Neutral Citation Number **[2025] UKUT 00287 (TCC)**

Case Number: UT/2024/000087

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

Heard on: 04 July 2025

Before

JUDGE RAMSHAW

Between

CHEON FAT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Thomas Chacko instructed by Doshi and Co Accountants

For the Respondents: Ms Hickey, Litigator HMRC Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant seeks permission to appeal against a decision (the 'Decision') of the First-tier Tribunal (Tax Chamber) (the 'FTT') released on 29 February 2024 [2024] UKFTT 180. The FTT dismissed the Appellant's appeal against VAT and Corporation Tax assessments and penalties. The Tribunal held that the Appellant had understated its takings across the relevant period. The Tribunal also held that a section 455 CTA 2010 charge on advances to participators could be imposed and that the Appellant was guilty of deliberate conduct.

2. The Appellant applied to the FTT for permission to appeal against the Decision and on 13 June 2024 permission to appeal was refused. On 15 July 2024, the Appellant made an in-time application to the Upper Tribunal (Tax and Chancery) ('UT') for permission to appeal against the Decision. On 06 October 2024 the UT refused permission to appeal on the papers. The Appellant requested an oral hearing of the application for permission to appeal. The application for permission to appeal was heard on 04 July 2025 by way of a remote video hearing. The Appellant was represented by Mr Chacko. Ms Hickey represented the Respondents. Mr Chacko provided a written skeleton argument which he amplified during oral submissions. References to paragraphs below are to paragraphs in the FTT decision unless the context indicates otherwise.

JURISDICTION OF THE UPPER TRIBUNAL

3. An appeal to the Upper Tribunal lies only on 'any point of law arising from a decision' of the First-tier Tribunal (section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act')). A party's right of appeal may be exercised only with permission (section 11(3) of the 2007 Act). The Upper Tribunal will generally give permission to appeal if there is a realistic prospect of success in demonstrating that the First-tier Tribunal materially erred in law in making its decision, in other words that it is arguable that the decision was wrong in law. A material error in the decision means that any error must have had the potential to change the outcome of the case.

4. Normally, findings of fact by the FTT cannot be the subject of an appeal. Findings of fact, whether primary facts or factual inferences, can be an error of law where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal (Lord Radcliffe *in Edwards v Bairstow* [1956]

AC 14 at 36). If, in making its factual finding, the FTT ignored relevant considerations, took into account irrelevant considerations, or came to a conclusion that could not be supported by the available evidence, its determination can be set aside.

5. The approach to this kind of appeal is a well-trodden path. The following principles (See *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) are well-settled:

> i) an appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong,
>
> ii) the adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) an appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable

6. Further the weight to be attributed to evidence is matter for the FTT and the evaluation of the reliability of witness evidence is the quintessential function of the First-tier Tribunal judge who has seen and heard the witnesses.

THE APPELLANT'S GROUNDS OF APPEAL AGAINST THE FTT DECISION

7. The Appellant initially advanced 9 grounds of appeal. Mr Chacko, in his written skeleton argument, indicated that only grounds 1, 3 and 4 in the application for permission to appeal were now pursued. The other grounds were no longer maintained. The UT's earlier refusal of permission to appeal is appended to this decision.

8. I refer to the three grounds of appeal that are now advanced as 1, 3 and 4 following the numbering in the Appellant's skeleton to avoid confusion.

9. The three grounds of appeal are:

> Ground 1. The FTT erred in its approach to section 455 CTA 2010

Ground 3. The FTT failed to apply the correct time limit

Ground 4. It was procedurally unfair for the FTT to permit documents relating to a key part of the case to be produced during the hearing

Ground 1 – s455 Corporation Tax Act 2010 ('CTA 2010')

10. Mr Chacko argued that both the respondents and the FTT appear to have approached this case on the incorrect basis that loans to directors fall within s 455. Shareholders are not the only "participators" as defined in s 454, but they are the typical example. It was not alleged that Mr Chan was a participator on any of the more unusual bases, e.g. as a loan creditor, and it was not alleged that he was an associate of a participator. The FTT uses the phrase "participants (directors or shareholders)". Given that the FTT held that he was not a shareholder (and therefore, prima facie, not a participator), and did not find he qualified as a participator or associate of a participator for any other reason, loans to him would not fall within s 455. Directors are not participators simply by virtue of being directors.

11. The FTT's decision at [97] – [100] is on the basis that HMRC were right to **assume** that a s 455 charge arises whenever profits have been suppressed on the basis that they are likely to have been extracted by the participants: i.e. there is no need to identify any particular amount lent to any particular participator. This is wrong for the reasons given in *Stirling Jewellers* [2019] UKFTT 44 at [357]:

> "The statute is not a useful 'fall-back' which engages where a close company is found to have made an under-declaration. The statutes are clear that an assessment can only be raised where a close company can be shown to have loaned or advanced any money to an individual."

12. The FTT described HMRC's s 455 argument at [14] as that "the suppressed takings had been for the benefit of the participants (directors or shareholders) and had not been correctly recorded in the directors' loan account…"

13. Mr Chan denied taking cash from the business. The FTT did not make any finding that Mr Chan's evidence on this was false. Moreover, his evidence that he had not taken money from the business was not rejected.

14. Mr Chacko submitted that it is hard to see how a s455 charge can arise where the FTT found that the individual HMRC accused of withdrawing money was not a shareholder and did

not find that he had withdrawn money. Further, it is clearly not fanciful that the Upper Tribunal could endorse the approach in *Stirling Jewellers*.

Discussion

15. The FTT summarised the Respondents' s455 argument at [14] and concluded at [97] – [99]:

> 97. We were told, and accept, that it is HMRC's practice to assume that where the takings of a limited company are suppressed they have been extracted by the participants (be that the shareholders or the directors). HMRC do not undertaken any tracing activity or look to establish which participants have benefitted on the basis that it is a reasonable assumption to have made.
>
> 98. The Appellant contends that HMRC were not able to identify Mr Chan as the person in charge on any of the covert visits and it is therefore unreasonable to impose a section 455 charge.
>
> 99. That argument completely misses the objective underpinning section 455. That section taxes the participants on the basis of extracted profits. No corporation tax assessment is raised where suppression is as a consequence of theft from the company by someone other than a participant. Where there is no evidence of such theft and no alternative explanation provided there is no evidence on which to set aside HMRC's assumption and the section 455 aspects of an assessment should stand.

16. This point argued in this ground of appeal was not raised before the FTT other than on the basis that Mr Chan was not the person in charge on any of the covert visits. As I set out in my refusal of permission to appeal on the papers:

> 9…An appeal to the UT is not an opportunity to argue a different case, i.e. to have a second bite of the cherry by pursuing arguments that ought to have been put but where not pleaded at first instance. That said on a purely legal point that the FTT ought to have considered but did not permission to appeal may be granted. In this case the issue is one of mixed fact and law. The legal point (for the avoidance of doubt it should not be inferred that I consider it correct) only arises if the factual position is ascertained to be as now asserted in the grounds of appeal. It appears that the FTT did not consider the points raised in this ground of appeal because the arguments appear to have been simply that Mr. Chan was not in charge on any of the covert visits. The Appellant was professionally represented. I note that there is no factual finding by the FTT that Mr. Chan was not a participator. Paragraph 5 of the decision simply records that he was the sole director from 1 February 2015 and that he did not own shares in it…

17. However, I am now just persuaded that it is arguable that the FTT may have erred in its approach to s455. I was not taken to any authorities on the particular issue raised i.e. that an individual/s must be identified. Mr Chacko relied on the FTT decision in *Stirling Jewellers.* This decision was appealed to the UT by both parties, but the Respondents did not appeal against the s455 aspect of the decision.

18. In proceeding on the basis that it is correct to assume that a participator must have extracted the profits without identifying an individual appears to be at odds with the FTT *Sterling Jewellers'* decision. In the instant case no finding was made (because the point was not raised) that the under-declarations were extracted by an individual. I note that the passage relied on by Mr Chacko ought to be read in the context of the factual findings in that appeal which differ considerably from the instant case.

19. The FTT also appears to have proceeded on the basis that a director is a participator. Again, this point was not raised before the FTT but if as a matter of law that is incorrect it is arguable that permission to appeal should be granted. I was not provided with any substantive argument on this issue by either party but consider that it at least arguable that the FTT ought to have engage with the basis on which Mr Chan was a participator.

20. For the above reasons permission to appeal is granted on Ground 1.

Ground 3 – failure to apply the correct time limit

21. Mr Chacko argued that the FTT proceeded on the basis at [72] that if they found deliberate error then the VAT assessments were automatically made in time. The FTT therefore erred, in relation to each VAT assessment, by failing to deal with the question whether s 73(6) was satisfied. This was in fact an issue before the FTT dealt with in the Respondents' statement of case. This is a question that therefore should have been dealt with at first instance. The outcome is not certain. The FTT held that HMRC's conclusion that cash receipts were being suppressed followed their visits to the premises (the final one on 27 July 2017) which is more than 12 months before the assessments were made on 26 November 2018. Jonathan Beard, in his witness statement admitted that the assessments had been made more than 12 months after obtaining the relevant information but that this was because HMRC were hoping that the Appellant would provide further information. The question whether the meetings and correspondence between the Appellant and HMRC in the course of 2018 should extend time for these purposes is a difficult one that could be decided either way - *Rasul v HMRC* [2017]

UKUT. Mr Chacko argued that the issue of fairness in respect of a failure to put issues to a witness is a matter for the appeal not for the permission threshold stage.

Discussion

22. This was not an issue raised before the FTT. The points I set out above re an appeal to the UT apply. The FTT set out the issues in dispute at [17]. I do not accept that this was an issue that the FTT was required to deal with. As Mr Chacko pointed out the issue was dealt with in the Respondents' statement of case and by its witness Mr Beard. A full explanation of the factual basis as to why the assessment satisfied the requirement in s73(6) was provided including reference to the *Rasul* case relied on by Mr Chacko. Mr Beard was called as a witness. It does not appear that any issue was taken with his witness statement in this regard. The FTT found him to be an honest witness. Time limits are an issue that accountants deal with routinely. In the absence of any dispute as to the facts set out by the Respondents it was not incumbent on the FTT, in my view, to go behind the undisputed facts.

23. Permission to appeal is refused on Ground 3

Ground 4 – Procedural unfairness

24. The Respondents were seeking to prove deliberate error, and the lack of records for test purchases were a key part of that. Therefore, it was procedurally unfair to allow such an important part of their case to be produced during the hearing preventing the Appellant's witness from dealing with it adequately. The taxpayer's representative was not a lawyer. Accountants regularly represent taxpayers in the FTT and can be expected to explain the taxpayer's case as a matter of the taxing provisions. However, on matters of procedural fairness and the approach to evidence, it matters whether or not the taxpayer is legally represented. The courts have acknowledged that non-legal representatives cannot be expected to deal with evidential and procedural matters in the same way that lawyers would be: see the Court of Appeal in *Serene Construction v Barclays Bank* [2016] EWCA Civ 1379 at [32] and [38], and the Equal Treatment Bench Book at 124-126.

25. It was confirmed at the hearing before me by Ms Hickey that the documents handed up contained 5 sheets that had been omitted from the bundle of documents that should have been included behind the first page that was included in the bundle. These sheets that contained a detailed analysis - referred to as the meal ticket analysis. Mr Doshi informed me that the

primary issue that he took issue with was the lack of documents underlying the analysis. The detailed analysis of the whole days' takings was new data. There was an objection made in written submissions made following conclusion of the hearing. Ms Hickey referred to her notes of the hearing which noted that the FTT Judge checked with the Appellant's representative regarding the admission of the evidence and that no objection was raised by the representative. In light of that information Mr Chacko agreed that the admission of the evidence was not properly objected to. The meal ticket analysis was provided to the Appellant during a meeting in 2018. Mr Chacko argued that the witness would not have been able to remember detail from so long ago.

Discussion

26. Whilst there may be some distinction to be drawn between legal representatives and non-legal representative in relation to dealing with procedural and evidential issues in this case the FTT specifically raised the admission of the evidence with the Appellant's representative. He did not raise an objection. Accountants regularly deal with appeals before the FTT. Mr Doshi had raised issues regarding evidence – in respect of this particular evidence he had argued that the lack of the source documents undermined the analysis and invited the FTT to draw an adverse inference against the Respondents for failure to produce the underlying evidence referring to authority in support – see [22]-[29]. I do not consider that there was any procedural unfairness. In any event as I set out in my earlier refusal the meal ticket analysis was not the only evidence the FTT considered in reaching its conclusions on the evidence – see paragraph 66. The evidence of HMRC regarding the meal tickets is consistent with the other evidence of suppression of sales including Mr. Chan's evidence of the percentage of cash sales.

27. Permission to appeal is refused on Ground 4.

Conclusion

28. Permission to appeal is GRANTED in respect of Ground 1 only. Permission to appeal is REFUSED on Grounds 3 and 4.

JUDGE PHYLLIS RAMSHAW

Release date: 20 August 2025

Appendix

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

Appellant: CHEON FAT LIMITED	**Tribunal Ref: UT/2024/000087**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE

JUDGE RAMSHAW

Introduction

1. The Appellant seeks permission to appeal against a decision (the 'Decision') of the First-tier Tribunal (Tax Chamber) (the 'FTT') released on 29 February 2024 [2024] UKFTT 180. The FTT dismissed the Appellant's appeal against VAT and Corporation Tax assessments and penalties.

2. The Appellant applied to the FTT for permission to appeal against the Decision and on 13 June 2024 permission to appeal was refused. On 15 July 2024, the Appellant made an in-time application to the Upper Tribunal (Tax and Chancery) for permission to appeal against the Decision.

Jurisdiction of the Upper Tribunal

3. An appeal to the Upper Tribunal lies only on 'any point of law arising from a decision' of the FTT (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). A party's right of appeal may be exercised only with permission (section 11(3) of the 2007 Act). The Upper Tribunal will generally give permission to appeal if there is a realistic prospect of success in demonstrating that the FTT materially erred in law in making its decision, in other words that it is arguable that the decision was wrong in law.

4. Normally, findings of fact by the FTT cannot be the subject of an appeal. Findings of fact, whether primary facts or factual inferences, can be an error of law where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal (Lord Radcliffe *in Edwards v Bairstow* [1956] AC 14 at 36). If, in making its factual finding, the FTT ignored relevant considerations, took into account irrelevant considerations, or came to a conclusion that could not be supported by the available evidence, its determination can be set aside.

5. The approach to this kind of appeal is a well-trodden path. The following principles (See *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) are well-settled:

> i) an appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong,
> ii) the adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> iii) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable

6. Further the weight to be attributed to evidence is matter for the FTT and the evaluation of the reliability of witness evidence is the quintessential function of the First-tier Tribunal judge who has seen and heard the witnesses.

The Appellant's grounds of appeal against the Decision

7. The grounds of appeal are that:

    (1) Section 455 was misunderstood.

    (2) HMRC were required to prove discovery to maintain their corporation tax discovery assessments.

    (3) The FTT failed to apply the correct VAT time limit.

    (4) The proceedings were procedurally unfair in examining the missing test purchases.

    (5) The proceedings were procedurally unfair in the failure to prove meeting notes except by cross examination.

    (6) The FTT adopted an irrational method of calculating profits.

    (7) The FTT failed to consider the overall outcome.

    (8) The FTT wrongly assumed that increases in VAT turnover would be reflected in increases in profits.

    (9) The FTT took into account irrelevant considerations and its reasons were inadequate when considering deliberateness.

Discussion

<u>Ground 1 – Section 455 was misunderstood.</u>

8. It is argued that Mr. Chan was not a participator therefore loans or advances to him could not give rise to a s455 charge. If HMRC cannot identify a participator who they claim to have received a loan or advance, then there is no s455 charge. Reliance is placed on the explanation given in *Stirling Jewellers v HMRC* [2019] UKFTT 44 at [357].

9. It does not appear that this point was raised before the FTT. An appeal to the UT is not an opportunity to argue a different case, i.e. to have a second bite of the cherry by pursuing arguments that ought to have been put but where not pleaded at first instance. That said on a purely legal point that the FTT ought to have considered but did not permission to appeal may be granted. In this case the issue is one of mixed fact and law. The legal point (for the avoidance of doubt it should not be inferred that I consider it correct) only arises if the factual position is ascertained to be as now asserted in the grounds of appeal. It appears that the FTT did not consider the points raised in this ground of appeal because the arguments appear to have been simply that Mr. Chan was not in charge on any of the covert visits. The Appellant was professionally represented. I note that there is no factual finding by the FTT that Mr. Chan was not a participator. Paragraph 5 of the decision simply records that he was the sole director from 1 February 2015 and that the did not own shares in it. I do not consider that there was an obvious point that would have given rise to a need for the FTT to have made factual findings on the specific issues set out in the grounds of appeal in the absence of any dispute by the Appellant on the issue.

Ground 2 - HMRC were required to prove discovery to maintain their corporation tax discovery assessments

10. It is argued that it is not for the Appellant to challenge discovery but for HMRC to prove it and in the absence of an express concession the FTT needed to address it. The grounds refer to paragraph 16 of the decision where the FTT recorded that it understood it to be accepted that HMRC had made a relevant discovery. It is submitted that this was not an appropriate approach.

11. I do not agree. The FTT is not required to go behind an acceptance by a professionally represented Appellant that HMRC had made a relevant discovery and so were entitled to raise the Discovery Assessments. That acceptance amounts to an express concession that discovery is accepted.

Ground 3 – the FTT failed to apply the correct VAT time limit

12. It is argued that the FTT erred by failing to consider if the VAT assessments were made within one year of evidence of facts sufficient to justify the making of the assessments comes to their knowledge (s73(6)(b) VATA 1994.

13. Again, this point does not appear to have been argued before the FTT and the same points made above arise. It is a mixed question of fact and law. At paragraph 72 of the Decision the only issue the FTT considered was whether HMRC could assess beyond the four-year time limit for VAT. Apart from the caution in permitting new points to be argued I am unable to ascertain if this point has any merit as the Appellant has not drawn my attention to any relevant dates. The Appellant has the burden of proving that a ground of appeal is arguable. The Decision does not appear to indicate the dates the assessments to VAT were made.

Ground 4 – Procedural Unfairness in examining the missing test purchases

14. In the grounds of appeal it is submitted that the meal ticket analysis is extremely hard to understand, this was only produced during the course of the hearing and the underlying documents were not produced. The question of whether or not the five test meals had not been recorded was central to the case. It was not fair to permit HMRC to produce their meal ticket analysis during the hearing giving the Appellant no chance to analyse of consider it.

15. Generally a party would require permission from the FTT to produce evidence it intended to rely on at such a late stage and only during the course of the hearing. There is no note in the Decision of any application or decision on such application. I note the FTT recorded that in addition to the bundle of 505 pages it had before it further documents erroneously missed from the bundle. Assuming that the meal ticket analysis was not included in the bundle of documents or in the index to that bundle, the correct time to raise the issue of fairness in relation to the production of such evidence was at the time it was produced. There is no indication in the Decision that the Appellant raised a formal objection or that an adjournment was requested to give the Appellant time to analyse the evidence.

16. The meal ticket analysis appears to have been presented during a meeting on 5 March 2018 so cannot have been entirely new. The meal ticket analysis was not the only evidence the FTT considered in reaching its conclusions on the evidence – see paragraph 66. The underlying documents were found (on the balance of probabilities) by the FTT to have been returned to the Appellant – see paragraph 26. It was open to

the Appellant to have produced evidence to counter the assertion that meals had not been recorded. The evidence of HMRC regarding the meal tickets is consistent with the other evidence of suppression of sales including Mr. Chan's evidence of the percentage of cash sales.

Ground 5 – procedural unfairness in the failure to prove meeting notes

17. It is argued that a key document relevant to the meal ticket analysis was undated and unsigned and not prepared by either of HMRC's witnesses. In the context of the imposition of penalties for deliberate error it was procedurally unfair for HMRC to prove the accuracy of the document except by putting it to the Appellant in cross examination. It is submitted that the FTT's decision on the accuracy of the document is inadequate explained it does not explain what was asked and by who.

18. Whilst the FTT in its decision does not set out precisely what questions were asked it records that significant parts of the note were put to Mr. Chan in examination in chief and in cross examination leading to its conclusion that the note was a sufficiently accurate record of the events on that evening. The FTT also specifically refers to Mr. Chan having confirmed that the note was accurate in that it recorded that he produced and gave the attending officers business records including meal tickets, purchase invoices and bank statements and an A4 purple book. The FTT also recoded that Mr. Chan accepted that the cash takings recorded on the note were correct and he accepted that he said that the float on that day was £80. I do not have a copy of the note before me but it would appear that a number of specific parts of the note had been agreed by Mr. Chan as accurate. The grounds of appeal do not set out any specific details on the note that it says were disputed and that the FTT ignored. The weight to be afforded to evidence is a matter for the FTT. It has the advantage of having not only the written evidence but also of hearing and evaluating the oral testimony of witnesses in relation to that evidence. The FTT did not simply accept HMRC's note as accurate – it arrived at a conclusion on the accuracy of the note after it had been tested against the witness evidence of Mr. Chan.

Ground 6 – the FTT adopted an irrational method of calculating profits

19. It is argued that the FTT's method of calculating profits was irrational because instead of calculating the correct cash figure for each period by multiplying card takings by

35/65 it multiplied the recorded cash figure for each period by 3.456 on the basis that average cash takings declared across the whole period was c.9%. This was irrational because the percentage of takings in cash varied enormously between 2012 – 2016, before 2015 cash receipts of less than 10% of turnover were recorded but from the second half of 2015 they were always substantially over 10%. In periods where cash sales were recorded closer to 15% multiplying them by 3.456 would enormously overestimate them.

20. The UT can only interfere with the FTT's factual finding if it is irrational. The thrust of the attack on the approach adopted arises from the fact that the percentage of cash sales recorded varied. The FTT proceeded on the basis of establishing an average percentage of suppression over the whole period. I do not have before me the document 'Proposed VAT Additions based on Cash to Card analysis' referred to by the Appellant. In calculating and average across a period it is implicit that where the % varies over that period some periods will be higher and some lower. The average of 9% was calculated from the declared takings over a four-year period. I note that no specific challenge has been made to the FTT's recording that the Appellant accepted that '*cash takings were not the 9% declared but of the order of 30-40%'*. In some periods the amount suppressed will be overstated but this is balanced out by the periods where the amount is understated. The task of the FTT is to arrive at a figure that is a fair assessment on the evidence of the amount of tax due. The method adopted is not irrational.

Ground 7 – Failure to consider the overall outcome

21. It is argued that the average meal spend of c. £24 was high as it was calculated without taking account of takeaways. The result of the FTT's estimation of the average meal price implied that there must have been c. 80 additional customers per week – this is an unrealistic addition to the regular business of the restaurant and one that HMRC's evidence did not support. The FTT erred by failing to consider whether the outcome of their profit reconstruction was reasonable in light of the other evidence as to how the business worked – *Stirling Jewellers v HMRC* [2020] UKUT 245.

22. I do not accept that the FTT failed to consider whether the outcome of the method of calculation of the suppressed sales was reasonable in light of the business operation. In paragraphs 84- 86 that is precisely what the FTT was doing. The FTT tested the figures by considering the number of additional customers which would be required to generate the additional sales. It found that the increase in customers which are implied was not unreasonable or unrealistic on the whole of the evidence available including the capacity of the restaurant and how busy the restaurant was on the days of observation. Although the grounds of appeal assert that c.80 additional customers is unrealistic I can see nothing in the FTT's reasoning and conclusions on the evidence before it that could be considered to be irrational. The FTT arrived at a figure for the average meal price based on several pieces of evidence which included the bill values declared on the day of the test – at paragraph 49 take away sales were included in bill values.

Ground 8 – wrongly assuming that increases in VAT turnover would be reflected in increases in profits

23. The grounds of appeal aver that the FTT erred in assuming that increases in VAT turnover would be reflected directly in increases in profits – the cash paid to staff could very substantially reduce the £2000 per week additional cash that the FTT considered to be missing.

24. I see no merit in this ground of appeal. The issue is suppression of sales. The payment of wages in cash is not relevant to the calculation of how much sales figures were suppressed. The Appellant did not argue that the payment of staff wages in cash had not been properly accounted for and recorded. It must be assumed that payment of wages was included in the accounts as an expense thereby reducing profit when computing the Appellant's corporation tax liability – whether the payment was by cash or any other method.

Ground 9 – irrelevant considerations and lack of explanation when considering deliberateness

25. It is asserted that the FTT misread data when finding that Mr. Chan had to be aware that cash takings were underdeclared because for the entire period declarations were

consistently made on the basis of cash takings which were on average below 10% . The % in the period Mr. Chan was director was consistently higher than 10%. Therefore Mr. Chan was being accused of deliberate understatement from a period before he was a director which was an irrelevant factor. The FTT's reasoning is compressed into two paragraphs and is inadequately explained.

26. The main thrust of the FTT's conclusion as to whether the conduct was deliberate was because of the scale of the suppression. It is the conduct of the Appellant that is under consideration – Mr. Chan was not being accused of deliberate understatement from a period before he was director. Although brief I consider the FTT has adequately explained why it concluded that the behavior was deliberate.

27. The findings and conclusions reached by the FTT were ones that were open to it. The grounds of appeal disclose no arguable errors of law.

Conclusion and right to apply for an oral reconsideration

1. Permission to appeal is refused on all grounds.

2. If the Appellant is dissatisfied with this decision, it may apply to the Upper Tribunal under Rule 22(4) and (5) of the Upper Tribunal Rules for the application to be reconsidered at an oral hearing. The application for an oral hearing must be made in writing within 14 days after the date on which this decision notice is issued.

Judge Ramshaw	**Date: 06/10/2024**
Issued to the parties on:	