



142TACD2020

BETWEEN/

[NAME REDACTED COMPANY] LTD.

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the refusal of a claim by the Appellant, a motor dealership, for a repayment of VRT in accordance with the export repayment scheme, in relation to twenty-six motor vehicles owned by the Appellant. The amount of the VRT previously paid in respect of the twenty-six vehicles totals €83,432.
2. On 1 October 2017, the Appellant claimed a repayment of VRT under the export repayment scheme in relation to fifty-six vehicle exports. On 12 December 2017, the Appellant was notified that twenty-six vehicles had been refused a repayment of VRT under the scheme. On 8 February 2018, the Appellant appealed to the Respondent unsuccessfully and the Appellant duly appealed herein.

Background

3. On dates between March 2016 and January 2017, the Appellant present twenty-six motor vehicles ('the vehicles') to Applus Car Testing Ltd. for VRT export examination. On the occasion of the examination of the vehicles, the Appellant presented the completed forms RF105 as proof of ownership of the vehicles.



4. Subsequent to the NCTS examination of the vehicles, the Appellant forwarded the RF105 forms to the Department of Transport and the NVDF system was thereafter updated with the details of the transfer of ownership of the vehicles.
5. The vehicle registration tax export repayment scheme, as provided for in section 135D of the Finance Act 1992 (as amended), allows for the repayment of 'residual' VRT which is permanently exported from the State.
6. The Appellant, [NAME REDACTED COMPANY] Limited, was incorporated in early 2015 and carried on a trade of selling used motor vehicles.
7. The Respondent engaged Applus Car Testing Limited ('Applus') to carry out the VRT export examinations on vehicles registered within the State prior to exportation.
8. The Appellant completed Form VRTER1 (claim for repayment of vehicle registration tax by a business for vehicles permanently removed and re-registered in another EU Member State) and sent this claim form to the Respondent for processing. Form VRTER 1 contains the following declaration; *'I understand that where a repayment is due, it will be made to the person named, at the time of the examination, on the National Vehicle Driver File (Section 135D(5), Finance Act 1993, as amended).'*' This declaration was signed by a director of the Appellant Company on 1 October 2017.
9. As the National Vehicle Driver File ('NVDF') did not identify the Appellant as the owner of the vehicles at the time of the NCTS examinations, the Respondent refused repayments of VRT in accordance with section 135D of the Finance Act 1992, as amended ('FA 1992'). While the Appellant sought to rely on a letter from the local County Council dated 9 January 2018, this letter referenced the dates of sale of the vehicles in circumstances where the Appellant was not on those dates, named as owner on the NVDF.
10. The initial refusal letter from the Respondent dated 12 December 2017 provides; *'Section 135D(5) Finance Act 1992 (as amended) provides that 'any repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), [on the records maintained under section 60 of the Finance Act 1993]. In relation to the vehicles on the attached list, 4x4 Exported Ltd. is not named on the National Vehicle Driver File (NVDF), at the time of the*





NCTS Export Examination. Accordingly, no repayment of vehicle registration tax under this section can be made to you.'

11. Correspondence from the Respondent dated 27 February 2018, refusing the Appellant's appeal to the Respondent, provides: *'The NVDF did not show [NAME REDACTED COMPANY] Ltd. as the owners of the vehicles at the time of their NCTS examination. The data shown on The NVDF record, after the NCTS examination, regarding the date of ownership (of a particular vehicle) is not relevant when considering a claim for repayment under the The VRT Export Scheme.'*

Legislation

Section 135D of the Finance Act 1992 as amended – Repayment of amounts of vehicle registration tax on export of certain vehicles

(1) The Commissioners may repay to a person an amount calculated in accordance with this section of vehicle registration tax based on the open market selling price of a vehicle which has been removed from the State,

where—

- (a) the vehicle [was charged the category A rate]*
- (b) the vehicle has been registered under section 131 and the vehicle registration tax has been paid,*
- (c) the vehicle was, immediately prior to being so removed, registered under section 131,*
- (d) within 30 days prior to being so removed—*
 - (i) the vehicle and any documentation to which paragraph (b) or (c) relates, and*
 - (ii) [where applicable, a valid test certificate (within the meaning of the Road Traffic (National Car Test) Regulations 2017 (S.I. No. 415 of 2017)) or a certificate of roadworthiness (within the meaning of the Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012), as the case may be, in respect of the vehicle concerned,] have been examined by a*



competent person and all relevant matters have been found by that person to be in order,

- (e) at the time of examination to which paragraph (d) relates, the open market selling price of the vehicle (being the price to which subsection (2) relates) is not less than €2,000, and*
- (f) the requirements of subsection (3) have been complied with.*

(2) The amount of vehicle registration tax to be repaid shall—

- (a) be calculated by reference to the open market selling price (being that price as determined by the Commissioners) of the vehicle at the time of the examination referred to in subsection (1)(d)*
- (b) include an amount that is calculated by means of one or more than one formula or other means of calculation as may be prescribed by the Minister by regulations made by him or her under section 141, and*
- (c) notwithstanding paragraph (a), not exceed the amount of vehicle registration tax paid on the registration of the vehicle under section 131.*

(3) A claim for repayment for an amount of vehicle registration tax under this section shall be made in such manner and in such form as may be approved by the Commissioners for that purpose and shall be accompanied by—

- (a) documentation to prove to the satisfaction of the Commissioners that the vehicle was removed from the State within 30 days of its examination under this section, and*
 - (b) proof that the vehicle has subsequently been registered in another Member State or has been permanently exported outside the European Union.*
- (4) The amount of vehicle registration tax calculated for repayment under this section in respect of a vehicle shall be reduced to take account of—*
- a) the net amount of any remission or repayment of that tax previously allowed on the vehicle under this Chapter, and*
 - b) an administration charge of [€100]*

(5) Any repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993.



Submissions

12. The Appellant claimed that as lawful owner of the vehicles, the Appellant should be granted a repayment of VRT in accordance with the VRT export repayment scheme notwithstanding the fact that the Appellant was not, at the time of the vehicle examination, the person named as owner of the vehicles on the NVDF as required by section 135D(5) FA 92. In particular, the Appellant submitted;

- that the lawful owner should obtain a repayment even if the RF105 details are not on the NVDF
- that a completed RF105 which was unentered on the NVDF database constituted a record for the purposes of section 60 FA 1993.
- that Applus Car Testing Ltd. accepted the RF105 as proof of ownership
- that other motor dealers were subject to the same practice since 2013 (meaning that the RF105 has been required to be produced to Applus at the time of the inspection). The Appellant submitted that there was an established countrywide practice which was changed without warning by the Respondent.
- that section 135D(5) FA 92 infringed Article 56 TFEU, was not in conformity with the EU law principle of proportionality and was contrary to EU Law.

13. The Respondent submitted that it was not possible for the Respondent to process a repayment otherwise than in accordance with section 135D(5) FA 1992 which provides that '*any repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993*'. The Respondent submitted that it is for the Appellant to send the RF105 to the Department of Transport in time and to ensure the Appellant is registered as owner prior to the vehicle examination date. The Respondent did not accept that section 135D(5) was incompatible with EU law as the Appellant contended.

ANALYSIS

Jurisdiction.



14. The scope of the jurisdiction of an Appeal Commissioner as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626*, *Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49* and *the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577* is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. The jurisdiction of the Tax Appeals Commission does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.
15. Insofar as the Appellant seeks that the Tax Appeals Commission set aside the refusal of the repayment claim based on the alleged unfairness, breach of legitimate expectation or disproportionality of the Respondent's application of the statutory requirement contained in section 135D(5), such grounds of appeal do not fall within the jurisdiction of the TAC and thus do not fall to be determined as part of this appeal.
16. Section 135D(5) FA 1992 provides; '*Any repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993.*'
17. Section 60 of the Finance Act 1993 established the National Vehicle Driver File ('NVDF') and the records maintained in accordance with section 60 are records contained on the NVDF.
18. The '*examination*' referred to in Section 135D(5) relates to an examination '*by a competent person*' in accordance with section 135D(1)(d) namely, Applus Car Testing Limited. The '*records maintained under section 60 of the Finance Act 1993*' are those contained on the NVDF.
19. The Appellant objected to the fact that the Appellant, as lawful owner of the vehicles at the time of the NCTS examination, was refused a repayment of VRT on the basis that the Appellant was not named on the NVDF as owner of the vehicles on the date of the examination of the vehicles by the NCTS. The Appellant challenged the refusal of the repayment on a number of grounds as set out below.



Lawful owner should obtain repayment even if RF105 details are not on the NVDF

20. The Appellant contended that the person entitled to the repayment of VRT in respect of each vehicle was the Appellant as lawful owner of each vehicle, irrespective of whether these details were contained on the NVDF at the time of examination of the vehicles by Applus. The Appellant submitted that the date of entry on the NVDF system did not accurately reflect the date of sale of each vehicle and did not therefore reflect the change in ownership of the vehicles. The Appellant stated that the Respondent was using the date that the RF105 was inputted to the NVDF and that this date was not necessarily the date of transfer of ownership as per the RF105.
21. Section 60 permits the Minister for Transport, Tourism and Sport and licensing authorities, to establish and maintain records in relation to licences under Part III of the Road Traffic Act 1993 and driving licences and provisional licences under Part III of the Road Traffic Act 1961. Thus, it is the officially recorded owner at the material time who may benefit from a claim for the repayment of residual VRT affecting a motor vehicle on its exportation. The records referred to by reference to section 60 FA 1993 are those held on the NVDF database.
22. The Appellant submitted that repayment of VRT should not be subject to the input or updating of data to the NVDF but should be paid to the Appellant based on the details contained on the RF105. However, as emphasised by the Respondent, section 135D (which commenced with effect from 8 April 2013, approximately two years prior to the incorporation of the Appellant in early 2015 and several years prior to the claims made by the Appellant in 2016 and 2017) provides that the repayment of VRT shall be to the person named at the time of the NCTS examination, on the records maintained under section 60, namely, the NVDF. The legislation is enacted and the duty and obligation of the Respondent is to act in accordance with the legislation.

Section 60 records

23. In the alternative, the Appellant contended that there was nothing in section 135D(5) FA 1992, which provided that records maintained under section 60 must be computer records or that they must be records which have previously been entered on the electronic database of the NVDF and on this basis the Appellant contended that a



completed RF105 which was unentered on the NVDF database constituted a record for the purposes of section 60. The Appellant contended that the person named as owner on the RF105 was entitled to a repayment of VRT in accordance with section 135D(5) irrespective of the fact that that person was not *'the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993'* as required by section 135D(5).

24. The Respondent submitted that the RF105 is not a document of record but is a document which is required to facilitate registration of the transfer of ownership of a motor vehicle from one person to another. When the RF105 is received by the Department of Transport, it is processed and the new owner is officially and publicly recorded on the NVDF.
25. The Respondent submitted that the signing of the RF105 is a necessary part of the process of transferring legal ownership and not, in and of itself, conclusive. The Respondent submitted that the form could be signed but never sent to the Department of Transport or could be lost in the post in a given situation. The Respondent stated that in such instances, the process of transferring legal ownership might not be finalised.
26. In short, I cannot accept the submission of the Appellant that section 60 records include documents that have not been previously entered on the electronic database of the NVDF. Section 135D(5) is clear and unambiguous. It expressly requires that the repayment be made to *'the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993'*.
27. The Appellant cannot pursue a remedy which would involve the Respondent taking an approach which it is not empowered to take such as by overlooking the statutory requirements of section 135D(5). The statutory wording contained in section 135D(5) is clear and unambiguous and the position is that the Appellant was not the registered owner of the vehicles on the NVDF system at the time of the VRT export examination carried out by Applus, and thus the requirements of section 135D(5) FA 1992 (as amended) were not met.

That Applus accepted the RF105 as proof of ownership



28. The Appellant submitted that Applus required that the RF105 be produced at the time of examination, as proof of ownership by the motor dealer of the vehicle(s) and for this reason, the RF105 forms were not sent to the Department of Transport until after the NCTS examinations. The Appellant identified the requirement to furnish this document at the time of examination in the FAQ section of the NCTS website. The Appellant stated that if the RF105 was to be furnished in the first instance to the Department of Transport, it would be unavailable for the examination by NCTS.
29. The Respondent submitted that form RF105 should be sent by the vehicle owner to the Department of Transport *prior* to the NCTS examination in which case the NVDF would be updated in time to allow the repayment to be processed in accordance with s.135D FA 1992. The Respondent also stated that there was an online facility available to motor traders which permitted traders to submit the RF105 to the Department of Transport online. A vehicle registration certificate is then sent to the new owner once the NVDF file is updated. A person presenting a vehicle for examination can then present the vehicle registration certificate to Applus at the time of the examination.
30. The Appellant in its notice of appeal argued that Applus, being the company that inspected vehicles for VRT on the Respondent's behalf, accepted the original RF105 as proof of ownership at the time of the VRT export examination.
31. The Respondent submitted that while Applus was engaged to carry out the VRT export examination of vehicles before they were exported, the purpose of the examination was to identify the characteristics of the vehicle to be exported, namely; make, model, mileage etc. The Respondent submitted that the 'repayable' amount provided to the customer by Applus was at all times an amount which was subject to a successful claim being made to the Respondent's Central Revenue Office post exportation of the vehicle.
32. The Respondent in submissions stated that '*... Applus does not guarantee, nor could it, that any repayment is legally due; such power is unequivocally reserved by the Oireachtas, under the legislation, to the Respondent, which alone can so decide, once it has received an application, processed it and, in so doing, determined that a repayment is actually due thereon. One of the statutory conditions in processing such applications requires the Respondent to check that the relevant vehicle was legally, on the official record, in the ownership of the refund-applicant 'at the time of the examination'. Such*





certainty of ownership can only be achieved if the person in question is named on the relevant NVDF at the time of the examination.'

33. I accept the submission of the Respondent and I refer again to the statutory language used in section 135D(5) which contains an express requirement that the repayment issue to *'the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993'*. As the Appellant was unable to satisfy the requirements of section 135D(5), the Respondent was unable to issue a repayment to the Appellant in accordance with the provision and the Appellant's claim for repayment was refused.

Alleged practice

34. The Appellant in its notice of appeal submitted that other motor dealers were subject to the same practice since 2013 (meaning that the RF105 has been required to be produced to Applus at the time of the inspection). The Appellant submitted that there was an established countrywide practice which was changed without warning by the Respondent. To the extent that the Appellant seeks to invoke the principles of legitimate expectation and/or judicial review of administrative decision making, the TAC does not have jurisdiction to adjudicate and determine such claims and the relevant case law is set out in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626*, *Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49* and *the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577*. In addition, the Respondent cited *Clare Gore v HMRC [2014] UKFTT 904 (TC)*, a case where the UK First Tier Tribunal held that it did not have jurisdiction to hear a claim based on legitimate expectation.

35. Separately, I accept the submission of the Respondent that the TAC does not possess any supervisory jurisdiction over the Respondent's alleged decisions to accept the RF105 with regard to other VRT refund claims made under section 135D.

EU Law



36. The Appellant submitted that section 135D(5) infringed Article 56 TFEU, was not in conformity with the EU law principle of proportionality and was contrary to EU Law.

Arbitrary change in practice

37. The Appellant submitted that, having exported vehicles for many years, it had been the practice of Applus to require motor traders to produce form RF105 at the time of the examination, as proof of ownership of the vehicle(s). The Appellant submitted that procedures in relation to the repayment of VRT in accordance with section 135D were changed by the Respondent '*without warning*' and were not adequately notified to the Appellant. The Appellant also contended that the interpretation adopted by the Respondent of the requirements stipulated in section 135D(5) represented an arbitrary change of practice by the Respondent.

38. The Respondent stated that the instruction to Applus has never been changed by the Respondent. The Respondent did not accept that the enacted legislation constituted an arbitrary, unfair or unjust change or practice as contended by the Appellant. The Respondent submitted that the objective rationale for the requirement was that the Respondent could in theory be faced with more than one claim for the same vehicle if it were not to adhere to the statutory requirement as set out pursuant to section 135D(5) FA 92.

39. The scope of the jurisdiction of an Appeal Commissioner as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626*, *Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49* and *the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577* is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. It does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.

40. The statutory requirement for the claimant to be named on the records maintained under section 60 FA 1993, *i.e.* within the NVDF system, has been an express legal requirement since the entry into force for the first time of the VRT refund scheme on 8 April 2013. The Appellant claimed that prior to section 135D(5) coming into force,



refunds in respect of residual vehicle tax under the VRT export scheme would be to the person named on the registration certificate issued in accordance with section 131(5)(a) i.e. the vehicle logbook. However, that possibility existed only in theory under section 83(1)(j) FA 2012 as it initially introduced the section 135D scheme. The scheme was not commenced however until after section 135D(5) had been amended by section 65 FA 2013. Accordingly, since the coming into effect of s.135D(5) on 8 April 2013, the repayment can only be made to the person named on the NVDF at the date of the examination.

41. Further, in circumstances where, the incorporation of the Appellant took place in early 2015 (approximately two years after the commencement of the legislation on 8 April 2013) and the repayment claims did not arise until 1 October 2017, it is difficult to see how the Appellant was adversely impacted by changes arising on foot of the legislative enactments. In addition, there has been no change to the legislative scheme in question since it was commenced on 8 April 2013.
42. As regards the Appellant's reliance on the EU law case of *Marine Harvest ASA v European Commission*, Case T-704/14, I am satisfied that the Appellant has not made out a case that there has been a sudden change in practice such as would require the principles in that case to be applied to the within appeal.
43. In the circumstances, I am satisfied that the Appellant's contention that there has been an arbitrary change in practice, is unfounded and that the provisions of section 135D(5) as amended are not incompatible with EU law.

Article 55 TFEU and disproportionality

44. The Appellant contended that the requirement that the person seeking the repayment be named on the records maintained under section 60 FA 1993 is a requirement which is incompatible with EU law on the basis that it is disproportional thereto. The Appellant also submitted that because no reason was given by the Respondent as to why a lead in and notice period was not adopted as regard the legislation commenced, the TAC is entitled to consider the provision to be disproportionate.



45. I do not accept the Appellant's submission in this regard. Member States are entitled (in the absence of any harmonising EU rules laid down by EU legislation) to put in place rules to ensure that the person making a claim for the repayment of a tax like VRT on the exportation of a motor vehicles, is in fact the person entitled thereto.
46. Further, the Respondent, as a statutory body, is not disproportional in its actions in applying the legislative rules laid down by the Oireachtas in administering a scheme for which it has been given legislative responsibility.
47. The Appellant's claim for repayment of residual VRT on exportation arose on 1 October 2017, which claim postdates the requirement for the Appellant to be named on the NVDF by over three years. In the circumstances, I am unable to see a stateable argument in relation to this particular submission.
48. The Appellant claimed that section 135D(5) breaches the Appellant's freedom to provide cross-border services within the EU, pursuant to Article 56 TFEU. The Appellant in its submission did not identify any restriction on the freedom to provide services in this case flowing from the application of section 135D(5). The fact that the Appellant did not succeed in making a successful repayment claim to the Respondent does not amount to a restriction as the Appellant could have organised its affairs to have complied with the requirements of section 135D(5) by ensuring that it was registered as owner of the vehicles on the NVDF prior to the VRT export examination. In the circumstances, I am satisfied that the Appellant's submission in relation to the refusal of its repayment claim falls outside the scope of application of EU law and that its invoking of the general principle of proportionality in EU law is unfounded.

Commission v Ireland, Case C-552/15

49. The Appellant cited and relied on the case of *Commission v Ireland, Case C-552/15* in which the Commission sought a declaration that by levying the full amount of VRT upon the registration by an Irish resident of a motor vehicle leased or rented in another Member State, without taking account of the duration of the intended use in the State (where the vehicle is not intended to be used in Ireland on a permanent basis) that Ireland had failed in its obligations under Article 56 TFEU. The case involved a clear potential link with non-resident leasing companies and their freedom to provide services into the State.



50. In this appeal the Appellant has pointed to no link with Article 56 TFEU regarding its own activities which concern the exportation of motor vehicles by way of sales thereof to parties resident outside of the State.

51. The case of *Commission v Ireland* considered *inter alia* the issue of vehicles made available by an undertaking established in one Member State by way of renting or leasing to persons resident in another Member State and the limitations EU law imposes in those circumstances. The judgment addresses the fact that the system in place failed to have regard to the purpose of such imports. The Court found that the VRT system may not impose full upfront payment of VRT in such circumstances. The key findings of the CJEU are contained in paragraphs 76 – 82 as follows;

'76 Such an obligation to register and to pay the full amount of registration tax also concerns residents who import into Ireland a vehicle rented or leased in another Member State, including when the duration of the rental or lease is limited and known in advance. It is common ground between the parties that the duration of the rental or leasing contract is not taken into account when calculating the amount of the tax.

77 Irish residents who rent or lease a vehicle in another Member State, even for a limited period that is known in advance, must therefore pay an amount of tax identical to that applicable where the vehicle is imported permanently.

*78 Such an obligation is liable to render the rental or leasing of vehicles from a company established in another Member State more onerous than when the rental or leasing contract is entered into with a company established in Ireland, in the light, in particular, of the discriminatory nature of such an obligation with respect to amortisation of the tax, to the detriment of rental or leasing undertakings established in another Member State (see, to that effect, judgment of 21 March 2002, *Cura Anlagen*, C-451/99, EU:C:2002:195, paragraph 69, and order of 29 September 2010, *VAV-Autovermietung*, C-91/10, not published, EU:C:2010:558, paragraph 20).*

79 It is true that vehicles leased or rented from companies established in Ireland are also subject to payment of the registration tax when they are first registered in Ireland. However, whilst the view may be taken that part of that tax may be



incorporated in the rental or leasing price of vehicles rented or leased from companies established in Ireland, the fact remains that, in the case of vehicles leased or rented from companies established in another Member State, it is the full amount of registration tax that must be paid.

- 80 *The finding that the obligation to pay the full amount of registration tax is liable to render the rental or leasing of vehicles from a company established in another Member State more onerous than that from a company established in Ireland is not called into question by the fact that, under section 135D of the Finance Act 1992, part of the registration tax may, under the conditions laid down in that article, be refunded.*
- 81 *Even though Ireland contests certain calculations made by the Commission, it concedes that the amount of registration tax levied initially may be more than double the amount of registration tax finally payable after a refund. As the Advocate General has observed in point 42 of his Opinion, such an approach entails the freezing of substantial funds and therefore represents a considerable cash-flow disadvantage for the person liable to pay the tax.*
- 82 *The obligation to pay in advance the full amount of registration tax is, therefore, liable to deter both Irish residents from calling on vehicle rental or leasing services offered by service providers established in other Member States and those service providers from offering vehicle rental or leasing services to Irish residents. Such an obligation thus constitutes a restriction on the freedom to provide services, prohibited, in principle, by Article 56 TFEU.'*

At paragraph 108 of the judgment, the CJEU stated; .

'108 Consequently, it must be held that, by imposing the obligation to pay in advance the full amount of the registration tax applicable in the event of permanent registration, whatever the actual duration of the proposed use in Ireland of the vehicle imported into that Member State, Ireland has failed to fulfil its obligations under Article 56 TFEU, since such an obligation, even coupled with the possibility of a refund, is not proportionate to the objective pursued by that tax, in cases where the duration of the lease or rental has been determined and is known in advance.'



52. The circumstances in *Commission v Ireland* are distinct from those at issue in this appeal. The CJEU in *Commission v Ireland* identified a restriction on the freedom to provide services, of vehicle leasing companies in other Member States to residents in Ireland, arising from the impugned Irish measures. However the Appellant in this appeal has not identified any potential restriction on the freedom to provide cross-border services arising from the proof of ownership requirement at issue in section 135D(5), nor has the Appellant adduced evidence that the application of the provision adversely affected the exportation of the vehicles which occurred prior to the Appellant submitting its VRT repayment claim.
53. The case of *Commission v Ireland* does not lay down a ‘marker’ in relation to the repayment of residual VRT on the exportation of vehicles, as submitted by the Appellant. I do not accept that there is a parallel between the rules regarding registration and payment of VRT on imports under the VRT scheme as considered by the CJEU in that case and the requirement in this appeal regarding exports as set out pursuant to the provisions of section 135D(5) and I am satisfied that the requirement contained in section 135D(5) did not in any way restrict the exportation of motor vehicles from the State.

Article 267 TFEU

54. In relation to the question of a preliminary reference to the CJEU under Article 267 TFEU, I am satisfied that no question of a preliminary reference arises. The first two questions proposed by the Appellant in relation to a possible preliminary reference relate to the alleged arbitrary change in practice by the Respondent in circumstances where I have found there to be insufficient basis for this submission. This is particularly so in circumstances where section 135D commenced with effect from 8 April 2013, approximately two years prior to the incorporation of the Appellant in early 2015 and several years prior to the examination of the vehicles in 2016 and 2017. The third question in relation to interest and costs is not appropriate for an Article 267 reference as costs are not a matter for the CJEU, nor does the Tax Appeals Commission exercise any jurisdiction as to costs. On the matter of interest, this could arise only where the Appellant was successful in this appeal in relation to its repayment claim.



Onus of proof

55. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments to tax are incorrect.
56. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated: *‘The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.’*
57. The onus in this appeal rests on the Appellant and the question is whether the Appellant has shown that it is entitled to a repayment of VRT in accordance with section 135D(5) FA 92.
58. Section 135D(5) FA 1992, as amended, requires that *‘[a]ny repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993’*
59. The Appellant was not the person named on the records maintained under section 60, at the time of examination of the vehicle for the purposes of exportation and thus the Appellant has not demonstrated on the balance of probabilities, that it is entitled to a repayment of VRT in accordance with section 135D(5).

Statutory Interpretation

60. Section 135D of the Finance Act 1992 as amended is clear and unambiguous on its face. It provides that *‘[a]ny repayment of vehicle registration tax under this section shall be to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993.’* [emphasis added].
61. The words contained in section 135D(5) FA 1992 are clear and unambiguous and as is well established by the common law rules regarding the interpretation of tax statutes, the interpretative approach to be applied in such instances is a literal one





based on the established authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 and *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449.

62. In particular, in relation to exemption legislation, Kennedy C.J. in the Supreme Court authority of *Revenue Commissioners v Doorley* [1933] IR 50, stated; '*As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.*'
63. The Respondent submitted that it was not possible for the Respondent to process a repayment otherwise than in accordance with the legislation and in this regard section 135D(5) is unequivocal. It provides that a VRT refund on exportation is to be paid *to the person named, at the time of the examination referred to in subsection (1)(d), on the records maintained under section 60 of the Finance Act 1993.*'
64. As the Appellant was not the registered owner of the vehicles on the NVDF system prior to the VRT export examination carried out by Applus, the requirements of section 135D(5) have not been met. As such, the Respondent was not authorised to make a repayment to the Appellant in accordance with the provisions of section 135D(5) and the Appellant is not entitled to avail of the repayment on exportation.

Determination

65. The scope of the jurisdiction of an Appeal Commissioner as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577* is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. The jurisdiction of the Tax Appeals Commission does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.
66. Insofar as the Appellant seeks that the Tax Appeals Commission set aside the refusal of the repayment claim based on the alleged unfairness, breach of legitimate expectation or disproportionality of the Respondent's application of the statutory





requirement contained in section 135D(5), such grounds of appeal do not fall within the jurisdiction of the TAC and thus do not fall to be determined as part of this appeal.

67. In this appeal, the Respondent has complied with the requirements of section 135D(5) in refusing to issue a repayment of VRT to a person other than the person named on the NVDF at the time of the vehicle examination. For the reasons set out above and in accordance with the provisions of section 135D FA 1992, I determine that the Appellant is unable to succeed in its claim for repayment of VRT pursuant to the export repayment scheme.

68. This appeal is hereby determined in accordance with s.949AL TCA 1997.

COMMISSIONER LORNA GALLAGHER

26th day of May 2020

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.

