



Neutral Citation: [2024] UKFTT 00511 (TC)

Case Number: TC09199

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House
88 Rosebery Avenue
London

Appeal reference: TC/2019/01727

VAT – Appellant owns convenience store – VAT returns prepared by former accountant – HMRC obtained data from tills – assessments issued by HMRC on basis of underdeclared takings and understated output tax liability – whether data reliable, with challenges including absence of USB stick used to copy data and effect of changes to till software – penalties issued for careless and deliberate behaviour in different periods – held – appeal against assessments dismissed – appeal against deliberate penalties allowed, with Tribunal replacing with penalties for careless behaviour – increased mitigation allowed for some periods based on quality of disclosure

Heard on: 23-24 April 2024
Judgment date: 6 June 2024

Before

**TRIBUNAL JUDGE JEANETTE ZAMAN
TRIBUNAL MEMBER DR CAROLINE SMALL**

Between

JAGTAR SINGH RAI AND SUKHDEV SINGH RAI (T/A BURSHA FOODS)
Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants: Dhiren Doshi, Doshi & Co

For the Respondents: Matthew Lindsay, counsel, of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. Jagtar Singh Rai (“Mr Rai) and Sukhdev Singh Rai (“Mr S Rai”) (together, “the Appellants”) bought the business which trades as Bursha Foods, a convenience store, on 17 August 2014. The VAT registration number ending 801 was transferred to the Appellants with the business.

2. Following an enquiry in which HMRC extracted and copied the data from two tills at Bursha Foods, HMRC issued various VAT assessments and penalties for the periods 02/14 to 02/16. The Appellants appealed to the Tribunal.

PROGRESS OF THE APPEAL AND CASE MANAGEMENT

3. The appeal had been listed to be heard on 23 November 2023 (the “November 2023 Hearing”). The time taken to address various case management matters on that date meant that the appeal was re-listed (before the same panel) to be heard at a later date. Following the November 2023 Hearing, the Tribunal issued directions on 29 November 2023 for the stated purpose of facilitating a smooth progression of the appeal to a hearing.

4. The issues addressed at the November 2023 Hearing and which arose subsequently are summarised below.

Periods in issue

5. The Notice of Appeal to the Tribunal had been given late. HMRC had objected to permission being given for late appeals to be made. The application was heard by the Tribunal on 19 July 2021 and the Tribunal gave permission for late appeals to be made against the assessments (or amended assessments) issued for the periods ending 11/14 to 02/16 (the “Late Appeal Decision”).

6. At [1] of the Late Appeal Decision the Tribunal recorded that “Although HMRC thought there was an appeal against the VAT assessments for the period 02/14-08/14 issued by HMRC on 11 March 2016, totalling £15,000, at the hearing, Mr Doshi clarified that this period was not under appeal.”

7. The Late Appeal Decision was issued as a summary decision. No application was made for a full decision.

Withdrawal of certain penalties by HMRC

8. Mr Lindsay confirmed that whilst HMRC’s position was that the Appellants did not have permission to make a late appeal against the assessments which had been issued for the periods 02/14, 05/14 and 08/14 (and that such assessments were therefore final), HMRC would withdraw the penalties which had been issued for these three periods (totalling £3,945), accepting that HMRC was not able to levy penalties against a subsequent owner of a business or VAT registration number in relation to the conduct of the previous owner.

Bundles

9. HMRC had prepared a “Respondents’ Combined Bundle” in advance of the November 2023 Hearing. Shortly before that hearing, the Appellants provided an additional electronic bundle, the “Appellants’ Bundle”, of more than 200 pages and applied for that to be admitted. HMRC did not object and the Tribunal agreed that it would be in accordance with the overriding objective to admit that additional material. We reminded the parties that, whilst the panel had read the pleadings and the witness statements (excluding exhibits) in preparation for the November 2023 Hearing, and would read the written submissions which were handed up during the November 2023 Hearing in advance of the re-arranged hearing,

the parties would need to take us to those pages within the bundle on which they sought to rely when making their submissions, or when challenging witness evidence in cross-examination.

10. At the November 2023 Hearing, Mr Lindsay offered to arrange for a single combined bundle to be prepared for use at the re-arranged hearing. That replacement combined electronic bundle (of 1564 pages) (the “New Bundle”) was filed on or before 9 April 2024.

11. Mr Doshi told us at the re-arranged hearing (the “April 2024 Hearing”) that he and the Appellants had not been able to access the New Bundle when it was served on them, and that (with HMRC’s assistance) they had only uploaded it on 22 April 2024, ie the day before the hearing. Mr Lindsay confirmed to the Tribunal that the New Bundle was comprised solely of the material which had previously been in the Respondents’ Combined Bundle and the Appellants’ Bundle (and this accorded with the Tribunal’s understanding based both on the directions which had been issued and the number of pages in the New Bundle).

12. At times during the re-arranged hearing Mr Doshi and Mr Rai referred to having only seen certain papers the previous day; the Tribunal confirmed that they were referring to material in the New Bundle (as that had been available to both parties in November 2023 and, for some of the papers, months or years prior to that). Mr Doshi did hand up some further papers at the April 2024 Hearing and he took us to some of those pages. These papers had not been included in the Appellants’ Bundle and were therefore not in the New Bundle.

Subsequent application for disclosure

13. Following the November 2023 Hearing, the Appellants made a further application for disclosure (including of a USB stick, HMRC laptops and copy returns). That application was refused on the papers, and was not renewed at the April 2024 Hearing.

RELEVANT LAW

14. Section 73(1) Value Added Tax Act 1994 (“VATA 1994”) provides:

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

15. Section 83(1)(p) VATA 1994 provides that an appeal lies to the Tribunal against an assessment under s73(1) or the amount of such an assessment.

16. Penalties were imposed under Schedule 24 Finance Act 2007. Paragraph 1 provides that a penalty is payable where a person gives HMRC a document (here, the VAT returns) and Conditions 1 and 2 are satisfied. Condition 1 is that the document contains an inaccuracy which amounts to or leads to an understatement of a liability to tax or a false or inflated claim to repayment of tax, and Condition 2 is that the inaccuracy was careless or deliberate.

17. Paragraph 3 provides that an inaccuracy in a document given to HMRC may be careless, deliberate but not concealed or deliberate and concealed for this purpose.

18. Paragraph 4 sets out the amount of the penalty payable. For a category 1 inaccuracy (as here), the penalty is 30% of the potential lost revenue (“PLR”) for careless action, 70% of the PLR for deliberate but not concealed action and 100% of the PLR for deliberate and concealed action.

19. Paragraphs 9 and 10 then provide for reductions for disclosure of an inaccuracy. Paragraph 9(1) provides that a person discloses an inaccuracy by telling HMRC about it,

giving HMRC reasonable help in quantifying the inaccuracy and allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. Disclosure is unprompted if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy and otherwise is prompted. The quality of the disclosure includes its timing, nature and extent. Paragraph 10 sets out the minimum percentage of penalty – for prompted disclosure, the minimum percentage for careless action is 15% and for deliberate but not concealed action it is 35%. Paragraph 11 provides that HMRC may reduce a penalty for special circumstances. Paragraph 14 provides that HMRC may suspend all or part of a penalty for a careless inaccuracy.

ASSESSMENTS AND PENALTIES

20. The Late Appeal Decision and HMRC’s withdrawal of penalties for 02/14, 05/14 and 08/14 mean that the appeal before us was against the following VAT assessments and penalties:

Period	Assessment	Amount	Penalty	Amount
11/14	Output tax	£4,063	Careless	£670.39
02/15	Output tax	£9,178	Deliberate	£5,139.68
02/15	Input tax	£3.05	Careless	£0.45
05/15	Output tax	£9,958	Deliberate	£5,576.48
08/15	Output tax	£9,610	Deliberate	£5,381.60
08/15	Input tax	£468	Careless	£70.20
11/15	Output tax	£9,582	Careless	£2,155.95
02/16	Input tax	£113		

ISSUES AND BURDEN OF PROOF

21. At the April 2024 Hearing, Mr Doshi confirmed:

(1) The Appellants were not appealing against the assessments of input tax which had been issued (for periods 02/15, 08/15 and 02/16), or the careless penalties (of £0.45 and £70.20) which had been issued in respect of these inaccuracies.

(2) The Appellants were appealing against the output tax assessments for 11/14 to 11/15 (inclusive).

(3) Two of the penalties for these inaccuracies were issued on the basis that conduct was careless, three on the basis of deliberate conduct (with HMRC pleading carelessness in the alternative). The Appellants accepted for all five periods that the conduct was careless, but it was not deliberate.

22. The assessments and penalties had all been issued in time.

23. The issues (and burden of proof) are therefore as follows:

(1) HMRC bear the burden of establishing that the output tax assessments were made to the best of their judgment.

- (2) If HMRC satisfy that burden, the Appellants bear the burden of establishing that the amounts assessed are overstated.
- (3) HMRC bear the burden of establishing that the Appellants' conduct in relation to any inaccuracies in the returns for 02/15, 05/15 and 08/15 was deliberate.
- (4) The Appellants bear the burden of establishing that further mitigation should be given to reduce the quantum of any penalties.

24. The standard of proof is the balance of probabilities.

SUMMARY OF APPELLANTS' GROUNDS OF APPEAL AND SUBMISSIONS

25. In the grounds of appeal to the Tribunal, the Appellant submitted that HMRC had not made a best judgment decision, but had instead relied on the previous accountant's explanations. There were no working documents to confirm the accountant's explanation. The Appellants had co-operated with HMRC throughout, and had permitted HMRC to visit the business. The penalties are too high, and the conduct was no more than careless.

26. In the Appellants' written submissions (handed up ahead of the November 2023 Hearing), Mr Doshi's submissions included:

- (1) No evidence had been made available by HMRC in respect of the assessments – the assessment for 11/14 was based on an email from the Appellants' previous accountant; and those for 02/15 to 11/15 were based on the analysis by Officer Neale Bray of the data copied from the tills. The Appellants were not provided with the USB stick or the original pdf of the data obtained by Officer Bray, ie before he performed calculations, and it is easily possible to add or amend Excel sheets incorrectly. The Tribunal cannot be 100% confident that the data it has in front of it is the correct data copied from the two tills on 7 September 2016.
- (2) The data analysis of Officer Bray does not reflect gross profit margins in the industry. His analysis says that sales were higher than those declared in the accounts, sale of tobacco was 34% of sales, and gross profit is 31.9% overall.
- (3) Officer Maxine Fellows had checked purchase invoices and had only identified a few duplicate purchase invoices. She had not challenged the ratios of purchases between zero-rated and standard-rated. It was therefore not logical for Officer Bray to come up with standard-rated sales at 73.6% to 83.2% when the standard-rated purchases were 55%.
- (4) The accounts prepared for 31 August 2015 are consistent with the VAT returns as filed.
- (5) The Appellants followed Costcutter pricing policy, retained the services of an accountant, provided VAT figures and prime documents and relied on their accountant.
- (6) Once HMRC opened an enquiry, the Appellants instructed their accountant to give full co-operation and gave permission to HMRC to extract data from the tills.
- (7) Penalties should be suspended by a SMART condition being imposed.

27. At the April 2024 Hearing, Mr Doshi accepted at the beginning of the hearing that if the data in Officer Bray's report was correct (ie it does belong to Bursha Foods rather than another business, and has not been corrupted or amended during the analysis process), it follows that the assessments are correct.

EVIDENCE

28. We had a hearing bundle of 1564 pages (ie the New Bundle), written submissions from both parties and some additional papers handed up by the Appellants at the April 2024 Hearing. In reaching our decision we have considered all of the pages to which we were taken during the April 2024 Hearing. As the parties were informed would be the case at the November 2023 Hearing, we have not read the remaining contents of that bundle. We have taken account of all of the parties' submissions, written and oral, but have not considered it necessary to refer expressly to each point made.

Witnesses

29. We had witness statements and heard oral evidence from Jagtar Singh Rai (to whom we refer throughout as Mr Rai), Officer Fellows and Officer Bray. (We did not hear evidence from Mr Rai's brother, Sukhdev Singh Rai, and we refer to him as Mr S Rai.) The Appellants had, prior to instructing Mr Doshi, appointed the accountant who had acted for the previous owners of the business to submit their VAT returns; we refer to him as AH rather than identifying him by name given the allegations (referred to below) that were made by Mr Rai when giving evidence as AH had not been called to give evidence in this appeal and has not had the opportunity to respond to those allegations.

30. Mr Rai provided two witness statements, dated 9 May 2022 and 16 November 2023, the second of which had been produced to respond to the witness statement of Officer Bray. Mr Rai gave additional evidence-in-chief at the hearing and was cross-examined.

31. Mr Rai's witness statements addressed the appointment of AH and their reliance on him, the Appellants' co-operation with HMRC including having given permission for HMRC's data extraction specialist to visit and extract data from the tills and his disagreement with the till data report produced by HMRC. Mr Rai's oral evidence addressed his own experience and the way in which he provided information to AH for him to prepare the VAT returns, Bursha Foods' supplier having been Costcutter when they bought the business and the decision to move to Nisa, his frustration with AH (as the VAT refund he said he was expecting didn't materialise) and allegations about AH's conduct (which included that AH had wrongly told HMRC that there was an underdeclaration of takings, that AH had acted out of spite as the Appellants had said they would be using a different accountant).

32. Mr Rai's evidence included that he had provided the details of daily takings from the tills to AH (recording the numbers daily, checking them weekly and providing them to AH in person monthly) for AH to prepare the VAT returns. Mr Lindsay questioned this, but did not put it to him during cross-examination that he knew these numbers were incorrect, or that he made up numbers to give to AH. Mr Lindsay did almost as a final question, put it to Mr Rai that it was HMRC's case that Mr Rai had deliberately edited the data provided to his accountant.

33. We found it difficult to assess the reliability of Mr Rai's evidence:

(1) There were several areas where Mr Rai's explanations were unhelpfully vague, in circumstances where we would have expected Mr Rai to have been able to check his own records (eg online calendar, emails, text messages) to remind himself of dates/timelines and produce some form of corroborating material to the Tribunal. By way of example, Mr Rai explained that they changed suppliers from Costcutter to Nisa, and that this had involved changing till software but was not able to be specific as to when either of these events had happened, suggesting it may have been in 2015 or 2016. Mr Rai sought to narrow the date range by saying it was happening around the same time as he changed accountants, but the documentary evidence indicated that AH was still acting for the Appellants in mid-2016 and Mr Doshi seemed to have been

instructed in early 2017. Mr Rai's witness statement had said that the software in one of the tills was changed in May 2016 (without linking this to the change of supplier, and specifying that this was just one till).

(2) The allegations about AH's conduct only emerged during Mr Rai's oral evidence. His witness statement had described AH as having given his 100%. Yet at the hearing, giving evidence-in-chief and then being cross-examined, Mr Rai blamed AH, not just by explaining that he had relied on AH, but stating that AH had not told HMRC the truth about undeclared cash that he reported to HMRC, and stating that this was done out of spite towards the Appellants as AH knew they were planning to change accountants. There was no documentary evidence supporting these allegations, eg emails or text messages between the Appellants and AH.

(3) Some of Mr Rai's explanations differed from what HMRC had previously been told, eg he said that when they bought the business, they only closed for less than a day to do a stock take, whereas AH had told HMRC that they shut the shop for a few weeks to refurbish. We recognise that the contemporaneous documentary evidence in this example was an email from AH who, on Mr Rai's evidence, is not necessarily reliable.

34. We take account of the full picture presented to us by all of the evidence (both documentary and from Officers Bray and Fellows), and this included:

(1) the Appellants gave HMRC access to their tills in circumstances where Mr Rai's own evidence was based on stating that he had used till data to provide numbers to his accountant;

(2) our assessment of Mr Rai's responses to being challenged in cross-examination. During cross-examination, Mr Rai's answers were consistent, even where initially it appeared that there was documentation contradicting him (which was the case with a challenge, later withdrawn by Mr Lindsay, as to whether Mr Rai had ever provided the numbers for the VAT returns by phone, which Mr Rai denied but appeared to be suggested by AH to Officer Fellows, although it was then accepted that this e-mail exchange was referring to the practice of the previous owners); and

(3) Mr Rai made various serious accusations of AH, yet hadn't produced any documentation in support (eg emails asking for copies of papers, or emails from the time that Mr Rai told AH that they would not be instructing him anymore).

35. Whilst we have some doubts as to Mr Rai's reliability, we have placed some weight on his evidence, including in relation to matters where there is no relevant documentary evidence (either in support or contradiction). This does not mean that we have accepted all of it. We have been reluctant to accept evidence where no documentation has been produced in support in circumstances where we would expect such material to exist – eg, in relation to numbers of customers (where even if there were no contemporaneous records, the Appellant could have produced current till records to illustrate the position and given evidence as to whether there were changes).

36. Officer Fellows had issued the assessments and the penalties to the Appellants. Her witness statement was dated 3 November 2021. She explained that she had taken over from Officer Patricia Harding in January 2016 (but did exhibit the earlier correspondence between Officer Harding and AH or other members of AH's accounting firm). Her evidence addressed the enquiry, instructing Officer Bray to produce a report, and the basis on which she had calculated and issued the assessments and determined the penalties).

37. We accept Officer Fellows' evidence.

38. Officer Bray, as a member of the HMRC Systems Evasion & Audit Team, had been asked in August 2016 to take the lead in obtaining till transaction data from Bursha Foods, assisted by Officer Michael Tilt, and to provide analysis to Officer Fellows to assist her enquiry. He visited Bursha Foods on 7 September 2016 with Officer Tilt; Mr Rai, Mr S Rai and AH were present. His witness statement described how he had copied till data, analysed the data and subsequently produced two reports which were sent to Officer Fellows. We refer to the reports as the “Data Analysis”, which is very detailed and contains different sheet presentations of the data obtained from the tills, and the “Bursha Data Report”, which is a short document summarising some of the findings.

39. We considered that Officer Bray was a reliable witness, doing his best to assist the Tribunal, and accept his evidence.

Production of documents

40. Whilst the New Bundle was ostensibly extensive (at 1564 pages), Mr Doshi challenged what he submitted was the failure of HMRC to produce various evidence, submitting that HMRC had a duty to disclose everything to the Tribunal.

41. That is not an accurate description of the disclosure obligations. Under The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, each party was required under rule 27 to send or deliver to each other party a list of documents of which they had possession, the right to possession or the right to take copies and on which they intend to rely upon or produce in the proceedings. They must then allow the other party to inspect or take copies of the documents on that list. HMRC had produced the documents on its list.

42. Separately, any party may apply to the Tribunal for a direction that another party produce documents. The Appellants had requested documents from HMRC and had applied to the Tribunal for a direction that certain documents and other evidence be produced. We address in our findings of fact one such item sought by the Appellants (the USB stick which was used by HMRC to copy data from the tills). There are two points to address at this stage:

(1) The bundle included a significant amount of material produced by HMRC, including the correspondence during the enquiry process and the till data reports prepared by Officer Bray. There had, however, been a problem with deletion of files by HMRC. Officer Bray explained in his witness statement that he saved his materials (data as uplifted from the tills, email exchanges with officers, the converted data) in the prescribed location on HMRC’s computer network. They were there at the end of 2017 but had, he understood, subsequently been deleted. He said he had no involvement or responsibility for the retention of saved data on this network. We accept his evidence that this had happened. Such a mistake is certainly regrettable and we have taken into account the absence of documents when making our findings of fact. However, some material had evidently been stored in a different location (as demonstrated from Officer Fellows’ ability to exhibit materials) and this would have included copies of emails between Officer Bray and Officer Fellows. We considered that the consequences for this appeal, and the parties’ ability to present their case, of the absence of the information saved by Officer Bray was significantly mitigated by the fact that HMRC had called Officer Fellows and Officer Bray as witnesses – between them they explained the enquiry, the data analysis and the basis on which the assessments and penalties were issued, and were cross-examined by Mr Doshi.

(2) Several of the requests for documents or evidence from HMRC were for materials that were (or would once have been) in the possession of the Appellants (or their accountant), eg the VAT100s which had been filed (where HMRC produced a table of the information submitted in those returns but not the returns themselves), till rolls, data

on the tills (as they were the Appellants' tills). The Appellants could have called evidence from Mr S Rai or AH, and could have obtained a further extraction of data from their tills. Mr Doshi criticised HMRC for not producing the prime documents showing the workings for some of the VAT assessments, but one of the issues faced in this appeal was that such workings had never been provided by AH to HMRC. That is not the fault of HMRC.

FINDINGS OF FACT

43. We make the findings of fact below on the basis of all of the evidence before us.

Business

44. The Appellants bought the business of Bursha Foods on 17 August 2014. At that time:

- (1) they shut the store for no more than one day to conduct a stock take;
- (2) the store was a Costcutter, ie Costcutter was their supplier, and as part of this arrangement Costcutter had supplied and installed the tills and the software used by the tills. The tills operated as an automatic ordering system – replacements for goods sold were ordered automatically (although the Appellants would have to place an order for additional stock if, eg, weather changes meant they expected to be able to sell more of certain products); and
- (3) the Appellants gradually refurbished the store, but we infer that the shop remained open during this time.

45. The business was described as a medium-sized convenience store (which we accept). The opening hours were from 6.30am to 9 or 9.30pm each day. Business was not consistent during the course of the day – their peak hours were 7-9am, or 7-9.30/10am, and 5.30-6pm, or 3.15-6.30/7pm. These peaks were based around schools (with customers being both children and their parents) and construction workers going to and from work, and they would sell sweets, fizzy drinks, lunches, groceries such as milk and bread, then lunches, magazines, cigarettes and alcohol during these peak times. The breakdown of sales would vary depending on the weather, but Mr Rai expected that they would make 20-25% of sales in the morning peak and 40-50% of sales in the afternoon peak.

46. They operated a lottery terminal and sold scratchcards from which Bursha Foods received commission on transactions, and a PayPoint terminal.

47. There are two tills at the premises. Till 1 was used throughout the day, but Till 2 would also be used during peak hours (as having two tills operating enabled them to deal with customers more quickly, even if there was only one person serving).

Preparation of VAT returns and accounts

48. On acquiring the business, the Appellants continued to use the accountant who had been used by the previous owners, AH. We accept Mr Rai's evidence that he (Mr Rai) only had basic familiarity with accounting and he and his brother relied on AH.

49. Mr Rai's explanation of the way in which he provided information to AH to enable AH to prepare the VAT returns was as follows:

- (1) At the end of every day, he would display the gross takings numbers on the till, and write this down.
- (2) He would prepare a manuscript note of these daily amounts, and would check these with the weekly totals which were shown on the tills. He produced one sheet for each month.

(3) He printed off the weekly totals every Sunday, generating what he referred to as Costcutter reports.

(4) He took this information to AH in person (as AH's offices were next to the bank). This was initially monthly, but later quarterly. He did not keep any copies.

50. We accept this evidence. In addition, we find:

(1) The Appellants did not keep any form of separate handwritten accounts. The tills were the sole method of obtaining sales data.

(2) Whilst giving evidence Mr Rai did refer to sometimes not being able to reconcile the numbers displayed on the tills with amounts in the tills each day. However, there was no evidence that he based the numbers given to AH on cash takings or credit card receipts. We find he did not do so.

(3) AH did not visit Bursha Foods – the first time AH came to the premises whilst the Appellants were running the business was for HMRC's visit in September 2016.

51. As Mr Rai did not keep copies of the information he gave to AH, and as AH has not produced to HMRC or the Tribunal any copies of information in his possession, we did not have before us copies of any of the numbers which had actually been provided by Mr Rai to AH, or to any Costcutter reports which were generated during the periods in issue. We were taken to an example of a Costcutter report (which had been sent to HMRC by AH for periods under the previous owners), and can see that it is a single row for each month recording total sales, and then splitting this between zero-rated and "VAT sales", with a separate table recording sales at different VAT rates. From the manuscript notes on these Costcutter reports and from emails between HMRC and AH in relation to earlier VAT periods, we infer that the "total sales" figures on these reports did include not only the groceries but also transactions on the lottery terminal, scratchcards and PayPoint.

52. The VAT returns were prepared and filed on the Appellants' behalf by AH. The VAT returns filed for the periods in issue recorded the following:

Period	11/14	02/15	05/15	08/15	11/15
	£				
Output Tax	10,838.29	18,412.14	18,636.14	18,394.72	16,639.34
EC Acquisitions Tax	0	0	0	0	0
Total Output Tax	10,838.29	18,412.14	18,636.14	18,394.72	16,639.34
Input Tax	30,548.15	25,154.33	22,512.36	23,762.69	22,935.90
Net Tax	-19,709.86	-6,742.19	-3,876.22	-5,367.97	-6,296.56
Outputs	147,479	177,973	180,139	171,049	220,434
Inputs	229,528	168,497	149,187	156,464	148,929

EC Supplies	0	0	0	0	0
EC Acquisitions	0	0	0	0	0

53. We accept Mr Rai's evidence that he and Mr S Rai did not see or approve the VAT returns either in draft or when they were finalised and submitted. As can be seen from the table above, the VAT returns filed for the periods 11/14 to 11/15 each claimed a repayment of VAT. Mr Rai knew this was the case (we infer from having been told by AH).

54. AH also prepared the accounts for the business. We were taken to the unaudited accounts for Bursha Convenience Store for the year ended 31 August 2015. We make the following findings:

- (1) The accounts were dated 23 January 2017. AH was still acting for the Appellants at that date.
- (2) Mr Rai and Mr S Rai did not see these accounts at that time or sign them.
- (3) The accounts record a sales turnover of £672,511 plus other income of commissions receivable (from lottery and PayPoint) of £7,265. The balance sheet as at 31 August 2015 records a right to a VAT repayment of £16,634.

Change of supplier and resulting changes to tills

55. The Appellants initially continued to use Costcutter as their supplier. However, they became unhappy with this arrangement, with the explanation given by Mr Rai as being that there had been problems with supplies of some goods which meant that they had to go to third parties (eg Bookers and cash and carries) to get fulfilment of orders, and they were having problems with the till software (as readings were not matching the cash and credit card receipts and lottery terminal). The only potentially supporting evidence in relation to problems with the software was in an email from AH to HMRC in which he said he had identified an unexplained cash discrepancy when preparing the accounts. However, Mr Rai denied there was any such discrepancy, and giving evidence accused AH of having made this up out of spite. We find that the Appellants changed suppliers, moving to Nisa, but make no findings as to the reasons. In particular, the Appellants have not established that there were problems with the Costcutter software.

56. The Appellants did change supplier to Nisa. This had happened by September 2016 (as Nisa-products were listed in sample sales transactions listed by Officer Bray in that month). There was no other documentary evidence in relation to this change, and Mr Rai's evidence was very vague as to timings. We make the following findings:

- (1) The change of supplier involved Nisa supplying Bursha Foods with new software for both of the tills.
- (2) The hard drive on one of the tills was later replaced. We infer that this was the hard drive on Till 2 (based on Mr Rai's evidence and information given to HMRC before they visited the store and which was recorded in the Bursha Data Report). This was in May 2016. From this we infer that they had moved to Nisa before May 2016 and the software had also been changed before that date.
- (3) Mr Rai's evidence included that Till 1 was then replaced in its entirety. He said this was before he changed accountants from AH to Mr Doshi. We find that this replacement of Till 1 was after HMRC visited in September 2016:

- (a) The Appellants or AH had told HMRC before the visit that a hard drive had been replaced. We infer they would also have said if the other till was new.
- (b) AH had still been acting for the Appellants in September 2016 (as he was present at HMRC's visit) and up to January 2017 (as that is when the accounts were prepared). Mr Doshi was instructed in March 2017.

Communications with HMRC

Initial checks and enquiries

57. The initial contact by HMRC was made by Officer Harding. The correspondence before us shows that her correspondence was with AH and members of the accountancy firm at which he worked.

58. The first visit was made by Officer Harding to the accountancy firm on 26 February 2015.

59. Officer Harding did review some records for 05/14 after that visit (ie for a period before the Appellants acquired the business). That review included reviewing purchase invoices and her letter of 28 April 2015 referred to the analysis of the purchase invoices for 05/14 (in the absence of retail scheme calculations and gross takings records supported by till rolls) supporting 75.44% of sales being standard-rated. Officer Harding also referred to the standard-rated percentage in 11/13 having been 82%.

60. There was further correspondence between Officer Harding and the accountants and on 7 January 2016 Officer Harding sent her findings for the 05/14, 08/14 and 11/14 returns:

- (1) for 02/14 – Revised daily gross takings amount, applied a standard-rated percentage of 75% to sales to produce output tax due;
- (2) for 05/14 – Revised daily gross takings amount, applied a standard-rated percentage of 75.44% to sales; and
- (3) for 8/14 – Did not revise daily gross takings amount, applied standard-rated percentage of 75%.

61. On 28 January 2016, AH emailed HMRC copies of some of the requested Costcutter reports (for December 2013 and January, February, April and May 2014). He said that VAT returns were based on the point of sale retail scheme, with the split of standard-rated to zero-rated sales and output tax due informed by the Costcutter reports from the tills.

62. There was an exchange of emails about the missing Costcutter reports (for March, June, July and August 2014) to support the actual daily gross takings and querying a low output tax declaration in 11/14. AH said they were not available – the previous owners did not have them and they cannot be obtained from Costcutter. Being asked further about this, AH said that the till was installed and maintained by Costcutter but the printouts that were downloaded from the computer belonged to the trader.

63. Officer Fellows had taken over from Officer Harding after the end of January 2016, and in May 2016 Officer Fellows told AH that if the detailed till audit trail to support the monthly readings was not available it may be possible to extract the data from the till.

64. Officer Fellows visited AH on 26 May 2016 (the Appellants themselves were not present). Officer Fellows was not given any information about the sales figures or how the VAT workings were done at that meeting. There was a record of the figures they had entered on SAGE for each month, but there was no back-up data (eg no till rolls, no audit trail).

65. On 29 June 2016 AH emailed Officer Fellows stating that the records she had asked for (sales transactions) do not exist, as they were originally maintained on a computer belonging

to the previous partnership. He said that the Appellants were happy for her to interrogate their computer system. He added that he had now drafted the August 2015 accounts, which showed an unexplained cash difference of £114,722. He said that after discussion with his client this had been accepted by him (ie the client) as probably relating to sales, as he had no confidence in the till recording system, leading him to invest in a brand new system. He had included 5/6 of this amount, £95,602, as sales in the accounts and the VAT amount of £19,120 as due to HMRC.

66. On 1 July 2016 Officer Fellows asked AH about the tills used (to enable her to make a decision on till interrogation) and AH replied later that day saying the response from the client was “Tills are Toshiba A10 (two tills, one has just had its hard drive replaced a few months ago) and the version of software running is IT Retail Systems Version 2.1 ...which I believe is bespoke to my needs now”. AH went on to say that sales were recorded on a computer system having the Nisa software which the client did not have access to and he had to get someone to print these for him.” AH also said that client said that the reports “did not mean much to him and he had little or no confidence in the summaries”. This email also said that the Appellant was lax and no reconciliations were attempted, which meant that he, AH, had discovered the cash difference.

67. On 15 July 2016 AH told Officer Fellows that he estimated that for the year to August 2015 the ratio of zero-rated to standard-rated products was approximately 15:85. He suggested that the VAT due on the undeclared sales was £16,252 to be split equally over the four quarters.

68. In her response later that day Officer Fellows indicated that 85% appeared to be higher than achieved in earlier returns, where the range was 35% to 75%. She asked for the output figures on the VAT returns, without incorrectly including lottery commissions and PayPoint activity, before she decided if further checks were required. Officer Fellows then set out questions arising from her checks on purchases, eg duplicate entries. Giving evidence, Officer Fellows said she was looking at the details on SAGE – she did see purchase invoices but did not audit each invoice.

Visit to Bursha Foods on 7 September 2016 and preparation of reports

69. Officer Bray visited the premises with Officer Tilt on 7 September 2016 to copy the data from the tills. Mr Rai, Mr S Rai and AH were present. The Appellants had given permission in advance, and gave permission whenever requested by Officer Bray during the visit.

70. Officer Bray copied the data from two tills onto a USB stick and then used that stick to copy the data onto an HMRC-encrypted laptop at the premises. The USB stick was used for the data transfer so that there is no need to attach or link the two computers. That data was later converted by HMRC specialists into a readable format and Officer Bray used that to produce the Data Analysis and the Bursha Data Report.

USB stick

71. The parties disagreed as to what happened to the USB stick that was used to copy the data from the tills onto Officer Bray’s laptop. HMRC’s position was that it was handed to one of the Appellants (for this purpose, being Mr Rai or Mr S Rai, not AH as their representative) at the visit; whereas the Appellants denied this, and said HMRC should have it.

72. The evidence before us was:

(1) Officer Bray’s witness statement which set out that HMRC procedure was to leave the USB stick with the trader. He said on this occasion that Officer Tilt had given it to either Mr Rai or Mr S Rai, and he (Officer Bray) did not know which of the two of them, but he did think (but couldn’t be sure) that they might have then given it to AH, based on where everyone was standing at the premises.

(2) The extract of HMRC’s register of USB sticks recorded the USB stick as having been used at Bursha and as having been “Left with director”. Officer Bray explained that at the time he thought Bursha Foods was a company such that the owners were directors. There is another obvious error on the face of that register, in that it says the USB stick was used on 6 September 2016, whereas the visit was the following day.

(3) Officer Bray’s witness statement also referred to a meeting on 18 August 2017 between Officer Bray, Officer Fellows and Mr Doshi at which Officer Bray had reminded Mr Doshi that his client had the USB stick with a copy of the data taken away by HMRC and said they could engage a third party to analyse the data. Mr Doshi did not suggest at that meeting that his client did not have the USB stick (but we recognise that neither Mr Rai nor Mr S Rai were present to refute this statement at that time).

(4) Mr Rai said that HMRC did not leave the USB stick with him. Giving evidence, he was adamant he would remember this even though it was a long time ago as he would have had to sign for it. HMRC’s submissions and evidence did not include that anyone had signed for the USB stick.

73. We recognise that there was no evidence before us from Mr S Rai or AH, and that the events in question were several years ago. Considering all of the evidence, we prefer Officer Bray’s evidence as to the general procedure in relation to USB sticks being left with the trader and his recollection of events on the day. We find that the USB stick was given to either Mr Rai or Mr S Rai at the premises that day, and HMRC did not take it with them.

Copying of till data and processing of extracted data

74. After the visit, Officer Bray sent a copy of the uplifted data to HMRC’s Data Conversion & Audit Team (“DCAT”) on 25 November 2016, asking them to carry out a conversion into conventional text and tables. It was sent to DCAT via the network (even though they were operating in the same room). DCAT provided him with the converted data on 1 December 2016. This was provided to him as a set of IDEA files.

75. Officer Bray used this converted, readable, data to produce the two documents which he sent to Officer Fellows. Giving evidence he explained that IDEA is a strong audit tool that automatically keeps a history of the audit trail, and records every step taken with the data. He then exported the sheets onto Excel. He did then make some further additions within Excel – he prepared a small table showing the estimated underdeclared VAT for each quarter, and inserted some totals columns into the Z readings to show the total value of VATable trade departments and non-trade departments. We accept this evidence.

76. Although the Data Analysis report is more detailed than the Bursha Data Report, and the former was used to produce the latter, we start by summarising the Bursha Data Report as that sets out the range of data retrieved and conclusions drawn therefrom. We do not lose sight of the Appellants’ submissions as to the source of the data, namely whether it was from their tills and, if so, was the software giving data from their shop. We address those challenges having set out the data retrieved.

77. The Bursha Data Report includes:

(1) There were two tills, the left till is more heavily used than the right one.

(2) They have ITS Solutions EPOS software and they feed into a common back office. The trader said that the right till had its hard drive replaced about four months earlier than the visit and there was no evidence that suggests to the contrary.

(3) The back-up of data included:

(a) a large sample of sales data relating to 28 February 2016 to 7 September 2016;

(b) till 1 Z reads for 20 November 2014 to 12 November 2015 (and Till 1 “appears to have consistently been used far more than Till 2”); and

(c) till 2 Z reads for 20 November 2014 to 7 September 2016.

(4) On the sales data extracted, (ie for the period 28 February 2016 to 7 September 2016) the summary is that in general, products tend to have been assigned to suitable departments, although sometimes the same product has been assigned to more than one department over many months. A low level of products appear at certain times to have been sold at the wrong VAT rates. The most notable error was identified as “LSV energy drinks”, but showed that the change to VAT resulting from this was £167.01.

(5) The sample sales totals by hour of day suggested no abnormalities in the timing of sales during the day.

(6) On Z reads, the report commented on the time the Z read had been taken each day (between 8pm and 10pm).

(7) The nature of the shop does not suggest that significant levels of items would be outside the scope of VAT, and concludes that the gross figures from the VAT returns (VAT plus net outputs) are understated when compared with the full quarters which were available from the Z reads:

	02/15	05/15	08/15
No of days Z reads available	89	91	92
Total sales trade departments	£224,930	£226,377	£221,342
VAT return: VAT + net output	£196,385	£198,775	£189,444
Understated gross on return	£28,545	£27,6032	£31,898

(8) The report then applied the percentage of gross sales at the standard rate obtained from the sample of sales, stating this suggested large underdeclarations of VAT. The differences were summarised, and the Excel sheets produced estimated underdeclared VAT of £9,178, £9,958 and £9,610 for 02/15, 05/15 and 08/15 respectively.

78. The Data Analysis was produced in the form of Excel sheets. In summarising these sheets, we have also included some of the evidence of Officer Bray. The sheets include:

(1) The longest sheet was a list of the Z readings from the two tills. As set out in the Bursha Data Report, the Z reads were for the period of period of 20 November 2014 to

7 September 2016, but it was only Till 2 that had data for this whole period. The Z readings for Till 1 ended on 12 November 2015.

(2) There is a one-page sheet summarising the data from both tills up to 12 November 2015, ie the period for which there was full overlap. That lists Department Sales for Trade and Non-Trade by category. Non-trade is lottery and PayPoint. The trade departments listed the categories identified and included a grocery non-VAT and grocery VATable.

(3) The sample sales transactions, totalling £376,426, was separate from the Z readings, and was for a period of time (which did not overlap with the periods in issue). The data set as a whole was not complete – there were transactions where there was, eg, no product, no price or no VAT rate. Officer Bray compiled the sheet for transactions where he had complete information, and listed the products, assigned department, quantity sold and total value. Officer Bray considered, and we accept, that this was a large enough sample to see if the Z reads were a fair basis for VAT assessments. Officer Bray explained he used this sample sales data to confirm that product descriptions were being assigned to the correct department. He concluded they were.

(4) Officer Bray calculated the estimated underdeclared VAT for three of the periods. He used the data from the Z Reads for the periods 02/15, 05/15 and 08/15 (as Z Reads were available for a minimum of 89 days in each of those quarters), took the percentage of standard-rate sales for each department from the sample sales data (ie the 2016 transactions), multiplied each by the value in the respective department to estimate how much should be subject to VAT, multiplied results to extract estimated VAT values and showed the resultant estimated VAT liabilities for each period in a Z Read Quarterly Analysis sheet. He showed these estimates against the declared VAT liabilities, and labelled the difference the Estimated underdeclared VAT. This was therefore a two-stage process – identify the understated gross on the VAT return, which were £27,000 to £32,000 for the three full quarters, then apply percentages from sample data to estimate the underdeclared VAT.

79. Officer Bray emailed these reports to Officer Fellows on 7 December 2016.

80. We find that the data which was emailed to Officer Bray by DCAT, analysed by him and formed the basis of the Bursha Data Report and the Data Analysis was from the two tills at Bursha Foods which had been extracted by HMRC on 7 September 2016. We find that the process of analysing the data and producing the data sheets was performed carefully and did not introduce errors or mistakes into the data, notwithstanding that Excel sheets are editable. We make these findings on the basis of Officer Bray's evidence, the fact that the reports identify two tills, one in more continuous use than the other (with the left till being Till 1), the end date of the data being the date of HMRC's visit to Bursha Foods, and the list of departments being used (which Mr Rai agreed looks like a standard list for a convenience store).

81. These findings do not of themselves address Mr Doshi's separate challenge as to whether the data on the tills was that of Bursha Foods given that there had been a change of software when the Appellants changed suppliers and a replacement hard drive. We address that, and make findings in relation thereto, in the Discussion.

Communications after the September 2016 visit

82. The Bursha Data Report and Data Analysis were prepared for internal HMRC use. In February 2017 Officer Fellows told Officer Bray that she would like to provide the reports to the Appellants' agent. Officer Bray produced amended versions of these reports – he

redacted references to HMRC strategies and its intelligence on till software providers, and added the term “sample” sales. These revised files were emailed to Officer Fellows on 13 February 2017.

83. These revised files were emailed by Officer Fellows to AH on 17 February 2017.

84. Officer Fellows issued the VAT assessments on 17 July 2017, some of which were amended on 28 July 2017. Those assessments (as amended) are detailed at [20.] above. A copy of them was sent to Mr Doshi, who was by this time instructed to act for the Appellants.

85. There was a meeting on 18 August 2017 between Officer Fellows, Officer Bray and Mr Doshi. At that meeting Mr Doshi accepted that HMRC had obtained till information from his client’s tills on 7 September 2016. Officer Bray explained the methodology he had used. In preparing his reports. Officer Bray reminded Mr Doshi that his client had been given the USB stick, which contained an exact copy of the information HMRC had taken away on that visit.

86. There was further correspondence between HMRC and Mr Doshi. Then, in an email of 5 December 2017, Mr Doshi told Officer Fellows:

- (1) All prime documents for the relevant periods were still with AH’s firm.
- (2) As the assessments were based on the accounts and not on prime documentation, they considered they need to appeal the assessments.
- (3) He attached various documents, the list of which included “Your colleague’s visit to Bursha & his breakdown report”, profit and loss accounts for the year ended 31 August 2015.
- (4) Stock had increased from £32,336 to £120,000, and this would result in a net VAT input, which appeared not have been considered by AH.
- (5) They proposed various adjustments, using the accounts as a base, that resulted in a £13,612.69 refund. They asked HMRC to agree this number.

87. Following further emails, HMRC issued the penalty explanation letters on 29 March 2018 (which are considered in the context of the Discussion on penalties below). The notices of penalties were issued on 22 May 2018. The penalties issued are at [20.] above.

88. There was further correspondence between Mr Doshi and HMRC and the Appellants gave notice of appeal to the Tribunal on 6 April 2019. The hardship application was granted on 24 July 2019.

DISCUSSION

89. The issues are set out at [23.] above. We address first those relating to the output tax assessments and then the penalties (both deliberate and careless in respect of those assessments).

Assessments

90. The jurisdiction of the Tribunal in relation to an assessment under s73(1) VATA 1994 has been considered extensively in the authorities. The correct approach to take was considered by the Upper Tribunal in *Mithras (Wine Bars) v HMRC* [2010] UKUT 115 (TCC) and was common ground between the parties. In summary:

- (1) The Tribunal has a quasi-supervisory function when considering whether an assessment was raised to the best of HMRC’s judgment, but has full appellate jurisdiction when deciding the correct amount of the assessment.

(2) In making a best judgment assessment, HMRC are required to consider fairly all material put before them by the taxpayer, but are not required to make investigations so long as there is some material on which they could reasonably base an assessment. Nevertheless, if HMRC do make any investigations, they must take into account the material disclosed by that investigation (at [8], citing *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, 292g-293a).

(3) HMRC are required to make this value judgment honestly and bona fide, and to come to a decision which is reasonable and not arbitrary as to the amount of the tax.

(4) It is open to the Tribunal, in the exercise of a quasi-supervisory jurisdiction, to find that the assessment was not raised to the best of HMRC's judgment and should never have been made at all, for instance on the ground that it was reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing, or was wholly unreasonable.

(5) In an appeal against the amount of the assessment, the Tribunal is not restricted to a quasi-supervisory function. It is appellate and can consider further information or argument and reduce the amount of the assessment, thereby substituting its own view of quantum. The Tribunal is able to decide for itself the correct amount of tax due.

Whether best of judgment

91. We have set out in our findings of fact the enquiry undertaken by HMRC. During that time they were not provided with till rolls or the documents/numbers which were used by AH to prepare the VAT returns on behalf of the Appellants.

92. Officer Fellows has explained the basis on which the assessments were issued (both on 21 July 2017 in a letter to Doshi & Co, and confirmed in evidence at the hearing):

(1) For 11/14 – This had been originally submitted as a claim for £19,709.86. This was changed to an assessment of £4,063. This assessment was based on the cash difference identified by AH for the year ended 31 August 2015 as follows: £114,727 x 85% SR = £97,513.70 x 1/6 £16,252 for the year x ¼ = £4,063 per quarter.

(2) For 02/15, 05/15 and 08/15 – This was based on the output tax due from the data extracted from the tills according to the Data Analysis, less the output tax actually declared on the VAT returns.

(3) For 11/15 – The till data was incomplete for this period, but had indicated a further shortfall. In the absence of complete data, an average of the difference in the three preceding periods had been taken, this was £9,582. The assessment was issued for that amount.

93. We consider that the approach taken by Officer Fellows was more than reasonable. The assessment for 11/14 was based on the information which was given to her by the Appellants' then accountant. The assessments for the following four periods were based on the data extracted from the Appellants' tills and which had been carefully analysed by Officer Bray. Not only do we consider that Officer Fellows made the required value judgment honestly and bona fide, we do not consider that Officer Fellows could have adopted any other approach.

94. Mr Doshi submitted that there must be doubts as to the accuracy of the Data Analysis given the changes to the till software and the replacement hard drive, and that Officer Fellows had not taken account of other information which had been available to her. We reject those submissions:

(1) The Data Analysis was carefully produced by Officer Bray. There was no evidence before us that the challenges which are put by Mr Doshi as to its reliability (including as to whether the data was that from Bursha Foods, or the potential impact of changes to the tills) had been put forward in July 2017. They were not mentioned in December 2017 (at the meeting with HMRC) or in the grounds of appeal to the Tribunal in 2019. We address these further in the context of considering the correct amount of tax, but there is no reasonable basis when reading the Data Analysis or Bursha Data Report to consider that they are anything other than what they purport to be, namely an analysis of the transactions recorded by the tills at Bursha Foods. Using this data cannot be said to be capricious or wholly unreasonable, or any of the other terminology which is used to impugn an assessment as not having been made to the best of judgment.

(2) Mr Rai's evidence would indicate that we should treat the accounts prepared by AH, which the Appellants did not see or sign, with considerable caution. In any event, we find that Officer Fellows did not see these accounts until after she had issued the assessments. She was unsure as to when she first received them, and there was no evidence of them having been sent to her before December 2017.

(3) Officer Fellows had, at the time she issued the assessments, reviewed some of the purchase invoices and identified some small errors in the input tax claims. Mr Doshi submitted that of the purchases only around 55% were standard-rated, and that Officer Fellows should have adopted this ratio when assessing underdeclared output tax. Officer Fellows' evidence was that she didn't use this information as she had only looked at a sample of invoices, the ratios for purchases would not necessarily follow through into the sales for a particular period, and she had actual sales data available (ie the Data Analysis and the Bursha Data Report). We accept that it was entirely reasonable in the circumstances for Officer Fellows to have reached this conclusion.

95. HMRC have established that the assessments were issued to the best of their judgment.

Amount of the assessments

96. We have full appellate jurisdiction in respect of the Appellants' appeal against the amount of the assessments, and can consider all of the evidence and submissions before us for this purpose. We do not lose sight of the fact that the Appellants bear the burden of establishing that the amount of each or all of the assessments should be reduced.

97. Both parties acknowledged that we were being presented with a binary choice – between the amounts declared by the Appellants in the VAT returns and the assessments which had been issued. In the course of the submissions and evidence at the April 2024 Hearing we were taken to some of the correspondence between the parties, and that included some emails from Mr Doshi to HMRC in which he proposed compromises based on adjustments from the accounts. Mr Doshi did not submit that we should consider whether those variations represented the correct amount of tax.

98. We consider first the VAT returns as filed, then Mr Doshi's challenges to the amount of the assessments which have been issued for the VAT periods in issue.

99. The output tax declared in the VAT returns for the business for the periods in issue is set out at [52.] above. In relation to these returns:

(1) The VAT returns were filed by AH on behalf of the Appellants. Whilst we accept that Mr Rai provided sales figures to AH to enable him to prepare the returns, we also accept Mr Rai's evidence that he did not see the VAT returns which were prepared and submitted.

(2) Giving evidence, Mr Rai not only did not confirm that the amounts as submitted were based on the numbers he had provided, but also made accusations of negligence and spite against AH in his dealings with HMRC.

(3) The workings of AH have not been produced to anyone – Mr Rai did not keep copies of the information he had provided to AH, AH did not show this information to Officer Fellows during the enquiry, and the Appellants and Mr Doshi have not subsequently obtained this information from AH.

(4) The accounts do record £120,000 of stock, and £156,493 of tangible assets. Mr Doshi submitted that these assets would have been VATable, and that it was natural for the Appellants to have expected a refund of VAT, as had been claimed in the returns. Whilst we accept that Mr Rai was expecting to receive a refund of VAT, we are not persuaded that any consistency between the VAT returns and the accounts supports the accuracy of the VAT returns – they were also prepared by AH, there were no workings, and the Appellants did not see or approve them.

100. In this situation, there is minimal evidence before us supporting the accuracy of the VAT returns as submitted.

101. We have set out at [92.] the basis on which Officer Fellows calculated and issued the assessments. We assess the challenges put on behalf of the Appellants before then reaching our decision on the correct amount of tax on the basis of all of the evidence and submissions before us.

Till data

102. Mr Doshi submitted that the Tribunal cannot be 100% confident that the data it has in front of it is the correct data copied from the two tills on 7 September 2016 and relates to Bursha Foods given that there had been changes of software and the hard drive in Till 2 had been replaced. Mr Doshi submitted that the conclusions based on the Data Analysis were illogical and unrealistic for the business of Bursha Foods. Mr Doshi's submissions also criticised the evidence before this Tribunal (namely the absence of the USB stick and the failure to produce a pdf of the data in the form extracted from the tills, ie before it was analysed and the sheets extracted in the form of the Data Analysis).

103. We have already found that the USB stick was given to either Mr Rai or Mr S Rai at the premises on 7 September 2016. After that date, it was no longer in HMRC's possession and cannot be produced by them. It was for the Appellants to retain that stick and, once it became evident to them that they no longer had it, to decide what further actions to take, which could have included instructing a data specialist to copy the data from the tills again (although we recognise that the replacement of Till 1 after the visit would have prevented the Appellants from obtaining a copy of some of the data extracted by HMRC).

104. We have also found that the data analysed by Officer Bray was from the two tills at Bursha Foods which had been extracted by HMRC on 7 September 2016 and that the process of analysing the data and producing the data sheets was performed carefully and did not introduce errors or mistakes into the data.

105. We consider here Mr Doshi's separate challenge as to whether the data on the tills at the premises was that of Bursha Foods given that there had been a change of software when the Appellants changed suppliers. We have already found that the hard drive on Till 2 was replaced in May 2016 and the software on both tills had been changed before that date, ie before the date on which HMRC visited the premises and extracted data from the tills. Mr Doshi's submission was essentially that the data extracted by HMRC could have been from different businesses if the software had previously been used in another store.

106. Addressing these submissions about the changes to the tills and software (before considering separately the submissions about the transactions which were said to have been recorded on the tills):

(1) We have described the date ranges of the data extracted from the tills. There were Z reads for Till 1 for 20 November 2014 to 12 November 2015, Z reads for Till 2 for 20 November 2014 to 7 September 2016 and sample of sales data from 28 February 2016 to 7 September 2016. We accept Officer Bray's evidence that, when the data was extracted, HMRC simply took a copy of the data that was available and able to be extracted, ie they did not input any commands about date range. It was only when it was converted that HMRC could see what had been extracted. This means that the range of data that was produced was dictated by the content of the tills. Looking at the date ranges, 7 September 2016 was the date of the visit. Yet we did not have sufficient evidence before us to explain the significance of the start date of 20 November 2014, or the relevance of 12 November 2015 or 28 February 2016. We accept Officer Bray's evidence that having different date ranges is not abnormal, and this can be a result of different back office settings on the tills.

(2) There was no evidence before us that the software which had been installed on both tills at the time of the change of supplier to Nisa had in fact previously been used in another business.

(3) Officer Bray could not confirm whether the software which had been installed on the two tills and was being used at the time of the visit was new or had been used by another business. Officer Bray's evidence (recognising that he is not an independent expert) was that as a general matter:

(a) if software had been bought second-hand, it may have the seller's data on it – it was possible for there to be "legacy" data but unusual; and

(b) tills could have a "back office" storage, which would still have files of data on it, even if the hard drive was replaced.

(4) The data which was copied from the two tills at Bursha Foods went back to November 2014 and we accept Officer Bray's evidence that the departments hadn't changed and there was no break in continuity of that data.

107. It was not helpful that the Appellants were not able to adduce evidence regarding the exact timing of the change of suppliers, or the date on which the software had been changed in the tills. In the absence of such evidence, and taking account of the two reports themselves and Officer Bray's evidence, we provisionally concluded that it was more likely than not that the data extracted from the tills was that of Bursha Foods, notwithstanding changes in software or the hard drive which had occurred. We place particular emphasis on the continuity of the data and departments for this purpose, and that the pattern of how the two tills were used accords with the evidence of Mr Rai. We then considered whether the submissions and evidence as to the transactions which were shown in the Data Analysis supported this conclusion or whether they were evidence to the contrary.

108. Mr Doshi put forward various challenges to the Data Analysis at different times (whether in his written submissions, in opening at the April 2024 Hearing, during examination of Mr Rai and cross-examination of Officer Bray and also in closing submissions). We have taken them all into account and address them below (albeit we have approached them in categories rather than each individual submission) before making our assessment based on all of the evidence in its entirety:

(1) Mr Doshi submitted that the Data Analysis of Officer Bray does not reflect gross profit margins in the industry. He submitted that in 2015 gross profit margins were around 20%, and by 2019 they were around 30%, whereas the Data Analysis is recording gross profit margins of 31.9% overall. However, there was no expert evidence before us as to gross margins in the industry, and the percentages referred to by Mr Doshi can only be averages. Furthermore, one of key planks of Mr Doshi's submissions was that the data captured and analysed was from another trader; such other trader was, on this basis, achieving this margin.

(2) Mr Doshi challenged the Data Analysis by reference to what he described as the Camelot figures, stating that there was a difference between the commissions which the Appellants had to pay to Camelot (said to average £5,278.20 per quarter) compared to £8,576.56 from the till readings as reported in the Data Analysis. This difference was said to be an indicator that the data was from another trader. Mr Rai's unchallenged evidence was that these Camelot figures looked too high. However, Mr Rai did not explain what this was based on, how he had recorded Camelot numbers and whether his recollection related to the periods in issue.

(3) Mr Doshi's written submissions included that errors could be made in the Data Analysis if, eg sales were recorded in Cigarettes rather than Grocery Non-VAT Departments and this would change the amount of the output tax due. The potential significance of this submission is that the Data Analysis recorded sales of Cigarettes at 34%: the sheet in the Data Analysis which summarises the data for the period of overlap, ie the two tills from 20 November 2014 to 12 November 2015 shows that the tills recorded sales of Grocery Non-VAT of £136,279.78, Grocery VATable of £181,280.96 and Cigarettes of £299,585.07. This was described by Mr Rai as being very high. There are, however, difficulties in evaluating this submission:

(a) Officer Bray explained that he used the sample sales transactions to check that products (which were scanned on the tills) were allocated to the appropriate department, and he had concluded that, other than a small amount, they were. We recognise that the sample transactions were from 2016, but this evidence does not support an incorrect categorisation.

(b) Mr Doshi's submission only affects the amount of output tax if products were being scanned as Cigarettes but were in fact non-VATable. There would be no difference if the products were not Cigarettes but were still standard-rated. There was no evidence of particular products being wrongly categorised in this way, let alone being non-VATable.

(c) The Appellants did not produce documentary evidence supporting a different proportionate breakdown of sales between departments, eg an itemised list of sales in a particular month (which could have been after the periods in issue).

(4) Mr Doshi submitted that the sales in the Data Analysis were higher than those declared in the accounts. That is correct, but given our findings as to the preparation of the VAT returns and the accounts we do not place any weight on this in our analysis.

(5) Mr Doshi drew attention to the number of transactions recorded in the Data Analysis, being an average of 728 transactions per day (based on the Customer Count of 259,474 in the Data Analysis), submitting this was high. Related to this, Mr Doshi submitted that this number of transactions implied an average spend of £3.37 per transaction, which he submitted was very low, even unrealistic, particularly when we

take account of the fact that the Data Analysis records 34% of sales as Cigarettes. On this:

- (a) Mr Rai's evidence was that the shop had 300 to 400 customers per day.
- (b) Mr Doshi only made this submission in his closing submissions. He had not put it to Officer Bray. Officer Bray would not have been able to give evidence of fact as to the actual sales in Bursha Foods, but would have been able to explain how the Customer Count had been arrived at in the analysis. We make this point as the Data Analysis was only from the tills, with no other source of information, and so cannot be a purported headcount of customers. Instead, it is a measure based on the transactions recorded on the tills, and we had no evidence as to whether a person buying, eg, groceries and lottery tickets, would count as one transaction (and thus one customer in the Data Analysis) or two transactions because of the separate lottery terminal.
- (c) We agree that the average spend of £3.37 does seem low if 34% of sales are Cigarettes, given the illustrative pricing to which we were taken of the sample transactions (which were not in the same period but were from the following year). However, this average spend is not set out in the Data Analysis, and was calculated using the Total Trade Departments of £874,534.49 and the Customer Count. We see no reason why the Customer Count on the tills would only be by reference to these sales. Mr Doshi's calculation ignored the £336,244.90 of Non-Trade Departments (lottery and PayPoint), which leads to sales totals of £1,210,779.39. Applying the Customer Count to this total implies an average spend of £4.67. This difference is small in absolute terms but potentially significant given the range of products sold. As with the approach to Customer Count, we considered we would have found it helpful for these numbers to have been put to Officer Bray in cross-examination.
- (d) Mr Rai's evidence identified that some customers would make low-value purchases, eg sweets and fizzy drinks, or milk.

109. We have remained mindful of both the burden of proof and the standard of proof, seeking to assess the whole picture presented to us. We consider carefully the evidence as to the numbers of customers, the Camelot data and the average spend per customer that is implied by the Data Analysis. We agree with Mr Doshi that some aspects could be viewed as unrealistic. However, we were troubled by how little documentary evidence we were given as to the business of the Appellants to enable us to assess fully these challenges. The VAT periods in issue are clearly several years ago, and we accept that Mr Rai does not have the manuscript records he made at the time of the takings (and that he kept no other records at that time). However, whilst Mr Rai described the Data Analysis as being woefully incorrect, he did not produce documentary evidence to support or explain this statement. Not only have the Appellants not produced any copies of that data from, eg, Costcutter or Nisa, but also they have not sought to show us how the business operated after this period, eg producing till records for a later period, with copies of purchase invoices and sales data, stock ordering, bank records, to present a picture of the level of activity of the shop.

110. Having considered all of the evidence (including our consideration of the changes to the tills and software) we were not, on balance, persuaded that the data that was extracted was from a different business. Whilst we have reached this conclusion as to the source of the data, we do take account of the challenges put (eg as to number of transactions) when assessing the correct amount of tax.

HMRC's reliance on information from Appellants' former accountant

111. The challenge to the assessment for 11/14 included Mr Doshi submitting that HMRC should not have accepted the explanation being provided by AH and should not have issued an assessment in reliance on that explanation.

112. Mr Rai's evidence was that there had been no discussion between AH and him regarding this and he had not accepted (as AH had said in his email of 29 June 2016) that the difference related to unreported sales.

113. The difficulty is that AH was acting for the Appellants at that time, was authorised to correspond with HMRC on their behalf, and whilst Mr Rai says that this cash difference did not exist, we were not shown any financial information to assist with making findings in this regard. AH had not been called as a witness in this appeal, so the accusations being made by Mr Rai could not be put to him. Furthermore, Mr Doshi's submissions were that we should prefer the amounts declared in the VAT returns to those assessed, yet the VAT returns were prepared by AH.

Proportion of standard-rated purchases and supplies

114. Mr Doshi submitted that Officer Fellows had checked purchase invoices and had only identified a few duplicate claims for input tax. She had not challenged the ratios of purchases between zero-rated and standard-rated. Mr Doshi submitted that it was therefore not logical for Officer Bray to come up with standard-rated sales at 73.6% to 83.2% when the standard-rated purchases were 55%. Furthermore, if standard-rated purchases were increased in the relevant periods to match those assessed as outputs, then the input tax would increase, either reducing or wiping out the assessment.

115. Giving evidence, Officer Fellows emphasised that she had checked only a sample of the purchase records. In cross-examination, she said that purchases would not necessarily correlate to sales in any particular VAT period. We consider this as a submission, and in principle we agree.

116. The evidence to which we were taken showed that just as there were different proportions of standard-rated sales in the Data Analysis on which the assessments for 02/15 to 11/15 were based, in other periods the standard-rated purchases had fluctuated, eg in 05/14 Officer Harding had identified that the purchase invoices (in the absence of retail scheme calculations and gross takings records) supported 75.44% of sales being standard-rated. This was not one of the VAT periods in issue, but it does illustrate the variation (which we would expect to exist).

117. Mr Doshi's submissions included the effect of making further adjustments to the proportion of standard-rated sales, and corresponding adjustments to the input tax claimed for each period. However, these submissions were not grounded in documentary evidence of the underlying transactions.

VAT scheme

118. Mr Doshi challenged the VAT scheme which had been used by HMRC to issue the assessments. This particular challenge was first made in his cross-examination of Officer Fellows – it had not been made in the grounds of appeal, written submissions, in oral opening or been raised as questions to the first two witnesses, Mr Rai and Officer Bray.

119. We considered that whilst the challenge had not been particularised, it was broadly within the scope of the Appellants' pleaded challenge to the amount of the assessments. On that basis, we considered that the submissions could be made, but the timing of them has potentially affected the evidence (in particular as questions were not put to Mr Rai or Officer Bray in cross-examination or re-examination).

120. Mr Doshi submitted that HMRC had impermissibly used different retail schemes when issuing the assessments – the 11/14 assessment was based on apportionment methodology (consistent with the approach taken by Officer Harding for assessments for earlier periods), whereas the assessments for 02/15 to 11/15 were based on a point of sale scheme (as they were based on the till data).

121. Giving evidence Officer Fellows said that she had been told by AH that the Appellants had moved to a point of sale scheme. We accept this, and it is consistent with Mr Rai providing till data to AH for AH to use to prepare the VAT returns.

122. The assessments for 02/15 to 11/15 were thus issued on the same basis as that which was being operated by the Appellants. Officer Fellows agreed that she had used an apportionment approach for 11/14, explaining that this was the evidence she had – there was no till data, which would be required to make point of sale calculations.

123. Whilst Mr Doshi submitted that businesses must continue to adopt their chosen retail scheme in successive periods, he did not explain to us why HMRC, when issuing assessments and having limited information, are not permitted to use whichever method is workable in the light of the information available. We have not placed any weight on this submission.

Discussion and conclusions

124. Mr Doshi submitted that we cannot be 100% confident that the amounts assessed by HMRC are correct. We agree, but that is not the relevant standard of proof. We are required to reach a decision as to the correct amount of tax on the balance of probabilities.

125. We are not persuaded that we should prefer the amounts declared in the VAT returns, given the lack of documentary evidence supporting those (whether the figures provided by Mr Rai to AH or AH's workings) and the accusations which have been made against AH.

126. In this situation, we have considered carefully the assessments issued by HMRC and all of the evidence before us as to how they were calculated and the challenges which have been put by Mr Doshi. We recognise that there are some matters which raise questions, in particular the customer count in the Data Analysis, the average spend which results from this and the apparently high proportion of sales of Cigarettes. However, we were not satisfied that there was sufficient evidence before us which would support any specific adjustments or corrections being made to the amounts assessed. On balance, in the light of all of the evidence, we have concluded that each of the assessments assessed the correct amount of tax.

127. The appeal against the assessments is dismissed.

Penalties

128. HMRC issued penalty assessments for the underdeclarations of output tax in the five periods in issue. HMRC had issued penalties for 11/14 and 11/15 on the basis that the conduct was careless but for 02/15 to 08/15 on the basis of deliberate conduct (whilst pleading in the alternative that the conduct was careless).

129. The Appellants have appealed against the decision that a penalty is payable, against the decision as to the amount of the penalty and HMRC's decision not to suspend the penalties. We have jurisdiction to affirm or cancel HMRC's decision to issue the penalties, and to affirm the amount or substitute another amount (that was within HMRC's power).

130. We set out below the basis on which the penalties were issued according to the penalty explanation schedules, including the reductions allowed for quality of disclosure, and then reach our conclusions.

02/15, 08/15 and 08/15

131. The penalty explanation schedule for the periods 02/15, 05/15 and 08/15 explains the basis on which HMRC considered the behaviour was deliberate:

(1) The Z readings from the till data were compared to the outputs and output tax declared on the VAT returns and large shortfalls were identified. The accountants confirmed that they had prepared the VAT return usings using figures provided by the Appellants.

(2) The value of the shortfalls was so consistently great that the Appellants must have deliberately provided the accountants with incomplete lower figures.

132. A 40% reduction for the quality of disclosure was applied (0% for telling, 10% for helping and 30% for giving). HMRC say that the Appellants did not accept that the sales value was incorrect or explain how the errors arose, the Appellants' accountant has discussed the findings but did not provide positive assistance to quantify the assessment, and the Appellants did give access to the records at the accountant's premises and allowed HMRC to extract data from the till.

133. There was no reduction for special circumstances.

11/14

134. The penalty explanation schedule sets out HMRC's conclusion that the behaviour was careless on the basis that cash differences had been identified by the accountant in the preparation of the accounts for 30 August 2014 and he estimated that there were further differences for 30 August 2015. The amount of sales understated for 11/14 was based on one quarter of the cash differences calculated. The behaviour is careless because of the lack of controls in place to record and report the correct amount of sales.

135. A 90% reduction was allowed for quality of disclosure (20% for telling, 40% for helping and 30% for giving). This was explained as the accountant accepted that the output tax had been understated but could not explain how the errors had occurred. He provided help to estimate the level of adjustment required to sales, and responded to requests for information.

136. HMRC have considered special reduction but considered no circumstances to warrant such a reduction.

137. HMRC said they can only suspend a penalty if they can set conditions to help avoid penalties in the future and if we think you can meet these conditions. Here, they cannot suspend the penalty as the VAT registration has been cancelled so no future returns will be submitted

11/15

138. The penalty explanation schedule sets out HMRC's conclusion that the behaviour was careless:

(1) The Z readings from the till data were compared to outputs and output tax declared on the VAT returns and large shortfalls were identified. The data for 11/15 was incomplete but was sufficient to show a shortfall. The accountant confirmed that they prepared the VAT return using figures provided by the Appellants.

(2) The value of the shortfalls was so consistently great that the Appellants must have deliberately provided the accountants with incomplete lower figures resulting in an underdeclaration of the output tax due.

139. A 50% reduction for the quality of disclosure was applied (10% for telling, 10% for helping and 30% for giving). HMRC say the accountants have accepted the basis of the calculation for this period, the Appellants' accountant has discussed the findings but did not provide positive assistance to quantify the assessment, and the Appellants did give access to the records at the accountant's premises and allowed HMRC to extract data from the till.

140. HMRC have considered special reduction but considered no circumstances to warrant such a reduction.

141. HMRC said they can only suspend a penalty if they can set conditions to help avoid penalties in the future and if we think you can meet these conditions. Here, they cannot suspend the penalty as the VAT registration has been cancelled so no future returns will be submitted

Discussion and conclusions

142. In his written submissions, Mr Doshi had submitted that there should be no penalties, that any inaccuracies were neither deliberate nor careless, with the only concession at that time being that the input tax inaccuracies were careless. The appeal against those penalties has been withdrawn. However, at the April 2024 Hearing Mr Doshi accepted that the conduct of the Appellants in respect of the underdeclarations of output tax was careless. This was the basis on which HMRC had issued the penalties for 11/14 and 11/15.

143. We consider first whether HMRC have established that the inaccuracies in the 02/15, 05/15 and 08/15 VAT returns were deliberate.

144. The Tribunal in *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) explained a deliberate inaccuracy in the following terms:

“63. In our view, 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. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.

64. The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37]).”

145. This explanation has been approved by the Upper Tribunal in *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) at [36]-[37]. We adopt and apply that approach.

146. The penalty explanation schedule based the conclusion that the conduct was deliberate on the accountants having prepared the VAT returns using figures provided by the Appellants, and that the shortfall was consistently great such that the Appellants must have deliberately provided suppressed numbers.

147. Mr Lindsay submitted that the divergence meant it was the inevitable conclusion that amounts were deliberately suppressed. Being asked to explain HMRC's decision to impose penalties on the basis that the conduct was careless for two of the relevant periods, Mr Lindsay referred to the fact that for 02/15, 05/15 and 08/11 HMRC had the Data Analysis from the tills for the entirety of each of these three periods, showing the level of suppressions.

148. We recognise that it is entirely possible that inaccuracies may be the result of different conduct in different periods, such that penalties should be assessed on different bases, or no penalty issued at all. Here, there was no evidence that the conduct of the Appellants had

changed in relation to different periods in issue. We do not regard the reason given by Mr Lindsay for the penalties being imposed as explaining HMRC's decision in this regard – the existence of the till data explains the basis of calculation of the assessments by HMRC, not the Appellants' conduct in relation to the preparation and submission of the VAT returns.

149. Here, we have found that Mr Rai provided gross takings numbers from the tills and Costcutter reports generated by the tills to AH to enable AH to prepare the VAT returns. Mr Lindsay submitted that there has been no explanation for the inaccuracies in the VAT returns. We disagree – Mr Rai's evidence was that he had not seen the VAT returns before their submission, and the lack of copies of information provided to AH, together with Mr Rai's accusations against AH, means that the explanation being put forward is essentially that Mr Rai provided correct information to AH but that information was not then used to prepare accurate VAT returns. We make no findings as to the conduct of AH. However, on the basis of the evidence before us, we are not satisfied that the Appellants knew that the VAT returns being submitted by AH were inaccurate. Accordingly, the conduct was not deliberate.

150. Mr Doshi has accepted that the Appellants' conduct was careless. We agree, and we base this conclusion on the Appellants' failure to keep any records, or to require that VAT returns be shown to them in draft beforehand (as we consider that they could reasonably have been expected to identify whether the sales figures shown on returns matched those they had provided to AH). This conclusion applies to all five periods for which penalties were issued.

151. HMRC has applied different mitigation to the penalties assessed on the basis of its conclusions as to the quality of disclosure:

- (1) 11/14 – 90%;
- (2) 02/15, 05/15 and 08/15 – 40%; and
- (3) 11/15 – 50%

152. The reasons for these differences were set out in the relevant penalty explanation schedules.

153. Whilst the Tribunal has jurisdiction to substitute its own decision as to the appropriate level of mitigation, we do not consider it would be fair or in the interest of justice to reduce the level of mitigation which has been allowed – this had not been pleaded by HMRC and the Appellants did not therefore address this possibility in submissions. Instead, we focus on the Appellants' submissions that higher mitigation should be allowed.

154. We take particular account of the following:

- (1) The Appellants instructed their agent to meet with HMRC to enable HMRC to conduct its enquiries. AH gave HMRC access to some records.
- (2) The Appellants (and their agent) did not provide HMRC with gross takings information or Costcutter reports for the periods in issue. Mr Rai had failed to keep copies, whereas AH had these documents but did not produce them.
- (3) The Appellants gave HMRC permission to extract data from their tills.

155. We consider that the permission for HMRC to extract data from the tills was significant, but so was the failure to produce VAT workings. Overall, and having considered all of the correspondence between AH and HMRC to which we were taken, we allow mitigation of 60% in total for telling, helping and giving. We would allow the same level of mitigation for each of the five periods in issue (as we do not consider that the quality of disclosure varied during this time, and the absence of till data for 11/14 was not the result of

actions of the Appellants); however, we have not, for the reason set out above, reduced the 90% level which HMRC had decided to allow for 11/14.

156. We do not consider that HMRC's decision in relation to the absence of special circumstances was unreasonable.

157. HMRC has refused to suspend the penalties. The penalties imposed for 02/15 to 11/15 were ineligible to be suspended under paragraph 14 as only penalties for careless inaccuracies can be suspended. On the basis of our decision, all five of the penalties are potentially eligible to be suspended. However, we agree with HMRC that as the Appellants' VAT registration number has been cancelled, the power should not be exercised as paragraph 14(3) provides that HMRC may suspend a penalty only if compliance with a condition would help the taxpayer to avoid becoming liable to further penalties for careless inaccuracy. There will be no further VAT returns and therefore no possibility of inaccuracy or careless inaccuracy.

158. The appeal against the penalties is allowed in part.

DECISION

159. As set out above:

- (1) The appeal against the input tax assessments for 02/15, 08/15 and 02/16 of £3.05, £468 and £113 respectively was withdrawn by the Appellants.
- (2) The appeal against the related penalties for 02/15 and 08/15 of £0.45 and £70.20 respectively was also withdrawn by the Appellants.

160. As regards the appeals which remained in issue before us:

- (1) The appeal against the output tax assessments for 11/14 to 11/15 is dismissed.
- (2) The appeal against the related penalties for these periods is allowed in part:
 - (a) The appeal against the penalty for 11/14 is dismissed.
 - (b) The appeal against the penalties for 02/15, 05/15 and 08/15 is allowed in part. Such penalties shall be reduced by re-calculating them on the basis that the conduct was careless and allowing mitigation of 60% for quality of disclosure.
 - (c) The appeal against the penalty for 11/15 is allowed in part. The penalty shall be reduced by allowing mitigation of 60% for quality of disclosure.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

161. 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.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

Release date: 06th JUNE 2024