AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

02TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal of income assessments made by the Revenue Commissioners ("the Respondent") to additional income tax and Value Added Tax ("VAT") due by the Appellant for the years 2005, 2006, 2007 and 2008 ("the relevant years" when referred to collectively). The notices of assessment to income tax in respect of each year under appeal issued on 2 February 2011. The notice of estimation of VAT due for the years 2005 - 2008 issued on 9 February 2011. The sum of the income tax and VAT assessed as due for the relevant years is €342,231.

2. In making this determination the Commissioner had the benefit of written and oral submissions made by both parties.

Background & Evidence

3. During the relevant years the Appellant operated a fast food business called "[redacted]" ("the business" or "the Appellant's business") from a rented premises on [redacted]. The Appellant ceased operating the business on or about 2011.

4. On or about 18 April 2007, the Appellant was informed by the Respondent that it intended to commence an audit inquiry into his tax affairs for the tax years 2005 and 2006. On 14 July 2009, the Respondent wrote to the Appellant informing him that the inquiry was to be extended to include the tax years 2007 and 2008.

5. Arising from the inquiry, the Respondent assessed the Appellant as having a charge to income tax for the year 2005 of €56,482.83, 2006 of €54,544.37, 2007 of €75,485.48 and 2008 of €70,668.45.

6. The Respondent also assessed the Appellant as having underpaid VAT in the amount of €86,063 for the period 1 January 2005 – 31 December 2008.

7. The commencement of the inquiry was preceded by a cold call visit by officers of the Respondent to the premises of the Appellant's business on the night of 24 November 2006, during which they conducted an examination of the Appellant's till readings. It was put to the Appellant in cross examination by counsel for the Respondent that upon the ending of the visit he immediately shut up shop for that night. In answer to this the Appellant said that he was not present at the time of the visit and did not know at what hour the business was closed by his staff. The Appellant agreed that on a busy Friday evening he would in the normal course stay open until approximately 3 am.

8. The value of the sales per the till readings (known as Z reports) at the time of inspection was €3,221. The Appellant gave evidence that the night of 24 November 2006 was especially busy. He said this was so because the well-known band "[redacted]" was holding a concert nearby in [redacted] University. No evidence was produced to corroborate the assertion that there was such an event held that night.

9. The Appellant gave evidence in examination in chief that the business was "*never a great success*". In part, this was on account of competitors in the vicinity, including [redacted] takeaway and the establishment of a McDonalds elsewhere in [redacted].

10. The Appellant gave evidence in examination in chief that the great bulk of the business's sales involved the selling of takeaway meals, primarily burgers and fish and chips, to customers who attended its premises. He stated that the number of sales that were made by way of delivery to the location of a customer was "*not significant*" and that the business relied heavily on sales made around or slightly after the closing time of pubs located in the town.

11. The Appellant said in evidence that he had only ever had one employee, [redacted], who performed the role of delivery driver on a full time basis. All other employees were assigned to work in the premises itself. The Appellant was questioned in cross examination

as to why, if delivery was only a minor part of his business, he had in a two week period in 2007 acquired five portable satellite navigation devices. He was also asked why on the day of the visit, six separate delivery bags were visible behind the counter of the business's premises.

12. In answer to the first question the Appellant said that he had bought one navigation device, but its battery had proved deficient. He had then bought four two weeks later in a sale at a better price. The Appellant said he needed them lest several delivery orders come in at the same time, as happened infrequently. He said that when this occurred, he or his wife would act as delivery drivers, or he would dispatch one of the staff working in the kitchen to fulfil the same role. In relation to the number of bags for the delivery of food, the Appellant said that in fact he had twelve bags, not six. He said that the reason why six bags were visible behind the counter at the time of inspection was that they were charging so as to be ready for use. It was, he said, necessary to have fully charged bags at the ready in the event of the arrival of several orders in a short space of time. This was so because, even accounting for the infrequency of delivery orders, it took 45 minutes to heat a bag by charging it and, therefore, having merely one or two on hand on an evening could result in orders being received with no heated bag ready to convey the food to its customer promptly.

13. The Appellant gave evidence that all of his sales were made through tills in the fast food premises. In cross examination on this matter, counsel for the Respondent put Z reports generated on 24 November 2006 by the three tills in the premises to the Appellant. Two of these reports contained a section headed "*Driver Details"* and together listed a total of 77 deliveries having been made by "[redacted]*",* "[redacted]*"* and *"*[redacted]*".* It was put to the Appellant that the value of the sales recorded as having been made by a driver that night came to 36% of the overall sales figure of €3,221. The Appellant agreed that this was what the Z readings suggested on their face, but went on to say that in reality they did not reflect the making of 77 deliveries that night, or the status of the aforementioned persons assigned to the task of delivery drivers.

14. The Appellant's evidence on the content of the Z reports was somewhat difficult to follow and at times contradictory. As regards the recording of deliveries by three specific drivers, he asserted that those named in the Z reports were, or had previously been, his employees who had worked behind the counter of the restaurant. None had fulfilled the specific role of delivery driver though, as noted already, they would on rare occasions be assigned that task where the need arose. He explained that the reason why the aforementioned persons were listed on the Z reports as drivers was because their names were added to the tills as

drivers by the "IT professionals" previously involved in installing them in the premises. By the Appellant's estimate, only twenty or so of the 77 sales recorded as deliveries were likely to have been accurately designated as such. He suggested that the balance so recorded in respect of 24 November 2006 was in all likelihood made up of orders for collection, as opposed to delivery. He said that when customers arrived to collect their orders, the staff member taking the order would in many instances simply press a button on the till recording the sale having been made by one or other of "[redacted]", "[redacted]" or "[redacted]" by way of delivery. No reason was given by the Appellant as to why this would have happened other than the assertion that it was a simple matter for a person working behind a counter to press the wrong button on the till when completing a sale.

15. It was put to the Appellant that his P35L return for the year 2006 listed ten employees, including the aforementioned [redacted], but not including anyone with the names [redacted], [redacted] or [redacted]. The Appellant stated that the reason for the absence of Ms [redacted], who he confirmed to be a woman, was that she had only done two or three days on probation in the shop, whereupon he had decided not to offer her a position. He did not address the absence of anyone by the name of [redacted] or [redacted].

16. Counsel for the Respondent also put documents referred to as "driver reports" and "sales reports" from 17 and 18 November 2006 to the Appellant. As with the Z reports, these contained reference to Ms [redacted] and [redacted] having made deliveries, along with information such as the number of orders made and "driver turnaround times". The Appellant repeated that the information set out in these reports relating to delivery sales was, for the most part, borne out of the inaccurate recording of sales that were either in-store or collection sales as sales made by way of delivery.

17. Counsel for the Respondent questioned the Appellant about the level of sales made on 24 November 2006 in the context of the sales figures for other days in that year and the sales during the year 2004, this being the most recent year prior to the inspection for which accounts were available. In respect of 2004, the Appellant accepted that his gross turnover for a 365 day trading period was €282,150 and that this amounted to average weekly sales of €5,425. Counsel asked the Appellant to comment on why it was that on only a few occasions in 2006 he had made sales exceeding those made on 24 November 2006, a night on which the Appellant was supposed to have closed early and which had no obvious significance that would account for a spike in trade. In particular, and relying on a table prepared by the Respondent the contents of which the Appellant did not take issue with, she asked why the business had made greater sales on only three other occasions that year (all on Friday) in circumstances where one of the other days was the last Friday before

Christmas.[1] In response to this the Appellant said, firstly, that Friday was on average the busiest day of the week. Secondly, he repeated that the holding of the concert at the University explained the especially high sales made that night.

18. In the course of the audit, the Respondent identified a discrepancy between the amount of sales as evidenced by the Appellant's accounts and VAT returns for the year 2007 and the till receipts for that year in the amount of €99,998. Although the Appellant asserted in his outline written arguments submitted in advance of the appeal that it was he who brought the Respondent's attention to this issue, it appears from contemporaneous documentary material that it was the officer of the Respondent who conducted the audit who raised it with the Appellant's former accountant.[2] Cross examined on this question, the Appellant indicated that he could not recall who first noticed the unaccounted for sales.

19. In any event, it was accepted in correspondence of 7 October 2009 between a newly appointed accountant of the Appellant and the Respondent that there had been an understatement of gross sales for the year 2007 in the amount of €99,998. The Appellant's accountant proceeded in this correspondence to calculate the Appellant's additional charge to income tax to be €50,992, a figure with which the Respondent took no issue.

20. In the same correspondence in which this additional income tax figure was communicated, it was also stated by the Appellant's new agent that:-

> "*As you have already seen, the initial mistake in relation to the sales figure arose simply due to a totting error, it was compounded on preparation of* [the Appellant's] *Tax Return when a clerk in* [the former accountant's office] *jumped to the conclusion that a 99,032 receipt received in June 2006 was in fact received in 2007 and balanced their books with this taken into account."*

21. As of the date of the hearing of the appeal the considerable majority of the additional income tax liability calculated as owed had been paid by the Appellant.

22. The Appellant was cross examined on the circumstances in which the understatement occurred. To begin with, the Appellant accepted in his evidence that there had been an understatement for 2007 because he had been told as much by his former accountant. His attitude was that if he was informed by his adviser that there was an additional liability then he would simply pay the extra tax, without asking questions.

[1] The other days were Friday 13 October 2006 (€3,317), Friday 15 December 2006 (€3,370) and Friday 22 December 2006 (€3,428).
[2] Note of meeting of 22 September 2009.

23. It was not in dispute that on the basis of the information contained in the Appellant's Form 11 return for 2007 the Appellant's charge to income tax was calculated at €1,278.15, a figure approximately 90% lower than that charged for the preceding year, 2006.

24. It was put to the Appellant by counsel for the Respondent that he must have been aware that there was some mistake in circumstances where his tax bill had fallen without a corresponding fall in his business's sales. At this stage in his evidence the Appellant asserted that the Respondent was in fact in error in identifying an understatement of sales. He said that although he did not believe there to be any understatement of sales and consequent additional tax due for this period, he opted to pay it nonetheless. He did not provide any comprehensible explanation as to why he would sanction his agent to send correspondence on his behalf admitting to an under declaration of sales for 2007 and calculating a liability in respect thereof when he actually believed himself not to have made any such under declaration.

25. The Appellant gave evidence in the course of cross examination that the three main suppliers of goods to his business were persons or entities known as "[redacted]", "[redacted]" and "[redacted]".

26. It was not in dispute in this appeal that, for the relevant years, the method of calculating the Appellant's annual income from sales for the purpose of his accounts was to establish the value of his purchased supplies and then to apply a margin to that value. Counsel for the Appellant put it to the Respondent in cross examination that his margin on the sale of supplies purchased was between 300% and 320%. The Appellant stated in reply that he did not know what margin he applied on the goods he purchased for the purpose of making supplies to his own customers.

27. It was not in dispute that in the course of the audit the Respondent made inquiries with the suppliers of the Appellant to seek to establish the true extent of his purchases, and from this his sales, over the relevant years. It was also not in dispute that on foot of these inquiries, the Respondent informed the Appellant on or about September 2009 that it was of the view that the accounts of his business did not reflect the true quantity of supplies acquired and sales made to his customers. On 13 October 2009, the Respondent further informed the Appellant that it was in possession of information suggesting that for the relevant years he had:-

> "[…] *systematically omitted purchases from his records and it is my contention that this was done to facilitate an understatement of sales."*

28. It was agreed that the Respondent told the Appellant in October 2010 that it had information pertaining to the understatement of "€40k" of purchases from one of his suppliers, [redacted], for the year 2006 that were "*off record*".[3] This was, according to the Respondent, part of a system of "*dual invoicing"* from that supplier that lasted from 2005 until February 2007.

29. One document that formed part of the papers accompanying the Appellant's appeal was a letter sent on his behalf by his accountant to [redacted], dated 23 April 2010. This stated:-

> "*Dear Sirs*
>
> *We are carrying out a review on* [the Appellant's] *records from July of 2005 to date.*
>
> *We would be grateful if you would be in a position to provide us with a detailed statement of all transactions on* [redacted] *account for that period and if you would also be able to confirm that the statement is a complete record of all transactions with* [redacted] *for that period."*

30. Also part of the Appellant's appeal documentation was the reply to this correspondence of 1 July 2010 from [redacted] Limited. This stated:-

> "*Dear Sir/Madam*
>
> *Please find enclosed recorded sales made to your client in the period requested. However if you need a record of van or yard sales made to your client we would need that date purchased or the number of the docket supplied to your client.*
>
> *We will let you have any copies you require, unfortunately due to the way our sales are recorded these sales are the only ones we can supply without further information."*

31. A list that accompanied this correspondence disclosed "*recorded sales"* of €65,561.29 made by [redacted] Limited to the Appellant over the period 15 September 2005 to 30 November 2009.

32. Though this correspondence formed part of the Appellant's appeal documents, it was in fact opened to the Commissioner and put to the Appellant in cross examination by counsel for the Respondent. Counsel noted the reference therein to "van or yard sales" and asked what he believed was meant by this. The Appellant was not able to provide an explanation. This being so, counsel for the Respondent further asked the Appellant whether he had inquired of [redacted] Limited what it meant. He said that he had not.

[3] Note of meeting between Appellant and Respondent of 20 October 2010.

Counsel asked the Appellant how he received the supplies purchased from [redacted] Limited and he said they would be delivered by van or truck. The Appellant was then asked whether he thought this could be what the term related to. He said that he did not know the answer to this.

33. Counsel for the Respondent put documents that it had obtained from [redacted] Limited relating to its trade with the Appellant to the Appellant in cross examination.[4] In particular, the Appellant put documents compiled by the agent of [redacted] Limited, [redacted], to the Respondent, which purported to enumerate total unaccounted for "cash sales" made to the Appellant over the period December 2005 – September 2007, along with typed and handwritten invoices supposedly matching the cash sales set out in these lists. In relation to these documents the Appellant had, for the most part, nothing to say save that they could not relate to his business's dealings with the this company over the aforementioned period. He did observe, however, in his evidence that the invoices which had been supplied to the Respondent did not bear any reference to his own business.

34. The Appellant was questioned by counsel for the Respondent as to why [redacted] Limited would have supplied the information that it did in response to a request from the Respondent to hand over information relating to the full extent of his purchases over the relevant years. The Appellant wondered whether the answer may have been that [redacted] Limited was seeking to protect another customer who had been engaged in wrongdoing of the kind alleged against him. He accepted, however, that this was speculation on his part. He did, however, say that after he became aware on or about October 2010 that [redacted] Limited had supplied information to the Respondent that led it to believe he was suppressing the level of supplies purchased, he went to its premises to "confront" the owner of that company, [redacted], so as to obtain an explanation.

35. It is important to emphasise a number of matters at this stage of the Determination. The Appellant and his agent were furnished invoices supplied by [redacted] Limited to the Respondent, which supposedly represented cash transactions not reflected in the Appellant's accounts, only shortly before the hearing of the appeal. This information was put to the Appellant by the Respondent in cross examination yet at the conclusion of the Appellant's case the Respondent indicated that it was not proposing to call any witnesses itself. The consequence of this was that nobody connected to [redacted]

[4] The fact of the provision of these documents by [redacted] Limited to the Respondent was not in dispute. What was in dispute however was the veracity of the documents provided.

[redacted] Limited was present to give evidence in relation to the material supplied to the Respondent and opened to the Appellant. The Appellant gave evidence that he did not ask any such person to come to give evidence in this appeal and he made no request of the Commission to direct attendance pursuant to the powers given to it under section 949AE of the Taxes Consolidation Act 1997 ("the TCA 1997"). The Respondent, for its part, did request the Commission to direct that [redacted], the Company Secretary of [redacted] Limited, attend. The Commissioner made a direction on foot of this request. However, in breach of this direction, [redacted] failed to appear on the day of the hearing. No application was made by either party for an adjournment as a consequence of her non-attendance. The Commissioner will address the implications of the foregoing in the part of this Determination headed "Analysis".

Legislation

36. The version of section 886 of the TCA 1997 in force during the period 1 January 2002 – 23 December 2008, is headed "*Obligation to keep certain records"* and provides:-

"(1) In this section—

"*linking documents*" *means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;*

"*records*" *includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to—*

(a) all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,

(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,

(c) the assets and liabilities of the trade, profession or other activity referred to in paragraph (a) or (b), and

(d) all transactions which constitute an acquisition or disposal of an asset for capital gains tax purposes.

(2) (a) Every person who—

(i) on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,

(ii) is chargeable to tax under Schedule D or F in respect of any other source of income, or

(iii) is chargeable to capital gains tax in respect of chargeable gains,

shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.

(b) The records shall be kept on a continuous and consistent basis, that is, the entries in the records shall be made in a timely manner and be consistent from one year to the next.

(c) Where accounts are made up to show the profits or gains from any such trade, profession or activity, or in relation to a source of income, of any person, that person shall retain, or cause to be retained on that person's behalf, linking documents.

(d) Where any such trade, profession or other activity is carried on in partnership, the precedent partner (within the meaning of section 1007) shall for the purposes of this section be deemed to be the person carrying on that trade, profession or other activity.

[…]"

37. Section 16 of the Value Added Tax Act 1972 is entitled "*Duty to keep records"* and, in so far as relevant, provides:-

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

[…]

(3) Records kept by a person pursuant to this section and 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 are in the power, possession or procurement of the person, and 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 shall, subject to subsection (4), be retained in his power, possession or procurement for a period of six years from the date of the latest transaction to which the records, invoices, or any documents relate […]

38. Section 949AC of the TCA 1997 is entitled "*Evidence"* and provides: -

"The Appeal Commissioners may –

(a) allow evidence to be given orally or in writing,

(b) admit evidence whether or not the evidence would be admissible in proceedings in court or in the State, or

(c) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction,

(ii) the evidence was provided in a manner that did not comply with a direction, or

(iii) they consider that it would be unfair to admit the evidence."

Submissions

39. The following is a summary of the submissions made by the parties upon the completion of the evidential stage of the appeal hearing.

Appellant

40. The Appellant's tax agent made submissions on the law on the Appellant's behalf at the conclusion of the evidence. He argued, firstly, that the burden of proof in the appeal should rest with the Respondent. He accepted that it would normally be the case that an appellant in a tax appeal would bear the burden but submitted that in this instance the collective quantum of the assessments raised was excessive and disproportionate. As such, there was a duty on the Respondent to justify the figures that it had arrived at in assessing the Appellant.

41. The agent for the Appellant submitted that the Respondent's assessment hinged on copies of invoices of, he said, dubious veracity, which were furnished by the Respondent to him and his client only shortly prior to the appeal hearing. In particular he noted that the invoices that accompanied the list of cash transactions drawn up by [redacted] were set out in monthly batches and were numbered consecutively. He asked why they would be so numbered in circumstances where it must have been the case that [redacted] Limited had numerous customers to whom it made supplies in any given month. The agent submitted that there must be a suspicion that the invoices were fraudulent and, therefore, had to be disregarded.

42. The agent for the Appellant submitted that once the invoices supposedly representing cash transactions were disregarded the basis for the Respondent's assessment was compromised altogether. All that remained to support the Respondent's belief of undisclosed sales and profits was the level of sales made on the night of the visit in November 2006 relative to the sales accounted for in the preceding year. This could hardly be used as an accurate guide to business generally and, moreover, the sales on the night of the visit had been explained by the Appellant as being on account, firstly, of Friday being, along with Saturday, the busiest night of the week and, secondly, of the occurrence of a [redacted] concert on the nearby university campus.

43. In relation to the €99,998 of profits for 2007 that had not been reflected in the business's accounts, the Appellant had acknowledged the making of a mistake and, to a great extent, had paid the tax that was owed on foot of this error. Thus, the agent for the Appellant submitted that the amended assessments to income tax and the VAT estimates should be reduced in all cases to nil.

Respondent

44. Counsel for the Respondent began by emphasising that it fell to the Appellant to prove on the balance of probabilities that the assessments made were in error, citing the well-known judgment of the High Court in *Menolly Homes v Revenue Commissioners* [2010] IEHC 49. She submitted that it was clear therefrom that it was not for the Respondent, or its officer who raised an assessment under appeal, to stand over the accuracy of the assessment. Rather, it was for the Appellant to lead evidence proving the assertion underlying the appeal that the sum assessed was wrong. If an appellant viewed an assessment to be lacking in rationality or reasonableness, as it appeared the Appellant in the within appeal did, then the remedy available was judicial review. What could not occur, however, was for an Appellant to utilise the appeals process without accepting that it was they who bore the onus.

45. The reason why the income tax and VAT assessments for the relevant periods issued was that the Respondent did not view the Appellant's accounts as setting out the true level of his purchases and sales, with the consequence that the level of profits set out in the accounts and his returns for the relevant years were understated. Despite this, the Appellant had not provided anything during the appeal hearing that might corroborate the accuracy of his accounts and returns. He had not opened any documentation that might assist the Commissioner or called any witness, save for himself.

46. Counsel for the Appellant stressed though that the assessments under appeal were not, as the agent had submitted, based only on the material supplied to it by [redacted] Limited. To begin with there was the unannounced visit of 24 November 2006, which revealed, firstly, that the Appellant's takings that night were €3,221 by 12.30am. This was 60% of his average weekly turnover. Although the Appellant sought to explain this by reference to a concert held in the university that evening, no corroboration of this claim had been forthcoming and there was no suggestion that the Appellant had even attempted to corroborate it. The Respondent, by contrast, had produced correspondence evidencing its – unsuccessful – inquiries with the university to establish whether or not this claim was true.

47. The Appellant had maintained at all times in the appeal that his business for the relevant years was almost exclusively that of a takeaway, with an insignificant part of it being related to orders made for delivery. He had, he said, only employed one person to do deliveries, namely [redacted], and it was only on an occasional basis that he, his wife or another staff member stood in to make deliveries to customers who had ordered remotely. Counsel for the Respondent submitted however that these assertions were inconsistent with his own Z-reports generated for 24 November 2006. Not only did these documents disclose that there were three drivers for that evening, deliveries ostensibly comprised 36% of the sales made for that evening. This figure was not indicative of a negligible delivery side to the business.

48. Counsel for the Appellant submitted that the discovery by it of an un-declared €99,998 in income was a further factor in the making of the assessments under appeal. The Appellant's explanation as to how this came to pass and how the accounts for 2007 balanced out given the non-declaration, insofar as he was in a position to explain these matters at all, was that it was an error on the part of a staff member employed by his former accountant. Despite this, he had sought to call nobody from this firm to give evidence.

49. Moreover, counsel for the Respondent submitted that it was not credible that the Appellant would have been unaware of the drop in returned income in circumstances where it

resulted in an approximate 90% reduction in his tax bill for 2007 from that for 2006, without a corresponding drop in his trade.

50. Returning to the question of the material obtained from [redacted] Limited, counsel for the Respondent acknowledged that nobody from that company had come forward to give evidence to prove it. She submitted, however, that the Respondent had done the most that it could to try to ensure the presence of [redacted], its Company Secretary during the relevant time, by requesting that the Commission exercise its powers under section 949AE of the TCA 1997 to require her attendance. Despite such a direction having issued to her she had not attended. Counsel submitted that in the circumstances it was open to the Commissioner to accept the material furnished to it as evidence and, in support of this, cited section 949AC of the TCA 1997, which expressly permits the admission by a Commissioner of evidence that would not be admitted in Court proceedings.

51. Counsel for the Respondent submitted that the material, if admitted as evidence, would prove that the Appellant was purchasing from one supplier, over the period December 2005 – September 2007, substantially greater supplies of goods used in the sale of fast food meals than claimed in its accounts. As the Appellant's profit was calculated on the basis of a 300% - 320% margin on goods acquired for supply, it would follow that there was an understatement of its profits or gains in its accounts and returns for the relevant years, as well as an understatement of VAT output.

Material Facts

52. The facts material to this appeal, including agreed facts, are as follows:-

- over the relevant years the Appellant was the owner and operator of a fast food restaurant named "[redacted]" located in [redacted];
- the Appellant operated this business until on or about 2011;
- on the night of Friday 24 November 2006 officers of the Respondent conducted a "cold call" visit to the Appellant's business;
- at the time of the cold call visit the business would remain open on Friday and Saturday nights until approximately 3am;
- in the course of the visit the officers of the Respondent took copies of the "*Z reports"* (i.e. till reports) generated by the three tills in the premises;

- also in the course of the cold call visit the officers of the Respondent observed the presence of 6 delivery bags on the floor behind the counter of the business;
- the aforementioned Z reports disclosed that sales for 24 November 2006 amounted to €3,223;
- the Appellant's business's total net sales for the year ended 31 December 2004 per its accounts (the most recent accounts available at the time of the cold call visit) were in the amount of €282,150 for a 365-day trading period;
- the average weekly turnover of the business for 2004 was, on the basis of the aforementioned accounts, €5,425;
- the amount of sales made on 24 November 2006 was the fourth highest recorded for that year. This amount of sales was exceeded on 13 October 2006 (€3,317), 15 December 2006 (€3,370) and 22 December 2006 (€3,428);
- the Appellant ascribed the high level of sales made on 24 November 2006 to a concert held that evening in the nearby university by the well-known group "[redacted]";
- the Appellant produced no evidence of the occurrence of this concert. Inquiries made by the Respondent into the occurrence of this concert with the university and the relevant students' union were inconclusive;
- the Appellant stated to the Respondent on or about 15 May 2007 that sales made by way of delivery only ever constituted a minor part of the business;
- the Z reports for 24 November 2006 stated on their face that the takeaway business made 77 delivery sales that day, constituting approximately 36% of the overall value of sales;
- the Z reports for 24 November 2006 also stated on their face that deliveries had been made by three different drivers, namely *"[redacted]";*
- a "sales report" for 18 November 2006, six days before the cold call visit, disclosed that on that night an employee of the business called *"[redacted]"* made deliveries, along with the aforementioned *"[redacted]";*
- a "driver report" for 17 November 2006, containing statistics such as driver turnaround times, also referred to "[redacted]" as having made 15 delivery sales that day, constituting 8.6% of sales overall. "Takeaway" sales constituted 90.5% of the overall sales, with the balance being sales for collection;

- on or about 30 May 2007 the Appellant purchased a GPS navigation device;
- on or about 13 June 2007 the Appellant purchased four additional GPS navigation devices;
- the Respondent informed the Appellant on or about 18 April 2007 that it was commencing an inquiry into his tax affairs for the period 1 January 2005 – 1 December 2006;
- the Respondent informed the Appellant on or about 14 July 2009 that it was extending the inquiry to cover the period up to the end of 31 December 2008;
- on 13 October 2009 the Respondent informed the Appellant by way of correspondence that it had information to suggest that he had deliberately understated the purchases made by his business. This was denied shortly thereafter by the Appellant's agent in meetings with officers of the Respondent[5];
- at a meeting on 20 October 2010 between officers of the Respondent and the Appellant's agent, the Respondent informed the Appellant that it was in possession of information detailing cash purchases "off record" from one of his suppliers, [redacted] Limited, for 2006 in the amount of "over €40k". The Respondent further informed the Appellant that it was of the belief that he had begun making off record cash purchases from this supplier in 2005 and had ceased doing so in February 2007. It also informed the Appellant that it was unconvinced that he did not engage in this practice with other suppliers;
- on 23 August 2010, [redacted], Company Secretary of [redacted] Limited, furnished the Respondent with sales totals for the Appellant's business for the period December 2005 – September 2007. This purported to show cash sales for the period January 2006 – December 2006 and for the period January 2007 – February 2007;
- by way of email correspondence of 11 March 2016, an agent of [redacted] Limited, [redacted], sent the Respondent an amended list of total sales made to the Appellant's business over the period December 2005 – September 2007;
- also by way of the same email correspondence of 11 March 2016, [redacted] sent a full list of each and every sale purportedly made by [redacted]

[5] See paragraph 5 of the Statement of Agreed Facts.

Limited to the Appellant's business each month from November 2005 to December 2009;

- [redacted] Limited further supplied the Respondent with copies of the invoices relating to the cash supplies supposedly made to the Appellant over the period December 2005 – September 2007;
- the Respondent did not furnish the invoices supplied by [redacted] Limited to it until 11 days prior to the hearing of the appeal;
- on or about September 2009, the Respondent informed the Appellant that it had, in the course of its examination of his business's sales records, discovered sales income for the year 2007 in the amount of €99,998 that had not been included in the business's accounts for that year or in his tax return. The Respondent sought an explanation as to how the Appellant's accounts could have balanced out in circumstances where this sales income was omitted;
- on 7 October 2009, the agent for the Appellant provided a calculation to the Respondent regarding the tax owed on foot of the sales figure understatement for 2007. The sum calculated by the agent for the Appellant in respect of tax owed was €50,992. This figure was accepted by the Respondent;
- in the same correspondence of 7 October 2009 the agent explained this understatement of sales as having occurred:-

  "[…] *due to a totting error* [which was] *compounded on preparation of* [the Appellant's] *Tax Return when a clerk in* [the Appellant's former agent's office] *jumped to the conclusion that a 99,032 receipt received in June 2006 was in fact received in 2007 and balanced their books with this taken into account."*

- on 2 February 2011 the Respondent issued notices of assessment to income tax in respect of the Appellant for the years 2005, 2006, 2007 and 2008 in the amounts of €56,482.83, €54,544.37, €75,485.48 and €70,668.45 respectively;
- on 9 February 2011 the Respondent issued a notice of estimation of VAT due for the period January 2005 – December 2008 to the Appellant in the amount of €86,063;
- the Appellant appealed the notices of assessment to income tax and notice of estimation of VAT due on 9 February 2011 and 17 February 2011 respectively.

Analysis

53. The Commissioner considers it necessary to observe at the outset of this part of the Determination that the burden of proof in appeals of tax assessments and estimates such as those at issue in the within matter has been described as follows by Charleton J in *Menolly Homes v Revenue Commissioners [2010] IEHC 49,* a case cited by counsel for the Respondent in legal submission:-

> *"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."*

54. Why this is so is apparent from paragraph 50 of the judgment of Gilligan J in *T.J. v. Criminal Assets Bureau [2008] IEHC 168,* where he stated that:-

> *"The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period."*

55. Before considering the impact of these statements of the law in the context of this appeal, the Commission first wishes to address the question of the admissibility of the material supplied by [redacted] Limited as evidence probative of the Respondent's case. In the course of cross examination, several iterations of lists purporting to enumerate undisclosed or "off record" cash transactions involving the Appellant and [redacted] Limited were put to the Appellant for him to comment on them. So too were invoices emanating from the same company. While the agent for the Appellant indicated that it was accepted as a matter of fact that this material had been supplied to the Respondent by [redacted] Limited, the truth of the contents of the material was denied. Strenuous objection was made to the consideration by the Commissioner of the material as evidence, in circumstances where nobody from [redacted] Limited had attended to prove it and subjected themselves to cross examination. Nor, moreover, had anyone from the Respondent involved in the inquiry into the Appellant's affairs been called as a witness.

56. The Commissioner is conscious of the fact that the Respondent did as much as it could have done to ensure that the person in a position to prove the material supplied by [redacted] Limited, [redacted], attended the hearing to give

evidence. Despite being directed to attend by the Commissioner pursuant to the powers given under section 949AE of the TCA 1997, she did not appear. No application was made by the Respondent for an adjournment. Instead, the Respondent put documents to the Appellant in cross examination, which he was not capable of proving and/or of which he denied any knowledge. At the conclusion of the Appellant's case, the Respondent indicated that it would not be calling any witness and at legal submissions stage argued for the inclusion of the material on the grounds of the procedural flexibility afforded by section 949AC of the TCA 1997.

57. It is of course true that the Commission as a quasi-judicial body and pursuant to statute can exercise some flexibility in the application of strict evidential rules concerning hearsay. This, however, cannot be done where the fairness of a hearing is endangered and especially in circumstances where the outcome of a finding in the Respondent's favour confirms the imposition of a major financial burden on an appellant, such as is the case in this instance. For this reason the Commissioner is not assured that the admittance of the material is possible without risk to the Appellant's entitlement to fair procedures. The conduct that [redacted] Limited is alleged to have engaged in has the potential to itself constitute wrongdoing and at the hearing the Appellant, stating that the documents could only be inauthentic or relate to another customer, speculated that their production might have been connected to the desire to protect some other party from legal or financial repercussions at his own expense. In legal argument the Appellant's agent called into question the veracity of the contention that the invoices furnished by [redacted] Limited related to the Appellant's business based on the fact that their reference numbering was, mostly or entirely, consecutive. How, he asked, would this be the case where a business has numerous different customers for its supplies?

58. The posing of this question illustrates exactly why the documents cannot be accepted as evidence. The Commissioner is in no position to make a factual finding in relation to the evidential weight to be given to the material provided by [redacted] Limited to the Respondent without hearing from someone with knowledge, at least, of the system of invoicing used in [redacted] Limited and maybe also of the creation of the specific invoices themselves. In legal submission counsel for the Respondent, in acknowledgment of the evidential issues arising, stated that it was a matter for the Commissioner to adjudge what weight could be given to the information obtained from [redacted] Limited. Having considered this question the Commissioner finds that they cannot be ascribed any evidential weight and should be excluded altogether as a factor in arriving at a determination in the appeal of the assessments and estimation for

the relevant years. Accordingly, the invoices themselves and their content play no part in the determination made in this appeal.

59. In legal argument, the agent for the Appellant stated that the Respondent's case hinged on the material furnished by [redacted] Limited. Counsel for the Respondent disagreed with this, submitting that it was just one of the reasons why the assessments issued. She submitted, however, that what was more pertinent was the failure of the Appellant to produce any documentary evidence to allow the Commissioner to establish what his actual purchases were for the relevant years and, thus, his true level of sales. All that the Appellant had done in the making of his case on appeal was to assert in bare terms that the level of purchases and sales set forth in his accounts were accurate.

60. As set out at the beginning of this part of the Determination, it is the Appellant who bears the burden of proof in appeals of assessments and estimates such as those at issue. The Appellant's agent suggested that the basis for the assessment was of such a flimsy nature that this appeal warranted the reversal of the burden. It is clear to the Commissioner that this is not so. If a taxpayer believes an assessment has been made on a basis that is devoid of rationality, is unreasonable as a matter of law or is invalid in some other way, that taxpayer's remedy is to seek an order of the High Court in judicial review proceedings for the quashing of the assessment. Issues going to the legal validity of an assessment, as opposed to the quantification of the correct amount of tax, if any, that may be owed, fall outside the jurisdiction of the Commissioner as determined by legislation passed by the Oireachtas (see *Lee v Revenue Commissioners [2021] IECA 18*). As observed by Gilligan J in the aforementioned case of *T.J. v Criminal Assets Bureau [2008] IEHC 168,* the self-assessment system is founded on the principle that it is the taxpayer who is best placed to prove what income/gains have been made by them in a given year for the purpose of calculating the correct tax owed. Moreover, the Appellant was obligated by section 886 of the TCA 1997 and, as was in force at the time relevant to this appeal, section 16 of the Value Added Tax Act 1972 to keep records relating to his business's purchases and sales. This obligation only serves to underline that in a tax appeal it is the taxpayer, not the Respondent, that is required to be in a position to establish by reference to supporting documentary material what their tax liability should be.

61. It was not in dispute that the Appellant in this case had been aware for many years as to why, in general terms, the Respondent raised the assessments under appeal. Upon the commencement of the Respondent's audit inquiry, the Appellant maintained that deliveries made up only a small part of his business and that he employed only one delivery driver, with himself, his wife and other staff members filling in as necessary to conduct deliveries.

In the Commissioner's view his explanation as to why the Z reports for this night told a different story was unconvincing. Staff members, he said, had a tendency simply to press the wrong buttons. This did not account for why staff members would press different buttons seemingly at random for different transactions, with the effect that particular persons were recorded as having carried out delivery sales. Nobody who worked in the shop at this time was called to give evidence to corroborate his account. The Commissioner appreciates that efforts to get such persons to give evidence may not have borne fruit given the lengthy passage of time. However, there was no suggestion that any attempt had ever been made in this regard.

62. To the Commissioner's mind, however, the most significant factor is that the Appellant was informed many years prior to the hearing of the appeal that the Respondent suspected that he had suppressed purchases made from his suppliers for the purpose of understating his level of income from sales to his own customers. This being so, one would have expected the Appellant to have called and produced evidence relating to his purchases. It is true that he contacted [redacted] Limited on 23 April 2010 seeking invoices evidencing his purchases. What was furnished on foot of this, however, came with correspondence from [redacted] Limited of 1 July 2010 stating that there could be additional invoices relating to further purchases in existence that could only be discovered upon the Appellant providing additional information. There was no evidence that the Appellant made any effort to provide this information to establish if further purchases from [redacted] Limited had been made over the relevant period. His own inquiries with them stopped at this point, save that he said that at some stage he went to [redacted], the head of that business, to "confront" him about the fact that he had erroneously informed the Respondent of the existence of un-recorded cash transactions. No application was made to the Commission by the Appellant that it exercise its powers under section 949AE of the TCA 1997 to require the attendance of [redacted] to give evidence.

63. One might also have expected the Appellant to seek to call or otherwise obtain evidence from his other suppliers, for example a representative of [redacted] Limited or [redacted], with a view to establishing that there was no suppression of purchases made from them over the relevant years. Again, no evidence of this nature was adduced at hearing.

64. The Appellant opened no material related to his bookkeeping supportive of his claim that his purchases and income from sales for the relevant years were as set out in his accounts and tax returns. No ledgers were opened, for example, for the Appellant to comment on in

examination in chief. It is striking that at paragraph 21 of his Outline of Arguments the Appellant appeared to criticise the Respondent for its reliance on information provided on behalf of [redacted] Limited in circumstances where it could not produce "delivery dockets" signed by a staff member of the business corresponding with cash supplies alleged to have been made off record. Yet despite this criticism, the Appellant himself produced no signed delivery dockets at hearing relating to the supplies admitted as received and included in his accounts for the relevant years. In short, the Appellant came with nothing to permit the Commissioner to come to a conclusion that the sums assessed by the Respondent were wrong.

65. Lastly, it was also clear that another factor in the making of the assessments under appeal was €99,998 worth of sales income that the Appellant did not include in his accounts or tax returns for the year 2007. In view of the fact that the Appellant ascribed this event to an honest error by a clerical officer employed by his former accountants and that the exclusion of this income had the effect that the Appellant's tax bill fell by over 90% from the preceding year, the Commissioner believes that cogent evidence was required in order to allow the making of a finding of fact in line with this. However, no representative of the Appellant's former firm of accountants was called to give evidence and there was no suggestion that any effort to do so had been made. This being so, it is not possible to conclude that the non-declaration of €99,998 of sales recorded on till receipts, which was only discovered by the Respondent on foot of its audit inquiries, was an inadvertent mistake.

66. The net effect of the foregoing is the Appellant, who in accordance with the law as expressed in *Menolly Homes v Revenue [2010] IEHC 49 and T.J. v Criminal Assets Bureau [2008] IEHC 168* shoulders the burden of proving his case, has failed to provide any basis upon which to establish that the Respondent's assessments and VAT estimate for the relevant years were in error. As such, the assessments to income tax and the VAT estimate under appeal must stand affirmed.

Determination

67. The Commissioner finds that the income tax assessments of the Appellant for the years 2005, 2006, 2007 and 2008 of 2 February 2011 and notice of assessment to VAT of 9 February 2011 stand affirmed.

68. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

69. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

70. Any party dissatisfied with the determination has a right of appeal to the High Court on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
20th October 2023