[2018] UKUT 0255 (TCC)

Appeal number: UT/2016/0233

VALUE ADDED TAX —application to admit new evidence in relation to "best judgment" assessment to VAT—application allowed— influence of new evidence on findings as to quantum of assessment— appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

KYRIAKOS KAROULLA t/a BROCKLEY'S ROCK
Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JUDGE THOMAS SCOTT

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 29 May 2018

Michael Firth, counsel, for the Appellant

Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. Kyriakos Karoulla, trading as Brockley's Rock, ("Karoulla") appeals against a decision of the First-tier Tribunal ("FTT") released on 17 August 2016. In that decision, the FTT (Judge Tony Beare and Mrs Ruth Watts Davies) upheld a "best judgment" assessment by HMRC against Karoulla for under-declared VAT and associated penalties in respect of takings from its fish and chip shop.

2. Karoulla's application for permission to appeal to the Upper Tribunal was refused by Judge Beare. Permission was also refused by the Upper Tribunal (Judge Sinfield) on 18 January 2017.

3. Karoulla applied under Rule 22(4) and (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Upper Tribunal Rules") for reconsideration at an oral hearing of Judge Sinfield's refusal. Judge Herrington of this Tribunal issued his decision on 5 May 2017 following that hearing. The decision granted permission to appeal in one respect only. The reasons and the scope of the permission are set out in the Decision Notice as follows (references to "Z readings" being to the readings on a till at the end of a shift or day):

> "3. In his application for permission to appeal which was considered and refused by Judge Sinfield on the papers, the Applicant set out many points of criticism of the [FTT] Decision which essentially related to the findings of fact made by the FTT. These points were not pursued before me and accordingly permission to appeal is refused on those grounds.
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> 4. However, at the hearing which commenced on 31 March 2017, it became apparent that shortly before that hearing the Applicant had received further evidence from HMRC which it had been seeking for some time, namely the till rolls and further evidence relating to the question as to whether credit card transactions were part of the Z readings taken from the till. In the Decision, the FTT accepted HMRC's submissions that some credit card sales were not reflected in the Z readings. It is quite clear from [34] of the Decision that this finding of fact was material to the FTT's conclusion that it should not disturb the quantum of the assessment made by HMRC.
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> 5. I understand that the evidence the Applicant has now received from HMRC was in HMRC's possession but was not made available to the Applicant by the time of the FTT hearing. Had it been made available, it would undoubtedly have been before the FTT. In those circumstances, there is a realistic prospect that the Upper Tribunal would consent to an application for the admission of fresh evidence applying the principles in *Ladd v Marshall* [1954] 1 WLR 1489.
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> 6. I therefore grant permission to appeal against the findings of the FTT in so far as they relate to the question as to the extent to which the takings from credit card transactions were reflected in the Z readings."

The FTT decision

4. The FTT decision ("the Decision") is reported at [2016] UKFTT 596(TC). In light of the limited grounds of appeal for which permission has been granted, we set out below only those aspects of the decision of relevance to those grounds.

Findings of fact

5. The Decision records the following relevant findings of fact, which are not in dispute in this appeal:

(1) Karoulla carried on a fish and chip shop business during the relevant period, which was 1 December 2011 to 31 October 2014.

(2) The business was registered for VAT throughout the relevant period.

(3) On 4 September 2013 Officer Susan Bush of HMRC visited the shop in the course of a VAT inspection and examined the VAT records.

(4) Officer Bush visited the shop again during the first week of October 2013. During that visit she collected and took away various records from the shop till, including audit and till rolls. She also changed the till settings with a view to generating additional data in future.

(5) The VAT returns which had been submitted by Karoulla throughout the relevant period had included sales figures based solely on the close of day "Z readings" generated by the till. The till documents taken by Officer Bush included a record of transactions reported while the till was in "training" mode.

(6) Officer Bush became concerned that the till's training mode was being used to suppress reported takings, leading to under-declared VAT on sales. HMRC arranged for a series of test purchases to be carried out. On 7 January 2014 Officer Bush returned to the shop and took further records from the till, including till rolls and reports.

(7) HMRC analysed the information they had obtained relating to purchases in the shop paid for by credit or debit card ("Card Purchases"). HMRC concluded that Card Purchases made after 8pm each day were not being entered on the till.

(8) On the basis of discrepancies between the sales records in the Z readings and those in the training mode records, the test purchases and the failure to record all Card Purchases, HMRC concluded that takings had been suppressed.

(9) In March 2015 HMRC issued a VAT assessment for £28,323 and in April 2015 raised an associated penalty of £26,913.18. HMRC upheld the assessment and penalty on statutory review.

The relevant law

6. The Decision records (at [4]) that there was no dispute between the parties as to the meaning and application of the relevant law.

7. Under section 73 of the Value Added Tax Act 1994 ("VATA") where it appears to the Commissioners of HMRC that a VAT return is incomplete or incorrect, the Commissioners may assess the amount of VAT due from that person "to the best of their judgment" and notify it to that person.

8. Under section 83(1)(p) VATA the taxpayer may appeal to the tribunal in respect of an assessment under section 73 or the amount of any such assessment.

9. At paragraphs [13] and [14] of the Decision the FTT correctly sets out the principles to be derived from three well-known cases on "best judgment" assessments, namely *Van Boeckl v CEC* [1981] STC 290, *WH Smith Limited v CEE* (Decision No. 16505/1999) and *Rahman v CEC (No.2)* [2003] STC 150. In particular, this case law establishes that there are two distinct questions for a tribunal in considering an appeal in respect of a best judgment assessment. The first is whether HMRC have assessed the amount of VAT due "to the best of their judgment". The second is whether the tribunal has grounds for changing the quantum of the assessment.

The decision

10. The FTT's analysis of the two issues—validity and quantum—is set out at paragraphs [16] to [34] of the Decision. The vast majority of the analysis deals with the validity issue, quantum being considered only at paragraphs [33] and [34]. It is helpful to set out the relevant findings in some detail.

11. At [18] the Decision states as follows:

> "The Respondents sought to rely on three distinct matters to justify their assessment. These were as follows:
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> (a) some sales were recorded while the till was in training mode and those sales were not reflected in the Z readings;
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> (b) some credit card sales were not reflected in the Z readings; and
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> (c) certain purchases and observations made by test purchasers were not reflected in the Z readings."

12. At [22] (c) the Decision refers to "the fact that certain credit card purchases were being omitted from the Z readings".

13. Dealing with the period for which the assessment was raised, the Decision states:

> "24. Just pausing there, even if the only matters which had been taken into account by the Respondents in making their assessment were the matters described at sub-paragraphs 18(a) and 18(b) above, we would consider that the Respondents made the assessment which they did to

> the " best of their judgment"…the till readings taken by Mrs Bush on 4 October 2013 indicated that suppression in the form of the use of the training mode and the failure to account for all credit card sales had been occurring in the period prior to the three months in question."

14. The Decision records that in making their assessment HMRC also took into account two "additional matters". They were the results of the test purchases and their enquiries in relation to one of Karoulla's suppliers. It states as follows:

> "25. There were some additional matters which the Respondents took into account in making their assessment. For the reasons which follow, we have accorded slightly less weight to those matters as an evidential matter in considering [the quantum question] but we do not doubt that, in relying on that evidence in reaching their conclusion, the Respondents acted in good faith and in a reasonable manner. Accordingly, we think that that evidence also tends to support the conclusion that the Respondents have made the assessment to the "best of their judgment".
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> 26. The first of these matters is the fact that certain purchases and observations made by test purchasers during the three months from 7 October 2013 to 7 January 2014 were not reflected in the Z readings.
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> 27. We think that, from the Respondents' perspective, it is unfortunate, to say the least, that they did not produce as evidence before the Tribunal the actual till rolls upon which the allegations based on the purchases made and observed by the various test purchasers are founded. That…means that we must inevitably place less weight on this evidence than on the evidence described above in considering [the quantum question]. Nevertheless, we have no doubt that the Respondents were acting in good faith in taking this evidence into account in making their assessment."

15. The assessment was based on the conclusion by HMRC that takings for the relevant period had been suppressed by 16.68%. Paragraph [29] explains how this percentage was arrived at as follows:

> "29. The way in which the Respondents calculated the suppression percentage of 16.68% was to use the average of the suppression percentage relating to the use of the training mode (18.39%) and the suppression percentage relating to the purchases and observations made by the test purchasers (17.74%). They did not take into account the suppression percentage relating to the credit card sales that were missing from the Z readings (26.92%). At the hearing, Mrs Bush explained that this was because it was difficult to be sure about the latter percentage given that it depended on consistency of sales during the relevant day and so, given that it was a higher figure, she had effectively given the Appellant the benefit of ignoring it entirely in reaching the average suppression percentage. We do not see how the fact that the higher suppression percentage potentially arising out of the missing credit card sales was not taken into account in calculating the average suppression percentage in any way vitiates the conclusion that the Respondents made the assessment to the "best of their

> judgment". The mere fact that the Respondents adopted the conservative approach of disregarding the higher suppression percentage relating to the credit card sales on the logical ground that credit card usage might be inconsistent does not call into question their good faith in reaching their conclusion. If anything, it rather tends to support the proposition that the Respondents have acted in a responsible and reasonable manner."

16. Having concluded that HMRC did exercise best judgment, the FTT dealt with the question of quantum as follows:

> "33. As the prior case law makes clear, an additional question for the Tribunal to consider in each case involving an appeal against an assessment under Section 73 VATA is whether, notwithstanding the fact that the Respondents have made the relevant assessment to the "best of their judgment" (so that the assessment is valid), the quantum of the assessment should be upheld. We have a duty to evaluate the evidence ourselves in order to decide whether the Respondents have gone wrong in some way, either by taking into account matters which they should not have taken into account, failing to take into account matters which they should have taken into account, simply drawing the wrong conclusions from the matters which they took into account or for any other reason.
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> 34. After considering the evidence which has been put to us by both parties, we can see no logical basis for disturbing the quantum of the assessment in this case. This is because of the reasons set out at some length in relation to question (a) above. Even if very little evidential weight is accorded to the purchases and observations made by the test purchasers and the purchases made by the Appellant from the unnamed supplier which the Appellant was unable to challenge at the hearing for reasons of confidentiality, we think that the evidence submitted by the Respondents in relation to the use of the training mode and the credit card receipts which were excluded from the Z readings are sufficient to justify the quantum of the assessment in this case."

Jurisdiction

17. The jurisdiction of the Upper Tribunal on an appeal from the FTT is conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007. This provides that any party has a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal…". This appeal relates solely to findings of fact by the FTT. It can therefore be appealed only if those findings of fact were so erroneous as to fall within the well-established principles set out in *Edwards v Bairstow* [1956] AC 14.

18. In this appeal, there is no challenge to the FTT's finding that HMRC exercised best judgment in making the assessment. The challenge is solely as to the FTT's findings as to quantum. That challenge is critically dependent on the decision whether to admit the new evidence.

Application to admit new evidence: the law

19. The power for the Upper Tribunal to admit fresh evidence on appeal is found in Rule 15(2) of the Upper Tribunal Rules, which provides as follows:

> "(2) The Upper Tribunal may-
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> (a) admit evidence whether or not-
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> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
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> (ii) the evidence was available to a previous decision maker; or
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> (b) exclude evidence that would otherwise be admissible where-
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> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
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> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
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> (iii) it would otherwise be unfair to admit the evidence."

20. The discretion in Rule 15 must be exercised having regard to the overriding objective in Rule 2 of the Upper Tribunal Rules to deal with cases "fairly and justly". The extent to which the well-established principles laid down by the Court of Appeal in *Ladd v Marshall* [1954] I WLR 1489 are to be applied in the context of Rule 15 and the overriding objective was considered by the Upper Tribunal in *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 0214 (TCC), and we endorse and apply the following guidance in that judgment:

> "20...we should refer to one particular issue that was presented in argument, namely the relevance of the criteria for the admission of new evidence set out in the decision of the Court of Appeal in *Ladd v Marshall* [1954] I WLR 1489.
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> 21. In *Ladd v Marshall*, Denning LJ, as he then was, set out three conditions that should be fulfilled to justify the admission of new evidence when he said (at page 1491):
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> "…first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
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> 22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise of our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the

> overriding objective. That requires us to take into account all the circumstances of the case.
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> 23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v Marshall* criteria are of "persuasive authority as to how to give effect to the overriding objective": see *Reed Employment* [97]. The *Ladd v Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100] …"

Discussion

21. The new evidence which Karoulla seeks to admit consists of the originals of till rolls and records relating to Card Purchases on the till for the relevant period. This evidence was only supplied by HMRC to Karoulla shortly before the commencement of the oral hearing of Karoulla's application for permission to appeal.

22. It will be recalled that the permission which has been granted is "to appeal against the findings of the FTT in so far as they relate to the question as to the extent to which the takings from credit card transactions were reflected in the Z readings".

23. Bearing in mind the guidance set out in *Bramley Ferry Supplies* as to the exercise of our discretion, we have considered Karoulla's application taking into account both the *Ladd v Marshall* criteria and the overriding objective.

24. In relation to the three *Ladd v Marshall* criteria, the parties agreed, rightly in our view, that the evidence satisfied the third criterion, namely apparent credibility.

25. The first criterion is that the evidence could not have been obtained with reasonable due diligence for use at the hearing before the FTT. HMRC's skeleton argument contained no challenge to the satisfaction of this condition in relation to the new evidence. However, at the hearing Mr Waldegrave did contest this point.

26. Mr Waldegrave's submission was that Karoulla should have applied to the FTT for an order seeking disclosure of the evidence, and because they did not do so they had made an insufficient effort to satisfy the first criterion. He further submitted that the position was not affected by any duty of candour applying to HMRC in failing to disclose the evidence to Karoulla before they did, since the duty of candour was a concept restricted to cases of judicial review.

27. We have no hesitation in finding HMRC's challenge on this point to be wholly unmeritorious. The correspondence which we reviewed between Karoulla's representatives and HMRC made it perfectly clear that Karoulla had sought the return of the original documents taken by HMRC on numerous occasions before the FTT hearing, and on each occasion HMRC had either refused or ignored the request. The only attempted justification given at any stage by HMRC for their refusal was that HMRC was under no obligation to assist Karoulla with its case.

28. As an example of HMRC's approach we quote the reasons given by HMRC for refusing the return of the records that were examined to substantiate the conclusion that no sales after 8 PM were recorded in the daily takings in a letter dated 9 February 2015:

29. "HMRC is not bound to disclose specific information or reasons for suspecting dishonest conduct, or any other evidence held. It is sufficient to identify the matters that are the subject of the enquiry. It is entirely a matter for the taxpayer to decide whether or not to take the opportunity to make a full disclosure."

30. That was a totally inappropriate response to a proper request from the taxpayer for the return of documents which he himself had provided to HMRC during the course of its enquiries and which the taxpayer plainly required in order to answer HMRC's case. To this day, HMRC have provided no explanation as to why they believe that such a response was appropriate. The observation of the FTT at [27] of the Decision, as set out at [14] above that the failure to produce the till rolls was "unfortunate" was a gross understatement.

31. HMRC cannot hide behind the absence of any tribunal order for disclosure to argue that the evidence "could have been obtained with reasonable due diligence". The many repeated requests by Karoulla for HMRC to return the documents are due diligence enough without the needless expense and use of resource generated by requiring an order for disclosure.

32. In any event, in the normal course HMRC should have disclosed these source documents, not only to Karoulla but also to the FTT, in accordance with its duty of candour. It is trite that the duty of candour is a concept derived from and developed in the area of judicial review. However, as HMRC will be well aware, it is long-established practice that HMRC usually accept that the duty applies to them in normal tax appeals. If any evidence of that is needed, the normal practice is referred to clearly in the recent decision in *Gardner-Shaw UK Ltd & others v HMRC* [2018] UKFTT 313(TC) at paragraph [27]:

> "27. HMRC had accepted in the hearing before the Upper Tribunal, as they normally did in all cases, that they had a duty of candour in the Tribunal and in particular that, even if the Tribunal only ordered disclosure of documents on which each party relied, HMRC would disclose all relevant material held by them."

33. We also observe that HMRC are under an obligation in both the FTT and this Tribunal to help the tribunal to further the overriding objective of dealing with cases fairly and justly: Rule 2(4)(a) of the Upper Tribunal Rules and the corresponding FTT rule.

34. We turn to the second *Ladd v Marshall* criterion, namely whether the new evidence is such that, if given, it could probably have an important influence on the result of the case.

35. This requires us first to consider what the new evidence shows, and in light of that to consider the extent to which the FTT's findings regarding Card Purchases formed part of its reasons for deciding that the quantum of the assessment was correct.

36. Officer Bush's comparison of the till rolls and other records of payments made by card led her to conclude that Karoulla was suppressing takings by failing to record Card Purchases made after 8pm each evening. Based on the number of hours for which the shop was open each day, this implied a suppression rate of 26.92%. As explained at paragraph [29] of the Decision, set out at [15] above, HMRC decided that this percentage could not robustly be assumed to apply consistently to all days in the relevant period.

37. Karoulla accepts that some suppression of Card Purchases did occur. Its advisers have at various stages suggested percentages ranging as high as 7%.

38. We considered the new evidence which Karoulla seeks to admit. The till rolls taken away by HMRC during their visits covered around a dozen days in the relevant period. However, Officer Bush based her conclusion in relation to Card Purchases on a consideration of the till rolls for only three days. It is not apparent from the evidence (and we were offered no explanation at the hearing) why Mrs Bush chose to consider only three days, and why she chose those particular days, as the basis for her conclusion that Card Purchase suppression was occurring in the same way for each day throughout the relevant period.

39. The new evidence, which includes till rolls for days other than the three chosen in this respect by Officer Bush, showed that in fact the suppression of Card Purchases was inconsistent. It was not in fact the case that such payments were being omitted after 8pm each day.

40. If this evidence, which was in the possession of HMRC but not then disclosed, had been before the FTT, would it probably have had an important influence on its decision on the quantum issue? This requires us to consider the Decision in detail in order to determine the FTT's reasons for reaching that decision.

41. The most striking aspect of the Decision is that it concentrates almost entirely on the question of best judgment, setting out its decision on quantum in a single paragraph. In practice, most appeals against best judgment assessments focus on quantum. We agree with the summary set out in this respect in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) as follows:

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC).

15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):

"In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary".

16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

"…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment."

17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):

"The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." "

42. It is possible that the Decision is one of the "exceptional cases" referred to by Carnwath LJ. There is no indication in the Decision whether the arguments of the parties before the FTT were focussed, primarily or at all, on the issue of best judgment.

43. The only discussion of quantum in the Decision is contained in paragraph [34]. The reasons given are "the reasons set out at some length in relation to question (a) above". There is also a reference to the evidence submitted by HMRC "in relation to the use of the training mode and the credit card receipts which were excluded from the Z readings" as sufficient to justify the quantum of the assessment.

44. In order to assess whether the new evidence would "probably have had an important influence" on the quantum decision by the FTT, we must therefore evaluate and read across the reasons set out in the Decision in relation to the issue of best judgment. That is not ideal, because the tribunal's task is quite different in relation to the two questions. The question to be addressed, the evidence to be taken into account in addressing it, and the tribunal's jurisdiction are all different. As is observed in the passage from *Rahman* above, a finding that best judgment has been exercised may be reached even if the amount of the assessment is not accurate. We note that somewhat curiously paragraph [33] of the Decision also describes the tribunal's jurisdiction as to the quantum issue in terms more germane to describing a supervisory jurisdiction.

45. We must nevertheless determine the probable effect of admitting the new evidence. This involves determining the weight given by the FTT in its decision as to quantum to the evidence relating to Card Purchases.

46. For HMRC, Mr Waldegrave submitted that the percentage of Card Purchases not reflected in the Z readings was "irrelevant to the best judgment assessment, the FTT decision and the subject of this appeal to the Upper Tribunal". He argued that the Decision makes it clear that HMRC took no account of the suppression percentage implied by the omission of Card Purchases from the Z readings, and it was therefore irrelevant to the Decision. Further, the FTT made no finding as to the suppression percentage in respect of Card Purchases, so the new evidence in that regard was again irrelevant. As a result, it failed to meet the second *Ladd v Marshall* criterion.

47. We do not agree. We accept that the Decision records no finding by the FTT as to the extent to which Card Purchases were suppressed, and the consequential effect on quantum. That in itself is somewhat unsatisfactory. However, we consider that implicitly HMRC's assessment must have assumed that Card Purchases were suppressed at the averaged rate implied by the evidence in other areas, which was used in calculating the assessment, namely 16.68%. There is nothing to suggest in the evidence or the Decision that HMRC's assessment was based on the assumption that the rate of Card Purchase suppression was zero, or some other figure.

48. Further, it is in our judgment clear from the Decision that the FTT's reasons for not disturbing the quantum included reliance on some suppression of Card Payments. Paragraph [18](b) records this as one of three matters relied on by HMRC to justify the assessment. Paragraph [22](c) refers to the omission of Card Payments from the Z readings as a finding of fact. Paragraph [24] refers to this as one of two matters which would support a finding that best judgment had been exercised. Finally, paragraph [34] refers back to the reasons given in relation to the best judgment issue and refers to the evidence given by HMRC in relation to the exclusion of Card Payments as one of two evidentiary matters sufficient to justify quantum.

49. We have concluded that it is not possible to predict with any degree of confidence that the FTT's decision on this issue would have been the same if given with the benefit of the new evidence. The new evidence would enable the tribunal to give that issue due consideration in the exercise of its full merits appellate jurisdiction.

50. Mr Firth made a number of other submissions, regarding procedural unfairness, and also the consequential effect of the new evidence on other areas of the Decision. In view of our decision to admit the new evidence, we need not address these issues, and we express no view on them.

Disposition

51. For the reasons given, the new evidence is admitted. We have carefully considered whether only part or parts of the Decision should be set aside. However, given the inter-dependence of the issues, including the penalty, we have concluded that we should allow this appeal and that the Decision should be set aside in its entirety. It is to be remitted for a fresh hearing before a new panel of the FTT, the members of which are to be chosen by the President of the Tax Chamber of the FTT. Appropriate directions should be issued in due course, including directions to clarify the precise issues in dispute and to make any necessary orders as to disclosure.

52. A further hearing could, of course, be avoided if, as we have previously urged the parties and do so again, the parties were able to reach a settlement as to quantum.

UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE THOMAS SCOTT

RELEASE DATE: 3 August 2018