AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

106TACD2023

Between

[redacted]

Appellant

and

The Criminal Assets Bureau

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") against Notices of Assessment to Value Added Tax ("VAT") issued on 8 May 2019 by the Criminal Assets Bureau ("the Respondent") for the periods 1 January 2015 to 31 December, 2015 in the sum of €547,615; 1 January 2016 to 31 December, 2016 in the sum of €1,132,791; 1 January 2017 to 31 December, 2017 in the sum of €434,425; and 1 January 2018 to 31 December, 2018 in the sum of €91,398.
2. The liabilities arose in circumstances where the Respondent withdrew the zero-rate provision for VAT applied by the Appellant to sales of [redacted] in the United Kingdom ("UK"), as the Appellant did not comply with the provisions of Regulation 29 of the Value Added Tax Regulations 2010 (S.I. No. 639 of 2010) ("the Regulations"), in so far as the Appellant failed to retain requisite documentary evidence that the goods were removed from the State and transported to another Member State, namely the UK.

3. The appeal proceeded by way of a hearing on 27 March 2022. The Appellant was represented by Junior Counsel and its Accountant [redacted] ("the Appellant's representative"). The Respondent was represented by Senior Counsel.

Background

4. The Appellant is engaged in the [redacted] trade business. The Respondent submits that since 18 April 2013, the Appellant has been registered as a taxpayer in respect of tax heads VAT, Corporation Tax and PREM.

5. As part of an investigation conducted by the Respondent, it evaluated the VAT returns filed by the Appellant for all VAT periods from 1 January 2015 to 31 December 2018. The Respondent, in its statement of case filed in relation to this appeal, sets out the VAT returns of the Appellant for the period 1 January 2015 to 31 December 2018. The Respondent summarises the VAT returns as follows:

Period Start	Period End	T1	T2	T3	T4	E1	E2
01/01/2015	30/04/2015	11,013	3,395	7,618	0	2,235,821	2,199,131
01/05/2015	31/08/2015	655,058	643,955	11,103	0	2,835,344	2,786,744
01/09/2015	31/12/2015	853,472	849,076	4,396	0	3,736,646	3,668,875
01/01/2016	30/04/2016	12,415	8,813	3,602	0	30,406	0
01/05/2016	31/08/2016	9,573	4,638	4,935	0	2,790,265	2,737,183
01/09/2016	31/10/2016	2,966	1,799	1,167	0	0	0
01/11/2016	31/12/2016	1,904	2,049	0	145	0	0
01/01/2017	28/02/2017	6,609	3,084	3,525	0	177,954	174,204
01/03/2017	30/04/2017	6,018	1,560	4,458	0	523,238	509,800
01/05/2017	30/06/2017	5,231	997	4,234	0	1,802,098	1,758,024
01/07/2017	31/08/2017	2,626	467	2,159	0	0	0
01/09/2017	31/10/2017	62,588	61,079	1,509	0	267,641	260,193
01/11/2017	31/12/2017	4,154	680	3,474	0	449,979	436,059
01/01/2018	28/02/2018	5,346	1,733	3,613	0	240,425	232,677
01/03/2018	30/04/2018	2,220	524	1,696	0	531,794	518,521
01/05/2018	30/06/2018	2,647	781	1,866	0	531,794	518,521
01/07/2018	31/08/2018	1,851	915	936	0	124,753	122,068

01/09/2018	31/10/2018	6,129	384	5,745	0	31,587	30,831
01/11/2018	31/12/2018	5,791	467	5,324	0	0	0
Total		1,657,611	1,586,396	71,360	145	16,310,425	15,952,831

T1 = VAT on sales

T2 = VAT on purchases

T3 = Net payable

T4 = Net repayable

E1 = Total goods to other EU countries (Intra Community Supply ("ICS"))

E2 = Total goods from other EU countries (Intra- Community Acquisition ("ICA"))

6. The Respondent states that it analysed and evaluated data from a number of sources to include VAT returns filed by the Appellant, VAT Information Exchange System Transactions ("VIES") and documentation obtained from the Appellant.

7. VIES is a search engine owned by the European Commission and it is an electronic means of validating VAT identification numbers of economic operators registered in the European Union for cross border transactions on goods or services.

8. The Respondent concluded that for the period 1 January 2015 to 31 December 2018, the Appellant had declared intra-community acquisitions of in excess of €15,000,000 and that the Appellant had applied the provisions of section 46 of the Value Added Tax Consolidation Act 2010 ("VATCA 2010") and Section 59(2)(c) VATCA 2010 to [redacted] purchased in the UK, which had the effect that all [redacted] acquired in the UK, were zero-rated for the purposes of VAT. The subsequent sale of these [redacted] in the UK was also zero-rated and treated as an intra community supply of goods ("ICS").

9. The conditions under which an ICS of goods may be zero-rated are contained in the Regulations. The provisions of the Regulations were applied by the Appellant to the sales of [redacted] in the UK, which effectively meant that a zero rate of VAT was charged on the subsequent sale of the [redacted] in the UK. However, the Respondent withdrew the zero-rated provision applied by the Appellant, to the sales of [redacted] in the UK, as the Appellant did not comply with the evidential requirements as provided for in Regulation 29 of the Regulations.

10. The Appellant states in its outline of argument that a zero-rate of VAT was correctly accounted for on the sale of these [redacted]. The customer was VAT registered, the sales

invoice included the customers UK VAT registration number, the Appellant's VAT number and the [redacted] was despatched to the UK VAT registered customer. Therefore, VAT was accounted for correctly on these sales. The Appellant enclosed with its submission an "*accompanying banker's box four lever arch files (a lever arch file In respect of each calendar year) which includes the detailed records of all* [redacted] *purchased from and sold to the UK / to UK VAT registered dealerships and businesses. The relevant detailed Purchase and Sales Schedules, VAT purchase Invoices, VAT sales Invoices, proof of delivery/ shipment and confirmation of payment by Electronic Fund Transfer are included*".

11. The Appellant argues that the Respondent has not previously sought this information and has raised assessments to VAT in the absence of this documentation, which are based on "*incomplete, inaccurate information and incorrect assumptions and have treated these sales incorrectly as sales liable to Irish VAT at the Standard Rate*". The Appellant states that the sales of the [redacted] at issue during the period 1 January 2015 to 31 December 2018, were correctly sold as an ICS with the zero-rate of VAT applicable.

12. On 7 June 2019, the Appellant duly appealed the notices of assessment to the Commission. In its notice of appeal received by the Commissioner on 7 June 2019, the Appellant sets out its grounds of appeal as follows:

    a. Revenue's assessments are not based on the books and records of the company

    b. Revenue's assessments do not correctly or accurately reflect the trading transactions of the company

    c. Revenue's assessments do not correctly or accurately reflect the vatable activity of the company

    d. Revenue have no basis for raising these assessments

    e. Revenue have erred in raising these assessments.

Legislation and Guidelines

13. The legislation relevant to this appeal is as follows:-

14. Section 46 VATCA 2010, Rates of Tax, *inter alia* provides:-

    (1) Tax shall be charged, in relation to the supply of taxable goods or services, the intra-Community acquisition of goods and the importation of goods, at whichever of the following rates is appropriate in any particular case:

(a) 23 per cent of the amount on which tax is chargeable other than in relation to goods or services on which tax is chargeable at any of the rates specified in paragraphs (b), (c), (ca) and (d);

(b) zero per cent of the amount on which tax is chargeable in relation to goods in the circumstances specified in paragraphs 1(1) to (3), 3(1) and (3) and 7(1) to (4) and (6) of Schedule 2 or of goods or services of a kind specified in the other paragraphs of that Schedule;

……..

15. Section 59(2)(c) VATCA 2010, Deduction for tax borne or paid, *inter alia* provides:-

……

(2) Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct -

(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her,

(b) in respect of goods imported by him or her in the period, the tax paid by him or her or deferred as established from the relevant customs documents kept by him or her in accordance with section 84(3),

(c) subject to such conditions (if any) as may be specified in regulations, the tax chargeable during the period, being tax for which he or she is liable in respect of intra-Community acquisitions of goods,

……...

16. Section 84 VATCA 2010, Duty to keep records, *inter alia* provides :

(1) Every accountable person shall, in accordance with regulations, keep full and true records of all transactions which affect or may affect his or her liability to tax and entitlement to deductibility.

(2) Every person (other than an accountable person) who supplies goods or services in the course or furtherance of business shall keep all invoices issued to him or her in connection with the supply of goods or services to him or her for the purpose of such business.

(3) The following:

(a) records kept by a person pursuant to this Chapter or section 124(7) and that are in the power, possession or procurement of the person;

(b) any books, invoices, copies of customs entries, credit notes, debit notes, receipts, accounts, vouchers, bank statements or other documents whatsoever which relate to the supply of goods or services, the intra-community acquisition of goods, or the importation of goods by the person and that are in the power, possession or procurement of the person;

(c) in the case of any such book, invoice, credit note, debit note, receipt, account, voucher, or other document, which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person; and

(d) any linking documents that are in the power, possession or procurement of the person

shall, subject to subsection (4) and sections 91C(7) and 91E(7) and notwithstanding any other law, be retained in that person's power, possession or procurement for a period of 6 years from the date of the latest transaction to which the records, linking documents, invoices, or any of the other documents relate.

17. S.I. No. 639 of 2010, VAT Regulations 2010, Regulation 29, Conditions under which the intra-Community supply of goods may be zero-rated, ("the Regulations") provides:

(1) In this Regulation—

"evidence", in relation to goods removed from the State and dispatched to another Member State, means commercial documentation confirming that the goods were supplied to a person registered for value-added tax in another Member State and clearly identifying—

(a) the supplier,

(b) the customer,

(c) the goods and the value of those goods,

(d) the consignor (if different from the supplier),

(e) the method of consignment and

(f) the destination of the goods.

(2) A supply of goods by an accountable person to a person in another Member State (in this paragraph referred to as the "customer") is chargeable to tax at the rate specified in section 46(1)(b) of the Act, if and only if—

(a) the customer is registered for value-added tax in that other Member State,

(b) the customer's value-added tax identification number, including the country prefix, is obtained by the supplier in advance of, or at the time of, the supply and is retained in the supplier's records in relation to that supply,

(c) the value-added tax identification number of the customer and the supplier is quoted on the invoice issued in accordance with Chapter 2 of Part 9 of the Act, and

(d) the goods are dispatched or transported to that other Member State and there is evidence that those goods are removed from the State and are dispatched to that other Member State within a period of 3 months from the date the supply took place.

(3) The supply of goods by an accountable person in the State to a person registered for value-added tax in another Member State for onward supply to a person in a third Member State is chargeable to tax at the rate specified in section 46(1)(b) of the Act provided that the conditions in subparagraphs (a) to (d) of paragraph (2) are satisfied.

(4) *Where the conditions in subparagraphs (a) to (c) of paragraph (2) are not satisfied, or where the accountable person fails to produce evidence that the goods have been removed from the State and dispatched to another Member State within the period of 3 months from the date the supply of the goods took place, then, tax is chargeable on the supply of those goods at the rate that would be applicable if those goods were supplied by the accountable person to another person within the State*.

Submissions

Appellant

18. The Appellant's representative made submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions made:-

(i) The difficulty in this particular appeal is that the [redacted] were sold by the Appellant in the State to UK registered companies and the [redacted] were delivered to Northern Ireland by way of car and trailer. The Appellant's Managing Director personally delivered the majority of the [redacted].

(ii) The [redacted] were invoiced to UK registered companies and the Appellant checked the VAT numbers registered in the UK. The company was invoiced by the Appellant and the Appellant was paid from a bank account based either in the UK or Northern Ireland. Information relating to the customer, value of the goods and the consignor was maintained and provided.

(iii) As the [redacted] sold to the UK registered companies were, in the majority of the cases, delivered personally by the Managing Director of the Appellant, on that basis the paperwork that could provide evidence of the shipping of these [redacted] would be non-existent. This was simply the way the business of the Appellant was ran. Nevertheless, the [redacted] were sold to the UK and were exported to the UK.

(iv) It was more cost effective for the Appellant to operate that way, rather than to engage a shipping agent. It cost approximately €50.00 for each [redacted] to be delivered by the Managing Director of the Appellant personally, whereas using a transporter it would be €150.00. There was in excess of one hundred [redacted] delivered in this manner. It is on that basis that there would be no documentation, but yet the [redacted] were exported and invoiced accordingly.

(v) The only other evidence that may possibly go to serve that purpose would be the registration of those [redacted] in the UK. The [redacted] are not in the State, they are in the UK. There is a database from which that information could be obtained to confirm that those [redacted] were and are registered in the UK, which would be the factual evidence that the [redacted] are located there. Alternatively, a diesel receipt, or a toll receipt, of which there are many included in the Appellant's accounts, could identify proof of delivery.

Respondent

19. Senior Counsel made submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:

    (i) Reference was made to the decision of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49 ("*Menolly Homes")* and that in a tax appeal before the Commission, the burden of proof is on the Appellant, as an Appellant is best placed to know its own tax affairs.

    (ii) Reference was made to the Regulations and specifically Regulation 29. Regulation 29(2) provides for goods to be zero-rated for the purposes of VAT, only if certain conditions are met. The words "*if and only if*" are significant. In addition, subsection (d) is of importance wherein it states that "*the goods are dispatched or transported to that Member State and there is evidence that those goods are removed from the State and are dispatched*" and the word "evidence" is defined.

    (iii) It is not enough to suggest that the goods were delivered personally. Further, no evidence of that has been adduced. There is a clear list of requirements in Regulation 29 to be satisfied and there has been non-compliance with the statutory framework. In particular, there has been non-compliance with Article 29 of the Regulations.

    (iv) The appeal must fail on the basis that no documentary evidence has been adduced that the goods were removed from the State and dispatched to another Member State. There was an acknowledgment of same when it was submitted that the goods were personally delivered by the Managing Director of the Appellant. Nevertheless, even it that evidence had been adduced, it is not enough, as the legislation requires commercial documentation confirming supply to the person in the other Member State.

    (v) Reference was made to the decision in *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*") and the rules of statutory interpretation.

    (vi) The requirements for goods to be afforded a zero-rate of VAT have been the subject of a publication as part of the Respondent's Tax and Duty Manual. These are not matters that are mysterious or only the provenance of lawyers.

(vii) In order to avail of the zero-rate for VAT, care must be taken to ensure that the statutory prerequisites or pre-conditions are met. However, that did not occur in this appeal.

Material Facts

20. Having read the documentation submitted, and having listened to the oral submissions at the hearing, the Commissioner makes the following findings of material fact:

(i) The Appellant is in the [redacted] trade business.

(ii) The VIES data is a record of all transactions where the VAT registration number assigned to the Appellant was used in the connection with the purchase of [redacted] in the UK.

(iii) The Appellant applied a zero rating for VAT to [redacted] sold in the UK.

(iv) No commercial documentation was adduced in this appeal to satisfy the evidential requirements in accordance with the provisions of Regulation 29 of the Regulations.

(v) The Appellant has had access to the banker's box of documentation submitted to the Commission since July 2022, when the Commission provided a link to the soft copy files to both the Appellant's representatives and the Respondent.

Analysis

Preliminary application

21. At the outset of the hearing, Counsel for the Appellant announced that he had limited instructions only, such that his instructions were to make a statement in relation to the Appellant's application for an adjournment dated 10 March 2023. Whilst Counsel was present with limited instructions, no instructing Solicitor from [redacted] Solicitors, the Solicitors on record for the Appellant, was present at the hearing of the appeal.

22. Counsel stated that "*the Appellant has been somewhat remiss in terms of getting his documentation together. I have to put it on record that the solicitor has had limited time to prepare this case and has stated to me that the Appellant is not ready to proceed…*" Counsel continued to apprise the Commissioner that he has been instructed "*to mention this by* [redacted] *Solicitors. It is only recently, as you are aware from the paperwork, that they have been instructed by the Appellant. There is a substantial amount of documentation, which they have not seen and I am sure, if this hearing continues, you will see that we do not have answers to a number of these questions. I have been asked*

to actually put it on record". (**Page 5 of the Transcript**). Of notable importance, is reference to the date upon which [redacted] Solicitors came on record and which the Commissioner considers in detail below.

23. Furthermore, Counsel for the Appellant explained that "*I have been instructed to put this on record. Obviously it is in the interest of fair procedures and fair hearing, even under your own principles of section 5 of your own principles on fair procedures. Obviously we have been remiss, there is no question about this. We are prepared, insofar as we do not have all the documentation. Counsel has not been instructed in terms of all of this documentation and I just simply want to put this on record. I totally appreciate and totally acknowledge the use of the Commission's time in and in scheduling of these matters but it is important, just in the interests of natural justice, that I put this on record*". (**Page 7 of the Transcript**)

24. In response, Counsel for the Respondent indicated that these appeals "*require considerable investment of man-hours by Officers of the Bureau…….that preparing for an appeal like this we are quintessentially the only people in the room, other than yourself, who do not know what is going to be said by an appellant until it is said and we have to prepare on the basis that any particular scenario is said. So that takes a long time"*. (**Page 8 of the Transcript**).

25. The Commissioner informed Counsel for the Appellant that the adjournment application had been dealt with previously and that her decision stands in relation to that application, such that the point is now moot. Counsel for the Appellant then proceeded to inform the Commissioner that he had received no instructions from the Appellant's Solicitor as to the substantive appeal and that his only instructions were to seek an adjournment, as the Appellant is not ready to proceed. In that regard, the Commissioner takes a very dim view of the absence of a Solicitor from [redacted] Solicitors at the hearing of the appeal and the presence of Counsel with limited instructions.

26. The Commissioner stated in no uncertain terms that it is of upmost importance that the Appellant has a fair appeal and that the requirements of fair procedures and natural justice are observed. The Commissioner stated that it is her view that the Appellant has been afforded the full panoply of fair procedures. The Appellant was given every opportunity during the appeal process and afforded fair procedures when granted a second hearing day following the initial or first application for an adjournment. The correspondence dated 20 March 2023, from the Commission refusing the Appellant's second application for an adjournment and stating that the appeal was to proceed could not have been clearer. The Appellant's legal representatives could not have been under

any misapprehension that the appeal would not proceed on the hearing date, having been afforded an adjournment on the previous occasion. [redacted], Managing Director of the Appellant ("Managing Director of the Appellant") was present at the hearing, as was the Appellant's representative.

27. The Commissioner considers that there is no clear bright line as to what is required to ensure observance of the requirements of fair procedures. These requirements vary from case to case and depend on the context, both factual and legal. In *Dunnes Stores v The Revenue Commissioners* [2020] IR 480, the Supreme Court found that the Revenue Commissioners and the Appeal Commissioners, when exercising their statutory powers, were bound in principle to apply procedural fairness. McKechnie J. at paragraph 93 stated that:

> *"There is no doubt but that the appeal body has to apply fair procedures from the inception of the process right throughout the hearing, up to and including finality…."*

28. The Commissioner has a statutory obligation in accordance with section 6 of the Finance (Tax Appeals) Act 2015 to perform her functions in a manner that has regard to the need for proceedings before the Commission to be fair. Accordingly, the Commissioner considers it important, in terms of context to the Commissioner's decision and reasoning to proceed with the hearing of the appeal, to set out the chronology of the manner in which the Appellant has dealt with its appeal before the Commission thus far.

29. On **7 June 2019**, the Managing Director of the Appellant lodged a notice of appeal dated 5 June 2019, in relation to the Notices of Assessment to VAT issued by the Respondent on 8 May 2019. In accordance with procedural requirements, on 11 June 2019, the notice of appeal was sent to the Respondent. In accordance with section 949L TCA 1997, the Respondent was provided with 30 days to raise objection to the acceptance of the appeal by the Commission. As no objection was received by the Commission from the Respondent within the requisite period, the Commission accepted the Appellant's appeal.

30. On **27 November 2019**, the Commissioner issued a direction under section 949E TCA 1997 to the parties to file a statement of case in accordance with section 949Q TCA 1997 on or before **17 January 2020**. On 16 January 2020, the Respondent filed its statement of case. The Commission did not receive a statement of case from the Appellant within the prescribed time period. On **9 July 2020**, the Commissioner issued a further direction to the Appellant to file a statement of case. On **2 September 2020**, the Commission wrote to the Appellant to state that the Commissioner intends to hold a Case Management Conference ("CMC") due to the failure of the Appellant to comply with the directions issued on 27 November 2019 and 9 July 2020, to file a statement of case in this appeal.

31. As the Commission received no response, on **23 March 2021**, the Commission issued to the Appellant a notice of intention to dismiss the appeal in accordance with section 949AV TCA 1997, stating that the Commissioner intends to dismiss the Appellant's appeal for failure to comply with the aforesaid directions. The correspondence provided the Appellant with 14 days to either provide an explanation for non-compliance or comply.

32. On **9 April 2021**, the Commission received correspondence dated 5 April 2021 from the Appellant stating that the appeal should not be dismissed as the Respondent has raised assessments in error and the Appellant should be *"afforded the opportunity to lay our case before you*". The correspondence was signed by the Managing Director of the Appellant in the capacity of Company Secretary. On 14 April 2021, the Commission responded to the Appellant to state that if the Appellant does not file its statement of case by 5 May 2021, the appeal will be dismissed. On **5 May 2021**, a statement of case was filed by the Managing Director of the Appellant, in addition to a number of attachments.

33. On **6 May 2021**, the Commissioner directed the parties to file an outline of arguments within 60 days of the date of correspondence. On 1 July 2021, the Respondent filed its outline of arguments. On **7 July 2021**, the Commission issued further correspondence to the Appellant reminding it to file an outline of arguments, as no outline of arguments had been received within the requisite time period directed as per the correspondence dated 6 May 2021. On **14 September 2021** and **18 October 2021**, the Commission again wrote to the Appellant to request, in accordance with the previous directions of the Commissioner, that it file an outline of arguments.

34. On **26 November 2021**, in accordance with section 949AV TCA 1997, a notice of intention to dismiss issued to the Appellant for failure to comply with the directions dated 6 May, 2021, 7 July 2021, 14 September 2021 & 18th October 2021, to file an outline of argument. On **30 November 2021**, the Appellant's representatives responded to the notice of intention to dismiss the appeal seeking a further 2 weeks to file an outline of arguments. The Commissioner granted the extension of time.

35. Of notable importance, at this remove [redacted] Solicitors were included on the email correspondence and are referenced to in the email as having come on record for the Appellant. This is entirely at odds with the submission of Counsel and previous submission of [redacted] Solicitors in January 2023 that they only came on record recently. As appears from this email, [redacted] Solicitors have been in record since **November 2021**.

36. On **22 December 2021**, [redacted] Solicitors wrote the Commission seeking an extension of time to mid-January 2022. On 30 December 2021, the Appellant's representative wrote

to the Commission to state that "*As Agent of* [redacted] *on record with Revenue (TAIN Reference: 71944K) I can confirm that* [redacted] *has prepared and compiled all necessary books, records and files required to appeal this matter successfully. Unfortunately our client was unable to provide you with these records before the Christmas break up and in this regard we would be obliged if you would accept our client's submission following the return to work after the Christmas Holidays*". A letter of authorisation was received on 22 April 2022 in relation to [redacted] being the Appellant's representative for the purposes of this appeal.

37. An extension of time to 19 January 2022, to file an outline of argument, was granted by the Commission. On **19 January 2022**, the Commission received the Appellant's outline of argument and a banker's box of documents. It appears no copy of the documentation contained in the box was retained by the Appellant or his representative and it is this box that is referenced at the hearing of the appeal.

38. On **25 January 2022**, the Commission wrote to the parties to inform them that the Commissioner intends to hear the appeal. The correspondence requested information from the parties as to the appeal and also directed that additional documentation be filed.

39. On 7 February 2022, the Respondent sought a copy of the Appellant's outline of arguments and banker's box of documents which had not been provided to the Respondent by the Appellant. The Respondent also sought an extension of time to consider the contents of the documents in the banker's box. The Commissioner understands that there was an exchange between the parties and the Commission as to the appropriate and most resource efficient manner in which the hard copy documents in the banker's box, in the possession of the Commission, could be provided to the Respondent.

40. In early **July 2022**, having converted all hard copy documents in the banker's box filed by the Appellant with its outline of arguments to soft copy, the Commission furnished a soft copy of the documents to the parties via file share enclosing the passwords to access same. It is not the role of the Commission to have to convert a banker's box of documentation for any party, but out of an abundance of assistance to the Appellant, the Commission utilised its resources to do so. On **20 August 2022**, the Commission's scheduling team notified the parties that the hearing of the appeal would take place on **26 January 2023**. This gave the parties, including the Appellant, many months to prepare for their appeal. It is worth repeating that it was the Appellant who filed the Notice of Appeal and chose to appeal to the Commission. The onus is on the Appellant to progress its appeal.

41. On **24 January 2023**, the Appellant via the Appellant's representative sought an adjournment ("the first adjournment request") of the hearing of the appeal due to commence on 26 January 2023 on the grounds that "[redacted] *has not instructed solicitors in this matter and it is my view that they should. They are instructing* [redacted] *Solicitors (*[redacted]*, Co. Dublin) this afternoon and in this regard I would be obliged if all parties would agree to an adjournment in order that* [redacted] *Solicitors can be fully briefed. My client delivered a full set of papers to the offices of the Tax Appeals Commission, Second Floor, Fitzwilliam Court, Leeson Close, Dublin 2 and unfortunately didn't retain copies of their submission I would be grateful if we could avail of an adjournment to allow us to procure copies of their submission from the Tax Appeals Commission in order that my client may fully brief* [redacted] *Solicitors and prepare full and complete books of appeal*". Notably, these are the Solicitors that are referred to as having come on record as aforementioned and the box of documents that the Commission copied and furnished to the parties in soft copy in July 2022.

42. The Respondent did not object to the adjournment as such, but stated that "*We note that parties have been on notice of the hearing date since 20th August 2022 (see attached). Further, in the absence of hearing from the Appellant and your office regarding the agreement of Appeal books, the CSSO has been communicating with all parties, including* [redacted] *Solicitors, since 18th January in order to progress this matter to hearing*".

43. The Commissioner considered the application and stated that she was extremely disappointed that the Appellant sought to make an application for an adjournment at such a late stage, in circumstances where it has been on notice of the hearing date since **20 August 2022**. In addition, the Commissioner stated that she was aware that the parties had been corresponding with [redacted] Solicitors, despite the Appellant's assertion that it is instructing [redacted] Solicitors on the date of the adjournment. The Commissioner informed the parties that at this remove, given the situation the Appellant finds itself in as a result of its representatives, there seems no other option but grant the application. The Commissioner granted an adjournment to **27 March 2023** at 10.00 am for hearing and stated that it is expected that on 27 March 2023, the Appellant will be in a position to proceed with its appeal, including being in possession of any documentation it requires in support of its appeal.

44. On **16 March 2023**, [redacted] Solicitors corresponded with the Commission seeking a further adjournment of the appeal scheduled to take place on 27 March 2023 ("the second adjournment request"). The application was made *inter alia* on the basis of the

unavailability of Counsel. In refusing the application for an adjournment, the Commissioner stated that "*In relation to the other grounds upon which this application is made, such as further time "to fully engage with our client and his accountant and to then instruct our counsel fully", the Appeal Commissioner deems it entirely unacceptable again at this late stage, that the Appellant makes this application. This is an appeal that dates back to 2019 and the Appeal Commissioner is of the view that the Appellant has had more than ample time to fully engage with its advisors*".

45. It is in light of the above chronology and against that backdrop that the Commissioner considered it appropriate to proceed with the appeal, despite no appearance by a Solicitor from [redacted] Solicitors and Counsel having no instructions in the substantive matter. Further, the Commissioner was satisfied that the Appellant's nominated representative was present, as was the Managing Director of the Appellant. The Commission has on file a signed authorisation to enable the Appellant's representative represent the Appellant in this appeal. Thus, the Commissioner considered that there was no risk to the Appellant's right to fair procedures or that the Appellant had not been afforded fair procedures in the process thus far.

46. The Commissioner was satisfied that the Appellant's representative having prepared the documents submitted and there being an authorisation on file from the Managing Director of the Appellant authorising the Appellant's representative to represent the Appellant, was the Appellant's representative. Moreover, the Commission furnished an electronic version of documents to the parties in **July 2022**. This is in addition to the Commission furnishing the Appellant's representatives with the box of documents for photocopying, which its representatives stated had not occurred to date and therefore at this remove, did not want to return the box to the Commission, despite the Commission's scheduling team providing the documentation on the basis that the banker's box would be returned.

47. The Commissioner considered that there could have been no misapprehension as to her decision dated 20 March 2023 to refuse the Appellant's request for an adjournment and thus, there being no risk to the Appellant's right to fair procedures, the hearing proceeded to the substantive issue. The Commissioner is satisfied that the Commission has provided multiple opportunities to the Appellant to assist it with its appeal and multiple opportunities of further time to seek legal representation and prepare for the appeal. The Commissioner is satisfied that the Appellant has been afforded fair treatment and fair procedures at all times.

Substantive issue

48. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes*, at paragraph 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".*

49. The Appellant's appeal relates to VAT liabilities assessed by the Respondent for the periods 1 January 2015 to 31 December, 2015; 1 January 2016 to 31 December, 2016; 1 January 2017 to 31 December, 2017; and 1 January 2018 to 31 December, 2018. The Appellant states in its notice of appeal that the assessments raised by the Respondent are not based on the books and records of the Appellant and are not reflective of the Appellant's trading activity.

50. The Commissioner notes that the Appellant is engaged in the [redacted] trade business. In response to a query from the Commissioner as to the witnesses to be called at the hearing of the appeal, the Commissioner was informed that the Managing Director of the Appellant was not being called as a witness to give sworn oral evidence in relation to the Appellant's business and that the Appellant's appeal would proceed on the basis of submissions only. The Appellant made the decision not to call the Managing Director as a witness. As stated above, the burden of proof is on the taxpayer. The Respondent states in its outline of arguments that "*it has come to the attention of the Bureau that* [redacted] *was disqualified from acting as a director for five years, ending on 3rd June, 2019*".

51. The Commissioner notes that liabilities arose when the Respondent withdrew the provision for a zero-rate of VAT applied by the Appellant to sales of [redacted] in the UK, on the basis that the Appellant did not comply with the provisions of Regulation 29 of the Regulations, in so far as the Appellant failed to retain requisite documentary evidence that the goods were removed from the State and transported to another Member State, namely the UK.

52. It is the case that an ICS or acquisition of goods occurs where goods are dispatched or transported between businesses in different Member States of the European Union ("EU"). At the time the transactions occurred, the UK was a Member State. Regulation 29

of the Regulations provides for the conditions under which the intra-Community supply of goods may be zero-rated for the purposes of VAT. The condition that goods are **dispatched or transported to another Member State** is a critical condition for the application of the zero-rate to an ICS.

53. Regulation 29 refers to a requirement for "evidence", in relation to goods removed from the State and dispatched to another Member State. Regulation 29(1) defines "evidence" as **commercial documentation** confirming that the goods were supplied to a person registered for VAT in another Member State and clearly identifying the following information; the supplier, the customer, the goods and the value of those goods, the consignor (if different from the supplier), the method of consignment and the destination of the goods.

54. The Commissioner is satisfied that the reference to commercial documentation means written records. There could be no other meaning ascribed to these words, having regard to a literal interpretation and the ordinary, basic and natural meaning of the words in accordance with the well settled principles of statutory interpretation (see *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 wherein Mr Justice McDonald provides a summary of the relevant principles).

55. Furthermore, in accordance with Regulation 29(2), a supply of goods by an accountable person to a person in another Member State ("customer") is chargeable to tax at the rate specified in section 46(1)(b) of the Act (zero-rate), if the customer is registered for VAT in that other Member State; the customer's VAT identification number, including the country prefix, is obtained by the supplier in advance of, or at the time of, the supply and is retained in the supplier's records in relation to that supply, the VAT identification number of the customer and the supplier is quoted on the invoice issued in accordance with Chapter 2 of Part 9 of the Act, and the goods are dispatched or transported to that other Member State and there is **evidence** that those goods are removed from the State and are dispatched to that other Member State within a period of 3 months from the date the supply took place.

56. However, Regulation 29(3) provides that where the conditions in subparagraphs (a) to (c) of paragraph (2) are not satisfied, or where the accountable person fails to produce **evidence** that the goods have been removed from the State and dispatched to another Member State within the period of 3 months from the date the supply of the goods took place, then, tax is chargeable on the supply of those goods at the rate that would be

applicable if those goods were supplied by the accountable person to another person within the State.

57. The Commissioner notes the Appellant's submissions at the hearing of the appeal wherein the Appellant's representative stated that the "*difficulty in this particular case is that the* [redacted] *were sold by the business in the South to UK registered companies and the* [redacted] *were delivered to the North, Northern Ireland by way of* [redacted] *and trailer and* [redacted] *personally delivered the majority of those* [redacted]". It was submitted that it was more cost effective to deliver the [redacted] in this manner, such that it cost approximately €50.00 for each [redacted] to be delivered by the Managing Director of the Appellant personally, whereas by using a transporter it would be €150.00. In addition, the Appellant's representative stated that agents of the purchasers also collected a number of the [redacted]. The Commissioner queried the number of [redacted] that were delivered in this manner and notes that the Appellant's representative stated that there were over 100 [redacted] delivered.

58. The Appellant's representative submitted that the [redacted] involved were sold to UK companies and the Appellant checked the VAT numbers of the companies to ensure that they were valid. He stated that the invoices were paid electronically to the Appellant from a bank account either in the UK or Northern Ireland ("NI"). The Appellant's representative submitted that all [redacted] sold were registered for [redacted] tax in the UK. The Commissioner notes the submission that in summary, it is the Appellant's case that in circumstances where the majority of the [redacted] were delivered personally by the Appellant's Managing Director, documentation that could evidence the shipping of these [redacted] would be non-existent. It was submitted that "*no paper would have been generated by the manner in which those* [redacted] *were delivered"*.

59. Further, the Commissioner has considered the Appellant's submission that "*the only other evidence that may possibly go to serve that purpose would be the registration of those* [redacted] *in the UK…..I understand that there is a database, that information could be obtained from that to confirm that those* [redacted] *were and are registered in the UK, which would be the factual evidence that the* [redacted] *are located there".* Nonetheless, the Commissioner considers that the Regulations are specific as to the requirements to be met by the Appellant to establish that it is entitled to apply a zero-rate of VAT.

60. The Appellant's representative had no further submissions or evidence to adduce in support of the Appellant's appeal. Furthermore, the Appellant's representative did not address the banker's box of documents that had been reduced to soft copy by the Commission and no submissions were made in respect of same.

61. Whilst no evidence was adduced in relation to the banker's box of documents, the Commissioner has had access to a soft copy of the documents which comprise of various invoices relating to [redacted]. On review and in the absence of any evidence being adduced by the Appellant as to the nature or relevance of the documents, on the face of them, the documents do not seem to consist of evidence capable of showing the dispatch and transport of [redacted] to another Member State. This is consistent with the submissions made by the Appellant's representative that no documentation exists in relation to the [redacted] being transported from the State to another Member State.

62. In accordance with the legislative provisions, the Commissioner considers that the zero-rate of VAT can apply if satisfactory evidence of dispatch and transport is produced. For example, if the supplier arranged transportation the supplier should retain documents such as an order document, delivery docket, suppliers invoice or transport document such as a bill of lading. If the customer arranged transport the supplier should ensure that documentation is retained to be used as evidence of the receipt of goods in another member state, such as copies of warehouse receipts or delivery dockets. The Commissioner observes that no such documentation has been produced by the Appellant in this appeal. In fact, the Appellant submitted that there exists no documentation in relation to these matters as the [redacted] in question, were personally delivered by the Managing Director of the Appellant to the UK.

63. As set out above, in a tax appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. The Appellant, being the person with access to all of the facts and documents relating to its own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions, but also to produce such documentation as may be required in support of its appeal, so as to meet the burden of proof. The Commissioner does not consider that the Appellant has provided the necessary documentation to demonstrate that the zero-rate of VAT should not have been withdrawn by the Respondent. In the circumstances, the Commissioner finds on the balance of probabilities that the Appellant has failed to adduce any evidence, whether oral or documentary, which tends to establish its claim.

64. In circumstances where the Appellant bears the burden of proof in an appeal before the Commission, the deficiency in records and documentation in this appeal, proves disadvantageous for the Appellant in terms of its claim. In addition, the Appellant did not adduce any evidence in relation to the supply of [redacted] to the UK. Consequently, the

Commissioner is satisfied that the Respondent was correct to raise the assessments, the subject matter of this appeal.

65. Accordingly, the Commissioner is satisfied that the Appellant in this appeal has not succeed in proving on the balance of probabilities that the Notices of Assessment to VAT raised by the Respondent are incorrect and has not brought forward any additional evidence to demonstrate that the Notices of Assessment to VAT are incorrect. Hence, then the Notices of Assessment to VAT shall stand.

Determination

66. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in showing that the tax is not payable. Therefore, the Notices of Assessment to VAT for the periods 1 January 2015 to 31December 2015 in the sum of €547,615; 1 January 2016 to 31 December 2016 in the sum of €1,132,791; 1 January 2017 to 31 December 2017 in the sum of €434,425; and 1 January 2018 to 31 December 2018 in the sum of €91,398, shall stand.

67. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Claire Millrine
Appeal Commissioner
02 June 2023