



113TACD2020

APPELLANT

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal concerns the valuation of a vehicle for the purposes of ascertaining the open market selling price ('OMSP') in respect of the calculation of Vehicle Registration Tax ('VRT').
2. On agreement of the parties this appeal is determined in accordance with section 949U of the Taxes Consolidation Act 1997, as amended ('TCA 1997').

Background

3. The vehicle, the subject matter of this appeal, is a Volkswagen Scirocco 2.0, registration REDACTED. The Appellant registered the vehicle with the National Car Testing Service (NCTS) on 31 August 2017 and mileage at the time of registration was 169,968 miles.
4. An OMSP of €9,334 was originally assigned resulting in a VRT charge of €2,146. The Appellant appealed to the Revenue Commissioners under section 145 of the Finance Act, 2001 (as amended). On appeal the OMSP was revised downwards to €7,750. This revised OMSP gave rise to a refund to the Appellant of €364. This was notified to the Appellant by letter dated 10 November 2017. The Appellant was aggrieved by the determination of the Revenue Commissioners and appealed to the Appeal Commissioners against the revised



determination. A notice of appeal was received by the Tax Appeals Commission on 6 December 2017.

Legislation

Section 145 of the Finance Act 2001;

(3) Any person who is the subject of a decision of the Commissioners in relation to any of the following matters [and who is aggrieved by the decision] may appeal to the Commissioners against that decision:

(a) the registration of a vehicle, or the amendment of an entry in the register referred to in section 131 of the Finance Act 1992;

(b) the determination of the open market selling price of a vehicle under [section 133] of the Finance Act 1992;

(c) the granting, refusal or revocation by the Commissioners of an authorisation under section 136 of the Finance Act 1992, or the arrangements for payment of vehicle registration tax under [that section];

(d) the liability to vehicle registration tax or the repayment of vehicle registration tax.]

(4) An appeal under this section shall be made in writing and shall set out in detail the grounds of the appeal.

(5) An appeal under this section shall be lodged by the person concerned with the Commissioners within 2 months from the date of the notification by the Commissioners of the decision concerned, or within such longer period as they may, in exceptional cases, allow.]

(6) An appeal shall, subject to subsection (12), be determined by the Commissioners within a period of 30 days from its lodgement with the Commissioners.

(7) The Commissioners may appoint one or more of their officers for the purposes of carrying out their functions under this section but no such officer shall determine an appeal under this section in respect of a decision he or she has made.

(8) The Commissioners shall notify in writing an appellant concerned of their determination of an appeal and the reasons for their determination.





(9) Where the Commissioners determine on appeal that the amount due is less than the amount paid, they shall repay the amount overpaid to the appellant concerned.

(10) Where the Commissioners determine on appeal that the amount due is greater than the amount paid, the appellant concerned shall pay the amount underpaid.

(11) For the purpose of determination of an appeal any goods or vehicles to which the appeal relates are to be produced to the Commissioners for inspection, if so required.

(12) Where an appeal has been lodged but not determined in accordance with subsection (6) there shall be deemed to have been a determination by the Commissioners on the last day of the period of 30 days from the date the appeal was lodged that the appeal was not upheld but such deeming shall cease to have effect if a determination is subsequently made by the Commissioners before a determination is made by the Appeal Commissioners under section 146 in respect of the matter concerned.

(12A) Where a person is required to furnish a return or to pay an amount of vehicle registration tax for the purpose of any requirement of excise law, no appeal lies under this section until such time as the person furnishes the return and, as the case may be, pays or has paid the amount of vehicle registration tax.]

Section 146 of the Finance Act 2001:

(1) Except where section 145(3) applies, any person who—

(a) has paid an amount of excise duty,

(b) has received a notice of assessment under section 99A, or is otherwise called upon by the Commissioners to pay an amount of excise duty that, in their opinion, that person is liable to pay, or

(c) has received a repayment of excise duty or has made a claim for such repayment that has been refused,

[and is aggrieved by any of the matters referred to in paragraphs (a) to (c), may, subject to subsection (3), in respect of the liability to excise duty concerned or the amount of that liability, or the amount of the repayment or the refusal to repay, appeal to the Appeal Commissioners in accordance with section 949I of the Taxes Consolidation Act 1997 within the period specified in subsection (2)





(1A) Any person aggrieved by any of the following matters may appeal the matter to the Appeal Commissioners [in accordance with section 949I of the Taxes Consolidation Act 1997 within the period specified in subsection (2)]:

- (a) a determination of the Commissioners under section 145;
- (b) a refusal to authorise a person as an authorised warehousekeeper, or to approve a premises as a tax warehouse, under section 109, or a revocation under that section of any such authorisation or approval;
- [(c) a refusal to authorise a person as a registered consignee under section 109IA or a revocation under that section of any such authorisation;]
- (d) a refusal to authorise a person as a registered consignor under section 109A or a revocation under that section of any such authorisation;
- (e) a refusal to approve a person as a tax representative under section 109U(2) or a revocation under that section of any such approval;
- (f) a refusal to grant a licence under section 101 of the Finance Act 1999 or a revocation under that section of any such licence that has been granted.

(2) The period specified for the purpose of making an appeal under this section is the period of 30 days after the date of—

- (a) the payment of excise duty in the case of an appeal under subsection (1)(a),
- (b) the notice of assessment or other notice calling for payment of the amount concerned in the case of an appeal under subsection (1)(b),
- (c) the repayment or the notice of the refusal to repay in the case of an appeal under subsection (1)(c), or
- (d) the notice of the determination, refusal or revocation concerned in the case of an appeal under subsection (1A).

Section 133 Finance Act, 1992, as amended:

(1) Where the rate of vehicle registration tax charged in relation to a category A vehicle or a category B vehicle is calculated by reference to the value of the vehicle, that value shall be





taken to be the open market selling price of the vehicle at the time of the charging of the tax thereon.

(2) (a) For a new vehicle on sale in the State which is supplied by a manufacturer or sole wholesale distributor, such manufacturer or distributor shall declare to the Commissioners in the prescribed manner the price, inclusive of all taxes and duties, which, in his opinion, a vehicle of that model and specification, including any enhancements or accessories fitted or attached thereto or supplied therewith by such manufacturer or distributor, might reasonably be expected to fetch on a first arm's length sale thereof in the open market in the State by retail.

(b) A price standing declared for the time being to the Commissioners in accordance with this subsection in relation to a new vehicle shall be deemed to be the open market selling price of each new vehicle of that model and specification.

(c) Notwithstanding the provisions of paragraph (b), where a price stands declared for a vehicle in accordance with this subsection which, in the opinion of the Commissioners, is higher or lower than the open market selling price at which a vehicle of that model and specification or a vehicle of a similar type and character is being offered for sale in the State while such price stands declared, the open market selling price may be determined from time to time by the Commissioners for the purposes of this section.

(d) Where a manufacturer or sole wholesale distributor fails to make a declaration under paragraph (a) or to make it in the prescribed manner, the open market selling price of the vehicle concerned may be determined [from time to time]⁴⁷ by the Commissioners for the purposes of this section.

(3) In this section -

'new vehicle' means a vehicle that has not previously been registered or recorded on a permanent basis—

(a) in the State under this Chapter or, before 1 January 1993, under any enactment repealed or revoked by section 144A or under any other provision to like effect as this Chapter or any such enactment, or

(b) under a corresponding system for maintaining a record for vehicles and their ownership in another state,





and where the vehicle has been acquired under general conditions of taxation in force in the domestic market;]

"open market selling price" means -

(a) in the case of a new vehicle referred to in subsection (2), the price as determined by that subsection,

(b) in the case of any other new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, would be determined under subsection (2) in relation to that vehicle if it were on sale in the State following supply by a manufacturer or sole wholesale distributor in the State,

(c) in the case of a vehicle other than a new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail and, in arriving at such price -

(i) there shall be included in the price, having regard to the model and specification of the vehicle concerned, the value of any enhancements or accessories which at the time of registration are not fitted or attached to the vehicle or sold therewith but which would normally be expected to be fitted or attached thereto or sold therewith unless it is shown to the satisfaction of the Commissioners that, at that time, such enhancements or accessories have not been removed from the vehicle or not sold therewith for the purposes of reducing its open market selling price, and

(ii) the value of those enhancements or accessories which would not be taken into account in determining the open market selling price of the vehicle under the provisions of subsection (2) if the vehicle were a new vehicle to which that subsection applied shall be excluded from the price.

Submissions

5. The Appellant submitted that the high level of mileage on the car was not included in the OMSP shown on the VRT calculator. The Appellant contended that the significant level of mileage would be regarded as very high in an equivalent Irish vehicle and thus have a disproportionate impact on the arm's length value of the vehicle in the Irish market. The Appellant did not provide any evidence in support of this claim.





6. The Appellant also submitted that the fact that the car had two previous owners, one of those owners being a business whereby the vehicle was used as a company car, should be reflected in the OMSP in order to provide a reasonable approximation of the selling price.

7. In her submission the Appellant also submitted that the OMSP is defined as "the price inclusive of all taxes". The Appellant states that residual VAT inherent in the second-hand price of a vehicle is included in the OMSP and thus the VRT charged is effectively a tax on a sum which already includes the residual tax which it is seeking to replace. The Appellant contends that the OMSP on which the VRT is calculated should be net of this 'residual tax' and that the calculation needs to be adjusted to take account of this.

8. The Appellant further submitted that the VRT system imposed by the Irish Government directly contravenes Article 110 of the Treaty on the Functioning of the European Union as supported by the cases determined in this area by the Court of Justice of the European Union. In support of that assertion, the Appellant relies on the decision in *Ministério Público and António Gomes Valente v Fazenda Pública C-393/98*

9. The Respondent submitted that the initial valuation of €9,334, provided via the VRT calculator and upon presentation to the NCTS, reflected market research conducted by the Respondent using sources such as motor trade guides, advertisements and direct enquiries with motor trade and other valuation experts.

10. The Respondent submitted that on review, having received a notice of a first stage appeal from the Appellant, this was reduced to €7,750 resulting in a refund of €364. To arrive at this value, the Respondent relied on the advice of a consultant valuation expert who valued the car at €8,250 based on research on comparable vehicles, the prevailing market and the mileage on the car. The Respondent provided a copy of the valuation prepared by the expert.

11. The Respondent further reduced the OMSP to €7,750 in order to reflect the fact that the car was used as a company vehicle by one of the previous owners.

12. In further support of their OMSP valuation, the Respondent included in their submission a copy of an online advertisement for a similar vehicle of the same age which showed a selling price of €10,950 a price far in excess of the OMSP of €7,750 assigned to the Appellants vehicle.





13. The Respondent submitted that VRT is a national tax and does not contravene Article 28 of the EU Treaty.

14. The Respondent submitted that Article 90 of the EU Treaty allows Member States to charge national taxes provided that there is no discrimination against imported goods in favour of indigenous goods. The Respondent quoted from Article 90 as follows: *"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products"*

15. The Respondent submitted that VRT is charged on all vehicles registered in the State, not only vehicles that have been imported.

16. The Respondent submitted that this principle is further underpinned by European Court of Justice (ECJ) Judgements (Case 47/88, Case C383/2001, Case C313/05 and others) where the ECJ ruled that the charging of a tax such as VRT is within Member State competence and is not contrary to Articles 28, 29 (quantitative restrictions on imports and exports) or Article 90 (tax provisions).

Analysis

17. When a car is brought into the State, the car is valued on the year, its mileage, its condition and the CO2 emissions. The rate of VRT is judged solely on CO2 emissions. Every car is subject to VRT on first registration in the State. The OMSP of a vehicle is determined in accordance with section 133 Finance Act 1992, as amended i.e. on the price inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State.

18. The OMSP was reduced by the Respondent to reflect both the mileage on the vehicle and to reflect the fact that the car was used as a company vehicle by one of the previous owners. In total the Appellant was afforded a 17% discount on the original OMSP assigned on registration.

19. The Appellant contended that the OMSP should be reduced by an amount to reflect the "residual VAT". I do not accept this assertion as the legislation states that the OMSP is





the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail.

20. In my view the Respondent has taken prudent and reasonable steps in the calculation of the OMSP, by employing the services of a valuation expert who specifically took account of the mileage of the vehicle and by reducing the valuation even further to reflect the business use of the vehicle, in order to achieve the lowest OMSP reasonably possible.

21. The Appellant argued that the VRT system imposed by the Irish Government directly contravenes Article 110 of the Treaty on the Functioning of the European Union as supported by the cases determined in this area by the Court of Justice of the European Union.

22. In support of that assertion, the Appellant relies on the decision in *Ministério Público and António Gomes Valente v Fazenda Pública C-393/98*. In that case it was concluded;

"The first paragraph of Article 95 of the Treaty (now after amendment, the first paragraph of Article 90 EC) does not permit a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the actual value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, unless those criteria or scales are capable of guaranteeing that the amount of the tax due does not exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory."

23. The Appellant provided no further submissions as to how this judgment could be relied on in determining that the VRT system directly contravenes Article 110 of the Treaty on the Functioning of the European Union.

24. The Respondent in support of its assertion that Article 90 of the EU Treaty allows Member States to charge national taxes provided that there is no discrimination against imported goods in favour of indigenous goods relied on a number of CJEU cases.

25. In Case C-383/01, between De Danske Bilimportører and Skatteministeriet, Told- og Skatkestyrelsen, on the interpretation of Articles 28 EC and 30 EC concluded;





"1. A charge on the registration of new motor vehicles established by a Member State which does not have any domestic production of vehicles, such as that laid down by the lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, constitutes internal taxation whose compatibility with Community law must be examined in the light not of Article 28 EC, but of Article 90 EC."

"2. Article 90 EC must be interpreted as not precluding such a charge."

26. Registration taxes on motor vehicles are not harmonised in EU law. Member States have the right to legislate motor vehicle registration tax as they see fit. However, they cannot do so in a manner contrary to the general principles of EU law, including, in particular, the freedoms of the single market.

27. Case C-552/15, Action for failure to fulfil obligations under Article 258 TFEU, brought on 23 October 2015, **European Commission v Ireland**.

28. This case concerned only the application of VRT to vehicles leased or rented in another Member State. In that case Ireland was held to have failed to fulfil its obligations under Article 56 TFEU, by imposing the obligation to pay in advance the full amount of the vehicle registration tax applicable in the event of permanent registration, whatever the actual limited duration of the proposed use in Ireland of a vehicle imported there, and although the temporary duration of the lease or rental has been determined precisely and is known in advance.

29. Nevertheless, the case provides some useful information in the general sense in relation to VRT and its vires in Ireland or in other Member States.

Para 39

"In the present instance, the action brought by the Commission relates to the Irish system of registration tax applicable to vehicles leased or rented in another Member State, as in force on the date on which the period laid down in the additional reasoned opinion expired."

Para 71

*"It should be recalled that, apart from certain exceptions not relevant to the present case, taxation of motor vehicles has not been harmonised at EU level. **The Member States are thus free to exercise their powers of taxation in that area** provided that they do so in compliance with EU law (judgment of 21 November 2013, X, C-302/12, EU:C:2013:756, paragraph 23 and the case-law cited)." **Emphasis added***

Para 72





"According to the Court's settled case-law, a Member State may levy a registration tax on a vehicle made available to a person residing in that State by a company established in another Member State when that vehicle is intended to be used essentially in the first Member State on a permanent basis or is in fact used in that way (order of 27 June 2006, van de Coevering, C-242/05, EU:C:2006:430, paragraph 24 and the case-law cited)." Emphasis added

Determination

30. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the relevant tax is not payable.
31. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*
32. Based on a consideration of the evidence and submissions together with a review of the documentation I determine €7,750 to be a fair and reasonable OMSP in relation to the vehicle. The appeal hereby is determined in accordance with section 949AL TCA 1997.

CHARLIE PHELAN

APPEAL COMMISSIONER

6 APRIL 2020

