD did not provide a credible explanation for the spike in takings on the dates of the unannounced visits. With regard to his evidence that there had been no suppression of sales the Tribunal were unable to believe him. He appeared to believe what he was saying to be truthful, but it could not be reconciled with the evidence.

37. However, and as stated during the hearing, the Tribunal considers that HMRC's interactions with PD were not as could have been reasonably expected by taxpayers generally. HMRC's internal complaints team investigated some of the concerns expressed by PD (though he never raised a formal complaint) and concluded that they arose from misunderstandings. On the evidence given in the hearing it is apparent to the Tribunal that PD lacked understanding on a number of key matters; however, where misunderstandings arise it is beholden on HMRC to rectify those misunderstandings where they can, but little attempt was made to do so with PD. There were a number of points on which the Tribunal provided explanation to PD which

he appeared to accept; at any point, HMRC could have given the same explanations, but they did not. It is not a matter for this Tribunal (whose jurisdiction is limited by statute) to comment on the complaints' procedure, but it is observed that there does appear to have been more substance to PDs concerns than was acknowledged by the complaints team.

Allegations of misfeasance

38. There were a number of allegations made by PD which it is appropriate to deal with before progressing to a consideration of the issues for determination. The allegations were that:

- (1) there were no test purchases undertaken;
- (2) the card reader ID had been misstated and could not have been as recorded;
- (3) HMRC had not opened the documents and business records sent by him prior to the meeting on 7 September 2017;
- (4) HMRC had fabricated a document on which total monthly card data from Worldpay was recorded;
- (5) it was not possible that HMRC could have seen, as recorded in the visit report of the unannounced visit on 27 July 2017, that both he and Ms M Jiang were recorded as the licenced proprietors of the Yummy Yummy Takeaway premises.

Test purchases

39. As regards the test purchases, it was contended by PD that there was insufficient information in Mr Padgham's witness statement and record of test purchase for it to be relied upon. He further noted that the second record of test purchase, that of Sarah Stevelidge could not be accurate. In this regard he referenced the menu information that had been provided to the Tribunal and cross referenced the price of the individual dishes listed which, he contended, did not total the amount she said she had paid and, in particular, that the bill for food could not have equalled £19.65 as dishes were all priced to 10p and not 5p (this was despite later accepting that plastic cutlery was sold at 5p). He also contended that because neither Mr Padgham nor Ms Stevelinge had requested receipts there was no evidence that they had, in fact, made the purchases. Finally, he contended that the order stated to have been observed by Ms Stevelinge was also not as per the menu.

40. Mr Padgham repeatedly stated under cross examination that he did make a test purchase. He stated that he did so on Thursday 25 August 2016. He could provide no more detail of the purchase than was recorded in a typed note which did not bear his signature, was undated, with no reference at all within it to the date on which the test purchase, was carried out. Mr Padgham did not say when the note was prepared. Although the test purchases were said to have been authorised no evidence of the authorisation was produced – had such authorisation been produced it may have supported the date on which it was in fact carried out. In correspondence, the date of the test purchase was stated to be 26 August 2016 and not 25 August 2016. There was no copy of a handwritten notebook which would have confirmed the date and/or confirmed that it was made contemporaneously.

41. The second test purchase was referenced in a significantly more detailed note prepared by Ms Stevelinge. Her note was signed and dated 25 August 2016. However, Ms Stevelinge was not called as a witness. Both Mr Padgham and Mr Hilton referenced her test purchase, and its absence from the daily takings list as supporting their conclusion that cash takings had been suppressed.

42. In his witness statement dated 4 May 2021 PD expressly challenged that the test purchases had been made at all. He contended that much of the detail in the statements would

have been obtained at the subsequent visits and from other information available to HMRC. Despite this challenge HMRC did not seek to adduce further evidence, including a statement from Ms Stevelinge nor any additional documents (including the authority to undertake the covert purchases, or contemporaneous notebooks) to corroborate the typed notes.

43. As stated the Tribunal does not consider that Mr Padgham was anything other than an honest witness and is therefore prepared to accept that a test purchase was made by him from Yummy. The Tribunal did not however, consider that his evidence was particularly elucidating of the circumstances of the test purchase and the deficiencies in the typed note were significant particularly in the context of correspondence which then systematically failed to reflect the date it is now said that the purchases were made.

44. Ms Stevelinge's note was expressly challenged and HMRC did not tender her as a witness for cross examination.

45. The Tribunal is aware of the provisions in the Tribunal Procedure Rules which permit the admission of evidence that would not be admitted under the civil procedure rules. However, Mr Padgham's assessments, being discovery assessments, are predicated on the basis that the inaccuracies in the corporation tax returns arose as a consequence of deliberate behaviour, and that must be proven, on the balance of probabilities, by HMRC. It would, in the Tribunal's view, be contrary to the overriding objective to admit, what can only be described as sloppily, and potentially arrogantly, prepared "evidence", in that context. Further, as Ms Stevelinge was not made available for cross examination it would be entirely inappropriate to permit HMRC to rely on her note. For that reason the Tribunal takes no account of Mr Padgham's evidence as to the test purchase or its alleged omission from the daily takings from either 25 or 26 August 2016 and similarly for the note of test purchase provided by Ms Stevelinge..

Card reader

46. It is not disputed that unannounced visits were undertaken by HMRC on 15 September 2016 and 25 November 2016. However, it is to be noted that the only record of the visit on 15 September 2016, carried out by Mr Padgham and a second officer Mr Thomson is a typed note which is digitally signed and notes that it was prepared from memory and written notes on 19 September 2016. The note itself does not record the date on which the visit was carried out. The handwritten notes of the meeting, referenced in the typed note were not provided to the Tribunal.

47. Within the typed note it is stated: "Payments were taken in cash and vis card. The business has ... one handheld PDQ with the merchant acquirer being Worldpay. TID26219428". Similarly, the record of the meeting of 25 November 2016 (carried out by Mr Hammond and Mr Walker) stated "MW noted the details of the single card machine used as: Worldpay (C98) – 26219428 (TID), 250-028-WP (ICT)."

48. PD disputes that his card reading device had the terminal ID reference 26219428. PD referred to a letter from Worldpay to him dated 16 September 2016, in relation to a charge back in respect of a transaction undertaken on 4 September 2016 stating the terminal ID to be 05984700000001. PD contended that the HMRC officers could not therefore have seen a different terminal. He also contended that the model number (250-028-WP) was not the correct model number.

49. The Tribunal was unclear as to where this challenge took the Appellant's case. It is correct that none of the reference numbers on the Worldpay letter correlate with the number recorded by HMRC.

50. HMRC did not provide any handwritten notes of the visits, but it would seem highly remarkable that two different sets of officers would have noted a terminal ID identically had

they not seen a device bearing that number. For the reasons set out below it is unnecessary to resolve the evidential conflict; however, the Tribunal considers it more likely than not that the terminal ID number was as stated on the Worldpay letter but that the device also bore the number recorded by HMRC albeit not the terminal ID number.

51. PD did not substantiate the assertion that the model number of the device was different, and the Tribunal is unable to resolve the question of what device was used in the shop on the dates of the visits. However, it is unnecessary to do so. The assessments were each raised by reference to card transaction data provided to HMRC by Worldpay in respect of merchant number 27708053 in the name of Yummy and PD. The Appellant did not dispute that his merchant number was 27708053 with the consequence that it matters not what device the transactions were recorded on simply that they were recorded (See paragraphs [58] to [66] below for PD's challenge to the Worldpay data).

The envelope

52. PD's evidence was that he sent the documents and records requested by HMRC to the designated address. The documents and records included till rolls, meal tickets, daily takings sheets and bank statements. PD claimed that the PO Box in question, at a Liverpool postcode, was simply a Royal Mail sorting office from which the documents were then rerouted to Brighton VAT office rather than being opened and examined on receipt. He claims that the envelope had not been opened by Mr Padgham or Mr Hilton prior to the meeting on 7 September 2017 and that HMRC had decided that he was suppressing sales without looking at the evidence. PD provided a detailed account of the meeting and events surrounding what he considered to be the opening of the envelope. He provided a photograph that he took of a hole in the envelope as it appeared in the meeting but which he claimed had been put in it as Mr Padgham entered the room at the meeting.

53. HMRC's record of the meeting on 7 September 2017 made no mention of the envelope, its opening, nor the coming and goings of the officers during the meeting. PD cross examined the HMRC officer's and put his recollection of the meeting to them. In response to PD's challenge that the envelope had not been opened Mr Padgham stated that the till riles for 25 and 26 August 2016 had been examined to check whether the test purchases had been made. But he stated that he had no recollection of anything about the meeting concerning the opening of the envelope. In cross examination Mr Hilton confirmed that a schedule he had used as an aide memoir at the meeting included the detail of the till rolls for Thursdays 8 July, 12 August and 24 November 2016 and Fridays 8 July and 11 August 2016 taken from the envelope. Reference was also made on that aide memoir to total card and cash takings for 21 and 28 October 4, 11, and 18 November 2016. Perhaps tellingly Mr Hilton also stated: "I extracted the records I needed to".

54. Mr Asuelimen cross examined PD by reference to specific paragraphs of PD's statement only and some broader questions. Mr Asuelimen was reminded by the Tribunal that if he did not cross examine on all aspects of the witness statement that were not accepted he would be taken to have accepted the evidence. Despite this Mr Asuelimen did not cross examine on PD's account of the meeting.

55. There is a question of the relevance of this issue to the issues to be determined. However, it was a matter in respect of which PD was very concerned. The Tribunal has considered in some detail the evidence given by each witness and the photograph of the package taken by PD. It appears to the Tribunal that the hole in the envelope would have enabled the removal of all meal tickets and the till rolls but would not have permitted the removal of any of the A4 documents (bank statements, daily takings sheets etc). The Tribunal finds that the envelope had been opened prior to the meeting on 7 September 2017 and the till rolls removed and

examined. That was not, on the balance of probabilities, the case for the larger documents. The Tribunal considers that the larger documents were removed after the meeting and, at that point, subject to review. The correspondence which states that the documents were reviewed is therefore accurate.

56. Under cross examination, and with the benefit of a detailed note of the questions asked and the answers given it is plain that Mr Padgham and Mr Hilton only referenced having removed the till rolls, firstly to check whether the test purchases had been recorded and, for Mr Hilton, to prepare his aide memoir including daily taking for specific dates.

57. The Tribunal considers it disingenuous that neither witness was completely open as to what happened in the meeting. It appears that their answers were carefully curated to be accurate but not to be a complete and open explanation of what occurred in the meeting. That is disappointing from HMRC officers. However, the Tribunal does not consider that it is sufficient to affect the bona fides of the assessments which are, for the reasons set out below, founded on conclusions reached on the data contained in the till rolls, a comparison of the run of trade to the dates of the unannounced visits and the Worldpay data.

Worldpay data

58. Both sets of assessments had, as their foundation, data provided to HMRC by Worldpay. Pursuant to Schedule 23 Finance Act 2011, as amended by section 228 Finance Act 2013, HMRC have the power, by notice, to require merchant acquirers to provide payment card transaction data in respect of a retailer.

59. HMRC did not provide a copy of the notice requesting such data from Worldpay (and it may have assisted PD in his understanding of the data provided had they done so). However, Mr Hilton gave evidence that such a notice had been issued and pursuant to it, card transaction data for Yummy had been provided. Mr Hilton's evidence indicates that the data was requested shortly after the second unannounced visit, he requested it before performing calculations which indicated an unusually high card transaction to total turnover ratio which, in turn led to the third unannounced visit on 27 July 2017 (at which time it was identified that the business had been transferred to new ownership).

60. The data provided concerned the account for Yummy, by reference to the merchant number 27708053 accepted by PD as the correct number and in respect of payments made into a bank account the details of which were the same as the bank statements produced by PD. It referenced Yummy and PD and the address of the premises.

61. The format of the data was to list under a column designated by year, i.e. 2015, 2016 and 2017 the number and value of transactions per month April to March. For the column 2017 figures were included from April to December with zeros for January to March.

62. PD contended that as he had ceased trading in March 2017 the data provided was "not possible" and that it proved that the information was false. He produced bank statements for the period 8 March 2017 to 7 March 2018 to demonstrate that payments, as shown as received from Worldpay had not been received.

63. PD believed, despite the format of the schedule produced of the Worldpay data, that the columns related to a calendar year and as such the 2017 information for April related to payments received in April 2017. This was an unfortunate misunderstanding, which could, quite easily, have been corrected by HMRC. It was plain to the Tribunal that the Worldpay data had been provided by reference to fiscal years such that the 2017 column was for the months April 2016 to March 2017. Mr Hilton requested the information after the second unannounced visit and the data was provided some time in early 2017, hence why January to March 2017 contain no data.

64. PD also challenged that the information could be accurate as, for instance, the figure shown on the Worldpay schedule indicated that he had received £12,513.88 for May (PD said 2017 but, as indicated that was 2016) in circumstances where his pricing precluded being paid 8p. All his menu prices were designated in multiples of 10p and whilst he accepted that he also sold plastic cutlery at cost/5p (it was not clear to the Tribunal which) he could never have received a payment to the value of anything and 8p. He said that whilst commission was paid to Worldpay in odd amounts (he referenced £2.08 paid on 21 June 2017 as part of the closing of the account) that would not have been recorded in a schedule of turnover and further provided that the schedule had been fabricated.

65. HMRC have the power to request merchant acquirers to provide transaction data. Mr Hilton said he did so, and the Tribunal accepts that evidence.

66. In the absence of bank statements for any month shown on the Worldpay schedule, the Tribunal sought, at a cursory level to interrogate the data from the schedule with the till roll data. That task proved impossible. In the period 1 July 2016 to 31 July 2016 till roll data indicated that card transactions were taken to the value of £10,990.85, the Worldpay data for July 2016 was £9,533.65. For 1 August to 31 August 2016 till rolls recorded £10,079.40 and Worldpay data was £11,542.50 and for September 2016 the figures were £7,481.15 (till rolls) as compared to £7,786.75 (Worldpay). Till roll data is recorded on the date that the card payments are accepted by Yummy, the Worldpay data is likely to reflect the date on which the payments are processed by Worldpay. The month-on-month data does not correlate however, over the three-month period the figures are £28,551.40 (till rolls) v £28,862.90 (Worldpay) which the Tribunal considers to be sufficiently consistent to be entirely satisfied that the Worldpay schedule represents a complete and accurate record of the payments made by Worldpay to Yummy and that Worldpay provided the data.

67. As to the 8p, PD told the Tribunal that cutlery was provided at cost not that it was always charged in units of 5p. There is also the possibility that very occasionally there were key entry errors. In any event the Tribunal accepts the Worldpay data as an accurate record of the card transactions undertaken by Yummy.

Recorded licence holder

68. In the visit report for 27 July 2017 it is noted that PD's name was "still on the wall" and that "MJ (Michelle Jiang) showed her name on the alcohol licence with Paul Donaldson". PD claimed that this was "not possible" and showed that the record of the visit contained inaccuracies. Implicitly at least PD indicated that this was further material that impugned the bone fides and accuracy of the assessments.

69. To support the "impossibility" of the evidence PD stated that each premises must be licenced by the local authority and that the licence was renewed annually in November. He stated that when he ceased trading he notified the authority but was told that if he cancelled the licence the premises would then be unlicensed. He said that at that time Ms Jiang did not hold the necessary accreditation to obtain a licence which required her to attend a course to become so accredited.

70. The Tribunal notes that the invoice for her course is dated 19 July 2016 (and not 2017) and as such by the time of the premises licence renewal in 2016 she was accredited. The details of the licence provide that the licence is in force until revoked, the holder becomes incapacitated or bankrupt or until it is formally surrendered.

71. As such there was no restriction on PD from surrendering the licence and requiring Ms Jiang (who was duly accredited) from applying for a new licence. PD did not however surrender the licence and, as observed PD's name remained on the premises licence which was

hung on the wall. PD stated that he had continued to provide assistance to Ms Jiang, the new owner, as she became familiar with the running of the business, whilst not an employee of the new business (as he said was incorrectly recorded in the visit report) he had supported through to early July.

72. The Tribunal finds that PD was the licence holder for the premises as he did not apply for the licence to be surrendered. There was no evidence to contradict the record of the meeting and it is conceivable that Ms Jiang had obtained a licence for herself (not appreciating that as it was the premises which was licenced she did not need to do so) or that she believed she was so licenced.

73. In the end, however, the point is not one which is material to the issues in dispute. The Tribunal is required to determine whether the assessments have been raised on a bona fides basis by reference to sufficient evidence and taking account of all relevant material. The nature of PD's continuing role (or otherwise) in the running of the business trading as Yummy Yummy take away was not taken into account by either Mr Padgham or Mr Hilton when making their assessments. As set out in more detail below, they considered their assessments to be supported by reference to the findings from the unannounced visit and on the basis that the pattern of trade observed by the officers and narrated by the new owners but no more.

FINDINGS OF FACT

Agreed facts

74. The premises were open for business seven days per week. Over the period it was owned and operated by Yummy the hours varied. Opening time was consistently 5pm but closing time changed from 11pm, to 10:30pm and finally to 10pm.

75. PD covered most shifts and worked together with a Chinese chef, a female assistant and a delivery driver.

76. Orders were taken either face to face by the customer attending at the premises or by telephone. Telephone orders could be collected or delivered.

77. An unannounced visit was made to the premises on Thursday 15 September 2016 at which time PD was present and undertook his cashing up procedures. A Z reading was taken from the till and the cash was counted. On that night takings were £770.40 of which cash on that night was £431.80 (representing 56.05% of total takings). There was a cash discrepancy of £44.80 between cash counted and the Z reading (the cash counted being higher than the Z reading).

78. A second unannounced visit was undertaken on Friday 25 November 2016. It followed a similar format to the previous one. Takings on that night were shown on the Z reading to be £1,531.30 with cash recorded as £886.70 (and 56.60% of total takings). There was a £4.70 discrepancy between the till role and the cash in the till (the Z reading being higher).

79. PD was the only director working in the business on a day-to-day basis and he was responsible for all accounting of daily takings.

Disputed facts, and associated findings

Ordering

80. PD stated that there were two computers in the shop. The principal computer was a touchscreen computer with a telephone connection. When orders were received by telephone the touchscreen would show caller ID. The second computer was not connected to the telephone, it required use of a keyboard but was linked to the touchscreen computer for the purposes of recording the orders entered. The keyboard computer was generally used for walk-in orders so as to leave the touchscreen available for telephone orders.

81. When a customer ordered (by either telephone or as a walk in) the order was said to be entered into one or other of the terminals using the numerical reference number from the order i.e. a chow mein was number 67. PD did not explain how for instance, a chicken chow mein was distinguished on the ordering system from pork/beef/shrimp which would be the same price as chicken or king prawn/duck which bore a higher price, or vegetable/mushroom which were a lower price all of which were numbered 67 on the menu.

82. Having entered the order into the computer PD stated that two meal tickets were then printed, one to a printer in the kitchen which would be printed in Chinese and one in the shop in English. PD maintained the shop meal tickets were retained and the kitchen ones were disposed of.

83. Having considered that the evidence regarding the test purchase transactions be discounted there was no evidence from HMRC on the ordering process and Mr Asuelimen did not cross examine PD on this evidence.

84. The Tribunal is therefore left that the only conclusion it can reach is that the computers were used as PD explained however, that conclusion does not assist in explaining why on the date of the two unannounced visits cash takings were so much higher than on any other Thursday or Friday in the entire period of trading.

85. The Tribunal therefore finds that whilst the ordering process was as described on days other than the unannounced visits, and in order to suppress cash sales, the computer entries must have been manipulated in some way by PD so as to remove cash orders.

Effect of closed competitors

86. PD was absolutely insistent that the reason for the higher takings on the nights of the unannounced visits were because his only competitors offering Chinese take away food had recently closed down. He explained that one establishment had reopened as a sit-down restaurant serving a different style of food. The other establishment had simply closed.

87. HMRC spent a considerable time cross examining PD on the lack of evidence to substantiate the closures. With respect this cross examination missed the mark. It mattered little to the assessments raised whether the closures could be evidenced or not because the pattern of trading as evidenced by the till rolls did not substantiate that there had been any noticeable, even short term, change in trade for Yummy as asserted by PD in consequence of the closures. There was a significant spike on the date of the first visit, a very gentle drift upwards after that visit, and then another significant spike on the date of the second visit. Given that the closures were permanent, had they had an impact on trade it would have not been for one night, and by coincidence, the night of the unannounced visits. Closure of a competitor might have had an immediate impact or a gradual one, but it would not, credibly, have impacted two isolated nights which also happened to be the nights of HMRC's visits.

88. The Tribunal therefore rejects that the closures provided any explanation for the significantly increased cash (and thereby total) takings on the nights of the unannounced visits.

Large group of teenagers

89. The Appellants contend that on 25 November 2016 cash takings were up as a consequence of a large group of teenagers having been "in and out" all night. HMRC's note of the unannounced visit notes that a large volume of customers arrived shortly after the visit commenced. It is understood that HMRC accept that these customers were teenagers. In evidence PD accepted that some of the teenagers paid cash and some by card.

90. On the basis that the teenagers were accepted to have paid both by card and by cash their presence on the 25 November 2016 would not explain why cash takings were so materially

higher. Evidence of card takings for other Friday nights would also not indicate that there was a marked increase in footfall overall on 25 November 2016.

91. Accordingly, the Tribunal rejects that they provide any material explanation for the marked increase in cash takings. However, on the basis that teenagers (certainly in a pre-covid world) may have been (marginally) less likely to use card the Tribunal considers that it is reasonable to conclude that an uplift of 56% (consistent with that observed on 15 September 2016 rather than the 56.6% observed).

Material facts

92. HMRC performed an analysis of monthly takings as recorded on the VAT returns over the period from 1 April 2014 through to 31 December 2016. This showed broadly consistent pattern in turnover and trade. Takings on a month-by-month basis rising only very slightly over the period.

93. As indicated above HMRC had also obtained from Worldpay the card takings over the same period. Cash as a percentage of total takings as recorded on the VAT returns and in the daily takings' records of the Yummy over the period April 2014 to December 2016 could therefore be calculated. In the period from April 2014 – the date of the first unannounced visit in September 2016 the cash to total ratio was broadly consistent at 28%. On the night of the first unannounced visit cash represented 56.05%. In October 2016 the cash to total ratio reported increased significantly (by 76% for Thursdays and 95% for Fridays) however, remained lower than the 56% observed on 15 September 2016. On the night of the second unannounced visit the proportion was 56.6%. In December 2016 cash as a proportion to total sales were 47%.

94. On the basis of this data HMRC considered that there had been systematic suppression of cash sales by Yummy throughout the period of trading.

95. As a result of that conclusion HMRC visited the premises of Yummy on 27 July 2017. However, by that date the business had been transferred to a different legal entity. Officers Hilton and Padgham sought to establish how the new business was run and considered that whilst ownership had changed substantively the trade was essentially a continuation of the trade carried on by Yummy. However, on the night of that visit cash represented 71.2% of total trade.

96. Yummy was given an opportunity to explain why cash takings on the nights of the unannounced visits were so different to those on previous Thursday and Friday nights. The explanations given were only that takings were higher because of the closure of two local competitors and, as regards 25 November 2016, that the large group of teenagers were “in and out” all night.

97. The VAT assessments and discovery assessments were issued on the basis of the Worldpay and recording takings data. As originally assessed card takings were “grossed up” by 56% to give estimated total takings. HMRC considered that the basis of calculation was corroborated by the absence of the test purchases from recorded takings and the subsequent visit to the Yummy Yummy Takeaway whilst under new ownership. The Assessments were amended on the basis that the factor or “grossing up” should be 56.32% (the average of the two unannounced visits). The same percentage was applied to all periods of trading on the basis of the consistency of such trade as evidenced both in Yummy’s own records and those of Worldpay.

98. HMRC did not consider the explanations for the discrepancies identified on the unannounced visits to be credible.

99. The Tribunal finds as a fact, by reference to the trading data extracted from the VAT returns and the Worldpay data that there was a material suppression of cash sales. For the reasons addressed above regarding the contentious evidence and the allegations the Tribunal does not consider there to have been provided any credible explanation for the significant proportion of cash takings on the dates of the unannounced visits other than, on those dates, due to HMRC's presence at the time of cashing up, PD was unable to suppress the cash sales.

100. It is clear to the Tribunal that the suppression was systematic and sustained and could only have happened as a result of deliberate conduct on the part of Yummy. On the evidence available, PD was solely responsible for accounting to HMRC in connection with both VAT and corporation tax and thus responsible for the deliberate suppression of cash sales.

CONSEQUENCE OF THE FACTUAL FINDINGS

101. As previously indicated there was no dispute as to the legal provisions which apply in the present case.

102. As regards the VAT assessments, in consequence of the findings above the Tribunal is clear:

- (1) HMRC had material in the form of the takings recorded in the unannounced visits, the Worldpay data and the consistency of trading which permitted a conclusion that the VAT returns were incorrect;
- (2) HMRC were entitled to discount the explanations given for increased takings on the dates of the unannounced visits;
- (3) The VAT assessments were honestly raised by reference to the material identified in (1) above;
- (4) The decision to assess was taken honestly and with bona fides.

103. However, and as indicated at paragraph [96] above the Tribunal considers that the VAT assessments are marginally overstated. That does not impact the conclusion that they were raised in exercise of best judgment, but the Tribunal directs HMRC to recalculate the sum assessed by reference to 56% rather than 56.32%.

104. As regards the discovery assessments, in consequence of the findings above the Tribunal is clear:

- (1) HMRC made a discovery of an insufficiency in the profits assessed by reference to the Worldpay data, as compared to the total sales recorded for both VAT and corporation tax purposes together with the cash to total ratio on the two unannounced visits.
- (2) The loss of tax was brought about deliberately through the conduct of PD and thereby justifying the issue of the discovery assessments, the penalty assessments and the personal liability notices.

105. However, and as indicated the Tribunal considers that the VAT assessments are marginally overstated. That does not impact the conclusion that they were raised in exercise of best judgment, but the Tribunal directs HMRC to recalculate the sum assessed by reference to 56% rather than 56.32%.

106. For the reasons stated the Tribunal considers that there were errors in both the VAT and corporation tax returns and that those errors were brought about deliberately through the suppression of cash sales. Yummy is therefore liable to a penalty subject to a maximum of 70% of the sums assessed.

107. HMRC allocated mitigation as set out in paragraph [20] above.

(1) By reference to the evidence and findings set out above the Tribunal considers that the level of mitigation permitted by HMRC in respect of telling was correctly assessed at 0%, the Tribunal has found on the evidence that Yummy systematically suppressed cash sales. PD was given every opportunity to tell HMRC that cash sales had been so suppressed, in face of the compelling evidence to that effect, but he did not.

(2) In terms of giving HMRC allowed 20%. The Tribunal considers that the Appellants cannot be entitled to full mitigation as HMRC had to issue a notice to provide information; however, the Tribunal considers that all records retained were, in the end, given to HMRC. It is most unlikely that the Appellants made or retained any record of the suppression and as such there was nothing further to give. The Tribunal therefore increases the level of mitigation to 25%.

(3) As regards helping HMRC allowed 25% mitigation. The Tribunal's view on the interactions between PD and HMRC were not ideal and PD's considered he had been unfairly treated. The Tribunal has found that there is some basis for the way PD felt and as such this will have impacted both his willingness to help and HMRC's perception of it. As such the Tribunal considers it appropriate to increase the level of mitigation to 35%.

108. For the reasons given the Tribunal has found that the deliberate suppression of cash sales by Yummy was attributable to the conduct of PD and it is therefore appropriate that a personal liability notice was issued.

DECISION

109. All the assessments were properly raised and subject to the minor adjustments to quantum and mitigation they stand.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

**AMANDA BROWN QC
TRIBUNAL JUDGE**

RELEASE DATE: 05TH SEPTEMBER 2022