Neutral Citation: [2024] UKFTT 00831 (TC)

Case Number: TC09289

FIRST-TIER TRIBUNAL
TAX CHAMBER

Birmingham Employment Tribunal

Appeal reference: TC/2020/00488
TC/2020/00489

VALUE ADDED TAX – assessment of undeclared profits – Appellants agreeing their takings were suppressed but arguing that suppression was not to the degree suggested by HMRC – whether assessments raised to best judgement – yes – whether evidence to support lower figures proposed by Appellants – yes, in part, for First Appellant, no for Second Appellant

VALUE ADDED TAX – procedure – whether appropriate to consider additional argument raised late in proceedings by Appellants – no

VALUE ADDED TAX – penalty – whether to grant either Appellant permission to make late appeal – no

Heard on: 2 March 2023
Judgment date: 12 September 2024

Before

TRIBUNAL JUDGE JANE BAILEY
MRS SHAMEEM AKHTAR

Between

(1) BANGLA LOUNGE (HARBORNE)
(2) BANGLA LOUNGE (HALL GREEN)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Rouf and Mr Miah, partners in the First Appellant and in the Second Appellant

For the Respondents: Mrs Sharon Hancox, litigator of HM Revenue and Customs Solicitor's Office

DECISION

INTRODUCTION

1. This decision is in respect of an appeal by each of the First and Second Appellants against an assessment to VAT. HMRC contend that each Appellant suppressed their takings from the restaurant that each Appellant ran, and that the revised VAT assessment raised reflects the level of suppression. Both Appellants accept that there was some suppression in the relevant period but dispute the Respondents are correct about the level of suppression.

ISSUES BETWEEN THE PARTIES

2. In addition to the substantive dispute there were two other procedural disputes between the parties.

3. First, the First and Second Appellants both understood that their joined appeals were against an assessment to VAT and an associated penalty. However, the appeals to the Tribunal did not include an appeal by either Appellant against the penalties imposed. At the beginning of the appeal hearing, we explained this omission and asked the Appellants if either wished to make an application for a late appeal to be admitted. Mr Rouf and Mr Miah, appearing on behalf of the Appellants, confirmed both Appellants did wish to make such an application and so the Appellants were directed to provide written submissions after the hearing, setting out their reasons for their appeal being late.

4. Second, in documents filed with the Tribunal during the course of the proceedings, each Appellant had suggested that they wished to argue that the VAT assessments were raised out of time for some VAT periods, although this did not appear as one of the grounds of appeal set out in the documents sent with either Appellant's Notice of Appeal. At the beginning of the appeal hearing, we asked Mr Rouf and Mr Miah if they wished to make an application to amend either Appellant's grounds of appeal so that they could argue this additional ground of appeal. Mr Rouf and Mr Miah confirmed that both Appellants wished to make such an application and so the Appellants were directed to provide written submissions on this point after the hearing.

5. Therefore, the issues for us to decide in respect of the VAT assessments were:

   (1) Should we allow either Appellant's application to amend their grounds of appeal to argue that the VAT assessments were not raised within time?

   (2) If yes, were the VAT assessments raised in accordance with statutory time limits?

   (3) Were the assessments raised to best judgement?

   (4) If so, had the Appellants satisfied us that the figures in the VAT assessment should be varied or reduced?

6. The issues for us to decide in respect of the penalties were:

   (5) Should we allow either Appellant's applications to make a late appeal to the Tribunal against the penalties?

   (6) If yes, have HMRC demonstrated that the Appellants' behaviour was deliberate?

   (7) If yes, have the Appellants satisfied us that the penalty percentage should be reduced?

OUTCOME

7. In the main body of this decision, we address the issues in the order set out above, setting out our reasoning and our conclusions. However, as this is necessarily a lengthy decision, we first set out the outcome for each of these issues:

8. Issue 1 – both Appellants' applications to amend their grounds of appeal against the assessments to VAT are dismissed.

9. Issue 2 – as a result of our decision on Issue 1, this issue does not arise.

10. Issue 3 – both VAT assessments were raised to best judgement.

11. Issue 4 – the First Appellant has satisfied us that the figures for the VAT assessment should be further reduced, and so the First Appellant's appeal against the assessment to VAT is allowed in part;

– the Second Appellant has not satisfied that the VAT assessment should be varied or reduced, and so the Second Appellant's appeal against the assessment to VAT is dismissed.

12. Issue 5 – both Appellants' applications to make a late appeal to the Tribunal against the Schedule 24 penalties are dismissed.

13. Issues 6 and 7 – as a result of our decision on Issue 5, these issues do not arise.

EVIDENCE BEFORE US

14. The evidence before us consisted of oral and documentary evidence.

15. On behalf of the Respondents, HMRC Officer Jonathan Beard had filed a witness statement for each appeal, and he gave oral evidence before us. Officer Beard was cross-examined by Mr Rouf on behalf of the Appellants. We found Mr Beard to be a credible witness who was prepared to accept when he had made an error, and who was able to explain the reasoning behind the conclusions he had reached. Except for the count of non-HMRC customers, we accept the entirety of Officer Beard's evidence.

16. During the course of the Tribunal proceedings, both Appellants had been represented by Mr Nasim. At the hearing, the Appellants were represented by Mr Rouf and Mr Miah, both partners in each of the Appellants. Prior to the hearing and on behalf of both Appellants, Mr Nasim had filed documents entitled "witness statement", which were said to be the witness statements of Mr Rouf, Mr Miah and himself. Those documents did not contain statements of fact that were within the knowledge of the person said to be making the statement. Instead, each document appeared to be more akin to a skeleton argument, prepared on the basis of Mr Nasim's understanding of events, and containing the submissions that Mr Nasim considered appropriate to each appeal. We treat all of those documents as a record of the Appellants' submissions.

17. Neither Mr Rouf nor Mr Miah gave formal evidence before us. However, during the course of their oral submissions during the hearing, Mr Rouf and Mr Miah both made statements about what they believed to be the factual background to the dispute between the parties. It was not possible for the Respondents to cross-examine Mr Rouf or Mr Miah on the basis of assertions made in this way. While we accept that Mr Rouf and Mr Miah were convinced of the truth of what they said, both accepted that neither of them had visited either restaurant during the period in question and so neither had first-hand knowledge of any of the relevant events. We found that Mr Raif and Mr Miah's oral evidence either consisted of speculation on their part about what might have happened, or what they believed ought to have happened, at the restaurants in their absence, or consisted of their grievances about various matters that were the subject of complaints to and about HMRC.

18. The parties have been in a longstanding dispute about certain documents. There are two aspects to this. The first aspect is that the parties do not agree whether some records (belonging to the Appellants and uplifted by the Respondents) had been returned by the Respondents to the Appellants' previous accountants, and then lost by those accountants (as

the Respondents contend) or not returned by the Respondents (as the Appellants contend). This aspect has already been the subject of a formal complaint to the Respondents. The Respondents' behaviour is not a matter over which we have jurisdiction and so we do not intend to comment further on this dispute.

19. The second aspect is that the Appellants do not consider that the Test Eat Reports that were disclosed to them are legible. Copies of the Test Eat Reports appear in the bundles. One report has had the bottom of the page cut off but we did not experience any other issues reading the reports in the hearing bundles.

20. That longstanding dispute about documents appears to have carried over into the preparation of the bundles. Shortly before the hearing, Mr Nasim was directed to email the Respondents a copy of each of the documents he wished to have included in the Tribunal bundles no later than 27 February 2023. The Respondents were directed to compile all such documents into a supplementary bundle, and (although there had been no request from the Appellants for paper copies) the Respondents were also directed to bring sufficient paper copies of all the bundles they had prepared to the hearing. When Mr Rouf and Mr Miah attended the hearing they brought copies of what they described as being the supplementary bundle. Mr Rouf stated that the bundles they had brought were identical to the bundle the Respondents had provided. Therefore, as the Respondents' version was in a lever arch file and paginated, rather than being loose and unpaginated, we stated that we would use the Respondents' version of the supplementary bundle. As neither Mr Rouf nor Mr Miah had brought laptops with them, the hearing proceeded on the basis that the Tribunal panel and both parties would use the paper copies of the bundles prepared by the Respondents.

21. At the conclusion of the hearing, Mr Miah suggested that perhaps there were different documents in the version of the supplementary bundle prepared by Mr Nasim, compared to the version prepared by the Respondents, and perhaps some of the emails Mr Nasim had sent to the Respondents by the 27 February 2023 deadline had not been received by the Respondents. Inspection of the supplementary bundle prepared by Mr Nasim after the hearing revealed that:

- the "witness statements" of Mr Rouf and Mr Miah had been amended;
- there were fewer documents in Mr Nasim's version of the bundle; and
- although there was significant overlap between the two versions of the supplementary bundle, there were also documents in each version that did not appear in the other version.

22. In the absence of any reason for the delay in providing new material, we do not consider it acceptable for new documents (or new versions of documents) to be presented only at the start of the substantive hearing. To the extent that there was additional material in Mr Nasim's version of the supplementary bundle, freshly introduced to the Tribunal and apparently not served on the Respondents in advance, we do not admit that fresh material into evidence before us.

23. Therefore, the documents admitted into evidence before us are the documents contained in the five lever arch files prepared by HMRC, comprising the bundle for the appeal of the First Appellant (three lever arch files), the bundle for the appeal of the Second Appellant (one lever arch file) and the Supplementary bundle (one lever arch file) containing the documents that were on the Appellants' List of Documents and provided to HMRC by 27 February 2023.

FACTUAL BACKGROUND

24. On the basis of the oral evidence given and the documents in the bundles before us, we find the following facts:

25. At all relevant times the First Appellant consisted of a partnership between Mr Rahim Miah, Mr Abdul Rouf and Mr Abdul Kalam. This partnership ran a restaurant and takeaway in Harborne, Birmingham, known as Bangla Lounge (Harborne).

26. At all relevant times the Second Appellant consisted of a partnership between Mr Miah, Mr Rouf and Mr Oliur Rahman. This partnership ran a restaurant and takeaway in Hall Green, Birmingham, known as Bangla Lounge (Hall Green).

27. Neither Mr Rouf nor Mr Miah worked at, or attended, these two restaurants during the periods that are relevant to these two appeals. The day to day running of each restaurant was conducted either by a restaurant manager or by the third partner in the partnership, assisted by employed staff.

The Test Eat visits organised by the Respondents

28. The Respondents organised Test Eat visits to take place at the restaurants run by each of the Appellants.

29. For each of the Test Eat visits, the Respondents organised four pairs of HMRC officers to visit and eat in the relevant restaurant during the evening of the test. The times at which the HMRC officers entered and left the restaurant were staggered so that there was at least one pair present between early evening and the time at which the restaurant closed for that night. The HMRC officers were given specific time intervals in which they should count non-HMRC customers eating in the restaurant. The HMRC officers were trained to sit themselves at their table in such a way so that one member of the pair was able to see the door at all times. Each pair of HMRC officers counted the number of non-HMRC customers entering the restaurant and eating in the restaurant, and was able to distinguish customers eating in from those entering the restaurant to collect a takeaway meal or book a table for another date. The HMRC officers were briefed that children who appeared to be under ten years old should not be counted as it was assumed that they would not eat a main meal. Older children who would eat a main meal were counted. None of the HMRC officers introduced themselves to the restaurant staff as being from the Respondents. Each pair of HMRC officers ordered and ate a meal during the time they were present at the restaurant, and paid for their meal in cash.

30. It was argued at various times by the Appellants that during the Test Eat visits the HMRC officers had counted children as if they were adults, and (as the Appellants maintained that children were given free food or would share a meal) that this cast doubt on HMRC's calculations of the suppression percentage. We consider that this is speculation on the part of both Appellants. Mr Rouf and Mr Miah both accepted that they rarely, if ever, went to either restaurant, and they were not present at either restaurant on any evening when Test Eat visits took place. There is no evidence to support their suggestion that young children were counted as if they were adults by the HMRC officers. In his letter of 30 January 2019, Officer Beard explained that the Test Eat officers were briefed that children under ten years old, who were too young to be expected to eat a main meal, should not be counted. We find on the balance of probabilities that the Test Eat officers counted non-HMRC customers in accordance with the briefing that they had been given, and that young children were not included in the customer count.

Test Eat visits to the restaurant of the Second Appellant

31. The Respondents organised Test Eat visits to the restaurant of the Second Appellant for Thursday 3 September 2015 and Saturday 5 September 2015.

32. On Thursday 3 September 2015, the four pairs of HMRC officers arrived at the Second Appellant's restaurant at 18:00, 19:30, 21:00 and 22:30. The last pair of HMRC officers left

the restaurant at 23:30. The Test Eat Reports showed the following non-HMRC customers entering the restaurant and eating in for a meal in the following periods:

- between 18:00 and 19:30 – one group of four people and two groups of two people;
- between 19:30 and 21:00 – one group of seven people and two groups of two people;
- between 21:00 and 22:30 – one group of four people; and
- between 22:30 and 23:30 – no further non-HMRC customers entered.

33. The four pairs of HMRC officers paid the following amounts, in cash:

£39.20 plus a tip of £3.80;

£34:25 plus a tip of £4.75;

£46:10 plus a tip of £3.90:

£35:20 plus a tip of £4.80.

34. On Saturday 5 September 2015, the four pairs of offices arrived at 17:45, 19:30, 21:00 and 22:300. The last pair of HMRC officers left the restaurant at 00:00 (midnight). The Test Eat Reports showed the following non-HMRC customers entering the restaurant and eating in for a meal in the following periods:

- Between 18:00 and 19:30 – one group of five people, and two groups of two people;
- Between 19:30 and 21:00 – one group of six people, one group of four people, two groups of three people and three groups of two people;
- Between 21:00 and 22:30 – four groups of two people; and
- Between 22:30 and 00:00 – one group of five people.

35. The four pairs of HMRC officers paid the following amounts, in cash:

£33.25 plus a tip of £1.75;

£44.10 plus a tip of £4.90;

£33.20 plus a tip of £6.80;

£44.40 plus a tip of £5.60.

Test Eat visits to the restaurant of the First Appellant

36. The Respondents organised Test Eat visits to the restaurant of the First Appellant for Thursday 23 June 2016 and Saturday 25 June 2016.

37. On Thursday 23 June 2016 the four pairs of HMRC officers arrived at 17:30, 19:00, 20:30 and 22:00. The last pair of HMRC officers left the restaurant at 23:05. The Test Eat Reports showed the following non-HMRC customers entering the restaurant and eating in for a meal in the following periods:

- between 17:30 and 19:00 – two groups of two people;
- between 19:00 and 20:30 – one group of six people and one group of two people;
- between 20:30 and 22:00 – one group of two people entered; and
- between 22:00 and 23:05 – no further non-HMRC customers entered.

38. The four pairs of HMRC officers paid the following amounts, in cash:

£39.15 plus a tip of £4.85;

£23.70 plus a tip of £2.30;

£27.15 plus a tip of £2.85;

£25.55 plus a tip of £4.45.

39. On Saturday 25 June 2016, the four pairs of offices arrived at 17:30, 19:00, 20.35 and 22:00. The last pair of HMRC officers left the restaurant at 00:15 on Sunday morning. The Test Eat Reports showed the following non-HMRC customers entering the restaurant and eating in for a meal in the following periods:

- Between 17:30 and 19:00 – 26 customers noted;

- Between 19:00 and 20:30 – one group of six people, two groups of four people and nine groups of two people;

- Between 20:35 and 22:00 – one group of seven people, one group of three people and two groups of two people; and

- Between 22:00 and 00:15 – one group of six people, two groups of four people, two groups of three people and five groups of two people.

40. Although we added the figures in the reports to reach a total of 102 customers noted in the Rest Eat Reports for Saturday 25 June 2016, the Respondents added these figures to produce a total of 100 non-HMRC customers for this night. This total was subsequently reduced to 84 customers (see below) by Officer Beard. This reduction was to avoid the risk that there had been double-counting between 19:00 and 19:30, as the first pair of HMRC Test Eat officers did not record the times when customers entered, and had not left the restaurant until 19:39.

41. The four pairs of HMRC officers paid the following amounts, in cash:

£52.40 plus a tip of £2.60;

£35.05 plus a tip of £0.95;

£31.70 plus a tip of £3.30;

£40.40 plus a tip of £4.60.

42. One issue to which Mr Rouf and Mr Miah paid particular attention in their submissions to us was whether a Test Eat Report had been amended after the event. Mr Rouf and Mr Miah argued that the report for the visit to the First Appellant at 20:35 on Saturday, 25 June 2016 initially stated that two non-HMRC customers had arrived but that the report was subsequently amended to show a group of seven people had arrived at the restaurant. Mr Rouf and Mr Miah argued that this showed that the Test Eat Reports were unreliable because the number of people counted at that table had changed.

43. Having looked in detail at the relevant handwritten report in the bundle, this argument appears to be based upon there being a curve to the top of the handwritten figure "7" which is more indicative of a "2". There is no lower horizontal "tail" as there would ordinarily be for a "2" and as is present for other instances of "2" in this report. The curved top of the "7" has been straightened with a heavier line. We remind ourselves that this is a written up report (noted as written four days after the visit) so it is likely that this report was made from notes taken on the evening of the visit. The report states "A party of 7 arrived at 21:40." The next line is: "A party of 2 arrived at 21:50." We are satisfied, and we find on the balance of probabilities, that the officer began to write an incorrect figure (perhaps reading too far ahead through the contemporaneous notes) and then made a correction midway through writing that number. This would explain the absence of a tail for a "2" and the need to straighten the top

of the "7" so that it was more obviously a "7". If the report had been amended after the event then there would have been a tail present for the "2" so the absence of a tail reinforces our conclusion. Mr Rouf and Mr Miah did not provide any explanation for why the tail for the "2" would be omitted on this one occasion but not others in the same report.

44. Our conclusion is also supported by the fact that a group of seven non-HMRC customers did arrive and dine at the First Appellant's restaurant that evening, as was demonstrated by a declared Meal Bill for a group of seven for that night. Neither Mr Rouf nor Mr Miah suggested any reason why a HMRC officer, at some time after the report was originally made, would amend a Test Eat Report, either at all or to make it match with a Meal Bill which had been declared and which became available only months later. We find that this report was not amended after the event. We are satisfied that the correction was made as part of the process of writing the report.

Events after the Test Easts – Second Appellant

45. On 14 January 2016, Officer Beard made an unannounced visit to the Second Appellant's restaurant to observe cashing up, and met Mr Rahman. Officer Beard noted that the restaurant did not have a working till. Mr Rahman conducted the cashing up. The takings for that night showed one takeaway meal (paid by card), four eat-in meals (paid in cash) and one delivery (paid in cash).

46. On 18 January 2016, Officer Beard wrote to the Second Appellant to ask to see records. This resulted in a visit being arranged for 24 March 2016 at the Second Appellant's then accountant. None of the partners in the Second Appellant were present at that meeting but Officer Beard was able to inspect sales records. Inspection of the Meal Bills that had been retained and passed to the accountant revealed that the Second Appellant had declared only a Meal Bill for only one of the eight meals purchased by the HMRC officers who had undertaken the Test Eat visits on 3 and 5 September 2015. In addition, the Meal Bills that had been declared were insufficient for the number of non-HMRC customers who had been counted by the HMRC officers during the Test Eat visits.

47. On 15 June 2016, a further meeting took place between the Respondents and Second Appellant, this time at the Second Appellant's restaurant. Mr Rahman attended, on behalf of the Second Appellant, as well as the Second Appellant's then accountant. At that meeting Mr Rahman informed the Respondents that the restaurant had 60 covers, that the restaurant prices had not changed in the previous four years and that he retained the Meal Bills as a sales record. Mr Rahman explained that he was present most evenings at the restaurant, and he would cash up about 50% of the time. In addition, there were five or six other members of staff who worked in the restaurant kitchen or as waiters, and most of these were trusted to cash up if Mr Rahman was not there.

48. A further meeting took place on 27 September 2016 between the Respondents and Mr Rahman and the Second Appellant's then accountant. Mr Rahman stated that no free drinks were given to either customers or staff but that staff were given water and were also entitled to meals.

49. By letter dated 5 December 2016, Officer Beard informed the Second Appellant that he was intending to issue a VAT assessment in the total sum of £44,791. With this letter was an explanation of the calculations undertaken. Officer Beard also stated his intention to issue a penalty on the basis that the Second Appellant's behaviour in suppressing takings had been deliberate.

50. On 14 February 2017 the Second Appellant's then accountant asked Officer Beard how the drinks in his Drinks to Total calculation had been quantified. Officer Beard answered by email on the same day.

VAT assessment raised on Second Appellant

51. On 8 March 2017, the Respondents issued an assessment to VAT on the Second Appellant in the total sum of £44,791. This assessment covered the VAT periods 12/12 to 09/16.

52. The Second Appellant took no action in respect of this assessment at this time.

Penalty raised on Second Appellant

53. On 12 April 2017, Officer Beard issued a penalty explanation letter to the Second Appellant. This set out Officer Beard's opinion that the Second Appellant's behaviour was deliberate and prompted. Officer Beard proposed giving a 5% reduction for telling, a 15% reduction for helping and a 30% reduction for giving. This resulted in a penalty percentage of 52.5%. The Second Appellant was invited to make representations by 11 May 2017.

54. Officer Beard did not receive any representations from the Second Appellant. On 11 May 2017, the Respondents raised a Schedule 24 penalty in the sum of £23,515.26 on the Second Appellant.

55. The Second Appellant took no action in respect of this penalty at this time.

Post-assessment correspondence between the Second Appellant and Respondents

56. It was not until 25 February 2019 that Mr Nasim was formally appointed by the Second Appellant. In a letter sent to the Respondents on this date, Mr Nasim argued that the period 12/12 should not have been included in the assessment as it was more than four years before the date on which the VAT assessment was issued. Mr Nasim also stated that, as he believed there were errors with investigation into the First Appellant's tax affairs, it was likely that there were also errors with the investigation into the Second Appellant's tax affairs.

57. On 18 April 2019, Officer Beard's manager wrote to the Second Appellant (in Officer Beard's absence). Although the Second Appellant's behaviour had been considered to be deliberate, the Respondents agreed to remove the VAT period 12/12 from the VAT assessment on the Second Appellant.

58. On 23 August 2019, the Respondents issued a revised VAT assessment to the Second Appellant in the sum of £42,288. This assessment removed the VAT charge for the VAT period 12/12. A revised penalty was issued to the Second Appellant at the same time, to remove the penalty charged for 12/12.

Events after the Test Eats – First Appellant

59. On 17 January 2017, Officer Beard visited the First Appellant's restaurant, with another HMRC officer, and then visited the First Appellant's then accountant to review the declared Meal Bills for 23 and 25 June 2016.

60. For 23 June 2016, seven Meal Bills had been declared by the First Appellant but five of these were marked as being takeaway meals. The two eat-in Meal Bills declared were for a group of six and a group of two people. No Meal Bills were declared for any of the remaining non-HMRC customers, or for any of the HMRC officers.

61. For 25 June 2016, 24 Meal Bills were declared by the First Appellant but seven of these were marked as being takeaway meals. The 17 eat-in Meal Bills declared were for one group of ten people, one group of seven people, two groups of four, three groups of three, nine

groups of two and one single person. No Meal Bills were declared for any of the remaining non-HMRC customers, or for any of the HMRC officers.

62. At the conclusion of the visit, Officer Beard uplifted the First Appellant's records for further review.

63. On 14 March 2017, Officer Beard conducted a VAT interview attended by Mr Rouf and the First Appellant's then accountant. A further meeting took place with Officer Beard on 28 November 2017, attended by the First Appellant's then accountant and Mr Rahman from Rahman & Co, a further firm of accountants. At this meeting, Officer Beard noted that:

> - the Daily Gross Takings for 23 and 25 June 2016 did not include the cash paid by any of the eight pairs of HMRC officers; and
>
> - the Meal Bills declared by the First Appellant for 23 and 25 June 2016 showed significantly fewer customers than had been counted by the HMRC officers. The Daily Gross Takings for 23 and 25 June 2016 only showed the Meals Bills that had been declared, so the Daily Gross Takings omitted a significant number of meals paid for in cash.

64. At this meeting, Officer Beard provided the First Appellant with a formal pre-assessment letter and calculation. These letters informed the First Appellant that the Respondents considered restaurant income had been suppressed, but that income from Just Eat sales (paid by card) was considered to be correct. Officer Beard noted that he had some concerns about the correctness of the income declared from take-away sales but that this would not be addressed at that time. At the conclusion of this meeting, it was agreed that Mr Rahman would provide HMRC with details of additional matters, relevant to the potential VAT assessment, that the First Appellant wished the Respondents to take into account.

65. By letter dated 12 December 2017, Mr Rahman notified HMRC that Rahman & Co had formally been appointed. In this letter Mr Rahman stated:

> With reference to your letter dated 29 November 2017, I would wish to provide you with some calculations based on the practices and policies applied at the business which will go towards explaining partly the discrepancy that has appeared in your observations and calculations.

66. Mr Rahman stated that he would write to Officer Beard by "the end of next week" or in the first week of January 2018.

67. On 2 February 2018, Officer Beard emailed Rahman & Co, to state that he had not heard anything and that, if he did not receive anything by 9 February then he would have no option but to raise the assessment. On 6 February Mr Rahman emailed in reply, stating that he would expect to be able to reply by 6 March 2018.

VAT assessment raised on First Appellant

68. On 16 February 2018, Officer Beard issued an assessment in the total sum of £93,105.86 (VAT of £87,323 and interest of £5,782.86) on the First Appellant. This assessment was for the VAT periods 03/12 to 06/17 inclusive.

Penalty raised on First Appellant

69. On 16 May 2018, Officer Beard wrote to the First Appellant to notify it that HMRC intended to issue penalties. A copy of a penalty explanation schedule was enclosed. This set out Officer Beard's opinion that the First Appellant's behaviour was deliberate but unprompted. Officer Beard proposed giving a 15% reduction for telling, a 30% reduction for helping and a 30% reduction for giving. This resulted in a penalty percentage of 32.5%. The

First Appellant was given until 13 June 2018 to provide HMRC with any additional information that was relevant to the imposition of a penalty.

70. On 26 July 2018, HMRC raised a Schedule 24 penalty in the total sum of £28,379.91 on the First Appellant.

Post-assessment correspondence between the First Appellant and Respondents

71. On 19 July 2018, Mr Nasim (who had been newly instructed by the First Appellant) wrote to Officer Beard to set out the First Appellant's observations on certain points. Mr Nasim suggested that the HMRC officers participating in the Test Eats had ordered more than the average customer, that non-HMRC customers would often meal share or order meal deals, that non-HMRC customers would not leave tips, and that frequent (non-HMRC) customers would not order drinks but would be offered free drinks. Mr Nasim suggested that these factors lowered the average customer spend and thus the amount to be assessed, and that once meal sharing, free meals, meal deals and staff pilfering were all taken into account, then the suppression rate could be as low as 20%. Mr Nasim also recorded his concern that certain documents uplifted by the Respondents had not been returned to the First Appellant's earlier accountant or to himself.

72. On 16 October 2018, Officer O'Mahoney (standing in for Officer Beard) wrote to Mr Nasim. Officer O'Mahoney explained that the amount spent by the HMRC officers who undertook the Test Eats were not included when calculating the average customer spend. Officer O'Mahoney explained that the average customer spend was calculated from the non-HMRC customer spend as shown in the declared Meal Bills, and so already took into account all the points relied upon by Mr Nasim. On that basis Officer O'Mahoney refused to reduce the assessments. Officer O'Mahoney concluded by explaining that the First Appellant could request a review or appeal to the Tribunal, and that the latter route would open up the option of ADR.

73. The First Appellant did not appeal to the Tribunal or seek a review. Instead, on 21 November 2018, Mr Nasim made an informal complaint to the Respondents about the way the enquiry was being run, with the aim of achieving a more detailed response from the Respondents to the points he had made.

74. On 30 January 2019, Officer Beard responded to the First Appellant. In respect of the VAT assessment, Officer Beard agreed that he had made a calculation error, and that this resulted in the assessment (and the associated penalty) being reduced. Officer Beard also addressed the issue of the missing documents (not under consideration by this Tribunal), and explained in detail how he had reached his Drinks to Total calculation and how he had reached the Suppression Rate. Officer Beard also set out information in the Test Eat reports, corrected an error made in earlier correspondence and confirmed that the amount spent by the HMRC officers was not taken into account when calculating the average amount spent by customers of the First Appellant. In this letter of 30 January 2019, Officer Beard also noted that no appeal had been received, and he stated he would consider an appeal that was made within 30 days of the date of that letter. Officer Beard made clear to Mr Nasim that ADR would not be possible unless an appeal was made to the Tribunal.

75. By letter dated 15 February 2019, Mr Nasim replied to HMRC. Officer Nasim asked Officer Beard to accept that letter as an appeal against the amended assessments issued to both Appellants, and to postpone collection. Mr Nasim also stated he would write more fully by 29 March 2019.

76. By email dated 25 February 2019, Officer Beard agreed that HMRC's Debt Management team would not pursue collection of the assessed VAT and penalties until after

29 March 2019. On the same date Officer Beard also issued a revised assessment to the First Appellant, reducing the VAT assessed to £58,364 and the penalty assessed to £18,968.27.

77. On 25 July 2019, Mr Nasim wrote again to HMRC on behalf of the First Appellant. In this letter Mr Nasim queried a number of the observations made in the Test Eat Reports.

78. By letter dated 13 August 2019, Officer Beard reiterated to the First Appellant that it could seek an independent review from HMRC, or it could appeal to the Tribunal. In a further reply, dated 13 September 2019, Officer Beard explained to the First Appellant why he did not accept Mr Nasim's criticisms, why he did not agree that there was no suppression on the days on which the Test Eat visits took place, and why he could not postpone collection of the VAT and penalty assessed any further in the absence of an appeal.

The Respondents review for both Appellants

79. By letter dated 19 September 2019, Mr Nasim sought an out of time review from HMRC of the VAT assessments that had been raised on each Appellant. However, this review request did not include a request for a review of the imposition of the penalties. By letter dated 27 September 2019, Mr Nasim again made a request for a review of the VAT assessments, but again did not seek a review of the penalties that had been imposed.

80. On 20 December 2019, HMRC issue a review decision to each Appellant, with a copy of that letter also sent to Mr Nasim.

81. Under the heading "What I have considered in my review" the reviewing officer wrote to the First Appellant:

> On 26 July 2018, Officer Beard issued a penalty notice to you for the 03/12 to 06/17 periods in the total sum of £18,968.30. Your representative has not made reference to the penalty in his grounds for review, so I have not considered the penalty at this point.

82. A very similar statement was made in the review decision issued to the Second Appellant on the same date.

Tribunal proceedings for both Appellants

83. It is necessary to cover this in some detail in order to consider the Appellants' applications to make a late appeal against the penalties (considered below).

84. On 13 January 2020, the Tribunal received an appeal from each Appellant. The First Appellant's Notice of Appeal was accompanied by various pieces of correspondence, including a letter from Mr Nasim to HMRC that referred to the Review Decision and a letter from HMRC that accepted the request for a review, but without a copy of the Review Decision itself. There is a record on the Tribunal file that a conversation took place between Mr Nasim and a Tribunal clerk, but not what was said. However, shortly thereafter Mr Nasim provided the Tribunal with a copy of the Review Decision for the First Appellant.

85. The Second Appellant's appeal was accompanied by a copy of HMRC's review decision dated 20 December 2019.

86. Neither Notice of Appeal was accompanied by a copy of the penalty notice. The only indication that a penalty had been issued was that, for each Appellant, a box had been ticked on the Notice of Appeal form to state that the appeal was against both VAT and penalties. The Notice of Appeal form completed for each Appellant also bore references to the appeal being against income tax assessments as well.

The First Appellant's grounds of appeal

87. The First Appellant's grounds of appeal were:

> HMRC best judgement VAT assessments are based on: 1. Test Eat: Our review suggests that the calculations are flawed. HMRC have requested additional information. We have provided these supported by direct evidence. These should be considered and assessments varied. 2. HMRC Test eat reports and calculations are supported by Drinks to Total calculations. Evidentially we can demonstrate that these are flawed, hence this argument and basis should be turned down.

88. The documents included with the First Appellant's appeal included a letter from Mr Nasim to the Tribunal, which largely consisted of Mr Nasim's chronology of his complaints about Officer Beard. As additional grounds of appeal, Mr Nasim also argued:

> – that the Test Eat Reports must be incorrect as the First Appellant's restaurant only had 54 covers and so it was not possible for 100 customers to have visited the First Appellant's restaurant in one evening; and
>
> – that duplicate purchase invoices showed that some of the items on the First Appellant's drinks purchase invoices were food and cleaning fluids, and so the Drinks to Total calculation was flawed.

The Second Appellant's grounds of appeal

89. The Second Appellant's grounds of appeal were:

> 1. The penalty assessment and interest for period 12/12 should be vacated.
>
> 2. We seek directions from HMCTS for HMRC to release the Test Eat reports for BLHG so that we can check the VAT calculations and Self Assessment which flow from the VAT calculations.
>
> 3. We seek directions from HMCTS for HMRC to release all calculations which underpins all the assessments (VAT & SA).

90. The documents included with the Second Appellant's appeal also included a letter from Mr Nasim to the Tribunal. Again, this largely consisted of Mr Nasim's chronology of his complaints about Officer Beard. Mr Nasim also argued:

> – that the penalty for VAT period 12/12 should be removed;
>
> - that the spreadsheet error made by Officer Beard in the First Appellant's appeal could have been made in the Second Appellant's appeal; and
>
> – that duplicate purchase invoices showed that some of the items on the Second Appellant's drinks purchase invoices were food and cleaning fluids, and so the Drinks to Total calculation was flawed.

The Tribunal's registration of both appeals

91. In respect of the First Appellant, in a letter to Mr Nasim dated 12 March 2020, the Tribunal queried the ticking of the box relating to income tax assessments when no income tax decision had been provided, and stated that the First Appellant's appeal had been registered as being against VAT and associated penalties only. Insofar as the clerk understood the appeal to be against the penalty, that understanding was incorrect.

92. In respect of the Second Appellant, the Tribunal wrote to Mr Nasim on 12 March 2020 to state that the Second Appellant's appeal had been registered as being against the VAT assessment only.

The progress of both appeals

93. On 25 March 2020, the Tribunal issued a general stay of 28 days on all appeals. On 26 April 2020, the Tribunal issued a further general stay of 70 days. Both of these stays were due to the Covid pandemic.

94. On 4 August 2020, the Respondents agreed that the appeals could proceed without either Appellant paying the VAT in dispute. Subsequently the appeals were joined and stayed for the parties to engage in ADR.

95. On 28 October 2021, the Respondents reduced the assessment on the First Appellant. Officer Beard agreed that there was a possibility of double-counting by the first and second pairs of Test Eat officers who had participated in the Test Eat visits on Saturday, 25 June 2016; Officer Beard removed 16 non-HMRC customers from the customer count for that evening. This reduced the non-HMRC customer count from 100 to 84 and so reduced the suppression rate. As a result of this reduction, the VAT assessment and penalty were both revised.

96. On 14 April 2022, the Respondents filed their Statement of Case for each of the Appellants. On 24 June 2022 the Tribunal issued case management Directions for both appeals. At that stage it was intended that the joined appeal would be heard as a video hearing.

97. On 4 July 2022 (a few weeks before the deadline for compliance with Directions 1, 2 and 3), Mr Nasim sent a long letter to the Tribunal setting out the historical difficulties he believed he had experienced in obtaining copies of the Test Eat Reports, and stating that he would shortly provide his own analysis of the Test Eat Reports that had been provided as, on one of the reports: "the number count has been amended from either 1 or 2 to 7". Mr Nasim stated that the Test Eat Reports were "riddled with inconsistencies" and "may not be reliable". Mr Nasim concluded that he would either comply with Directions 1 to 9 no later than 30 August 2022, or he would seek further directions. The reason for the delay in complying with Directions 1 to 3 was stated to be the ill health of Mr Rouf.

98. On 19 July 2022, the Respondents filed their list of documents. This list included the Test Eat Reports, and a review of these reports. The Respondents also provided their listing information.

99. On 4 August 2022, Mr Nasim's colleague stated that Mr Nasim's wife was seriously ill, and that he would take over from Mr Nasim.

100. On 5 August 2022, the Respondents filed and served the witness statement of Officer Beard. On 18 August 2022, the Respondents applied for permission to amend their List of Documents to include documents referred to by Officer Beard in his witness statement.

101. On 30 August 2022, Mr Nasim emailed the Tribunal. In the body of the email, Mr Nasim provided the Appellants' response to Directions 1 to 9. Attached to the email were the Appellants' lists of documents, and a document described as being the witness statement of all three of Mr Rouf, Mr Miah and Mr Nasim. This document, written from Mr Nasim's perspective, related Mr Nasim's understanding of events from the time that he had been instructed, and set out several of Mr Nasim's complaints about the way the Respondents had handled the Appellants' tax affairs.

102. In respect of listing information, Mr Nasim stated that no one would attend the hearing from the Appellants and that the partners in the Appellants did not have the IT equipment necessary to attend a video hearing. Mr Nasim requested "the matter be concluded by email". Mr Nasim also asked the Respondents to bring the original Test Eat Reports to the hearing, stated that he would provide a bundle by 30 September but asked the Respondents if

they would send the Tribunal their copies of the documents he had listed to minimise the Appellants' costs. Mrs Hancox, the Respondent's litigator, emailed the Tribunal the following day to raise her concerns about various aspects of Mr Nasim's email. Mr Nasim emailed again two days later to request a paper hearing and to make a belated request for paper bundles.

103. On 28 September 2022, Mr Nasim sent an email to Mrs Hancox with two Dropbox links. Mrs Hancox replied on the same day to say that she could not open the attachments.

104. On 12 October 2022, a Senior Tribunal Caseworker clarified what was required from the Appellants, explained that the document entitled "witness statement" was not a valid witness statement and that witness statements were not required, and directed that the hearing would be listed as a face to face hearing in Birmingham. The parties were directed to provide their dates to avoid. The Respondents complied with this Direction but the Appellants did not.

105. On 26 October 2022, Mr Nasim wrote to the Tribunal to ask for a direction that ADR take place. On 5 December 2022, a Senior Tribunal Caseworker explained that the Tribunal did not have the power to make such a direction. The Appellants were directed that any witness statements they wished to rely upon should be filed within 14 days, and both parties should provide their dates to avoid so a hearing could be listed.

106. On 23 December 2022, Mr Nasim filed two documents said to be the witness statements of Mr Rouf and Mr Miah, stated that he, Mr Rouf and Mr Miah would all attend the hearing, and provided the Appellants' dates to avoid. Both of the documents described as witness statements were written from Mr Nasim's perspective and contained Mr Nasim's commentary about events, in particular his complaints about HMRC. As noted above, we treat these documents as a record of the Appellants' submissions.

107. On 13 January 2023, Mrs Hancox asked Mr Nasim to provide a copy of any documents he wished to have included in the bundles. Mr Nasim replied on 21 January 2023, stating that these had been sent by Dropbox and asking for "Clear Test Eat Reports". Mrs Hancox responded on 24 January 2023, noting that she had informed Mr Nasim in September and October 2022 that those documents could not be opened and pdfs should be sent.

108. On 3 February 2023, the Tribunal notified the parties that a two day hearing had been listed for 2 and 3 March 2023.

109. On 7 February 2023, Mrs Hancox emailed the Tribunal to state that she still had not received the Appellants' documents, and so would issue the bundles containing only the Respondents documents. On 9 February 2023, Mr Nasim wrote to the Tribunal to complain that he had not received the bundles that the Respondents had been directed to prepare.

110. On 14 and 15 February 2023, the Respondents filed electronic bundles with the Tribunal and confirmed that a paper copy was being sent to the Appellants.

111. Also on 15 February 2023, the Tribunal directed the Appellants to email their documents to the Respondents, in batches, to reach Mrs Hancox no later than 5 p.m. on 21 February 2023. The Respondents were directed to compile a supplementary bundle of all documents received by 5 p.m. on 21 February 2023. The Appellants were directed that if they failed to meet that deadline then they must make their own bundles, and serve that on the Respondents no later than 5 p.n. on 27 February 2023.

112. The parties exchanged emails concerning how best to exchange documents. On 20 February 2023, Mr Nasim's colleague wrote to the Tribunal (as Mr Nasim was unwell). In this email it was stated:

> … a meeting with the clients had taken place and they confirmed that they would be going ahead with the hearing. They were happy to accept the Test Eat results but not in its entirety. Their immediate concern was that this could have been resolved at a meeting/ADR, cost effectively to all parties concerned rather than litigating this over 2 days. The costs to them were piling up and both the businesses had ceased to trade shortly after the 2nd Covid lockdown.

113. On 22 February 2023, Mr Nasim wrote to the Tribunal to state that the documents had been transferred to the Respondents by the 5 p.m. deadline on 21 February 2023, and that he would not attend the hearing but Mr Rouf and Mr Miah would be present.

114. Having set out that lengthy factual background, we can now consider the issues before us.

ISSUE 1 - THE APPELLANTS' APPLICATION TO AMEND THEIR GROUNDS OF APPEAL AGAINST THE VAT ASSESSMENTS

115. The first issue for us to consider is whether permission should be given for either of the Appellants to amend their grounds of appeal so as to argue that "Some of the VAT assessments and penalties may have been out of time".

The test we should apply when deciding whether to grant permission to amend grounds of appeal

116. It is clear that Tribunal Rule 5(3)(c) gives us the power to allow a party to amend its case to include additional grounds of appeal. In deciding whether or not we should allow a late application in this case, we have been steered by the approach adopted under the Civil Procedure Rules as useful guidance when considering how we should proceed. The principles to take into account when considering a late application to amend are set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). *Quah* concerned an application by the claimant, made three weeks before the first day of the trial, to amend her particulars of claim. At paragraphs 36 to 38 of *Quah*, Mrs Justice Carr set out the relevant principles in determining whether permission to amend should be granted when an application is made. Those principles can be summarised as the following test for us to apply:

- does the proposed new ground have real prospects of success? If it does not then that is determinative of the application;
- what are the reasons given as to why the application is made now and what explanation is given for any delay in making the application?
- what prejudice might be caused to the other party if the application is permitted (recognising that there is a limited costs regime and so it would not ordinarily be possible for an award of costs to be made)? and
- what prejudice might be caused to the applicant if the application is refused?

Does the proposed new ground have real prospects of success?

117. Applying *Quah*, we first ask ourselves if the proposed new ground of appeal has real prospects of success. Although the proposed new ground is said to refer to both the assessments to VAT and the penalties, here we consider it only in respect of the VAT assessments. (The Appellants' applications in respect of a late appeal against the penalties are considered below.)

118. The relevant parts of Section 73 Value Added Tax Act 1994 ("VATA 1994"), in force between 2016 and 2020, provide:

> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in Section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

119. The relevant parts of Section 77 VATA 1994, as it applied in February 2018, when the VAT assessment was raised on the First Appellant, provide:

> (1) Subject to the following provisions of this section, an assessment under Section 73, 75 or 76, shall not be made—
>
> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or
>
> …
>
> (4) In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).
>
> (4A) Those cases are–
>
> (a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),
>
> …

The Second Appellant's application

120. The Second Appellant argues that the VAT assessment raised upon it was not raised within one year one year after "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge", contrary to Section 73(6)(b) VATA 1994.

121. The VAT assessment raised upon the Second Appellant was raised on 8 March 2017. The Second Appellant has not suggested a date by which it considers Officer Beard had sufficient information to justify raising an assessment.

122. The Respondents argue that it was not until the meeting on 24 March 2016, when they discovered that the Meal Bills for the meals eaten by the Test Eat officers had not been declared by the Second Appellant, that the Respondents had evidence that would justify the

making of an assessment. This is within one year of 24 March 2016, and so satisfies Section 73(6)(b) VATA 1994.

123. Given the chronology for the Second Appellant (set out in our findings of facts, above), we do not consider that the Second Appellant has real prospects of successfully arguing that the VAT assessment raised upon it was issued out of time.

124. Where a proposed new ground does not have real prospects of success, that is determinative of the application. Therefore, it is not necessary for us to go on to consider the remainder of the test set out in *Quah*. As the proposed new ground does not have real prospects of success, the Second Appellant's application to argue this new ground of appeal is dismissed.

The First Appellant's application

125. The First Appellant also argues that the VAT assessment raised upon it was not issued within one year one year after "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge" contrary to Section 73(6)(b) VATA 1994. The First Appellant points to the fact that the VAT assessment was not issued until 16 February 2018, despite a meeting between the parties having taken place on 17 January 2017.

126. The Respondents accept that Officer Beard had information after his review of the declared Meal Bills following the meeting at the First Appellant's restaurant on 17 January 2017. A formal pre-assessment letter was prepared and delivered to the First Appellant at a subsequent meeting on 29 November 2017. However, the Respondents argue that Officer Beard delayed raising the VAT assessment because, at that November 2017 meeting, Rahman & Co stated that they wanted to provide further information to the Respondents that would affect the calculation of the VAT assessment. The Respondents' explanation is confirmed by the contents of the letter dated 12 December 2017 from Rahman & Co., and the email exchange between Officer Beard and Mr Rahman from early February 2018 (set out in the findings of facts, above).

127. The Respondents also refer us to the Upper Tribunal decision in *Rasul v HMRC* [2017] UKUT 357 (TCC) where the only issue was whether assessments had been made within the time limit set out in Section 73(6)(b) VATA 1994. At paragraph 16 the Upper Tribunal held:

> 16. The threshold for making a "best judgment" assessment is therefore comparatively low. But that is not the same as saying that the twelve month time limit in s 73(6)(b) starts to run as soon as there is sufficient evidence before HMRC to enable an officer to reach the view that he is entitled to issue a "best judgment" assessment. If the officer decides that further enquiries need to be made and/or further information obtained before making an assessment, the time limit will not start to run against him unless that decision is perverse or wholly unreasonable.

128. Here, Officer Beard's evidence, which we have accepted, was that he waited to allow Rahman & Co. to provide him with the information that the First Appellant had stated it wished to provide. We consider that it was reasonable for Officer Beard to take that approach, and to delay raising the VAT assessment until the First Appellant had provided the information it stated it wanted to provide. In the circumstances we do not consider that the First Appellant has real prospects of successfully arguing that the VAT assessment was issued out of time. The evidence demonstrates that Rahman & Co. had stated that it wished to provide Officer Beard with material that would be relevant to the VAT assessment.

129. Our conclusion that the proposed new ground does not have real prospects of success is determinative of the First Appellant's application. Therefore, the First Appellant's application to amend its grounds of appeal is dismissed.

ISSUE 2

130. In light of our conclusion on the time limit argument (Issue 1), Issue 2 does not arise for consideration.

ISSUE 3 AND 4 – WERE THE ASSESSMENTS RAISED TO BEST JUDGEMENT?

131. In an appeal against a VAT assessment, the burden is on the Respondents to show the assessment has been made to "best judgement". If they do that then burden passed to the Appellant to show that the assessment is incorrect. In both cases, the standard of proof is the civil standard of the balance of probabilities.

132. The classic statement of the test for whether a VAT assessment is raised to best judgement is set out in the High Court case of *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290. Woolf J. stated at page 292:

> Therefore, it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

133. This passage has been commented upon many times in the subsequent decades. In *Rahman t/a Khayam Restaurant v Customs and Excise Commissioners* [1998] STC 826, Carnwath J. commented:

> I have referred to the judgment in some detail, because there are dangers in taking Woolf J's analysis of the concept of 'best judgment' out of context. The passages I have italicised show that the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar Wednesbury principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment.

134. It should always be the case that the true figures will either be known to the appellants or can be ascertained by them from the records that they are able to keep. The Respondents do not have that luxury and must piece together an assessment from the more limited information that they can gather. For that reason, the Respondents are given a fairly wide margin for error when assessing. So, the Respondents must have some information available to them which suggests that an assessment is required, and they must base their assessment on all of the information that they have gathered. The assessing officer must act honestly and

their decision must not be arbitrary – it is important that the assessing officer consider whether the conclusions he or she has reached are reasonable. But in the absence of the true figures being provided to the Respondents by the relevant taxpayers, it is accepted that there will always be an element of estimation in an assessment that is raised to best judgement.

The basis for the Respondents' VAT assessment upon the Second Appellant

135. In his witness statement Officer Beard explained that his starting point when considering whether an assessment was required was to look at the information he had from the Test Eat Reports and the records retained by the Second Appellant. The absence of seven (out of eight) Meal Bills for the meals undertaken by the Test Eat officers, combined with there being insufficient Meal Bills for the number of non-HMRC customers counted, indicated that there was suppression of the Second Appellant's takings. The sales records indicated that all card takings had been declared and that the Second Appellant was under declaring cash takings.

136. Officer Beard explained to us how he undertook a calculation of the suppression rate derived from the Meal Bills and the number of non-HMRC customers counted in the Test Eat reports. These calculations indicated a suppression rate of 48%.

137. Officer Beard then undertook two Drinks to Total calculations, by way of credibility check of the Test Eat calculations. The first Drinks to Total calculation was for the VAT period 09/15, based upon the drinks shown in the declared Meal Bills for 09/15 and the marked up value of drinks purchased. This indicated a suppression rate of 49%. Officer Beard also undertook a Drinks to Total calculation over the whole of the VAT periods 12/14 to 09/15. This second Drinks to Total calculation indicated a suppression rate of 46% but also demonstrated continuity of suppression across the whole year.

138. Officer Beard used 46%, as the lowest of the three suppression rates, when assessing the Second Appellant.

The basis for the Respondents' VAT assessment upon the First Appellant

139. For the First Appellant's appeal, as with the Second Appellant's appeal, Officer Beard explained that his starting point when considering whether an assessment was required was to look at the information he had from the Test Eat Reports and the records that the First Appellant had retained. No Meal Bills had been declared for any of the undertaken by the Test Eat officers. In addition, there were insufficient Meal Bills for the number of non-HMRC customers counted. Both of these factors indicated that there was suppression of takings. As with the Second Appellant, the First Appellant's sales records indicated that all card takings had been declared and that the First Appellant was under declaring cash takings.

140. Officer Beard used the information from the Test Eat reports and Meal Bills to calculate the suppression rate. This indicated a suppression rate of 44%. After Officer Beard agreed in 2021 to remove 16 customers from the total customer count (due to the possibility that some customers had been counted twice) Officer Beard recalculated the suppression rate using this method, with a suppression rate of 35% indicated.

141. As a credibility check Officer Beard undertook a Drinks to Total calculation over the period 09/15 to 06/16. This was based upon the consumed drinks shown in the declared Meal Bills and the uplifted purchase invoices. This calculation indicated a suppression rate of 57%.

142. Officer Beard used 35%, the lower of these two suppression rates, when assessing the First Appellant.

The Appellants' arguments that the VAT assessments were not raised to best judgement

143. Despite both Appellants accepting that there was some suppression, both Appellants argue that the assessments were not raised to best judgement. We remind ourselves that this requires the assessment to have been raised "dishonestly or vindictively or capriciously", or for the assessment to be a "spurious estimate or guess in which all elements of judgment are missing".

144. The Appellants have made a number of challenges to the accuracy of the figures used by Officer Beard to calculate the suppression rate. However, we do not consider that these challenges to the figures, whether taken together or separately, are sufficient to suggest that either assessment was a "spurious estimate or guess" or that the raising of the assessment was dishonest, vindicative or capricious. We are satisfied that both assessments to VAT were raised to best judgment by Officer Beard and that, in raising those assessments, he took care to ensure he took reasonable account of all relevant information available to him.

145. We are also satisfied that when further information came to light, either through identification of a spreadsheet error or from additional information supplied to him, Officer Beard acted correctly to reduce the original assessments. That does not mean that the assessments are completely perfect or that there are no further reductions required (as discussed further below) but the allegations made by the Appellants are very far from showing that Officer Beard did not raise the assessments to best judgement.

ISSUE 4 – DID THE APPELLANTS SATISFY US THAT THE FIGURES IN THE VAT ASSESSMENT SHOULD BE VARIED OR REDUCED?

146. As we have concluded that the VAT assessments were raised to best judgement, the burden shifts to the Appellants to demonstrate that the assessments should be revised or varied.

147. In the Notice of Appeal Mr Nasim argued that the Test Eat Reports must be incorrect as the First Appellant's restaurant only had 54 covers and so it was not possible for 100 customers to have visited the First Appellant's restaurant in one evening. The submissions made by Mr Rouf and Mr Miah challenge the underlying figures used by Officer Beard in both of the methods he has used to calculate an indicative suppression rate.

Are reductions appropriate based upon the challenges to the Test Eat Reports calculations?

148. We do not accept that the First Appellant is correct in arguing that the Test Eat Reports must be wrong because 100 non-HMRC customers were counted but there were only 54 covers in the First Appellant's restaurant.

149. The Test Eat Reports note that there were 54 covers in the main restaurant and that there was also a function room. It is usual for restaurant tables to be used more than once (sometimes multiple times) over the course of an evening. HMRC officers were present at the First Appellant's restaurant for six and three-quarter hours on Saturday 23 June 2016. We are satisfied that customers who ate at the First Appellant's restaurant at the beginning of this period would have left the restaurant sufficiently early that the restaurant staff could have cleared their table and prepared it for other customers to use later on the same evening. Therefore, we do not agree with Mr Nasim that it was impossible for 108 customers (including the HMRC officers) to have eaten at the First Appellant's restaurant over the course of six and three-quarter hours.

150. The Appellants make the following additional points in respect of the Test Eat Reports:

– there was a possibility of double counting when officers overlapped;

– some reports were only written by one officer; and

– one report had been amended after the event and this undermined the reliability of all of the Test Eat Reports.

151. The Appellants' submission in respect of double counting applies principally to the Test Eat Reports for the visit to the First Appellant's restaurant on Saturday 25 June 2016. As noted above, in 2021, Officer Beard agreed to remove 16 non-HMRC customers from the counted total of non-HMRC customers visiting the First Appellant on 25 June 2016 due to the risk of double counting. The First Appellant maintains that 26 customers should be removed.

152. There are two Test Eat Reports from the pair of HMRC officers who visited the First Appellant's restaurant to count between 17:30 and 19:00 that night, one report from each officer. These two reports agree that the officers were present in the First Appellant's restaurant between 17:30 and 19:39. Both reports state that there were no customers in the restaurant when they entered. These two officers had been briefed to count between 17:30 and 19:00. However, rather than provide an account of the number of customers who arrived during in this timeframe, one of these two reports stated only that there were 26 customers in the restaurant when the two HMRC officers left the restaurant at 19:39. The other report gave no customer count. There was no indication of the times at which the 26 customers present at 19:39 entered the First Appellant's restaurant, and no indication of how many customers were in the First Appellant's restaurant at 19:00 when these two officers had been briefed to stop their count.

153. There are also two Test Eat Reports from the pair of HMRC officers who visited the First Appellant's restaurant to count between 19:00 to 20:30 on 25 June 2016. These two reports agree that the officers were present in the First Appellant's restaurant between 18:55 and 20:35. In these Test Eat Reports, it is reported that two customers were eating in when the HMRC officers arrived. (As the officers were briefed to count only non-HMRC officers, and noted other HMRC officers, we are satisfied that the two customers observed at 18:55 were non-HMRC customers.) These two Reports show 24 customers had arrived by 19:30.

154. Although the Test Eat officers were briefed on the period in which they should count, we agree with the First Appellant that the omission of entry times in the 17:30 Test Eat Reports gives rise to the possibility that there was double counting in the period between 19:00 and 19:39. While Officer Beard also accepted that this was a possibility, and agreed to remove 16 customers counted by the second pair of the officers from the total, we agree with the First Appellant that it is the first pair of Test Eat Reports which are the issue. The First Appellant has persuaded us that the count in the Test Eat Reports for the period of 17:30-19:00 should not be relied upon. Therefore, we agree that the 26 non-HMRC customers counted in the Test Eat Reports for 17:30-19:00 should be removed from the total non-HMRC customer count. As those 26 non-HMRC customers are removed, we consider it appropriate to add back in the 16 non-HMRC customers that Officer Beard had previously removed. We also consider it appropriate to add back in the two non-HMRC customers observed at 18:55 in the second pair of Test Eat Reports. (We consider more likely than not that the two non-HMRC customers already present in the restaurant at 18:55, plus the 24 non-HMRC customers counted by the second pair of HMRC officers by 19:30, are the same 26 non-HMRC customers counted by the first pair of HMRC officers at 19:39.) That means that the overall count of non-HMRC customers is 76, eight fewer than accepted by Officer Beard in 2021. Finally, we add back in the two additional non-HMRC customers noted in the reports who were not included when Officer Beard originally added the non-HMRC customers counted. This results in a non-HMRC customer count of 78 for 25 June 2016.

This will further reduce the suppression rate for the First Appellant indicated using Test Eat Report calculations, and so will further reduce the VAT assessment and the associated penalty issued to the First Appellant.

155. Both Appellants argue that this incident of possible double-counting has implications for the other Test Eat Reports. However, in the other Test Eat Reports, for both the First and Second Appellants, there is much more detail about the time of entry of the non-HMRC customers, and the HMRC officers report entry and exit times for themselves which more closely match the intervals in which they were counting. While there is always the possibility of human error we do not accept it is likely that it is more likely than not that there was double counting for the other Test Eat visits.

156. We also do not consider the absence of a second report from some of the pairs of HMRC officers renders Officer Beard's calculation based upon the Test Eat Reports unreliable.

157. In respect of the third point, in our findings of facts, we set out our findings in respect of the allegation that the Test Eat Report for the visit to the First Appellant at 20:35 on 25 June 2016 had been amended at some time after the report had been written up. We concluded that the allegation made by the Appellants was unfounded. We did not do not agree that the reliability of the 20:35 Test Eat Report or the Test Eat Reports as a whole is undermined.

Are reductions appropriate based upon the challenges to the Drinks to Total calculations?

158. In addition to their challenges to the Test Eat Reports calculations, Mr Rouf and Mr Miah also challenge the Drinks to Total calculations, asserting that the amount of wastage estimated by Officer Beard is insufficient for the Second Appellant, and that Officer Beard should not have relied upon the statements of Mr Rahman (that staff and customers were not given free drinks) because those answers would have been given out of fear of the Respondents.

159. In respect of wastage, Officer Beard has explained that his estimate for the Second Appellant's wastage is based upon the statements of Mr Rahman that no free drinks were given to customers or staff. During cross-examination Officer Beard pointed out that Mr Rahman was accompanied by the Second Appellant's accountant throughout the relevant meeting, and that Mr Rahman was adamant that staff and customers were not given free drinks. Although some of the Test Eat Reports for the visits to the First Appellant's restaurant mention free choc ices, the Test Eat Reports for the visits made to the Second Appellant's restaurant do not mention any free food or drink being provided, either to the Test Eat Report officers or to any non-HMRC customers observed. Considering the oral evidence of Officer Beard, and the documents before us, we have not been satisfied that the estimate for wastage should be varied. We consider the contemporaneous account of wastage from the partner who ran the Second Appellant's restaurant, as reported to Officer Beard, is more likely to be accurate than the much later assertions of the two partners who did not attend the Second Appellant's restaurant during the relevant period.

160. In addition, in correspondence, Mr Nasim asserted in the Notices of Appeal that duplicate invoices obtained by each Appellant showed that not all of the items on the drinks purchase invoices used by Officer Beard to calculate the Drinks to Total suppression rate were drinks. However, those duplicate invoices were neither on the Appellants' list of documents, nor provided to the Respondents in February 2023 so they could be included in the bundles before us. In *CA McCourtie v The Commissioners of Customs and Excise* (LON/92/191), Tribunal Chairman Dr Brice quoted *B Zaman T/A Eastern Style v The Commissioners of Customs and Excise* (LON/93/1315A) and continued as follows:

> The same point was made in the *Zaman* decision where the chairman said:
>
> "It is not enough for the Appellant simply to produce different estimates… It is open to an Appellant, faced with an estimated assessment presumed or shown to be validly made, to demonstrate by satisfactory evidence that it is excessive… the estimated assessment is prima facie right, and remains right until the Appellant displaces it. The Appellant must, as a general rule, show not only negatively that the assessment is wrong but also positively what corrections should be made to make it right or more nearly right."
>
> In the light of those principles, I turn to consider the three factors in respect of which the Appellant submitted that the assessment was excessive; namely, the amount of the mark-up percentages used for drinks and for food; the fact that the food was purchased in a condition ready to be sold; and the amount of the allowances.
>
> Apart from the evidence already mentioned, the Appellant produced no other evidence to support the view that the mark-up percentage of 61.5% for drinks and 100% for food was excessive. He has not, therefore, discharged the burden of proof which rests on him.

161. An assertion by Mr Nasim, not supported by the invoices in question, is not sufficient to persuade us that there was an error in Officer Beard's Drinks to Total calculation for either Appellant.

The Appellants' figures

162. During the hearing, we asked Mr Rouf and Mr Miah what figures they considered would be accurate for the amount of additional VAT that was due, they suggested that the correct figures were £15,000 for the First Appellant and £25,000 for the Second Appellant. However, Mr Rouf and Mr Miah were not able to explain how they arrived at these figures, or propose any underlying basis. Mr Rouf and Mr Miah could they point us to anything (other than their own beliefs) which suggested that these figures were more accurate than the Respondents' calculations.

163. We conclude that the VAT assessment issued to the First Appellant should be further reduced for the reasons set out above, but that no further revisions are required to the VAT assessment issued to the Second Appellant.

ISSUE 5 – THE APPELLANTS' APPLICATION TO MAKE A LATE APPEAL AGAINST PENALTIES

164. As found above, on 13 January 2020, the Tribunal received an appeal from each Appellant. As we explained to Mr Rouf and Mr Miah at the beginning of the hearing, Rule 20 of the Tribunal Procedure Rules require an appeal against penalties to be accompanied by (1) a copy of the penalty notice or decision appealed against, and (2) grounds of appeal against the penalties. Neither of these were provided with either of the appeals filed by the Appellants.

165. In addition, where an appeal is late (and, even in January 2020, an appeal against either of the penalty notices would have been very late) Rule 20(4) requires an appellant to provide reasons for the appeal being late. We explained to Mr Rouf and Mr Miah that if the Appellants wish to make an application for a late appeal against the penalties to be accepted, they should submit their written reasons for making a late appeal. Our oral explanation to the parties was followed by a letter, setting out the position. Unfortunately, at first the Tribunal clerks overlooked sending that letter so the initial submissions (filed by the Appellants on 14 March 2023) did not address lateness, instead Mr Nasim simply stated his belief that the appeals were made in time.

166. On 7 April 2023, once our letter had been issued to the parties by the Tribunal, the Appellants filed further submissions. On 25 April 2023, HMRC filed their submissions in response, opposing both Appellants' applications for permission to make late appeals against the penalties.

The test we should apply when deciding whether to grant permission to make a late appeal

167. The Tribunal has the power to grant a person an extension of time to make an appeal, but must decide, in each case, whether it would be appropriate to do so given the particular circumstances. The test for granting permission to make a late appeal is set out by the Upper Tribunal in the case of *Martland v HMRC* [2018] UKUT 178 (TCC).

168. As the Upper Tribunal explains, the Tribunal should consider the length of the delay, the reasons for the delay and then weigh all relevant factors to reach a decision about whether to grant permission to appeal. The onus is on an appellant to explain the reasons for the delay and to make the case for being given relief from the failure to comply with the relevant time limit. The Tribunal's starting point is that permission should be granted only exceptionally, and that permission should not be granted unless it is persuaded that this case is one where the circumstances are such that it is right to depart from the general rule.

The length of the delay

169. Looking first at the First Appellant's delay, the penalty was raised on 26 July 2018. The deadline for making an in-time appeal was 25 August 2018. Treating 2 March 2023 (the date of the hearing) as the date on which the First Appellant asked the Tribunal for permission to appeal out of time, then the First Appellant's appeal was made 1,650 days late.

170. Looking at the Second Appellant's delay, the penalty was raised on 12 April 2017. The deadline for making an in-time appeal was 12 May 2017. Again, treating 2 March 2023 as the date on which the Second Appellant asked the Tribunal for permission to appeal out of time, then the Second Appellant's appeal was made 2,120 days late.

171. In both cases the delay is "serious" and "significant".

The reasons for the delay

172. For the First Appellant, Mr Nasim submits that the request for a review was intended to include the penalty as well as the VAT assessment, and that the failure to seek a review in respect of the penalty was a simple omission. While we accept that it may have been oversight that caused the First Appellant to seek a review only for the VAT assessment and not the penalty, the First Appellant has not explained why – when it received the review decision in which it was explicitly stated that the review did not cover the penalty – it did not either seek a review of the penalty from the Respondents, or provide the Tribunal with a copy of the penalty letter and its reasons for not having appealed at any earlier date. We do not accept that a good reason has been provided by the First Appellant for any of its 1,650 days of delay.

173. For the Second Appellant, Mr Nasim has explained that he was not personally in possession of a copy of the penalty notice as it had been served on the Second Appellant with a copy sent to the accountant acting for the Second Appellant at the time the penalty was raised. Therefore, Mr Nasim submitted, he personally was not able to provide a copy of the penalty notice when he filed the Second Appellant's appeal with the Tribunal. As the penalty notice was served on the Second Appellant, we do not consider the fact that Mr Nasim personally did not have a copy of the penalty notice in January 2020 provides the Second Appellant with a good reason for its lateness in appealing to the Tribunal. The Second Appellant received the penalty notice, and so could have provided Mr Nasim with a copy of the penalty notice when he was instructed, or at any time thereafter. If the penalty notice had

been lost, the Second Appellant could also have asked the Respondents to provide Mr Nasim with a copy of the penalty notice.

174. Although Mr Nasim also suggests that the penalty could have been overlooked by the Second Appellant due to the protracted nature of the correspondence between the parties, we do not accept that either Mr Nasim or the Second Appellant was unaware of the penalty in January 2020 when the Second Appellant's Notice of Appeal was filed. The review decision that accompanied the appeal referred to the fact that the penalty was not part of the review (and so it must have come to Mr Nasim's attention at that time, if not before), and the amount of the penalty was entered in the relevant part of the Notice of Appeal form.

175. The explanation provided does not account for any of the delay which occurred between 12 May 2017 and Mr Nasim's instruction. We do not accept that a good reason has been provided for any of the Second Appellant's 2,120 days of delay.

Weighing all relevant factors

176. Neither Appellant has provided a compelling reason for why they took no action at all in respect of the penalties from the time the penalties were issued (in April 2017, in the case of the Second Appellant, and in July 2018, in the case of the First Appellant) until September 2019 when Mr Nasim requested an out of time review of the decision to issue VAT assessments.

177. Both review decision letters were issued in December 2019. Both Appellants were explicitly informed in those review letters that the review did not include the penalty because no review of the penalty had been sought. Although it has been suggested that it was oversight that resulted in neither Appellant asking the Respondents in September 2019 to conduct a review of the Respondents decision to issue penalties, neither Appellant took the opportunity to seek an out of time review of the penalty when they realised (upon receipt of the December 2019 letter) that the review decision did not include a review of the penalties.

178. In January 2020 both Appellants filed an appeal to the Tribunal against the assessments. Both Appellants were aware – from the review decision – that any appeal against a penalty issued (at least) a year earlier would be significantly late. Both Appellants should also have been aware – from the Notice of Appeal form that they completed – that they were required to provide the Tribunal with a copy of any decision that they wished to challenge, and that as the review decision explicitly did not include the decision to issue a penalty, then the separate penalty notice must be filed.

179. The situation then differs for the two Appellants. For the First Appellant, we consider that the Tribunal's incorrect record of the appeal filed by the First Appellant (that it was against the assessment and associated penalties) could, potentially, have confused the First Appellant into thinking that it had appealed against the penalties when it filed its appeal to the Tribunal in January 2020. It is possible that confusion on this point was the reason that the First Appellant did not try to file a late penalty appeal at any point between January 2020 and March 2023.

180. With regard to the Second Appellant, the Tribunal correctly recorded that the appeal was against the assessment only. Therefore, the Second Appellant must have been aware in January 2020 that its appeal to the Tribunal did not include an appeal against the penalty. The Second Appellant has not provided any explanation for why it did not take any steps between January 2020 and the hearing in March 2023 to file an appeal with the Tribunal.

181. If we grant either Appellant permission to make their appeals out of time then prejudice will be suffered by HMRC, who for a long time regarded this issue settled, and by other tribunal users, who have appealed in time (often at personal sacrifice to ensure the time limit

was met) but who find their litigation delayed by Tribunal resources being spent on appeals that were only filed after the 30 day time limit. Looking at the consequences if we do not grant either Appellant permission to file their appeal out of time, then the Appellants will have lost the chance to challenge the penalties before the Tribunal. However, as both Appellants were represented throughout, they will have their remedy against the various advisors who failed to appeal to the Tribunal at the time the penalties were issued, failed to include the penalties in the out of time request for a review, and failed to make an appeal to the Tribunal at the earliest opportunity following the realisation that no earlier appeal had been made.

182. The First Appellant did not refer to the penalties at all in its grounds of appeal.

183. In its grounds of appeal against the VAT assessment, the Second Appellant asserted that the penalty notice should be vacated for the period 12/12. Although the Second Appellant did not explain its reasoning, we assume that this was on the basis that the VAT assessment for the period 12/12 had been vacated. However, by letter dated 25 March 2021, the Respondents explained that the penalty for the period 12/12 had been vacated when the VAT assessment for that period was removed. As the revised penalty assessment does not include the period 12/12, there would be no benefit to the Second Appellant in arguing that this period should not be included; the Second Appellant has already succeeded on this point without the intervention of the Tribunal.

184. The only argument that either Appellant made at the hearing before us in respect of the penalties was to argue that the behaviour of both Appellants should have been regarded as careless rather than deliberate. While it is not appropriate, when considering an application for permission, to conduct a mini-trial of the parties' arguments, we conclude that the neither Appellant has any reasonable prospects of successfully arguing that their behaviour was careless, and not deliberate, in an appeal in which both Appellants have accepted that they did suppress their profits to some extent.

185. Following the hearing, the written submissions filed on behalf of both Appellants argued that "the penalties may have been out of time". (Above we considered the Appellants' applications to amend their grounds of appeal in respect of the VAT assessments.) A penalty imposed under Schedule 24 to the Finance Act 2007 must be raised within 12 months of the end of the appeal period for the related VAT assessment. Both penalties were raised within one year of the VAT assessment being raised and so is within this time limit. We do not consider that either Appellant has any reasonable prospects of being successful on this ground.

186. We remind ourselves that the onus is on each Appellant to persuade us that they should, as an exception to the general rule, be granted permission to appeal out of time. Weighing the relevant factors here, we are not so persuaded. We conclude that the factors, in particular the very long delay before January 2020 without any action being taken, and the very limited prospects of either Appellant being successful in respect of their penalty appeal, weigh against granting permission to make a late appeal against the penalties. Therefore, neither Appellant is granted permission to make an appeal against the penalty issued to them.

187. Issue 5 is decided in favour of the Respondents.

ISSUES 6 AND 7

188. As neither Appellant has been granted permission to make a late appeal against the penalty issued, issues 6 and 7 do not arise for consideration.

CONCLUSION

189. For the reasons set out above:

- the First Appellant's appeal against the VAT assessment is successful in part;

- the Second Appellant's appeal against the VAT assessment is dismissed;

- the First Appellant's late appeal against the penalty is not admitted by the Tribunal; and

- the Second Appellant's late appeal against the penalty is not admitted by the Tribunal.

190. In consequence, for the First Appellant, the VAT assessment is to be reduced as set out above, and a consequential reduction should be made to the associated penalty. If the First Appellant and the Respondents are unable to agree the figures for the VAT assessment and penalty, following the reduction to the suppression rate, within 56 days of the date of this decision, then within a further 14 days, both parties should provide the Tribunal and each other with their submissions on the correct figures for the VAT assessment and penalty.

191. In consequence for the Second Appellant, the VAT assessment is confirmed in the revised figures raised by the Respondents, and the associated penalty remains in the revised figures raised by the Respondents.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

192. 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.

JANE BAILEY
TRIBUNAL JUDGE

Release date: 12th SEPTEMBER 2024