



28TACD2024

Between

[REDACTED]  
[REDACTED]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by [REDACTED] (“the Appellant”) pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for July 2020 to August 2021 inclusive, and were in the total amount of €2,244,179.50.
2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business had expected or was expected to experience a 30% reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.
3. The appeal proceeded by way of a hearing on 9 November 2023.

## Background

4. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020, and which replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic, and provided for a flat-rate subsidy to qualifying employers based on the numbers of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.
5. On 15 July 2022, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

<b>Period of Assessment</b>	<b>Amount €</b>
July 2020	7,053.50
August 2020	4,108.50
September 2020	55,307.00
October 2020	92,923.50
November 2020	128,380.00
December 2020	222,266.00
January 2021	168,845.00
February 2021	186,095.00
March 2021	171,122.00
April 2021	205,372.00
May 2021	197,945.00
June 2021	239,101.00

July 2021	307,860.00
August 2021	257,801.00
<b>Total</b>	<b>2,244,179.50</b>

6. In addition to the above, the Appellant had claimed EWSS payments for September 2021 (€263,416), October 2021 (€90,948) and November 2021 (€1,000). However, these payments were withheld by the Respondent and not paid to the Appellant.
7. On 4 October 2022, the Appellant, via its agent, appealed against the assessments to the Commission. The appeal was made outside the 30 days allowed by section 28B(14A) of the EMPI Act 2020. Following a request for reasons for the late appeal from the Commission, the Appellant’s agent stated that it was due to unavailability of a key worker in the Appellant due to medical reasons. On receipt of medical evidence, the Commission accepted the appeal pursuant to section 949O of the Taxes Consolidation Act 1997 as amended (“TCA 1997”).
8. In its notice of appeal, under “Grounds of Appeal”, the Appellant simply stated, “*We disagree with the EWSS amounts to be repaid as calculated by Revenue. We believe that the full amount of EWSS received is not repayable by the Company.*” The Commissioner notes that section 949I(2)(d) of the TCA 1997 stipulates that a notice of appeal “*shall specify... the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds.*” Additionally, section 949I(6) states that, “*A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.*”
9. The parties subsequently submitted statements of case to the Commission, pursuant to section 949Q of the TCA 1997. In its statement of case, the Respondent set out in substantial detail its engagement with the Appellant regarding the EWSS payments from August 2021 to October 2022 (45 separate steps in total). The Commissioner does not propose to set out those details herein, save to note that the Appellant’s agent subsequently stated that it did not dispute the outline of relevant facts in the Respondent’s statement of case.

10. In January 2023, the Commission were directed to provide pre-hearing documentation from the parties within 60 days. The parties were directed to provide, inter alia, "*Any other outstanding documentation or information not already submitted upon which you intend to rely upon at the hearing.*" An extension to this direction was granted in March 2023.
11. Pre-hearing submissions were received from the parties in May 2023. In its pre-hearing submissions, the Appellant's agent stated that "*We are of the opinion that the client has met the required 30% reduction in a number of months, and that the amount of the repayment being requested by Revenue is overstated...We are now in a position to submit requested information to Revenue in order to complete their review of our client's eligibility to qualify for EWSS received.*" No documentation supporting this submission was provided.
12. On 16 May 2023, the Commission notified the parties that the hearing of the appeal would be held on 9 November 2023.
13. On 7 November 2023, at 5.35pm, without prior notification, the Appellant's agent emailed additional documentation (292 pages), including new/revised calculations regarding the Appellant's contended eligibility for the EWSS.
14. Despite the very late submission of additional documentation by the Appellant, no application for an adjournment was made by the Respondent. However, on the morning of the hearing, prior to its commencement, the Respondent handed in a supplemental outline of arguments which was titled "Preliminary Issue". The Respondent stated that it was not resiling from its previous submissions, but that, even if the Appellant's revised figures were accepted (which the Respondent did not), the Appellant was not eligible for the EWSS. It asked the Commissioner to dismiss the appeal.
15. The hearing proceeded as scheduled. Counsel on behalf of the Respondent, David Quinn BL, submitted that, even taken at its height, the Appellant's appeal could not succeed, as the wrong turnover test had been applied by the Appellant's agent in its revised calculations. He asked that, rather than proceeding to hear substantial detailed evidence regarding the Appellant's sales figures (which were disputed by the Respondent), the Commissioner simply proceed on the basis of the figures provided by the Appellant and determine whether they satisfied the statutory test.
16. The Appellant's agent, [REDACTED], did not object to the Respondent's requested approach. He asked the Commissioner "*to review our figures and make a determination based on it.*" In response, the Commissioner stressed that the onus lay on the Appellant to demonstrate that the Respondent's assessments were incorrect.

17. In the circumstances, the Commissioner is satisfied that it is appropriate to take the Appellant's case at its height; i.e. to assume that the figures provided in the revised workings submitted on 7 November 2023 are correct, and to use these to determine whether or not the Appellant has demonstrated that the Respondent's assessments were incorrect. In coming to this view, he is satisfied that no prejudice could possibly accrue to the Appellant, and that such an approach is in accordance with the requirements of section 949H of the TCA 1997, which obliges the Commissioner, as far as possible, to take a flexible approach to proceedings.

18. If the Commissioner finds that the Appellant, on its own figures, has not satisfied the requirements of section 28B of the EMPI Act 2020, that will dispose of the matter. If, on the other hand, he finds that the Appellant's figures do satisfy the relevant requirements, he considers that it will be necessary to hold a second hearing to address the additional matters raised by the Respondent, including its non-acceptance of the accuracy of the Appellant's sales figures.

19. [REDACTED]

### Legislation and Guidelines

20. Section 28B of the EMPI Act 2020, as in force from 1 July 2020, provided *inter alia* that:

*"(1)... 'qualifying period' means the period commencing on 1 July 2020 and expiring on 31 March 2021 or on such later day than 31 March 2021 as the Minister may specify...*

*(2) Subject to subsections (4) and (5), this section shall apply to an employer where –*

*(i) in accordance with guidelines published by the Revenue Commissioners under subsection (20)(a), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce –*

*(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders*

*being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period')...*

*and*

*(b) the employer satisfies the conditions specified in subsection (3).*

*(3) The conditions referred to in subsection (2)(b) are –*

*(a) (the employer has logged on to the online system of the Revenue Commissioners (in this section referred to as 'ROS') and applied on ROS to be registered as an employer to which this section applies,*

*(b) having read the declaration referred to in ROS as the 'Covid-19: Employment Wage Subsidy Scheme' declaration, the employer has submitted that declaration to the Revenue Commissioners through ROS,*

*(c) the employer has provided details of the employer's bank account on ROS in the 'Manage bank accounts' and 'Manage EFT' fields, and*

*(d) the employer is throughout the qualifying period eligible for a tax clearance certificate, within the meaning of section 1095 of the Act, to be issued to him or her.*

*(4) Where on any date in the qualifying period the employer ceases to satisfy the condition specified in subsection (3)(d), the employer shall cease to be an employer to which this section applies as on and from that date.*

*(5) Where, by virtue of subsection (2) (apart from paragraph (a)(ii) thereof), and subsection (3), an employer is an employer to which this section applies –*

*(a) immediately upon the end of each income tax month (in this subsection referred to as 'the relevant income tax month') in the qualifying period, apart from July 2020 and the last such month, the employer shall review his or her business circumstances, and*

*(b) if, based on the result of that review, it is manifest to the employer that the outcome referred to in clause (I), (II) or (III), as the case may be, of subsection (2)(a)(i) that had previously been envisaged would occur will not, in fact, now occur, then –*

*(i) the employer shall immediately log on to ROS and declare that, from the first day of the income tax month following the relevant income tax month (in subparagraph (ii) referred to as 'the relevant day'), the employer is no longer an employer to which this section applies, and*

*(ii) on and from the relevant day, the employer shall not be an employer to which this section applies and shall not represent that his or her status is otherwise than as referred to in this subparagraph nor cause the Revenue Commissioners to believe it to be so otherwise.*

*[...]*

*(11) Where the Revenue Commissioners have paid to an employer a wage subsidy payment in relation to an employee in accordance with subsection (7)(a) and it transpires that the employer was not entitled to receive such payment in relation to the employee, the wage subsidy payment so paid to the employer shall be refunded by the employer to the Revenue Commissioners.*

*(12) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (11) (in this section referred to as 'relevant tax') shall be treated as if it were income tax due and payable by the employer from the date the wage subsidy payment referred to in that subsection had been paid by the Revenue Commissioners to the employer and shall be so due and payable without the making of an assessment.*

*(13) Notwithstanding subsection (12), where an officer of the Revenue Commissioners is satisfied there is an amount of relevant tax due to be paid by an employer which has not been paid, that officer may make an assessment on the employer to the best of the officer's judgment, and any amount of relevant tax due under an assessment so made shall be due and payable from the date the wage subsidy payment referred to in subsection (11) had been paid by the Revenue Commissioners to the employer.*

*[...]*

*(20) The Revenue Commissioners shall prepare and publish guidelines with respect to –*

*(a) the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (2), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce, and*

*(b) the matters to which an employer shall have regard in determining the appropriate class of Pay-Related Social Insurance to be operated by an employer in relation to a qualifying employee for the purposes of compliance by the employer with subsection (7) (e).”*

21. Section 28B of the EMPI Act 2020 was amended from time to time to *inter alia* account for changes to the qualifying periods as the EWSS continued into 2021 and 2022. From 1 January 2021, the relevant specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019 (section 28B(2A)). From 1 July 2021, the relevant specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019 (section 28B(2B)). From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020 (section 28B(2C)). Otherwise in respect of these time periods, and insofar as is relevant for this appeal, section 28B remained as set out herein.

22. Additionally, from 1 August 2020, subsection 14A was inserted into section 28B:

*“A person aggrieved by an assessment or an amended assessment to relevant tax made on that person may appeal the assessment or amended assessment, as the case may be, to the Appeal Commissioners, in accordance with section 949I of the Act, within the period of 30 days after the date of the notice of assessment or the amended assessment, as may be appropriate.”*

23. As required by section 28B(20), the Respondent published Main Guidelines on the operation of the EWSS (“Guidelines”). The Guidelines stated that:

*“The scheme is administered by Revenue on a “self-assessment” basis. Revenue will not be looking for proof of eligibility at the registration stage. We will in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering and remaining in the scheme.”*

24. In respect of the “rolling reviews” mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (1 November 2021 version) stated that

*“Employers must undertake a review of the six month period on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.*

*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period...as illustrated below:*



Paydates in January to June 2021			
Date review is undertaken	Total of Column A & B equals 2021 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 December 2020	N/A	January to June 2021	Actual results for period January to June 2019
31 January 2021	January 2021	February to June 2021	
28 February 2021	January & February 2021	March to June 2021	
31 March 2021	January to March 2021	April to June 2021	
30 April 2021	January to April 2021	May and June 2021	
31 May 2021	January to May 2021	June 2021	

Paydates in 2020			
Date review is undertaken	Total of Column A & B equals 2020 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 August 2020	July & August 2020	September to December 2020	Actual results for the period July to December 2019
30 September 2020	July, August & September 2020	October, November & December 2020	
31 October 2020	July to October 2020	November & December 2020	
30 November 2020	July to November 2020	December 2020	

*If an employer no longer qualifies, they must deregister for EWSS through “Manage Tax Registration” on ROS with effect from the following day (that being the 1<sup>st</sup> of the month) and cease claiming the subsidy...*

*If an employer becomes aware prior to the end of the month that they will no longer meet the eligibility criteria (e.g. unexpected donation or grant received at the start of a month), they should deregister immediately and cease to claim subsidies.*

*Subsidies correctly claimed in accordance with the terms and conditions of the scheme prior to deregistration will not be repayable...*”

25. The Guidelines further stated:

*“Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period. It is reasonably expected that the assumptions which underpin the projections will be reliable, will reflect the operating conditions of the business, and will remain materially unchanged. However, Revenue appreciates that in exceptional circumstances, certain unforeseen events may occur which require the employer to revise the original budget estimate e.g. imposition of further Government restrictions (post the review date) impacting trade, receipt of an unexpected donation, entering into a significant new sales contract etc.*

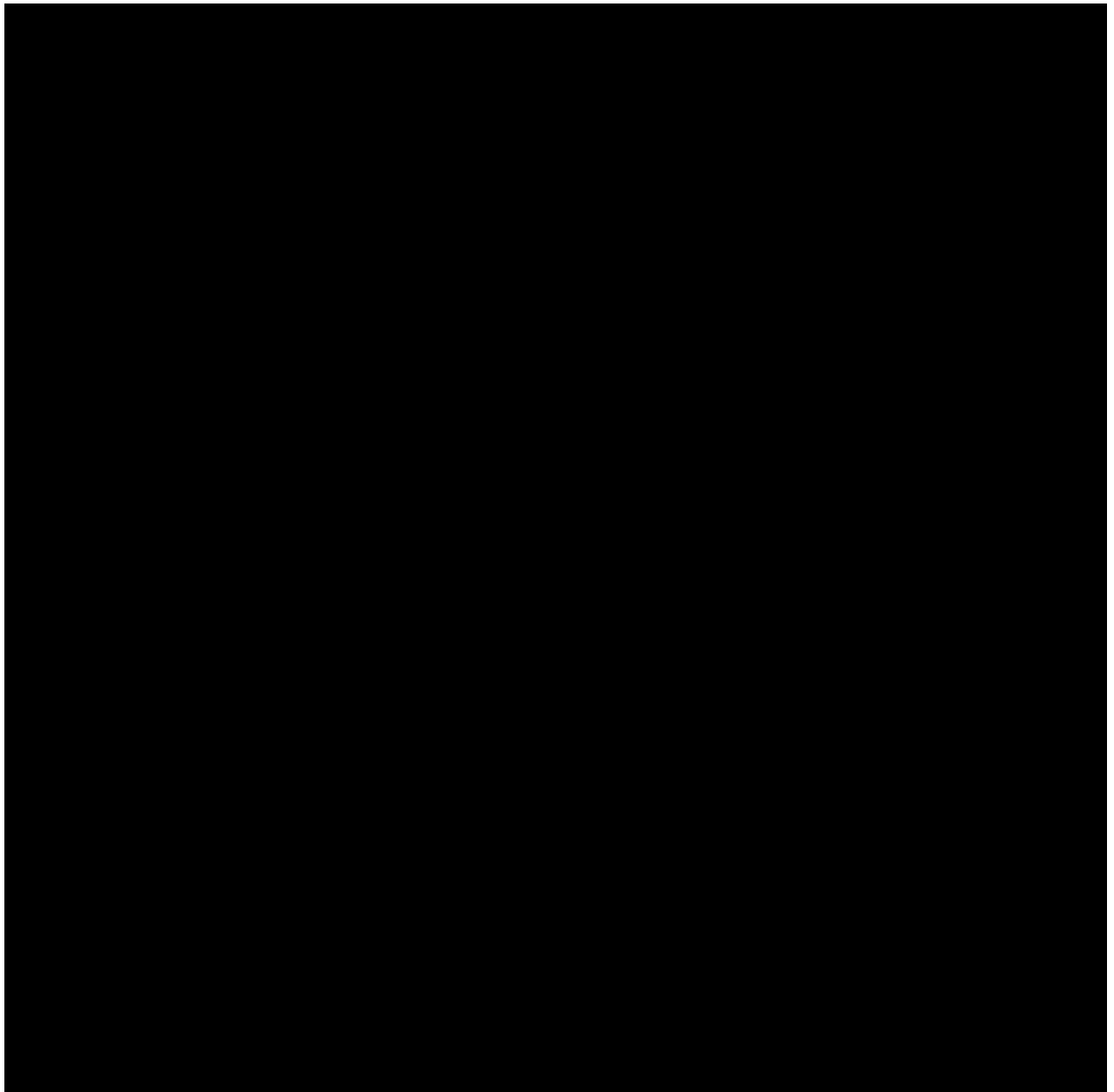
*Where Revenue determines that an employer, at any time over the term of the scheme, claimed and received payment by applying accounting practices that are clearly not appropriate, or by deliberately misrepresenting the true financial position of the business, it will be excluded from the EWSS in its entirety. No further claims will be*

*accepted, and all subsidy paid and PRSI credit issued will be immediately repayable together with interest and penalties. The business may also face possible criminal prosecution.”*

## **Submissions**

### *Appellant*

26. In its submission of 7 November 2023, the Appellant’s agent provided the following summary calculations of what it stated were the Appellant’s relevant figures for the appeal against the Respondent’s assessments:



27. In oral submissions at the hearing, the Appellant’s agent stated that it took over the Appellant’s accounts in 2019 [sic] and had great difficulty in getting books and records

from the previous agent. It prepared the above accounts as best it could. Following the Respondent's intervention regarding the EWSS payments, it undertook a review of the books and records of the company. It came to the conclusion that, while the Appellant was not entitled to the full EWSS payments received, there was a net liability of €84,951.58 payable. This was because, while the Appellant was liable for repayments in the amount of €1,091,229.58, it was entitled to an additional amount of €1,006,278 for months that had not been paid to it by the Respondent.

28. The agent had carried out a retrospective review of the accounts. The approach taken was as follows:

*"When we reviewed it, the best approach we could take was to look at the figures on a monthly basis and compare them to what they actually submitted to see, if there was any month they actually had qualified. The only month that we qualified was anything that was, obviously where the 30% reduction had happened.*

*They didn't hit the 30% reduction in the months of July '20 to November '20, so we said that these were disallowed... The months that they qualified, December '20; January '21; March '21; April '21; June '21, July '21, they had hit the mark of the [30]%*

*We thought then that after they were removed from the scheme in August, that there were additional months they could have claimed only they were removed from EWSS."*

29. In response to a question from the Commissioner, the agent stated that it compared the Appellant's turnover *"on a month by month basis, so we would have compared, say July 2021 and July 2019."* When the Commissioner stated that the Respondent argued that this was the incorrect approach, the agent stated that it based it on the Guidelines, and in particular page 7 of the updated Guidelines dated 1 November 2021, which stated inter alia that

*"Employers must undertake a review of their eligibility for the scheme on the last day of every month until and including December 2021 to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.*

*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the period January to December 2021 for paydates in the period 1 July 2021 to 30 April 2022."*

30. In response to the Respondent's submissions, the Appellant's agent stated that he believed that rolling reviews had been carried out by the Appellant in "real-time". He

believed that the Appellant should have been entitled to continue in the Scheme and had performed calculations on that basis.

*Respondent*

31. In its outline of arguments dated 5 May 2023, the Respondent made a number of contentions about the Appellant's participation in the EWSS, including that it had failed to carry out rolling reviews and that it had understated its turnover/sales figures for the relevant periods. However, as this Determination is focused on the preliminary issue of whether, taken at its height, the Appellant's case satisfies the requirements of section 28B of the EMPI Act 2020, the Commissioner will not set out details of those submissions herein, save to reiterate that the Respondent has made clear that it has not resiled from them.
32. In its supplemental outline of arguments on the "Preliminary Issue", the Respondent stated that the Appellant had applied the wrong test in its calculations submitted on 7 November 2023. It had compared the 2020 and 2021 actual monthly figure with the equivalent 2019 month. This was not the statutory test, which required participants in the EWSS to demonstrate a 30% reduction in turnover during the relevant qualifying period compared to the corresponding period in 2019.
33. When the Appellant's own figures were applied to the statutory turnover test, the Appellant was ineligible for each month. The Respondent provided tables based on the Appellant's figures, which showed, for each of the three 'specified periods':
- i. From July to December 2020, total turnover of €1,274,354 compared to July – December 2019 turnover of €1,634,047: A reduction of €359,693, which was 22.01%.
  - ii. From January to June 2021, turnover of €1,334,817 compared to January – June 2019 turnover of €1,637,661: A reduction of €302,844, which was 18.49%.
  - iii. From January to December 2021, turnover of €2,465,103 compared to January – December 2019 turnover of €3,271,708: A reduction of €806,605, which was 24.65%.
34. Consequently, as the Appellant's figures failed to show a reduction of 30% for any of the three 'specified periods', the appeal was doomed to fail.
35. In oral submissions, counsel stated that it was highly unsatisfactory to receive additional documentation, with a new set of figures, 36 hours before the hearing. However, it was

clear that the Appellant had applied the wrong test. The Appellant had not only failed to carry out rolling reviews in real-time as required by the EMPI Act 2020, it had submitted figures that were incorrect and had sought to claim it had an entitlement to EWSS payments on the basis of the wrong test.

36. The approach of the Appellant, to apply for EWSS payments for every month and then afterwards work out if it was entitled to them, was not in compliance with the statute. But it was also unfair to market participants who played by the rules by carrying out rolling reviews and monthly projections. Such participants may not have claimed for certain months on the basis that they projected they would not suffer a 30% reduction in turnover; however, even if it subsequently transpired that they did incur such a reduction, they had no entitlement to retrospectively seek EWSS payment for those months. That was why the approach of the Appellant was unfair.

37. The Appellant had claimed for EWSS payments for September – November 2021, which had been withheld by the Respondent. The Appellant had not claimed for subsidies for December 2021 into 2022, but in the figures provided by its agent in the appeal, it had sought to claim for those additional months as well. It was not open to them to do so, and the Commissioner was limited to considering the assessments actually raised by the Respondent.

### **Material Facts**

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

38.1. [REDACTED]  
[REDACTED]  
[REDACTED]

38.2. The Appellant registered to participate in the EWSS on 1 August 2020. It received payments under the EWSS in the total amount of €2,244,179.50 between July 2020 and August 2021 inclusive.

38.3. The Appellant sought further payments under the EWSS for September, October and November 2021 but these payments were withheld by the Respondent and not paid to the Appellant.

38.4. On 15 July 2022, the Respondent raised assessments against the Appellant in respect of the entirety of the EWSS payments received by the Appellant between

July 2020 and August 2021, i.e. €2,244,179.50. These assessments were appealed to the Commission.

38.5. The hearing of the appeal was held on 9 November 2023. On 7 November 2023, the Appellant's agent submitted new calculations on behalf of the Appellant. These calculations purported to show that the Appellant owed €1,091,229.58 in EWSS repayments, but was entitled to a further €1,006,278.00 for months not granted or claimed, leaving a 'net liability' of €84,951.58.

38.6. The calculations carried out by the Appellant's agent and submitted on 7 November 2023 were not based on contemporaneous rolling reviews but were calculated on an *ex post facto*, retrospective basis using actual turnover figures (as claimed) for 2020, 2021 and 2022 versus actual turnover figures (as claimed) for 2019.

38.7. The Appellant's agent's calculations, which aimed to show which months the Appellant was eligible for EWSS payments, were performed on a straight month versus month basis, e.g. July 2019 turnover versus July 2020 turnover. However, the EWSS required that calculations be carried out on a 'specified period' versus 'corresponding period' basis.

## **Analysis**

39. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise assessments in the total amount of €2,244,179.50 for EWSS payments made between July 2020 and August 2021 inclusive. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*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.*"

40. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders being received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. From 1 July 2021, the specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019. From 1 January 2022, the relevant specified

period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020.

41. The first matter to be considered is the scope of this appeal. The Respondent states that it concerns the assessments raised by it in respect of EWSS payments made to the Appellant between July 2020 and August 2021. The Appellant wishes to additionally include its claims for September – November 2021, which were not paid out by the Respondent, as well as additional payments for January and April 2022 which were not claimed for at the time.
42. The Commissioner is satisfied that his jurisdiction in this appeal is to consider the assessments actually raised by the Respondent, and it does not extend to claims not allowed or claims not made at the time. In *Lee v Revenue Commissioners* [2021] IECA 18, the Court of Appeal (Murray J) stated that

*“20. The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.*

[...]

*31...Read together the provisions strongly suggest what is envisaged by s. 933 and the supporting legislative scheme is an appeal against an assessment alone directed solely to whether the Inspector has properly reflected the statutory charge to tax in the assessment itself, with the Appeal Commissioners abating, reducing, letting stand or indeed increasing the assessment as appropriate in the light of the facts and law found relevant to that inquiry...*

*64... From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge.”*

43. While the judgment in *Lee* was concerned with the predecessor to the Commission, and the relevant statutory provisions applying in that case, the Commissioner is satisfied that the same principles apply in this instance. The Tax Appeals Commission was established by the Finance (Tax Appeals) Act 2015 as the successor to the Office of the Appeals

Commissioner, and Part 40A of the TCA 1997 applies to appeals made to the Commission. Section 949AK of the TCA 1997 provides that the Appeal Commissioners may reduce or increase an assessment, or determine that the assessment stand.

44. The Commissioner's view is supported by the wording of section 28B(14A) of the EMPI Act 2020, which provides for the making of an appeal to the Commission in respect of EWSS:

*"A person aggrieved by an assessment or an amended assessment to relevant tax made on that person may appeal the assessment or amended assessment, as the case may be, to the Appeal Commissioners, in accordance with section 949I of the Act, within the period of 30 days after the date of the notice of assessment or the amended assessment, as may be appropriate."* (emphasis added)

45. It is clear from the wording of section 28B(14A) that the Oireachtas envisaged that appeals to the Commission in the context of EWSS would be against assessments. There is nothing in that subsection which allows for an appeal against a claim that was not allowed by the Respondent, not to mention a claim that was not even made at the time but was raised retrospectively in the context of an appeal. Section 949J(1) of the TCA 1997 provides that a valid appeal is one that is made in relation to an "*appealable matter*", and section 949A of the TCA 1997 provides that an "*appealable matter*" means "*any matter in respect of which an appeal is authorised by the Acts.*" It seems clear to the Commissioner that an appeal against disallowed EWSS claims, or claims not made at all at the time, is not authorised by the EMPI Act 2020, and the Appellant did not point to any provision of the EMPI Act 2020 (or any other Act) permitting such an appeal. Therefore, the Commissioner determines that this appeal is only concerned with the assessments raised by the Respondent, and cannot consider the additional claims for payment made by the Appellant.

46. Even if the Commissioner was wrong about that, and instead it was the case that appeals against disallowed claims and retrospective claims could be made *in principle*, the Commissioner notes that no such grounds were specified or particularised by the Appellant in its notice of appeal, and therefore it seems to him that, pursuant to section 949I of the TCA 1997, such grounds could not be advanced at the hearing in any event.

47. Turning now to the figures produced by the Appellant to support its appeal, the Commissioner notes again that this Determination is proceeding on the basis that the stated turnover is correct, notwithstanding the Respondent's repeated assertions that it is not.



48. The Appellant's agent was clear at the hearing that its figures were compiled on the basis of month versus month comparisons: *"we did it on a month by month basis, so we would have compared, say July 2021 and July 2019."*

49. The Commissioner is satisfied, however, that this was not the test prescribed by section 28B of the EMPI Act 2020. To take one example, subsection (2)(i)(I) stated that

*"there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period')..."*

50. While the time periods changed with subsequent amendments, the underlying methodology did not. Therefore, it was necessary to compare the 'specified period' (in the above instance, July – December 2020) with the 'corresponding period' (above, July – December 2019), and calculate on the basis of those periods whether a 30% reduction in turnover was anticipated.

51. This methodology was explained further in the Guidelines prepared by the Respondent. There were a number of iterations of the Guidelines, although, as with the Act itself, the underlying methodology for assessing entitlement to EWSS payments did not change. For example, the Guidelines issued on 8 July 2021 stated that

*"an employer must be able to demonstrate to the satisfaction of Revenue that their business is expected to experience a 30% reduction in turnover or customer orders in the period from 1 January to 31 December 2021 for paydates on or between 1 July and 31 December 2021, and this disruption to normal operations is caused by COVID-19.*

*This reduction in turnover or customer orders is relative to...the period 1 January to 31 December 2019 where the business was in existence prior to 1 January 2019..."*

52. The Guidelines also provided worked examples showing how eligibility was to be calculated, as well as a table setting out how the calculations were to be performed. The 8 July 2021 version of the Guidelines provided the following table:

Paydates in July to December 2021			
Date review is undertaken	Total of Column A & B equals 2021 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
30 June 2021	January to June 2021	July to December 2021	Actual results for period January to December 2019
31 July 2021	January to July 2021	August to December 2021	
31 August 2021	January to August 2021	September to December 2021	
30 September 2021	January to September 2021	October to December 2021	
31 October 2021	January to October 2021	November and December 2021	
30 November 2021	January to November 2021	December 2021	

53. The Commissioner is satisfied that there is nothing in the Guidelines to support the Appellant's contention that a straight month versus month comparison was permitted, and he finds that they were not. Consequently, as this was the basis on which the Appellant's appeal was brought, it follows that the appeal cannot succeed.
54. Additionally, the Respondent used the Appellant's own figures to calculate, applying the correct test, whether it was entitled to any EWSS payments, and found that it was not. It calculated that from July to December 2020 it suffered a 22% reduction in turnover, from January to June 2021 it suffered an 18.49% reduction in turnover, and from January to December 2021 it suffered a 24.65% reduction in turnover. Therefore, even on its own figures, the Appellant was not entitled to subsidy payments.
55. The Commissioner considers that it was incumbent on the Appellant to attempt to demonstrate that the Respondent's calculations were incorrect, but that it did not do so. The Appellant's agent asked the Commissioner to review its figures "*and make a determination based on it.*" However, as the Commissioner made clear to the Appellant's agent in the hearing, it is not his role to review a party's figures/accounts etc. and come to an independent view as to what the correct assessment might be. It is his role to determine whether an appellant has sufficiently demonstrated that an assessment raised by the Respondent is incorrect. In this instance, despite numerous invitations from the Commissioner to do so, the Appellant did not challenge the Respondent's calculations and did not make submissions as to why Respondent's understanding of the statutory test was wrong. Consequently, the Commissioner determines that the Appellant has failed to meet the evidential burden of showing that the assessments are not payable.
56. Furthermore, the Commissioner considers that, *even if* the Appellant had used the correct test, and *even if* in doing so it demonstrated that the figures used by it suggested it was entitled to EWSS payments, he would *still* find that in fact it was not. This is because the figures were, as freely admitted by the Appellant's agent, arrived at by means of a

retrospective review of the Appellant's accounts: "We looked at the accounts retrospectively obviously. We got this in 2021 when all the EWSS had been filed already." However, as stated in 83TACD2023,

*"the plain meaning of section 28B is that the carrying out of monthly rolling reviews was a necessary condition for participating in the EWSS. Subsection (2) states that section 28B shall apply to an employer, but that this is subject to subsections (4) and (5). As discussed herein, subsection (5) requires the carrying out of monthly rolling reviews. Therefore, it is clear that if an employer failed to carry out monthly rolling reviews, it was not entitled to participate in the EWSS."*

57. The carrying out of contemporaneous rolling reviews was not an optional extra, or a "nice-to-have", but was a fundamental component of how the EWSS worked. At the hearing, the parties disagreed as to whether or not rolling reviews were carried out by the Appellant; the Respondent stated that it did not believe they were, whereas the Appellant's agent asserted that he was of the opinion that such reviews had been carried out, albeit no evidence of such rolling reviews was provided.

58. However, the Commissioner considers that the question of whether or not rolling reviews were carried out by the Appellant is, in this instance, ultimately moot. This is because the figures relied upon by it were, by express admission, not the product of contemporaneous rolling reviews carried out during the Appellant's participation in the EWSS, but were calculated and derived on an *ex post facto*, retrospective basis for the purposes of this appeal. The Commissioner considers that there is nothing in section 28B of the EMPI Act 2020 which allows for such retrospective calculations to be carried out to justify receipt of subsidy payments. Rather, the wording is clearly prospective in nature: "*there will occur in the specified period at least a 30 per cent reduction...*" Hence the need for projections to be carried out for the specified period, which were then to be compared against the corresponding period to assess eligibility.

59. The Commissioner agrees with the submission of counsel for the Respondent that the approach of the Appellant, if permitted, would result in unfairness against market participants who acted according to the requirements of the scheme. This is because such a participant may have projected that they would not incur a reduction of turnover of 30%, and therefore not have claimed subsidy payments. However, if it transpired that the participant did in fact suffer a 30%+ reduction, they would have no right to retrospectively claim subsidies, thereby placing themselves at a disadvantage to those employers, such as the Appellant, who sought to claim on a retrospective basis. The Commissioner is satisfied that there is nothing in section 28B of the EMPI Act 2020 to justify such an

approach, or to suggest that the Oireachtas intended to allow some participants to make retrospective claims, which could unfairly prejudice those who did not.

60. In conclusion, for the reasons set out herein, the Commissioner is satisfied that (a) the Appellant applied the wrong test when seeking to justify its EWSS claims, (b) it failed to contradict the Respondent's contention that, using the correct test, it was not entitled to EWSS payments, and (c) it was not entitled to use figures calculated on a retrospective basis to claim for EWSS payments. Consequently, he is satisfied that the appeal cannot succeed.

### **Determination**

61. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments against the Appellant in the total amount of €2,244,179.50 for July 2020 to August 2021 inclusive. Therefore, those assessments stand.

62. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 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**

63. 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**

64. Any party dissatisfied with the determination has a right of appeal 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.



Simon Noone  
Appeal Commissioner  
07 December 2023

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