



Neutral Citation: [2023] UKFTT 74 (TC)

Case Number: TC08709

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/00777/00856/00862

*VAT –section 73 Value Added Tax Act 1994 – whether assessments made to “best judgment”
– yes – whether related corporation tax assessments based on same material also correct – yes
– whether consequential penalties and officer’s liability notice correct – yes – appeal dismissed*

Heard on: 20 September 2022

Judgment date: 23 January 2023

Before

**TRIBUNAL JUDGE MARK BALDWIN
MR DUNCAN MCBRIDE**

Between

**WJE LIMITED
KIT LING CHAN**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Feng of Tax Concerns

For the Respondents: Ms Laura Castle litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. These appeals are against HMRC's decisions to assess WJE Limited ("WJE") for value added tax ("VAT") and corporation tax (including liabilities under section 455, Corporation Tax Act 2010 ("CTA 2010")) together with penalties for deliberate and concealed inaccuracies in its VAT and corporation tax returns. In addition, personal liability notices were issued to Kit Ling Chan ("KLC"), a director of WJE, in relation to these penalties.

2. The amounts HMRC originally considered to be due have been varied (in some cases very significantly) as a result of information obtained by HMRC during the preparation for this hearing. We have attached a table to the end of this decision notice which sets out the various decisions which are the subject of this appeal showing both the original amounts HMRC assessed following review and the amounts HMRC currently consider to be due.

BACKGROUND

3. WJE Ltd was incorporated on 5 January 2005 and traded as the 'Oriental Garden', running a buffet-style restaurant. WJE notified HMRC that it commenced trading on 2 April 2006. It was initially registered for VAT under VAT registration number 862 8599 68 with an effective date of registration of 1 September 2005. This was the date it intended to start making taxable supplies. The company deregistered for VAT on the basis the business had been transferred as a going concern on 30 September 2015. The company then registered again under VAT registration number 255 3741 01 with effect from 1 December 2016 and de-registered with effect from 2 October 2021.

4. On 21 August 2019, Officer Samantha Samways ("Officer Samways") wrote to WJE to say that she would be conducting a compliance check of the company's VAT returns and to arrange a meeting at the business premises. What transpired at that meeting and the subsequent steps taken to ascertain WJE's additional VAT and corporation tax liabilities are set out in the evidence of Officer Samways and Officer Eddy.

5. This resulted in a VAT and corporation tax assessments, together with penalties for inaccuracies in VAT and corporation tax returns and notices of an officer's liability to pay a company penalty in respect of VAT and corporation tax.

6. These decisions were the subject of a review and in October 2020, HMRC issued their review conclusion letters in respect of Corporation Tax, VAT, penalties and the personal liability notices which upheld the decisions but varied the amounts.

7. In June 2021, HMRC issued a closure notice in respect of WJE's corporation tax accounting period which ended on 31 March 2019.

8. WJE and KLC commenced appeals to this tribunal against all these decisions.

9. On 12 January 2022, Mr Feng provided documents that WJE wished to reply upon in the proceedings. These documents related to years 2012 to 2015 and had not been seen previously by Officer Samways or Officer Eddy. These documents showed that WJE traded with Total Asia in the period January 2017 to October 2018. There was no evidence that WJE had traded with Total Asia or its predecessor prior to this period. As a result of this the Officers' decided that it was reasonable to assume that purchases were suppressed only for the period January 2017 to October 2018 when WJE was shown to have traded with Total Asia. This is what resulted in amendments to the quantum of all decisions.

10. We received witness statements from three HMRC witnesses, Officer Samways, Officer Henderson and Officer Eddy. All three gave evidence in person, were cross-examined by Mr Feng and answered questions from the tribunal. In view of some of what follows, we wish to

state clearly and unequivocally at the outset that we found all three witnesses to be clear, truthful and to be doing their best to help the tribunal.

OFFICER SAMWAYS' EVIDENCE

11. Samantha Samways ("Officer Samways"), an officer of HMRC in the Taskforce and Specialist Compliance team based in Cardiff, provided a witness statement, gave evidence before us and was cross-examined by Mr Feng.

12. Officer Samways described the meeting with the Appellants on 17 October 2019. This took place at the business premises (Unit 8 The Red Dragon Centre, Hemingway Road, Atlantic Wharf, CF10 4JY). In attendance were Officer Samways, Officer Henderson, Mr Williams, WJE's then accountant, KLC and Ms Wendy Chan (WC), a family friend who was there to help translate. Notes were taken by Officer Samways and Officer Henderson.

13. Officer Samways said that she was able to converse with KLC, she responded to her questions and demonstrated an understanding of the questions asked. WC assisted when needed, but much of the information provided was by KLC directly. Officer Samways said that if she had thought there were any communication issues she would have involved the help of an HMRC approved interpreter.

14. Officer Samways asked KLC if there were any errors that needed highlighting from the start of the meeting. KLC confirmed till rolls were not available. On 27 September 2019 her car was broken into and records, plus £7,000 in cash stolen. A crime reference was provided. Officer Samways asked whether this affected just the one period to which she confirmed it did not, she did not have any till rolls. The till rolls were sent to Hong Kong where the data was extracted, and the till rolls destroyed. The bookkeeper in Hong Kong then issued a summary of the till data to the accountant to prepare the Corporation Tax and VAT returns. Mr Williams confirmed he did not have sight of prime records to complete the returns. Officer Samways said that she expressed her concerns with this, as prime records were a legal requirement to support the sales figures provided so a full audit trail could be established to ensure the right tax is paid at the right time.

15. The history of the business was discussed so Officer Samways could understand the evolution of the business. She could see no transfer of going concern from the previous company, her research had shown this to be a long-standing business and therefore Officer Samways was surprised there was no transfer. KLC confirmed she rented the premises out to the two previous companies (L Best Award Ltd and Good Diner 88 Ltd). No evidence has been provided to show the rental of the premises nor do the Corporation Accounts reflect rent being paid. KLC confirmed at the end of the meeting that what she initially told Officer Samways was incorrect, and that she had been in control of the company since 2005 despite the company name changes. She had always remained the person in control. KLC confirmed that from a customer's perspective, nothing had changed within the business since 2005. The size of the restaurant remained the same. The cuisine, trading name, prices had increased slightly but this was marginal.

16. Sales were recorded daily on a Softabacus XR till system. The business accepted cash and card. A Z read would be produced nightly which was then checked against the till, any errors being established at the time and resolved. KLC confirmed that the overall responsibility for this fell on her.

17. KLC confirmed her suppliers were Peter Broughton Ltd (paid via cash or cheque), CL Foods, who KLC confirmed were previously Total Asia Food Ltd (paid for by BACS), Glamorgan Brewing Company Ltd (paid by cash or cheque), ABM Catering Ltd (paid online or by cheque), Sure Crest Ltd (paid by cash), New Hap Sing Trading Ltd (paid by cash), Hunts (paid by cash), Global, Brakemoor Ltd and Tesco. The main delivery days were Monday,

Wednesday, Thursday and Friday. Later in the meeting she confirmed further suppliers to be Abdul Poultry Ltd and Almoor Ltd.

18. KLC confirmed real time information was completed by Terence Wei (Bookkeeper in Hong Kong) and there were 13 staff, a mixture of part and full time. She confirmed she would normally operate with 3 to 4 staff during a sitting (lunch sitting and evening sitting), but weekends were busier with all staff in.

19. KLC confirmed business rates, environmental health, rent and trading standards were all sorted by herself and had been since 2005. She was the main point of contact for the business.

20. The meeting was paused whilst Officer Samways and Officer Henderson reviewed the records provided. HMRC were in receipt of information in respect of WJE's supplier Total Asia which was an excel spreadsheet detailing date, route number, drop number, customer code, code, invoice numbers, and amounts paid for the period of 03/07/2017 to the 29/01/2018. Officer Samways cross referenced this information with the VAT accounts provided. She identified all invoices relating to the account reference number 1104. All invoices relating to 'cash' were not in the records.

21. When the meeting resumed Officer Samways issued Factsheet 9 'Human Rights' as she believed errors had been found and KLC was given the opportunity to speak to Mr Williams privately. This was declined. Officer Samways asked if there was anything further KLC wished to disclose, she stated there was not. KLC confirmed she was responsible for the recording and reporting of the sales of the business. KLC reconfirmed her suppliers and the date she started using them. She confirmed she had used the same suppliers since 2005, there had been no changes in suppliers. KLC confirmed Total Asia Food Ltd/C L Foods Ltd was her main supplier and accounted for 40- 50% of her total supplies. Officer Samways asked who was responsible for the decision to use these suppliers, which KLC confirmed this to be her. She also confirmed she was responsible for placing the orders and ensuring funds were available for payment. Officer Samways asked whether the business had any accounts with the suppliers, KLC confirmed she did but could not recall the detail of each supplier. She did confirm she would have been responsible for setting these accounts up. Officer Samways asked if more than one account was ever operated with any of the suppliers, KLC confirmed there was not. KLC confirmed that no goods had been taken for personal use or by staff. KLC confirmed no goods have been sold or transferred to any other business.

22. Officer Samways gave KLC a copy of the excel spreadsheet containing the list of invoices supplied by Total Asia Food Ltd. Mr Williams then requested a private meeting with KLC (accompanied by WC). Mr Williams returned from the meeting and explained he had strongly advised his client that they needed to come clean. He wanted it noted that he acted only for this business since 2016 and he was unaware of the history that had been outlined today. Officer Samways explained to KLC that HMRC had obtained information from the wholesaler Total Asia Food Ltd between 2017 and 2018. This information showed that two accounts were operated, an invoice and cash account. Only the invoices shown on the account were present in the records. WJE had purchased goods to the value of £68,375.68 using both accounts, of which £41,526.57 were present in the records, and £26,849.10 were not present. This equated to 39% of the purchases being undeclared.

23. Officer Samways confirmed HMRC's position that WJE Ltd had regularly made additional purchases from Total Asia Food Ltd and had failed to include these in the business records. On returning from her meeting with her accountant and WC, KLC advised she wanted to fully cooperate, and KLC admitted that she had failed to include all purchases in her business records and operated two accounts with Total Asia, an invoice account, and a cash account. Officer Samways asked where the cash invoices were, KLC confirmed she kept them for a few days to check the stock and they these were placed in the bin. Officer Samways advised that

the conclusion to be drawn from not including all purchases was that the corresponding sales to the undeclared purchases were also suppressed and that was done to avoid additional VAT and Corporation Tax. KLC confirmed she had manipulated the sales figures and had undeclared sales. She confirmed the till held the correct information regarding sales, the till rolls were sent to Hong Kong where cash sales were removed, and new sales figures were then sent to Mr Williams to compile the returns. The till is set up to destroy the record of takings on a nightly basis.

24. Officer Samways asked what the cash had been used for. KLC confirmed she would pay students additional cash wages as they could only work 20 hours due to their visas. The additional cash had also been used to fund refurbishment work on the restaurant as well as funding KLC's personal life.

25. A copy of the notes of the meeting were provided by letter dated 22nd October 2019 to the company and a copy to Mr Williams. They were asked to notify Officer Samways if the notes contained any errors. On the 13th November 2019 an email was received from Mr Feng advising he had been appointed as a new agent for WJE Ltd and enclosed a signed 64/8 authority form.

26. On the 20th November 2019 Mr Feng confirmed that the note of the meeting was disputed and further information would follow shortly. He requested a copy of the Total Asia data provided to his client and access to the business records. Officer Samways responded the same day.

27. On the 21st November 2019 Mr Feng raised further questions and requested documentation to be provided. On the 27th November 2019 Officer Samways received a voicemail from Mr Williams, WJE's previous accountant, asking her to call him. She returned this call on the same day. Mr Williams advised he had received an email from Mr Feng confirming the new Form 64/8 was in place. She asked whether Mr Williams would still be dealing with company accounts to which he responded he would not, he did not get involved with stuff like this and was relieved. As the notes were now disputed, she requested Mr Williams to review a copy of the notes alongside the notes he had taken, and to let her know if there were any discrepancies.

28. On 28 November 2019 Mr Feng emailed about the telephone call with Mr Williams alleging that data protection rules had been breached. On 5 December a further email was received direct to Officer Samways' manager. This was dealt with by her manager who confirmed a Form 64/8 was also in place with Mr Williams and therefore no breach had occurred.

29. A meeting was arranged for 7 January 2020 with Mr Feng. Mr Feng wrote on 10 December 2019 asking further questions and this was the basis for the format of the meeting. In attendance at that meeting were Officer Samways, Officer Eddy and Officer McKay (Officer Samways' manager). Mr Feng asked why HMRC discussed the position from 2005 involving other companies and questioned whether confidentiality had been broken? Officer Samways confirmed there was no issue with speaking about the other companies as all information discussed was in the public domain and KLC had been a director of all companies involved. It was KLC herself who said she had been in charge since 2005 despite the companies changing. She confirmed she had been the controlling mind behind the company.

30. Mr Feng noted that Companies House entries for Total Asia Food Ltd show they commenced trade in 2015 not 2005. Officer Samways confirmed that Total Asia had previously traded as Jing Xing Trading Co Ltd with the same directors and the decision was made based on the presumption of continuity with which KLC did not disagree with at the meeting. Mr Feng asked whether the debt in Total Asia's company accounts (totalling £822,498) could include the cash invoices? As WJE operates on an invoice accounting system this does not

affect WJE accounting. Officer Samways did not think it plausible a company would continue to supply goods if these were not being paid for.

31. Mr Feng requested confirmation as to how the information was obtained for Total Asia Food Ltd and whether this was done lawfully. Officer Samways confirmed it had been. Mr Feng asked whether she knew how the buffet had operated since 2016? Officer Samways confirmed she did, and this was documented in the notes. Officer Samways confirmed the notes were taken and produced based on what KLC had told her. She explained the reason for the difference between the information at the start compared to the end was KLC admitting what had happened. Mr Feng raised his concerns with KLC's language comprehension. Officer Samways confirmed she was satisfied that KLC understood the conversation and that if not WC was present to help. KLC had confirmed she dealt with complaints in the restaurant and was able to converse with her accountant.

32. Mr Feng concluded by asking Officer Samways what her thoughts were on the case. She advised she needed to gather more information from the other suppliers. She confirmed she was in no doubt of the conversation that took place on 17 October. Mr Feng stated that HMRC officers often use misleading questions and answer on behalf of the trader. Officer Samways requested confirmation whether Mr Feng had authority to raise this allegation on KLC's behalf and he confirmed he did not. It was highlighted to Mr Feng that his client had said she wished to be honest and engage with finding a resolution and had done so at the meeting, so that any proposals he wished to put forward would be considered and these would be relevant to potential penalty mitigation. The meeting concluded with Mr Feng agreeing to review figures with his client, and Officer Samways saying that she would contact other suppliers, so a best judgement assessment could be raised with mutual agreement. Copies of Factsheets 7a, 9, 13 and 14 were given to Mr Feng and a letter was sent to WJE on 9 January 2020 enclosing the same factsheets in addition to a copy of the meeting notes between Officer Samways and Mr Feng. Mr Feng acknowledged receiving the notes on 14 January 2020.

33. On 11 February 2020 a request for third party information notice was made to the following suppliers: Sure Crest Ltd, New Hap Shing Ltd, Hunts Food Ltd, Global Foods Ltd, Glamorgan Brewing Company Ltd, Blakemoor Ltd, ABM Catering Ltd, Alnoor Ltd and Abduls Poultry Ltd.

34. The case was paused due to Covid 19 on 17 April 2020 and an email was sent to Mr Feng advising this. Mr Feng confirmed he had temporarily ceased working also. Up until this time Officer Samways had received a response from the following suppliers – ABM Catering, Peter Broughton, and Glamorgan Brewery. On review of the records they provided it was found that they matched what had been declared in WJE's records. Due to the pandemic, it was agreed to be inappropriate to keep chasing other suppliers and that loss of tax would be calculated on the basis of suppression of purchases from one supplier. On 11 March 2020 Mr Feng raised further questions regarding the Total Asia spreadsheet. These were addressed in the decision letter to WJE dated 29th May 2020

35. KLC had been a director of all companies trading from the business premises since 2005 (although it is noted she resigned from L Best Award Ltd). No evidence could be provided to show that the other companies traded independently. KLC told Officer Samways she had been the director and controlling mind since the start, which was further confirmed by rent, environmental health, trading standards and business rates all falling under her responsibility since 2005. Based on what KLC told Officer Samways and the lack of any explanation as to whether/how this had changed, combined with no production of any evidence (solicitors' letters/ payments from the other companies/change of lease etc), led Officer Samways to the conclusion that this has always been KLC's business.

36. As L Best Award Ltd and Good Diner 88 Ltd are now dissolved companies HMRC decided that it would not be cost effective to reinstate these companies and therefore would not raise tax assessments for the periods they traded which was 1 October 2015 – 30 November 2016.

37. At the original meeting, KLC had confirmed the business trade remained consistent and therefore no reasons were given for any significant increase or decrease in yearly turnover. On review of the turnover figures submitted annually, trade between 2007 – 2009 was consistent (2007 is the first full comparative year even though the business incorporated in 2005), averaging £934,865. Between 2009 – 2012 there was a decline in turnover. From 2012 to present day the average trade is £645,579. Officer Samways therefore believed it to be fair and reasonable to conclude the sales suppression happened from 2012, and therefore the uplifted sales figures were applied from 2012 and not 2005 in order to be fair and reasonable.

38. The third-party data obtained from Total Asia detailed delivery routes and drop numbers that related to WJE's business address. The route number is 14, and the drop number is 14, these are the same for both the goods delivered from the invoice account purchases and the additional purchases paid for in cash. The code 1104 is WJE's customer number for the invoice account held with Total Asia. All invoices do however carry an invoice number which can be traced, and Officer Samways invited KLC to obtain these invoices herself. The way the deliveries are linked is through the route and drop number, which is specific to WJE only. Both orders would be sent on the same day (delivered on the same date as the date on the invoice and cash purchases were dated the same day) throughout the period the information covered, from 1 July 2017 to 31 January 2018.

39. Officer Samways said KLC had confirmed this is what happened at the meeting and she had not provided her with any credible explanation as to why what she told her in that meeting has since changed. No explanation was given as to why Officer Samways would hold the information recorded in her notes had this not come direct from KLC. Officer Samways's notes are supported by Officer Henderson in addition to the comments made by Mr Williams, KLC's own accountant at the time.

40. KLC later disagreed that the till rolls are destroyed in her amended notes provided on 10 December 2019. To date, till rolls have not been provided. KLC has confirmed that Terrance Wei returns the purchase invoices back to her. These were provided and therefore Officer Samways would expect the till rolls would be returned also. However KLC has been unable to produce these records. Officer Samways concluded that it is probable that these have been destroyed, which raises concerns whether other records could be produced.

41. Officer Samways said that WJE's declared gross profit rate ("GPR") for the periods 09/17 and 12/17 was 66.29%, which is within the average range HMRC would expect for a restaurant business. When the undeclared purchases for the periods are taken into consideration, the GPR drops to 46.29%, which falls well below the trade average, supporting her view that sales would have resulted from the additional purchases.

42. The way additional purchases and sales were calculated is explained by Officer Eddy (see below).

43. Having reviewed the resulting turnover figures against the turnover at the start of the business Officer Samways noted that this figure is still significantly lower than the turnover first declared when the business first started, and therefore a fair and reasonable reflection of trade.

44. Officer Samways said that she had considered whether there were any other explanations as to where the additional purchases may have been used. However, as KLC has confirmed

there was no personal use nor stock transferred, Officer Samways concluded the purchases were used for the business.

45. On 8 June 2020 Mr Williams responded to Officer Samways and confirmed his own notes were less detailed than the ones provided. He confirmed the notes were in keeping with her recollections of the meeting and that his own notes confirmed the till rolls were destroyed.

46. On 11 May 2021 the invoices were received from Total Asia and Officer Samways inputted these into an excel spreadsheet. All invoice numbers, dates and amounts matched the information she had originally been provided on the summary sheet in Excel she had used to compare against the business records. She reviewed every invoice and, to gain a better understanding of the contents of the invoices, she took key items she would expect to see being purchased on a regular basis in a Chinese restaurant. She highlighted the invoices declared in the business records and identified the cash invoices missing from the records. By doing this exercise she was satisfied that the purchases made on the cash invoices would be required for the business to operate.

47. We have set out Officer Samways's evidence (primarily in her witness statement, but expanded before us). We should note some points put to her by Mr Feng in cross-examination and her response to those points.

48. Mr Feng noted the third party notices Officer Samways had served on Total Asia seeking additional information. He criticised her for having failed to notify WJE, as required by paragraph 4 of Schedule 36. Her view was that the invoices sought were part of WJE's statutory records, so there was no need to do this. He asked Officer Samways whether this information request indicated that she doubted the Excel spreadsheet information her enquiry was originally based on. Officer Samways said no, she was collecting information for the tribunal. The Excel spreadsheet had been verified by KLC and that was a good enough starting point.

49. Mr Feng asked Officer Samways whether she had considered whether the "cash invoices" met the requirements for a VAT invoice. Officer Samways said she had not. He also asked whether Officer Samways had considered the fact that unit prices for cash sales were different from unit prices for declared sales. Officer Samways said that there could be lots of reasons why unit prices for similar goods delivered at the same time might be different. Food could be nearing its use-by date and that would clearly impact on price or value. She had raised her assessments on the total amount WJE had paid and had not concerned herself with unit prices.

50. Mr Feng put it to Officer Samways that she had cash invoices and material on Excel for the period to 29 January 2018, but otherwise she had guessed the amounts. Officer Samways said that she and Officer Eddy (see below) had used the evidence and numbers they had. Officer Eddy had calculated revised turnover on the basis of the information they had from Total Asia and KLC's confirmation. Mr Feng suggested that the original much larger assessment (now reduced) suggests Officer Samways just came up with a bigger number and left WJE to appeal. Officer Samways rejected this. She reiterated the process she had gone through and said the process was evidence based. The reductions had followed because the new (January 2022) evidence suggested no trading between Total Asia and WJE.

51. We note, in the light of what is about to follow, that, whilst Mr Feng asked Officer Samways a number of questions about the detail of her evidence, at no point did he suggest to her that the evidence in her witness statement or to the tribunal about what took place on 17 October 2019 was incorrect.

OFFICER HENDERSON'S EVIDENCE

52. Andrew Henderson ("Officer Henderson") is an officer of HMRC in the Individual & Small Business Compliance Team based in Cardiff. He has worked for HMRC for 5 and a half years.

53. Officer Henderson gave evidence in relation to the meeting at WJE's premises on 17 October 2019. His sole was primarily as notetaker. His evidence corroborated that of Officer Samways.

54. Mr Feng challenged Officer Henderson and suggested that his notes of the meeting were fabricated. The Tribunal interjected to warn Mr Feng that he could not suggest dishonest behaviour on the part of HMRC officials without clear prior notice. Officer Henderson nevertheless responded to Mr Feng's challenge and confirmed that his notes (both in manuscript and as typed-up) were correct.

OFFICER EDDY'S EVIDENCE.

55. Russell Eddy ("Officer Eddy") is a Senior Officer of HMRC. He has worked for HMRC for 19 years with 8 years' compliance experience in Specialist Investigations and Individual & Small Business Compliance. At the time of these decisions he worked as a Compliance Caseworker involved in investigating businesses and individuals suspected of under-declaring taxable profits (evasion) or claiming fraudulent repayments. He provided a witness statement and gave evidence of his methodology for calculating WJE's corporation tax liabilities and penalties.

56. Taking the accounting period ending in March 2019 as an example, his methodology was as follows:

57. To calculate revised business purchases, he established the percentage of the declared total purchases that related to Total Asia from the VAT accounts that had been provided. For the periods ending 31 March 2018 and 31 March 2019, purchases from Total Asia (and its successor) accounted for 42.17% of the total purchases. He applied the rate of suppression (39.26%) to the Total Asia purchases as follows:

(a) $£198,434 * 42.17\% = £83,679$ (the purchases relating to Total Asia)

(b) $£83,679 / 60.74 * 100 = £137,766$ (true purchases from Total Asia)

(c) $£137,766 - £83,679 = £54,087$ (the additional purchases calculated)

58. In order to calculate the additional sales that arose from the undeclared purchases, he used the GPR from the company accounts prepared for the period in question (67.79%) as follows:

$$£54,087 / 32.21 * 100 = £167,920 \text{ (additional sales)}$$

59. He accepted this figure was inclusive of VAT and adjusted it, as follows, to calculate revised total sales:

(a) $£167,920 * 5 / 6 = £139,933$ (net additional sales)

(b) $£139,933 + £615,525 = £755,458$ (revised total sales)

60. Next, he considered how to calculate the revised taxable profit for the period. KLC had admitted to paying additional wages and repairs. He decided it was fair to increase the deductions to represent the same percentage of the revised business sales as they did the declared sales. The deduction in the company accounts for wages was 17.73% of the declared turnover and the repairs was 2.19%. The deductions were recalculated as follows:

(a) Wages - $£755,458 * 17.73\% = £133,916$ (an increase of £24,805)

(b) Repairs - £755,458 * 2.19% = £16,572 (an increase of £3,070)

61. The adjustments described resulted in the following increase to declared profits:

- (a) Additional Sales - £139,933
- (b) Additional Purchases - £54,087
- (c) Additional Wages - £24,805
- (d) Additional Repairs - £3,070
- (e) Profit Increased by - £57,971

62. KLC had admitted during the interview that she had been in control of the company since 2005 and had purchased goods from Total Asia, its successors and predecessors for a number of years. The size and nature of the business had not changed during this period and prices had only increased to cover inflation. Officer Samways and Officer Eddy believed that a large drop in turnover in the year ending 2012 indicated the suppression had commenced during that period as the declarations prior to 2012 were consistent with their findings for 2019. He believed it was reasonable to conclude that the inaccuracies had occurred in the previous accounting periods under a presumption of continuity

63. Officer Eddy then considered what had happened to the additional profits. The increased profits were not visible in WJE's assets. No evidence was provided to suggest they were paid as a dividend or salary and KLC admitted to gaining personally from the under declarations. He conducted reviews of KLC's personal tax returns which indicated substantial financial commitments, a property rental portfolio and significant investments in shares exceeding the returned income. Officer Eddy concluded that the amounts were withdrawn from the company as loans resulting in an overdrawn director's loan account ("DLA") There was no evidence the loans had been repaid to WJE, so they were subject to a section 455 Corporation Tax Act 2010 charge for loans to participators in close companies. There was no mention of a DLA in any of the financial accounts for the periods in question so he concluded that the additional profits identified equated to the increase in the amounts overdrawn at the end of each period.

64. Turning to Officer Eddy's cross-examination by Mr Feng, Officer Eddy was challenged about the level of questions/enquiries he raised. Officer Eddy said that he had not felt it necessary to ask questions of WJE himself as he had all the information he needed from Officer Samways. Related to this, Mr Feng challenged Officer Eddy on the information he used for the closure notice. The enquiry, discovery and evidence focused on 2018 but the closure notice was for 2019. It was based on a principle of continuity and flawed. Officer Eddy said that he took the earlier information as his starting point, coupled with KLC's admission that she had suppressed figures over a period and the accounts were consequently unreliable. He had used the information available to him.

65. Mr Feng put it to Officer Eddy that the closure notice was based on assumption rather than enquiry, a suggestion Officer Eddy rejected.

66. Similarly, Mr Feng challenged the discovery assessments. He suggested Officer Eddy hadn't requested anything and just used the VAT figures. Officer Eddy said his corporation tax calculations had been based on the evidence HMRC had gathered and KLC's confession. He had discussed with colleagues how best to calculate numbers based on evidence held.

THE ISSUES

67. The issues between the parties go fundamentally to the question whether there has been any under-declaration of turnover, with the VAT and corporation tax consequences which flow from that.

68. The VAT assessments must be made to “best judgment” (see section and here Mr Feng says that this is an example of a “rare case” where Officer Samways did not fairly consider all material in her possession. He points to cash invoice unit prices being different from the unit prices in the declared invoices. He says this is “prima facie evidence ... that WJE Ltd did not conceal from the company’s business records” and that “Ms Chan had not behaved deliberately” and it is a factor that is missing from Officer Samways’s analysis. He goes on to say that Officer Samways only considered one aspect of all the material in her possession, this was unfair, was wholly unreasonable, was a guess and was arbitrary. She should have considered the discrepancies he identified, even though they may have been discovered after her decision, and not doing so means that her decision is an arbitrary one because she did not consider all the material before her. He says that Officer Samways “guessed because she drew inferences from the amounts”.

69. In his submission all the VAT and corporation tax assessments stand or fall on the same foundation as VAT best judgment. Essentially, his case is that Officer Samways’s decision about whether WJE under-declared its purchases cannot stand and, because they all stand on its shoulders, all the other decisions (corporation tax, including section 455 CTA 2010, and penalties) fall with it. In relation to corporation tax he also argued that the principle of continuity was being applied in appropriately. Mr Feng did not raise any points of detail on the computation of the amounts of VAT or corporation tax assessed. As we have indicated, his argument was that HMRC’s approach to their finding of suppressed purchases was so flawed that it was not a finding to the best of Officer Samways’s judgment and cannot stand as the basis for a VAT or corporation tax assessment.

70. Mr Feng did not raise any points as to the statutory conditions for raising a corporation tax assessment. Nor, in his skeleton argument, did he raise any issues around HMRC’s initial interview with KLC and the disclosures she made.

71. HMRC’s submissions focus on each amount they assess (VAT, corporation tax and penalties). Their analysis of the factual narrative is as follows:

- (1) The Appellant failed to make a disclosure regarding inaccuracies in their returns when given an opportunity to do so at the beginning of the visit on 17 October 2019..
- (2) During the visit HMRC compared the data they had obtained from Total Asia for the period 3 July 2017 to 29 January 2018 to WJE’s purchase records. This revealed that the purchases classed as ‘cash’ had not been declared in WJE’s returns..
- (3) HMRC’s findings were then put to KLC during the visit. Following a discussion with WJE’s accountant Steve Williams, KLC made a detailed disclosure regarding the accuracy of their declared sales and purchases. This included details about their record keeping, wages and repairs. KLC’s family member, Wendy Chan was also present and acted as an interpreter.
- (4) HMRC took the following steps to determine the additional tax liabilities.
 - (a) HMRC used the data obtained from the wholesaler Total Asia showing all the sales made to the Appellant for the period 3 July 2017 to 29 January 2018.
 - (b) This data was compared to WJE’s own records and this confirmed that all purchases described as ‘cash’ were not declared in WJE’s records. The total purchases from Total Asia for the period 2 July 2017 to 29 January 2018 was £69,335.68 of which £42,486.57 were declared in WJE’s records. The amount of undeclared cash purchases totalled £26,849.11. The suppressed purchases from Total Asia equated to 38.72%. 98.

(c) HMRC then established using data for the years 2018 and 2019 that the declared Total Asia purchases equated to 42.17% of the total declared purchases in this period. This also took into account that Total Asia became CL Foods during 2019.

(d) HMRC could then establish the additional purchases WJE made that should have been declared. To calculate the underdeclared sales as a result of the additional purchases HMRC applied the gross profit ratio ('GPR') that WJE had achieved in its Corporation Tax returns.

(e) When calculating the additional Corporation Tax due Officer Eddy took into account the additional wages, repairs and VAT due. Officer Eddy finally calculated the section 455 charge based on the additions to the profits.

(f) Officer Samways calculated the VAT due using the additional sales identified.

72. In HMRC's view Officer Samways's calculation of the additional VAT due met the criteria for "best judgment".

73. Similarly, HMRC say they were right to correct WJE's corporation tax return for APE 31 March 2019 because WJE had suppressed purchases in order to under-declare sales and profit. The same applies to the discovery assessments. HMRC submit that in this case it is appropriate to apply the presumption of continuity to the uplift in WJE's profits for the years assessed. The presumption of continuity was made by Officer Eddy, who had a reasonable ground to believe that WJE suppressed their cash takings from 1 February 2011. HMRC submit that the start date for the suppression of sales is 1 February 2011. This is based on the decrease in declared turnover declared in WJE's Corporation Tax returns. HMRC submit that when there is evidence of omissions from one year's return, they are permitted to infer that these omissions occurred in other years unless the taxpayer can prove otherwise. The authority for this is *Jonas v Bamford (H.M. Inspector of Taxes)* [1973] STC 519 where Walton J observed (at page 540):

"But, so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on 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."

74. HMRC submit that the evidence obtained throughout the course of their enquiries demonstrates that the suppression of purchases and subsequent suppression of sales is an established pattern that covers the period 3 July 2017 to 29 January 2018. HMRC therefore consider that the presumption of continuity is reasonable in WJE's case as there has been no evidence provided to demonstrate a change in its situation.

75. Section 455 CTA 2010 applies to loans/advances made on or after 1 April 2010. If a close company makes a loan or advance which is not repaid by the participator before the end of the accounting period, the amount is treated as if it were an amount chargeable to Corporation Tax. For the purposes of section 455, a close company is treated as making a loan or advance where a participator incurs a debt to the close company. HMRC submit that money has been taken from WJE, however this has not been declared as salary or dividends. Neither WJE nor KLC has provided evidence of how the money has been extracted. HMRC therefore contend that the money has been taken from WJE without proper authority and is a debt which has given rise to a charge under section 455.

76. As to penalties, HMRC contend that WJE is liable to the penalties as they submitted documents to HMRC which are listed within the table of paragraph 1(1) of Schedule 24 FA

2007. Condition 1 is met as the documents contained an inaccuracy leading to an understatement of a liability to tax, namely the suppression of sales. HMRC submit that the behaviour that led to the inaccuracies is deliberate and concealed in accordance with paragraph 3(1) (c) of Schedule 24 FA 2007. The reasons why HMRC took this view are set out in paragraph [100] below.

77. HMRC contend that these inaccuracies were deliberate and concealed in nature and attributable KLC, who was a director of WJE. She was a director from 5 January 2005 to 20 November 2016 and then from 10 January 2017 to date. HMRC are aware that Justin Jim was also a director from 5 November 2016 to 2 September 2019. However, KLC advised them during the meeting on 17 October 2019 that he was never part of the business but was a shareholder. KLC confirmed she had overseen and controlled the business from the start and that she was the person in charge. KLC also made the disclosure regarding the inaccuracies. HMRC therefore submit they were correct to charge a penalty in line with paragraph 19 (1), Schedule 24 of FA 2007.

DISCUSSION

VAT

78. There was no great discussion of the authorities before us. The starting point is *Van Boeckel v CCE*, [1981] STC 290, where Woolf J addressed the principles inherent in the requirement that HMRC should exercise their best judgment, which he considered to be:

- (1) “[T]he Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide”;
- (2) “[T]here must be some material before the Commissioners on which they can base their judgment”.
- (3) “[T]he Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations.”; and
- (4) “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.”

79. This discussion has been developed in a number of cases, and (although neither party referred us to them) we now briefly refer to a number of important subsequent cases. In *Rahman t/a Khayam Restaurant v CCE*, [1998] STC 826, Carnwath J considered Woolf J's comments in *Van Boeckel*. He observed that:

“I have referred to the judgment [of Woolf J] in some detail, because there are dangers in taking Woolf J's analysis of the concept of "best judgment" out of context. 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 [...] Short of such a finding, there is no justification for setting aside the assessment.”

80. In *Commissioners of Customs & Excise v Pegasus Birds Ltd*, [2004] STC 1509, Carnwarth LJ observed that:

“The statutory words ‘to the best of their judgment’ are used in a context where the taxpayers’ records may be incomplete, so that a fully informed assessment is unlikely to be possible. Thus the word ‘best’, rather than implying a higher than normal standard, is a recognition that the result may necessarily involve an element of guesswork. It means simply ‘to the best of (their) judgment on the information available’.”

81. In *Georgiou (t/a Marios Chippery) v CCE*, [1996] STC 463, the Court of Appeal held that the Tribunal had used the right test in deciding that HMRC had assessed to the best of their judgement by using the evidence before them at the time of making the assessment.

The meeting on 17 October 2019

82. In his skeleton argument and before us Mr Feng used expressions (such as “spurious estimate” or “guess”) to describe the VAT assessment. We will turn to those points shortly. But first of all we should say something about the allegations of dishonesty he levelled against two of the officers, Officer Samways and Officer Henderson, involved in this appeal. Allegations of dishonesty were (as is recorded in Officer Samways’s evidence) trailed following Mr Feng’s initial appointment. They do not seem to have been followed up in his later dealings with HMRC and they had disappeared by the time he wrote his skeleton argument. They re-appeared suddenly in the course of these proceedings, when Mr Feng without warning accused Officer Henderson of having made up his notes of the meeting. The Tribunal interjected to remind Mr Feng that it is not permitted to make allegations of this nature without notice or supporting evidence. We record that, despite this interjection, Officer Henderson firmly rejected Mr Feng’s suggestion and very clearly stated that his manuscript and typed-up notes were his and were correct. When asked in the course of his final submissions what he had to say about Officer Henderson’s note of meeting and the evidence of Officer Henderson and Officer Samways, Mr Feng said he was not able to comment.

83. We should state clearly and unequivocally that we found all HMRC’s witnesses to be straightforward individuals who were doing their best to assist the Tribunal. We note that three other individuals, KLC, Wendy Chan and Mr Williams were all present at the meeting with HMRC. None of them have provided a witness statement or given evidence before us to support Mr Feng’s assertion. We have already noted that Mr Feng did not challenge Officer Samways about her recollection of the meeting, which is clearly set out in her witness statement.

84. We find as a fact that the meeting between KLC, Wendy Chan and Mr Williams on 17 October 2019 took the course described by Officer Samways in her evidence to this tribunal and that KLC made the confession in the terms described.

85. This is an important finding, because HMRC’s enquiries started because of information they had received from Total Asia and which they confronted KLC with at the meeting on 17 October 2019. Her confession as to what she had been doing is an important part of the material garnered by HMRC, although there is significant additional evidence, most importantly the material obtained from Total Asia.

Were the VAT assessments made to “best judgement?”

86. Against that background, it was reasonable for Officer Samways to proceed on the basis that there has been under-declaration of purchases, sales and VAT liability; indeed, it would have been quite irrational for her to have proceeded on any other basis.

87. When she came to make her assessment, in addition to KLC's confession, Officer Samways considered:

- (1) The spreadsheet she had from the outset which showed WJE's dealings with Total Asia in the period 3 July 2017 to 29 January 2018;
- (2) the information obtained from Total Asia which showed the cash purchases (which were missing from WJE's records) in the same period; see paragraph;
- (3) the declared GPR for the periods 09/17 and 12/17 was 66.29%, which is within the average range HMRC would expect for a restaurant business. When the undeclared purchases for the periods are taken into consideration the GPR drops to 46.29%, which falls well below the trade average supporting Officer Samways's view that sales would have resulted from the additional purchases.

88. The way the additional VAT liability was calculated is described above. We find nothing spurious or irrational in the approach taken. It was a careful, rational extrapolation from what she had found out (that there was an under-declaration of purchases) using other information available to her. Officer Samways was cautious in the conclusions she drew. For example, following some (albeit incomplete) researches, she assumed that Total Asia was the only supplier where there had been an under-declaration of purchases. In May 2021 she received invoices from Total Asia and inputted these into an excel spreadsheet. All invoice numbers, dates and amounts matched the information she had originally been provided on the summary sheet in Excel she had used to compare against the business records.

89. Although KLC had operated this business since 2005, it was run in L Best Award Ltd and Good Diner 88 Ltd between 1 October 2015 and 30 November 2016. As these are now dissolved companies Officer Samways considered that it would not be cost effective to reinstate these companies and therefore HMRC would not raise assessments for the periods they traded.

90. Evidence suggested that profit suppression started as long ago as 2012.

91. Although Total Asia Food Ltd commenced trade in 2015, it had previously traded as Jing Xing Trading Co Ltd with the same directors. So, it could be assumed that the behaviour stretched back beyond 2015.

92. At the point she raised the VAT assessment in May 2020 she had all this information (except the invoices sent over in May 2021) and could, in our opinion, quite reasonably have concluded that WJE dealt with Total Asia from 1 December 2016 in the way (and with the VAT effects) she had concluded. Officer Samways did not have a complete set of evidence covering the entire period she assessed, but the facts in *Van Boeckel* make it clear that "sampling" is a perfectly valid approach when making a "best judgment" assessment. Here Officer Samways had data for seven months and used it as the basis for an assessment period of 28 months. That does not seem to us to be an unreasonably short period. Neither WJE nor Mr Feng had provided her with any information which could cause her to doubt her judgment that this was an appropriate way of proceeding. Nor have they provided any information or evidence to challenge the quantum of the assessments.

The additional material provided in January 2022

93. On 12 January 2022, Mr Feng provided documents that WJE wished to reply upon in the proceedings. These documents related to years 2012 to 2015 and had not been seen previously by Officer Samways or Officer Eddy. These documents showed that WJE traded with Total Asia only in the period January 2017 to October 2018. As a result of this the Officers' decided that it was reasonable to assume that purchases were suppressed only for the period January 2017 to October 2018 when WJE traded with Total Asia. This is what resulted in amendments to the quantum of all decisions.

94. We do not consider that the production of this information suggests that Officer Samways's assessment was a random guess. HMRC have indicated that assessments for two of the VAT periods (at the beginning and end of the period covered by the original VAT assessment) should be reduced to zero, but this does not, in our opinion, impugn the remaining assessments. This assessment was raised because Officer Samways believed that WJE had been trading with Total Asia from the beginning of the period of she assessed and neither WJE nor Mr Feng at any time suggested this was not the case. Indeed, it is instructive to note that Mr Feng did not notice (or, if he did, he certainly did not share with HMRC) that the information supplied in January 2022 indicated that WJE had only been trading with WJE over a much shorter period. It is much to the credit of Officer Samways and Officer Eddy that they noticed this and drew it to WJE's attention. We remind ourselves of Woolf J's observation (quoted above) that "best judgment" does not require HMRC to do a taxpayer's work for them, which is exactly what the officers have done here. Far from suggesting that the VAT assessment was a guess and not made to HMRC's best judgment, this suggests to us that it was made to their best judgment and corrected as and when further information (in favour of WJE) emerged. We have determined that the VAT assessments meet the requirement of being made to "best judgment" and there is nothing to question the liabilities they assess.

Corporation Tax

95. The corporation tax assessment period was originally much longer than the VAT period, stretching back to 2012 and that brings the "principle of continuity" very much to the fore. Mr Feng pressed us vigorously on the appropriateness of applying the principle of continuity from an investigation period (essentially the second half of 2017 and January 2018) back so far. His point, assuming WJE was trading with Total Asia in that period, was that this was far too long a period to extrapolate over. Again without warning in his closing submissions he referred us to *Wong Yau Lam and Sau Yau Lam T/A Sunlight Takeaway Meals v HMRC*, TC/2015/02286. Ms Castle, understandably, objected to his doing so. She need not have been anxious. We have read the decision in that case and it does not seem to us to help Mr Feng at all. There HMRC appeared to be applying a presumption of continuity by reference to 2007-08. The Tribunal thought that was "... inappropriate. There was no basis to use 2007-08 as the starting point when it had not been the focus of the enquiry. [HMRC's] investigation of the business related to 2006-07 and [the officer] did not consider any business records for other years." Clearly, it is not appropriate to apply a principle of continuity taking as the base period one which has not been the subject of any investigation. That, however, is not the case here. The base period is the investigation period. This case could only help Mr Feng if we accepted his proposition that HMRC's investigation into WJE's affairs was so flawed that there is no reliable enquiry or investigation result to use as the basis for that principle to operate on. As we do not accept that proposition, there is nothing here to help Mr Feng.

96. As the Tribunal remarked in *Sunlight Takeaway Meals*, the presumption of continuity is not a rule of law, but a rebuttable presumption of fact. This Tribunal observed in *Dr I Syed v HMRC*, TC/2009/12349 (at paragraph [38]) commenting on the quotation from Walton J in *Jonas v Bamford* (supra):

"In our view this quotation expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A it must be assumed that it happened in the prior year. An officer is not bound by law and 5 in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a commonsense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year.

Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present. In the circumstances of *Jonas v Bamford* there had been undeclared income in a particular year: it was not unreasonable to conclude that the same habit of concealing income had been followed in previous years.”

97. It seems to us that it is perfectly reasonable to take the position (as a starting point, at least) that the level of suppression of purchases (and the sales/profit suppression to be surmised from it) in the base period continued throughout the period from 2012 when abnormally low profits were observed. This is, however, no more than a sensible starting point and we can see here (in fact already have seen) how HMRC approached the evidence. Initially they took the view that they should proceed on the basis that what they had found out about how WJE was manipulating the figures in the base period should be taken to have been the case throughout the period from 2012. Then, when they discovered something new (that WJE had not been trading with Total Asia throughout this period) they moved away from that position, applied the principle of continuity to a much shorter period and withdrew some of their earlier assessments. In our judgment, it was perfectly appropriate for HMRC to apply the principle of continuity in the way they did from the base period over the total period when WJE was trading with Total Asia. Indeed, it is difficult to see what else they could have done.

98. Turning to other matters, Mr Feng did not challenge the way Officer Eddy used the information HMRC had to calculate uplifts of WJE’s profits or assumed debts owed by KLC (on the basis that the only explanation for the assumed profits not being in WJE is an unauthorised withdrawal by KLC which results in a debt owed by her to WJE) giving rise to a charge under section 455 CTA 2010. Mr Feng’s approach was to challenge the use of the principle of continuity over what (he said) was such a long period. Whatever the position might have been had we been considering HMRC’s calculation of profits back to 2012, now that we are only considering periods starting in January 2017, it is clear that applying the principle of continuity as HMRC have done over that shorter period is clearly appropriate in the absence of any suggestion that things have changed that would make that inappropriate. Mr Feng made no such suggestion.

99. It is for WJE to show that the amendments to the corporation tax return for the year ending 31 March 2019 in the closure notice are not correct and that the quantum of the discovery assessments should be reduced. They have failed to do so.

Penalties

100. Mr Feng did not have much to say about penalties, other than to observe that in his view HMRC had not met the “deliberate” hurdle and that it was rare to see a case where HMRC questioned themselves or sought more information after they had raised an assessment. It is not clear to us how these points bear on the penalty issue. HMRC categorised WJE’s behaviour as deliberate and concealed because of the following factors:

- (a) The errors are of an amount that could not have gone unnoticed and KLC/WJE would therefore have known they were submitting inaccurate returns.
- (b) KLC admitted she/WJE made a personal financial gain as a result of the under declarations.
- (c) KLC admitted that the till recorded the true amount of sales but that the information was sent to Hong Kong to be manipulated before being sent to their original accountant.

- (d) KLC admitted to making the additional cash purchases from Total Asia and concealing them from their original accountant and HMRC.
- (e) KLC admitted to knowingly providing their original accountant with incorrect sales figures which means they knew the returns submitted to HMRC were inaccurate.
- (f) KLC admitted the till rolls were destroyed to conceal their true sales figures.
- (g) KLC admitted their till is programmed to delete sales on a daily basis.
- (h) KLC admitted that the staff included students who could only work for 20 hours. They were paid for 15-20 hours through payroll. Any additional hours were paid in cash and that there were staff not on a list previously given to HMRC.

101. A deliberate act is one done consciously with the intention or purpose of submitting an incorrect document. In *Auxilium Project Management v HMRC* [2016] UKFTT 0249 (TC) the tribunal, noting that the legislation did not further define the word “deliberate”, took the view that “a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document”. The tribunal emphasised this was a subjective test and that the question was not whether a reasonable taxpayer might have made the same error or even whether the taxpayer failed to take all reasonable steps to ensure that the return was accurate, “it is a question of knowledge and intention of the particular taxpayer at the time.”

102. *Leach v HMRC* [2019] UKFTT 0352 (TC) addressed the meaning of ‘concealed’, where the tribunal observed (at paragraphs [105]-[109]):

“The meaning of ‘concealed’ is also not defined in Schedule 24. The Oxford English Dictionary (‘OED’) states that ‘conceal’ as an intransitive verb means: ‘To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from ... others; to refrain from disclosing or divulging.’

We noted that Mr Leach immediately told Mr Wishman that he had destroyed all the records: this was not something HMRC discovered subsequently, so he did not ‘refrain from disclosing or divulging’ what he had done.

However, ‘conceal’ has a slightly different meaning when it is used transitively (ie so that the verb has an object); it is then defined as: ‘To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible.’

The statutory context here is Sch 24, para 3, which says: ‘an inaccuracy in a document is ... “deliberate and concealed” if the inaccuracy is deliberate on P’s part and P makes arrangements to conceal it.’

An inaccuracy is therefore ‘concealed’ if the person makes arrangements to conceal ‘it’, ie the inaccuracy, so this is a transitive usage. The question is therefore whether Mr Leach prevented the inaccuracy from being visible?”

103. HMRC submit that WJE must have known that there were inaccuracies in their VAT and Corporation Tax returns. It is not plausible that the omission from Appellant’s VAT and Corporation Tax returns of such a large proportion of their sales could have been anything other than deliberate and concealed. The act of arranging two accounts with a supplier, declaring only one account’s purchases within the records in order to suppress their sales whilst retaining a credible GPR dictates a level of concealment. It can reasonably be inferred from the disclosure during the visit on 17 October 2019 and the actions taken to conceal the true sales that WJE intended, or at least knew, that they were providing HMRC with documents that contained an error with the intention that HMRC should rely upon it as an accurate document. The disclosure of the failure was prompted as it was made after HMRC attended the WJE’s

premises in order to look into their tax affairs. For a deliberate and concealed inaccuracy that was prompted the penalty range is from 50 to 100%.

104. Mr Feng did not challenge the detail of the penalty calculation. He simply suggested that HMRC had not shown that WJE's behaviour had crossed the "deliberate and concealed" threshold, but he did not explain why he took that position. We agree with HMRC's analysis, for the reasons set out above, that WJE's behaviour crossed the "deliberate and concealed" threshold.

105. Paragraph 19, Schedule 24 FA 2007 provides that, where a penalty is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty as HMRC specify by written notice to the officer. HMRC contend (and we accept) that these inaccuracies were deliberate and concealed in nature and attributable to the director of the Company KLC, who was a director of the business from 5 January 2005 to 20 November 2016 and then from 10 January 2017 to date. One Justin Jim was also a director from 5 November 2016 to 2 September 2019, but KLC told HMRC during the meeting on 17 October 2019 that he was never part of the business but was a shareholder. KLC confirmed she had overseen and controlled the business from the start and that she was the person in charge. She also made the disclosure regarding the inaccuracies. We are satisfied that the penalties assessed on WJE are clearly attributable to KLC's behaviour. That is self-evident from the meeting on 17 October 2019 and her confession.

DETERMINATION

106. This appeal is dismissed and the VAT, corporation tax and penalty assessments and officer's liability notices are confirmed in the revised amounts shown in the Appendix to this decision notice.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

107. 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.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 23rd JANUARY 2023

Appendix: The Amounts in Dispute

VAT Assessments

VAT period	Amount following review	Current amount
12/16	2,143	0
03/17	7,576	6,832
06/17	7,115	7,446
09/17	6,971	7,296
12/17	5,927	6,202
03/18	6,317	6,611
06/18	6,750	4,041
09/18	7,276	4,356
12/18	6,941	4,155
03/19	6,391	0
TOTAL	63,407	46,939

The inaccuracy penalty in respect of the VAT assessment was originally £50,725 but is now £37,551.20. An officer's liability notice under paragraph 19, Schedule 24, FA 2007 was served in respect of 100% of this penalty.

Corporation Tax Closure Notice and Assessments

Period	Amount following review	Current amount ¹
01.02.11-31.01.12	33,182.28	0
01.02.13-31.01.13	27,688.67	0
01.02.13-31.01.14	29,453.75	0
01.02.14-31.01.15	28,545.78	0
01.02.15-30.09.15 ²	9,870.15	0
01.10.16-31.03.17	10,576.96	7,435.53
01.04.17-31.03.18	26,304.60	27,528.34
01.04.18-31.03.19	29,185.34	16,068.48
TOTAL	194,807.53	51,032.55

The inaccuracy penalty in respect of the corporation tax closure notice and assessments was originally £160,995 but is now £40,825.88. An officer's liability notice under paragraph 19, Schedule 24, FA 2007 was served in respect of 100% of this penalty.

¹ Includes amounts due under section 455 CTA 2010

² The gap between 01.10.15 and 01.10.16 covers the period when the business was not being carried on by WJE.