



Between

[REDACTED]

**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter “the Commission”) as an appeal against a determination of the Revenue Commissioners (“the Respondent”) made pursuant to section 485 (24) (a) of the Taxes Consolidation Act 1997 (“TCA 1997”) on 1<sup>st</sup> September 2021. Within the Respondent’s determination it held that the Appellant was not a “*qualifying person*” under the Covid Relief Support Scheme (“the CRSS”) for the period 13<sup>th</sup> October 2020 to 28<sup>th</sup> July 2021 (“the claim period”).
2. During the claim period the Appellant received payments under the CRSS in the amount of €86,623.
3. Since 2022, the Commission have adjudicated upon and issued Determinations in respect of a number of CRSS appeals. Those Determinations may be found on the Commission’s website<sup>1</sup>.
4. Subject to certain conditions being fulfilled, section 949AN TCA 1997 - “*Appeals raising common or related issues*” - permits the Commission to determine an appeal having regard to a previous Determination issued by the Commission (“the similar appeal”) where the matter under appeal and the similar appeal share “*common or related issues*”.
5. Where those provisions apply, the Commission is required to send a copy of the similar appeal Determination (redacted for privacy) to the Appellant and the Respondent (“the parties”). In addition, the Commission are required to request arguments from the parties, if any, to be received within 21 days after the date of the request, in relation to why the parties, or either of them, would deem it unsatisfactory to have regard to the similar appeal Determination in adjudicating upon the matter under consideration in the parties’ appeal.
6. In accordance with section 949AN TCA 1997, the Commission wrote to the parties and enclosed a copy of a suitable similar Determination of the Commission, 73TACD2022<sup>2</sup>. As neither party submitted any arguments to the Commission objecting to the Appellant’s appeal being determined in the manner proposed, this appeal is determined without a hearing and is therefore based upon the similar appeal Determination and documentation received from both parties, in accordance with the provisions of section 949AN TCA 1997.

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<sup>1</sup> <https://www.taxappeals.ie/en/determinations> - 73TCAD2022, 83TACD2022, 85TACD2022, 87TACD2022, 88TACD2022, 98TACD2022, 148TACD2022, 10TACD2023, 13TACD2023, 17TACD2023, 64TACD2023, 130TACD2023, 131TACD2023, 132TACD2023, 149TACD2023.

<sup>2</sup> <https://www.taxappeals.ie/en/determinations/73tacd2022-crss->

## Background

7. The Appellant is a limited liability company having its registered office at [REDACTED] and operates its business under the name "[REDACTED]". The Appellant carries on the trade of a newsagent and the online sale of craft beer.
8. On 6<sup>th</sup> November 2020, the Appellant contacted the Respondent stating that it was carrying on the two trading activities it conducts from the same premises. The Appellant queried whether the newsagent component of its business would qualify for CRSS eligibility.
9. On 10<sup>th</sup> November 2020, the Respondent replied explaining that:

*"An application for the CRSS scheme must list all premises (businesses) that contribute to the annual turnover of the Company. However once the Company makes a claim for payment under the scheme from mid-November, you will be required to state which businesses are qualifying or not. The sale of craft beers would qualify under the scheme if your customers were restricted from entering the premises. However if you are a supplier to other businesses only, that business would not qualify."*
10. Following that correspondence the Appellant registered for the CRSS and received payments totalling €86,622.95 under the scheme.
11. On 28<sup>th</sup> July 2021, the Appellant's agent was advised by the Respondent that the Appellant's business was the subject of a review and certain information was sought, in particular:
  - "...1. The exact nature of the business.*
  - 2. Is your business carried on from a business premises?*
  - 3. Does your business have a customer facing premises i.e. Do customers normally attend the premises?*

*Eligibility criteria for this scheme states that your client must have a business premises from which the trade is conducted and access to this premises must be restricted under Government guidelines. The scheme is not available to any business whose trade is only supplied to another business."*
12. The Appellant's agent replied to that correspondence on 4<sup>th</sup> August 2021 as follows:

*“1) ...the Business is an independent retail newsagent and part off-licence that operates on the ground floor of the 600sq/ft. premises. The business operates as a tobacconist, retailing tobacco products in various forms and related accoutrements. The business is a registered lottery agent, ATM and leap card agent and sells stationary along with confectionery and minerals. Due to the COVID-19 restrictions and the confined nature of the unit, it was a challenge for the business to manage the social distancing within the unit as only 2 or 3 customers were allowed in at any given time as a result of the small size of the shop and narrow shape which significantly restricted the customers' access to the business premises. Consequently, the business suffered a loss of turnover of 75% in the claim period.*

*2) Yes, the business is carried on in a business premises.*

*3) Yes, the business has a customer facing premises and customers attend the premises.”*

13. By letter dated 19<sup>th</sup> August 2021, the Appellant’s agent was advised by the Respondent that following an examination of the Appellant’s eligibility for CRSS, it had been concluded that it did not satisfy the eligibility criteria for the scheme. That letter stated:

*“a) The trade must be carried on from a business premises that is located in a region subject to restrictions introduced in line with the Government’s ‘Living with Covid-19 Plan’, with the result that the business is required to prohibit or significantly restrict customers from accessing its premises to purchase goods or services;*

*b) It is not sufficient that the trade of a business has been impacted because of a reduction in customer demand as a consequence of Covid-19, or because customers to whom the business supplies goods or services are currently not purchasing these goods/services due to Covid-19 restrictions. To be eligible for the CRSS, a supplier business must meet the eligibility criteria in its own right; the business must be required by the specific terms of Covid restrictions to prohibit or significantly restrict customers from accessing its own business premises, with the result that the business is either required to temporarily close or to operate at a significantly reduced level.” [Emphasis added].*

14. On 27<sup>th</sup> August 2021, the Appellant’s agent wrote to the Respondent and stated that it wished to be afforded time to consult with the Appellant to prepare arguments why the Appellant disagreed with the Respondent’s findings. On 31<sup>st</sup> October 2021, the Appellant’s agent wrote to the Respondent and detailed the following:

- *“The business meets the fundamental statutory requirements to qualify under the scheme.*
- *The business carries on trading activities, the profits from which are chargeable to tax under Case I of Schedule D.*
- *The business was inhibited to a degree that trade was below the requisite turnover threshold as set out in the Guidelines on the operation of the COVID Restrictions Support Scheme to be eligible for the CRSS.*
- *The turnover levels during the restrictions period were reduced by 75% as compared to that of 2019 weekly averages.*
- *The restrictions imposed by the Government and direct correlation to the collapse in turnover demonstrates that the business was directly affected in such a way that considerably restrict customers from accessing its business premises.*
- *The severe consequences of the level 5 restrictions and particularly the 5k travel restrictions had a devastating effect to the [REDACTED] as a whole and had caused the [REDACTED] to practically shut down.*
- *Due to the location of the business, which is adjacent to [REDACTED]  
[REDACTED]  
[REDACTED] hence its heavy reliance on hospitality, tourism, and high footfall in general, the business was adversely affected to a higher degree compared to similar businesses in residential areas.*
- *In addition to the reduction in public transport capacity to 25%, the mandatory “work from home unless essential for work, which is an essential health, social care or other essential service and cannot be done from home” directive had significantly reduced footfall to the area which also further plummet [sic] the business turnover.”*

15. On 1<sup>st</sup> September 2021, the Respondent issued its determination to the Appellant stating that it deemed the Appellant was ineligible for payments under the CRSS and as such was required to repay the sums received by it, which were detailed as €17,380 for 2020 and the sum of €69,243 for 2021.

16. The Appellant who was not in agreement with the Respondent’s determination, issued its appeal to the Commission on 29<sup>th</sup> September 2021.

## Documentation presented to the Commission

17. Included within the documentation presented to the Commission was the following:

17.1. A report from a firm of Chartered Surveyors and Architects. This report was entitled "*Report on Ground Floor Retail Shop*", was dated 27<sup>th</sup> April 2022 and referred to the Appellant as the client. Page 2 of that report detailed the author's instructions as follows:

*"We were instructed by [the Appellant] to carry out an inspection and to advise on the suitability of the premises for use in the context of the level 5 Covid restrictions which were introduced in line with the governments "living with Covid-19 plan".*

17.2. Included within the report was several headings entitled "*Inspection*", "*Requirements*", "*Findings*", "*Floor Plan*" and a number of photographs of the property.

17.3. The Report concluded as follows:

*"The premises are a relatively small premises, and the layout is such that the overall width is restrictive and thus it would not be possible to have more than 2 or 3 customers within the building at any one time in order to comply with the social distancing restriction of 2 metres. Even at this, one customer could not bypass another customer and would have limited access to the goods, and thus the whole accessibility and suitability of the shop for use was severely restricted in order to comply with the social distancing requirements. Accordingly, and in practical terms the only real workable policy would be to permit one customer in the shop at any given time."*

17.4. The referenced photographs illustrated the following:

- 17.4.1. General view of the exterior/main front elevation of the shop.
- 17.4.2. Close up of the main front entrance to the shop.
- 17.4.3. General view in the front part of the shop.
- 17.4.4. Further view of the above showing a customer at the counter.
- 17.4.5. Further general view, viewing towards the main entrance door.
- 17.4.6. General view in the vicinity of the coffee dock.

- 17.4.7. Further general view towards the coffee dock and entrance door.
  - 17.4.8. General view towards the rear of the shop.
  - 17.4.9. Close up view of the rear of the shop.
  - 17.4.10. Further view of the above with a customer in place.
  - 17.4.11. General view towards the right hand corner.
  - 17.4.12. General view towards left hand corner of the shop.
  - 17.4.13. General view taken from the rear of the shop towards the front.
  - 17.4.14. Further view towards the front including the access control gates in line with the end of the counter.
- 17.5. The photographs all contained a narrative beside them which sought to explain the constraints on customer flow which was evident from the shop layout and size.
- 17.6. A floor plan which displayed the layout of the shop. This floorplan specifically referenced a number of fridges within the shop, the cigarette machine and the checkout/counter areas.

## **Submissions**

### *Appellant*

18. The Appellant submitted that it was an independent retailer which operates predominately as a tobacconist retailing tobacco products and related accoutrements. The Appellant stated in addition to the sale of tobacco products, it is a registered lottery agent, leap card agent and has an ATM situated in its store. The Appellant further stated that minerals and confectionary are also available for sale on its premises.
19. The Appellant submitted that it met all of the conditions for CRSS eligibility and in particular that its turnover was reduced by more than 75% of the 2019 comparative average. The Appellant submitted that *“the restrictions imposed by the Government and its direct correlation to the collapse in turnover demonstrates that the business was directly affected in such a way that it met the legislative requirement under section 485 TCA 1997 as a direct consequence of the restrictions applied in accordance with the Government’s “Living with Covid-19 Plan”.*

20. The Appellant further submitted *“the severe consequences of the level 5 restrictions and particularly the 5k travel restrictions had a devastating effect to the [REDACTED] as a whole and had caused the [REDACTED] to practically shut down and was basically desolate from midnight 30th December 2020 to in or around May 2021. Due to the location of the business, which is [REDACTED] [REDACTED] hence its heavy reliance on hospitality, tourism, and high footfall in general, the business was adversely affected to a higher degree compared to similar businesses in residential areas. In addition to the reduction in public transport capacity to 25%, the mandatory “work from home unless essential” directive also significantly reduced footfall to the area which led to a further significant reduction in business turnover”*.
21. The Appellant submitted that in order to comply with the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 and the later “Return to Work Safety Protocol” as mentioned in the Government’s publication “Resilience and Recovery 2020-2021 Plan for Living with Covid-19”, the number of customers entering the business premises had to be restricted to only 2 or 3 customers at any given time. As a consequence, the Appellant stated that its turnover had dramatically reduced to the extent that it was less than 25% of its 2019 turnover.
22. The Appellant further submitted that the report furnished by its expert, which detailed the layout of the shop, made it clear owing to the size and layout of its business premises, that its trade would have been severely impacted by implementing the legally required social distancing measures within its store.
23. The Appellant stated that when the CRSS was first announced, it contacted the Respondent with a query regarding its eligibility for inclusion on the CRSS, whilst stating that it operated the trade of a newsagents. The Appellant submitted that despite being accepted on the CRSS and receiving payments under the scheme, it was not until some nine months later that that the Respondent queried the Appellant’s entitlement to receive CRSS payments before demanding the sums received under the scheme be repaid. The Appellant submitted as it was the Respondent who erred in making payments to it, then it should be entitled to keep the monies it had received under the scheme.
24. In conclusion, the Appellant opened paragraph 4.2.1 of the Respondent’s CRSS Guidelines which states *“the CRSS scheme is targeted at those businesses which, under the specific terms of public health Regulations, are required to prohibit or significantly restrict customers from accessing their business premises such that the business is*



*required to temporarily suspend its activities, or its business is significantly disrupted.”*

The Appellant submitted in line with those guidelines it was required to restrict the number of customers entering its premises, in compliance with required social distancing measures, and this had the effect of significantly disrupting its business to the extent that its turnover was significantly reduced. In those circumstances, the Appellant submitted that its appeal should be allowed.

*Respondent*

25. The Respondent submitted the burden of proof was on the Appellant to demonstrate, on the balance of probabilities, the Respondent’s determination was incorrect and that the Appellant was, in fact, entitled to the CRSS payments the subject matter of this appeal.

26. In support of this position, the Respondent opened the case of *Menolly Homes Ltd v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, (“*Menolly Homes*”) where Charleton J held:

*“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.”*

27. The Respondent stated that section 485 TCA 1997 was inserted by section 11 of the Finance Act 2020 and came into effect on 13 October 2020. The Respondent further stated that the objective of the CRSS, is outlined in section 484 TCA, which it states “*is to provide a necessary stimulus to the economy to mitigate the financial consequences of the Covid-19 pandemic.*”

28. The Respondent submitted for the Appellant to be entitled to payments under the CRSS, it was required to fulfil a number of conditions.

29. Turning to those conditions, the Respondent opened section 485 (1) TCA 1997 which defines a “*business activity*” as “*in relation to a person carrying on a trade either solely or in partnership*” meaning:

*“(a) where customers of the trade acquire goods or services from that person from one business premises, the activities of the trade, or*

*(b) where customers of the trade acquire goods or services from that person from more than one business premises, the activities of the trade relevant to each business premises,*

*and where customers of the trade acquire goods or services from that person other than through attending at a business premises, that portion of the trade which relates to transactions effected in that manner shall be deemed to relate to the business premises or, where there is more than one business premises, shall be apportioned between such business premises on a just and reasonable basis,”*

30. The Respondent further opened section 485 (1) TCA 1997 which defines a “business premises” as:

*“...in relation to a business activity, [...] a building or other similar fixed physical structure from which a business activity is ordinarily carried on”.*

31. The Respondent noted that section 485 (1) TCA 1997 provides that the “*applicable business restrictions*” provision shall be construed in the manner provided for in the definition of “*Covid restrictions period*” in this subsection” and that “*Covid restrictions*” pertain to:

*“...restrictions provided for in regulations made under sections 5 and 31A of the Health Act 1947, being restrictions for the purpose of preventing, or reducing the risk of, the transmission of Covid-19 and which have the effect of restricting the conduct of certain business activity during the specified period* [Emphasis added].

32. The Respondent further noted that “*Covid restrictions period*” is further defined within that section as:

*“...in relation to a relevant business activity carried on by a person means a period for which the person is required by provisions of Covid restrictions to prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity is carried (referred to in this section as ‘*applicable business restrictions provisions*’) and is a period in which commenced on the Covid restrictions period commencement date and ends on the Covid restrictions period end date” [Emphasis added].*

33. And that “*claim period*” is defined as “*a Covid restrictions period, or a Covid restrictions extension period, as the context requires*”.

34. The Respondent stated that section 485 (4) (a) TCA 1997 defines a “*relevant business activity*” as a “*business activity which is carried on by that person in a business premises located wholly in a geographical region*” and that section 485 (4) (b) states that the section applies to a person (thereafter referred to as a “qualified person”) who carries on a business activity and who:

*“...In accordance with guidelines published by the Revenue Commissioners under subsection (22), demonstrates to the satisfaction of the Revenue Commissioners that, in the claim period, because of applicable business restrictions provisions that prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity of the person is carried on –*

- (I) the relevant business activity of the person is temporarily suspended, or*
- (II) the relevant business activity of the person is disrupted, such that the turnover of the person in respect of the relevant business activity in the claim period will be an amount that is 25 per cent (or less) of the relevant turnover amount, and it satisfies the conditions specified in subsection (5)...”*

35. The Respondent further noted that it was required to publish guidelines under section 485 (22) TCA 1997 as follows:

*“The Revenue Commissioners shall prepare and publish guidelines with respect to matters that are considered by them to be matters to which regard shall be had in determining whether:*

- a) there are provisions of Covid restrictions that prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity of a person is carried on in a Covid restrictions period, or Covid restrictions extension period, as the case may be, and*
- b) as a result of the provisions referred to in paragraph (a), the turnover of the person in respect of the relevant business activity in the Covid restrictions period, or Covid restrictions extension period, as the case may be, will not exceed an amount that is 25 per cent (or less) of the relevant turnover amount.”*

36. The Respondent stated that it had published those guidelines entitled “*Guidelines on the operation of the Covid Restrictions Support Scheme*” on 27 October 2020, which it subsequently amended (‘the Guidelines’).

37. The Respondent opened paragraph 4.2.1 of the Guidelines which state:

*“[...] See Appendix III for details of the public health Regulations.*

*The CRSS scheme is targeted at those businesses which, under the specific terms of public health Regulations, are required to prohibit or significantly restrict customers*

from accessing their business premises such that the business is required to temporarily suspend its activities, or its business is significantly disrupted. Under Levels 3, 4 and 5 of the Living with Covid-19 Plan, domestic travel restrictions are imposed on society generally which mandate that people only travel outside their county for purposes of work, education, medical and other essential purposes. These are not the level of restrictions that give rise to eligibility for CRSS, neither are the general public health guidelines around social distancing and related protective measures which apply to society as a whole and are important and necessary measures for lowering the risk of transmission of Covid-19. To be eligible for CRSS, more targeted restrictions must apply in respect of a relevant business activity. [Emphasis added].

In relation to what constitutes a restriction for the purposes of CRSS, a “Covid restrictions period” is defined in the legislation as follows:

*“the period for which the person is required by provisions of Covid restrictions to prohibit, or significantly restrict, members of the public from having access to the business premises in which the relevant business activity is carried on (referred to in this section as ‘applicable business restrictions provisions’) and is a period which commences on the Covid restrictions period commencement date and ends on the Covid restrictions period end date”.*

As can be seen from the above, ‘applicable business restrictions provisions’ are provisions of Covid restrictions (Regulations made under the Health Act 1947) which require a person to prohibit or significantly restrict members of the public from having access to the business premises in which a relevant business activity is carried on.”

38. The Responded noted that paragraph 4.2.4 of those guidelines states:

“It is not sufficient that the trade of a business has been impacted because of a reduction in customer demand as a consequence of Covid-19, or that the business supplies goods or services to another business that qualifies for the support because, under the Covid restrictions, that other business is required to temporarily close, or significantly reduce, its business activity.” [Emphasis added].

39. The Respondent stated that Sections 5 and 31A (inserted by section 10 of the Health (Preservation and Protections and other Emergency Measures in the Public Interest) Act 2020 (No. 1 of 2020)) of the Health Act 1947 empower the Minister for Health to make regulations for preventing, limiting, minimising or slowing the spread of Covid-19. Those regulations categorised ‘essential retail outlets’ as including (but not only):

*“• Outlets selling food or beverages on a takeaway basis, or newspapers, whether on a retail or wholesale basis and whether in a non-specialised or specialised outlet*

*• Markets that, wholly or principally, offer food for sale.*

...

*• Outlets selling food or beverages whether on a retail or wholesale basis and whether in a non-specialised or specialised outlet insofar as they sell food or beverages on a takeaway basis or for consumption off the premises.”*

40. In consideration of the foregoing, the Respondent submitted that as the Appellant was considered at all material times an “essential service” providing “essential goods”, then the Appellant was not required to significantly restrict customers from entering its premises pursuant to a, or any relevant, Regulation made pursuant to the Health Act 1947.
41. The Respondent submitted while the Appellant stated that the impact of the government advice and restrictions in place had a devastating impact on its turnover thereby creating significant financial hardship, that this did not satisfy the requirements of section 485 TCA 1997, as the Appellant was considered to be providing both an essential service and essential goods and hence was permitted to remain open during Covid restrictions.
42. As such, the Respondent submitted that as the Appellant was not required to prohibit or significantly restrict members of the public from accessing its business premises within which its business activities took place, then it did not fulfil the eligibility requirements of the CRSS and hence its appeal could not succeed.

### **Material Facts**

43. The Commissioner found the following material facts from the documentary evidence, which were not contested by the Respondent, and are required eligibility conditions for inclusion on the CRSS:
- 43.1. The Appellant’s business activities commenced before 26<sup>h</sup> December 2019.
- 43.2. The Appellant’s turnover was less than 25% of the average weekly turnover level of that in 2019.
- 43.3. The Appellant’s business profits are chargeable to taxation under Schedule D, Case 1.

- 43.4. The Appellant intended to (and subsequently did) carry on business activities after the “Covid-19 restrictions” were lifted.
- 43.5. The Appellant had complied with all their VAT registration and return obligations.
- 43.6. The Appellant held a tax clearance certificate at all material times.
- 43.7. The Appellant conducted its activities from a “*business premises*”.
44. In addition, the Commissioner found the following material facts from the parties submissions:
- 44.1. Within its correspondence to the Respondent, the Appellant described its business activities as that of a newsagent and the online sales of craft beer.
- 44.2. In its submissions, the Appellant amended its primary business activities to those of an “*independent retailer which operates predominately as a tobacconist retailing tobacco products and related accoutrements*”. In addition to the sale of tobacco products, the Appellant stated it sold minerals and confectionary, was a registered lottery and leap card agent and that it had an ATM located in its premises.
- 44.3. No evidence was presented to the Commission which established that any of the Appellant’s activities related to the online sale of craft beers.
- 44.4. From the photographs of the Appellant’s retail premises provided to the Commission, it is evident that the Appellant operates as a newsagent with an off-licence section at the back of its shop. In addition to those services, the photographs illustrate that the Appellant also sells tobacco products, lottery tickets, leap cards, non-alcoholic beverages and confectionary.
- 44.5. The Appellant received the sum of €86,623 under the CRSS from the Respondent for the period 13<sup>th</sup> October 2020 to 28<sup>th</sup> July 2021.
- 44.6. A determination notice issued to the Appellant from the Respondent on 1<sup>st</sup> September 2021 denying eligibility under the CRSS and demanding the return of sums previously paid.

### **Analysis**

45. In the similar appeal, the Appellant operated the business of a small convenience store selling products including groceries, confectionary and cigarettes. The central issue to be determined within that appeal was whether the Appellant was required as a result of

applicable business restriction provisions to prohibit, or significantly restrict, members of the public from having access to its business premises which the Commissioner noted is a prerequisite for CRSS eligibility under section 485 TCA 1997.

46. In coming to his findings in that appeal, the Commissioner examined the “complicated” sections of section 485 TCA 1997 utilising the principles of statutory interpretation promulgated in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* ([2020] IEHC 552).
47. In so doing, the Commissioner noted that certain businesses were permitted to remain open during the period of Covid restrictions and hence were not required to have any restrictions in place for its customers. Those businesses were classified as either “essential services” or “essential products” under Statutory Instrument 701 of 2020, “Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 10) Regulations 2020 (“the Regulations”).
48. Included within Part 1A of the Regulations was the definition of an “essential retail outlet” which included:
  - “1. *Outlets selling food or beverages on a takeaway basis, or newspapers, whether on a retail or wholesale basis and whether in a non-specialised or specialised outlet.*
  2. *Markets that, wholly or principally, offer food for sale.*
  3. *Outlets selling products necessary for the essential upkeep and functioning of places of residence and businesses, whether on a retail or wholesale basis.....”*
49. Part 2 of the Regulations further defined an “essential service” as including:

“...  
*Wholesale and retail trade.*

  6. *The following services relating to wholesale and retail trade:*
    - (a) *the operation of essential retail outlets...*”
50. As the Appellant in the similar appeal provided goods and services of a type specified in Part 1A and 2 of the Regulation Schedules, it was considered both an essential retail outlet and an essential service under those Regulations and hence was not required to prohibit, or significantly restrict, members of the public from having access to its business premises. As that was an essential requirement to be eligible for payments under the

CRSS and as that condition was not fulfilled the Commissioner found that the Appellant in the similar appeal was not entitled to have received payments under the CRSS and as it had done so, it was required to repay the amounts received in accordance with the provisions of section 485 (17) TCA 1997.

51. Furthermore, in noting the Appellant Director's comments regarding allegations of the lack of engagement by the Respondent, the Commissioner commented as follows:

*"The jurisdiction of the Commission is generally confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by a Commissioner or based on undisputed facts as the case may be as established by a number of Irish cases, including; The State (Whelan) v Smidic [1938] 1 I.R. 12 626, Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49, The State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577 and notably the most recent case between Kenny Lee and the Revenue Commissioners [2021] IECA 18. Hence, the Commissioner is constrained from adjudicating on these matters. However, the Commissioner notes that there is a positive obligation on all public bodies to inform its customers of its complaint procedures. The Appellant Director should note that the Respondent has a complaint and review procedure, details of which are provided on the Respondent's website under the Complaint and Review Procedures Leaflet CS4. The Commissioner assumes the Respondent will contact the Appellant Director to inform him about the complaints procedure and hence the appropriate forum for complaints in relation to service and handling of a case is as set out in the Respondent's leaflet."*

52. Turning to the Appellant's appeal, the Commissioner notes that its business activities are identical to those of the similar appeal save that the Appellant does not sell groceries but in place sells beers and spirits from the off-licence section of its premises. However, as outlets selling food or beverages on a take-way basis are considered an essential retail outlet, and as the Appellant conducted those services, it follows the findings reached in the similar appeal apply equally to the Appellant's appeal.
53. Therefore, the Commissioner finds that the Appellant was not eligible to receive payments under the CRSS as it has failed to discharge the burden of proof mandated under *Menolly Homes* to show that it was entitled to avail of the provisions of section 485 TCA 1997.
54. In a like manner to the similar appeal, the Appellant is required to repay the Respondent, the amount of CRSS payments it received, €86,623 without unreasonable delay in accordance with the provisions of section 485 (17) TCA 1997. Failing which, the



Respondent is authorised in accordance with section 485 (15) (a) TCA 1997 to raise an assessment against the Appellant under Schedule D, Case IV for an amount of €346,942, which represents four times the amount of ACTE received by the Appellant in error.

55. The Commissioner notes the Appellant's comments that it received payments under the CRSS despite informing the Respondent at the outset of its business activities. While the Appellant stated it conducted the business activity of online craft beer sales and having failed to produce any evidence of same, whilst later altering the nature of its business activities within its submissions, the Commissioner draws the Appellant's attention to paragraph 51 above, the contents of which are endorsed by the Commissioner.
56. Furthermore, the Commissioner notes that registration for the CRSS was done on a self-assessment basis which required the Appellant to confirm based upon the applicable legislation and applicable guidelines that it was eligible for registration under the CRSS. The Commissioner further notes at the time it completed its registration, the Covid pandemic was at its height, which had an obvious effect on the Respondent's operations and its ability to effectively review the volume of CRSS registrations received.
57. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes*, "*the burden of proof is...on the taxpayer.*" The Commissioner finds that the Appellant has not discharged the burden of proof in this appeal and finds that the Appellant has not shown that it was entitled to avail of the provisions of section 485 TCA 1997.

### **Determination**

58. For the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in demonstrating its eligibility for inclusion in the CRSS. Accordingly, the Appellant is required to repay to the Respondent the sum of €86,623 representing the ACTE sums received by it in error without "unreasonable delay". Failing this, the Respondent is authorised to raise an assessment to tax under Schedule D, Case IV, against the Appellant in the sum of €346,942 which represents four times the amount of ACTE received by the Appellant in error.
59. It is understandable that the Appellant and its director may well be disappointed with the outcome of his appeal but the Commissioner has no discretion to deviate from the legislation. The Appellant was correct to avail of its right of appeal and to check its legal entitlements. The Commissioner hopes the Appellant's business has recovered since the easing of Covid restrictions.

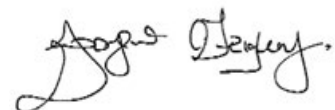
60. This Appeal is determined in accordance with Part 40A TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

### **Notification**

61. 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**

62. 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.



**Andrew Feighery**

**Appeal Commissioner**

**14<sup>th</sup> December 2023**