



**Ref: 124TACD2020**

**BETWEEN/**

**REDACTED**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal against assessments to income tax and to VAT issued on 27<sup>th</sup> September 2017 as follows:

a) Income tax year of assessment 2013	€2,897
b) Income tax year of assessment 2014	€8,473
c) VAT 1 November 2012 to 31 October 2013	€1,233
d) VAT 1 November 2013 to 31 October 2014	€3,071
2. By agreement of the parties, this appeal is adjudicated without a hearing in accordance with the provisions of s.949U TCA 1997.

**Background**

3. The Appellant operates a public house in REDACTED. In addition to the business of a publican the Appellant has a small income from concerts at the public house and from the letting of a premises.
4. The principal issue of difference between the parties in this appeal relates to the adequacy of records in relation to sales in the Appellant's business and in particular, the relevance of the failure to retain till records of daily sales.



5. The Appellant was of the view that the amounts declared as sales in his returns submitted were the amounts received as sales in the appeal periods. The Appellant advised that that to suggest otherwise could only infer that sales were suppressed and is adamant that this is not the case and wished to defend his good name.

## **Legislation**

### **6. Section 886 TCA 1997.Obligation to keep certain records**

See the full text in the appendix. I have included the 2 years (FA 2012 and FA2013) in the appendix. There were some minor changes in s. 886 which have no impact on this determination.

### **7. Section 84 VATCA 2010 Duty to keep records**

See the full text in the appendix

### **8. Regulation 27 VATCA 2010.**

See the full text in the appendix

## **Submissions**

9. The Appellant submitted that Revenue conducted an audit of his records and business in early 2016 and concluded using a mark up exercise that his returns were inadequate.
10. The Appellant submitted that the mark up used by Revenue assumed that the entire contents of every keg of beer purchased by him was converted to sales receipts.
11. The Appellant submitted that no account of wastage, free drinks or other factors were considered by Revenue in concluding that the sales returned by the Appellant were understated. In this the Appellant submitted that Revenue took the total contents of a keg containing 88 pints when computing its mark-up on purchases.
12. The Appellant submitted that even though s111 of the VAT Consolidation Act 2010 allows an Inspector of Taxes to raise an assessment if the Inspector *"has reason to believe that an amount of tax is due"*, the assessment must still be reasonable.
13. The Appellant submitted that the Revenue assessment is unreasonable as he provided Revenue with a reconciled analysis of the Inspector's figures of expected sales with the actual sales figures returned. The Appellant contended that Revenue clearly did not take account of wastage and other factors in using 88 pints per keg in



its analysis.

14. The Appellant further submitted that Revenue was unreasonable in its failure to underpin its assessment for example in unexplained accumulation of assets or insufficient drawings to support the Appellant's lifestyle.
15. The Appellant submitted that as the Inspector failed to address the Appellant's explanation the assessments were raised with no good reason and therefore, the inspector cannot be said to have had a reasonable basis for raising the assessment.
16. The Appellant provided all the correspondence between his agent and Revenue in relation to the findings of the audit conducted by a Revenue official in 2016.
17. The Appellant submitted that the Revenue's Customer Charter, provides, that all taxpayers are "to be treated as honest in your dealings with Revenue unless there is clear reason to believe otherwise". The Appellant stated that outright overlooking of his reasonable explanation prejudiced his presumption of honesty and that there was no clear reason to believe he was not being honest.
18. The Appellant referred to Article 6 of the European Convention on Human Rights in his submission but did not elaborate on the context of its provisions in support of his submissions.
19. The Respondent submitted that the assessments raised related to the following issues which were identified during the examination of records:
  - Mark-up exercise to confirm sales.
  - Addbacks due in relation to light and heat for personal use and deductions for personal expenses claimed in the business records.
  - VAT due on Admission charges to concerts held in the premises.
  - Appellant's disclosure in relation to undeclared rental Income.
20. The Respondent submitted that the Appellant used a cash register to record sales and that till rolls and Z reads were not maintained. The Respondent pointed out, that an information leaflet titled "Cash Registers and the obligation to maintain proper books and records to determine tax liability or entitlement to deductibility" was issued to the Appellant in July 2008.
21. The Respondent submitted that till rolls and Z reads are primary sales records and taxpayers are obliged to retain these records. In the absence of Sales records, a mark-up analysis was carried out by the Auditor to confirm the turnover of the business.



22. The Respondent submitted that the inspector carried out a cost of sales analysis in the business to ascertain the correct mark up achievable in the business.
23. The Respondent submitted that the Statutory obligation to keep records for tax purposes are set out in Section 886 TCA 1997 and Section 84 VATCA 2010 and Regulation 27 of the VAT Regulations 2010.
24. The Respondent submitted further that the Appellant did not produce any sales records for the purpose of the Revenue audit and that the inspector conducted a mark-up exercise to verify the sales figures returned.
25. The Respondent submitted that for the kind of business operated by the Appellant, Revenue would expect tally rolls, daily balanced cash book, including records of wastage and free drink given to customers and musicians.
26. The Respondent submitted that the mark-up exercise was conducted using available purchases records and sales prices provided on the day of audit. In conducting the mark-up exercise, purchases were broken down into the following categories – kegs, spirits, bottled beers, minerals, cans, wine, cigarettes and snacks to arrive at a weighted mark-up. The Respondent further submitted that it had excluded free kegs from suppliers and a number of missing invoices from a cash and carry supplier, when carrying out its mark-up analysis.
27. The Respondent submitted that the Inspector’s estimate was adequate and reasonable even though it omitted wastage, free drinks and other factors. The Respondent provided a computation in support of this that outlined its exclusion of the cash and carry invoices equated to allowing wastage and free drinks of 60 pints per week in the appeal periods.
28. The Respondent submitted that agreement has been reached in relation to certain aspects of the assessments in relation to addbacks, concert VAT and rental income.

### **Analysis and Findings**

29. The Appellant submitted that the Revenue official failed to make an allowance for wastage, free drinks and other factors in making its assessment for unrecorded sales.
30. The Appellant has suggested that the Revenue official was unreasonable in making an assessment, acted contrary to the Revenue Charter and contrary to Article 6 of the European Convention on Human Rights.



31. The Respondent advised the Appellant in its letter dated 22 March 2016 of having conducted a summary mark-up exercise on the drink sales in the business which concluded that Revenue would expect a mark-up of 109% on drink purchases in the Appellants business. The letter suggested additional sales in the business for 2013 and 2014 of €10,012 and €14,300 respectively.
32. The agent for the Appellant responded to that letter and reconciled the Revenue expected mark-ups with estimated drink losses and free drinks supplied. The Agent calculated the value of these losses and free drinks at €14,111 per annum. This would equate to approximately 89 pints (at cost price) per week across the range of products.
33. Revenue responded to that letter and offered to reduce its expected mark-up to 103% in an effort to resolve the audit matters. The Agent for the Appellant rejected the offer and subsequently asked for a local review in the conduct of the audit.
34. A senior Revenue official at Principal Officer level carried out an internal review of the conduct of its audit in this case. By letter dated 15 June 2017 he acknowledged certain shortcomings in the conduct of the audit and apologised for delays etc. in the conduct of the audit. However, he supported the use of a business economics approach to estimate sales because of the lack of back up documentation to accurately support the sales records presented.
35. The Respondent advised the Appellant in its letters dated 24 July and 26 September 2017, that it would use the lower mark-up of 103% in making its assessments.
36. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant. In appeals against assessments, the Appellant must prove on the balance of probabilities that the assessments are incorrect. 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.'*
37. The Statutory obligation to keep records for tax purposes are set out in Section 886 TCA 1997. The same statutory obligations exist in relation to Value Added Tax in Section 84 VATCA 2010 and Regulation 27 of the VAT Regulations 2010.



38. The Appellant is the person who has access to all of the facts and documents pertaining to his own tax affairs. In a tax appeal, if the Appellant cannot succeed in demonstrating that the assessment is incorrect, then the assessment shall stand.

39. The Appellant in this case contended that the returns submitted were in accordance with the sales achieved in his business. The Appellant was unable to demonstrate this as he had failed to retain the necessary documentary evidence in support of this contention. The statutory obligations are that all transactions are capable of being produced or reproduced for a period of six years. Where data is recorded electronically as in this case from the till records, it must be capable of being produced or reproduced at short notice. However, because the Appellant did not produce the data, he was unable to prove the accuracy of the returns submitted. As a result, the Appellant did not succeed in discharging the burden of proof in this appeal, thus I determine that the assessments shall stand.

### **Determination**

40. The burden of proof in tax appeals rests on the Appellant who must prove his/her case on the balance of probabilities. The Appellant, being the person with access to all of the facts and documents relating to his/her own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions (section 886 TCA 1997 and section 84 VATCA 2010) but also to produce such documentation as may be required in support of his/her appeal so as to meet the burden of proof. The Appellant in this appeal did not succeed in proving on the balance of probabilities that the assessments were incorrect and therefore did not discharge the burden of proof and thus I determine that the assessments shall stand.

41. The appeal is thus determined in accordance with section 949AK TCA 1997

**CHARLIE PHELAN**

**APPEAL COMMISSIONER**

**6 May 2020**



## APPENDIX

### Finance Act 2013 S886 TCA 1997

*(1) In this section-*

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

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

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

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

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

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

*(2)(a) Every person who-*

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

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

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

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

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

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

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

*(3) Records required to be kept or retained by virtue of this section shall be kept-*

*(a) in written form in an official language of the State, or*

*(b) subject to section 887(2), by means of any electronic, photographic or other process.*



*(4)(a)[Notwithstanding any other law]<sup>1</sup>, linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records-*

*(i)for a period of 6 years after the completion of the transactions, acts or operations to which they relate, or*

*(ii)in the case of a person who fails to comply with [Chapter 3 of Part 41A] requiring the preparation and delivery of a return on or before the specified return date for a year of assessment or an accounting period, as the case may be, until the expiry of a period of 6 years from the end of the year of assessment or accounting period, as the case may be, in which a return has been delivered showing the profits or gains or chargeable gains derived from those transactions, acts or operations.*

*[...]*

*[(4A) For the purposes of this section—*

*(a)where a company is wound up, the liquidator, and*

*(b)where a company is dissolved without the appointment of a liquidator, the last directors, including any person occupying the position of director by whatever name called, of the company,*

*shall keep or retain the linking documents and records of the company for the period specified in subparagraph (i) or (ii), as appropriate, of subsection (4)(a).]*

*(5)[Any person who fails to comply with subsection (2), (3), (4) or (4A)] in respect of any records or linking documents in relation to a return for any year of assessment or accounting period shall be liable to a penalty of [€3,000]; but a penalty shall not be imposed under this subsection if it is proved that no person is chargeable to tax in respect of the profits or gains for that year of assessment or accounting period, as the case may be.*

## **Finance Act 2012 S886 TCA 1997**

*(1)In this section-*

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

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

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

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

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





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

*(2)(a) Every person who-*

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

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

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

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

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

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

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

*(3) Records required to be kept or retained by virtue of this section shall be kept-*

*(a) in written form in an official language of the State, or*

*(b) subject to section 887(2), by means of any electronic, photographic or other process.*

*(4)(a) [Notwithstanding any other law], linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records-*

*(i) for a period of 6 years after the completion of the transactions, acts or operations to which they relate, or*

*(ii) in the case of a person who fails to comply with [Chapter 3 of Part 41A] requiring the preparation and delivery of a return on or before the specified return date for a year of assessment or an accounting period, as the case may be, until the expiry of a period of 6 years from the end of the year of assessment or accounting period, as the case may be, in which a return has been delivered showing the profits or gains or chargeable gains derived from those transactions, acts or operations.*

*[(b) Paragraph (a) shall not require the retention of linking documents and records in respect of which the inspector notifies in writing the person who is required to retain them that retention is not required.]*

*[(4A) For the purposes of this section—*

*(a) where a company is wound up, the liquidator, and*



*(b) where a company is dissolved without the appointment of a liquidator, the last directors, including any person occupying the position of director by whatever name called, of the company, shall keep or retain the linking documents and records of the company for the period specified in subparagraph (i) or (ii), as appropriate, of subsection (4)(a).]*

*(5) [Any person who fails to comply with subsection (2), (3), (4) or (4A)]<sup>5</sup> in respect of any records or linking documents in relation to a return for any year of assessment or accounting period shall be liable to a penalty of [€3,000]; but a penalty shall not be imposed under this subsection if it is proved that no person is chargeable to tax in respect of the profits or gains for that year of assessment or accounting period, as the case may be.*

### **Finance Act 2013 S84 VATCA 2010**

- (1) Every accountable person shall, in accordance with regulations, keep full and true records of all transactions which affect or may affect his or her liability to tax and entitlement to deductibility.*
- (2) Every person (other than an accountable person) who supplies goods or services in the course or furtherance of business shall keep all invoices issued to him or her in connection with the supply of goods or services to him or her for the purpose of such business.*
- (3) The following:*
- (a) records kept by a person pursuant to this Chapter or section 124(7) and that are in the power, possession or procurement of the person;*
  - (b) any books, invoices, copies of customs entries, credit notes, debit notes, receipts, accounts, vouchers, bank statements or other documents whatsoever which relate to the supply of goods or services, the intra-Community acquisition of goods, or the importation of goods by the person and that are in the power, possession or procurement of the person; and*
  - (c) in the case of any such book, invoice, credit note, debit note, receipt, account, voucher, or other document, which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person, shall, subject to subsection (4) [and notwithstanding any other law], be retained in that person's power, possession or procurement for a period of 6 years from the date of the latest transaction to which the records, invoices, or any of the other documents, relate.*
- (4) Notwithstanding the retention period specified in subsection (3), the following retention periods shall apply:*
- (a) where a person acquired or developed immovable goods to which section 4 of the repealed enactment applied, the period for which the person shall retain records pursuant to this Chapter in relation to that person's acquisition or development of those immovable*



*goods shall be the duration that such person holds a taxable interest in such goods plus a further period of 6 years;*

*(b) where a person exercised a waiver of exemption from tax in accordance with section 7 of the repealed enactment, the period for which the person shall retain records pursuant to this Chapter shall be the duration of the waiver plus a further period of 6 years.*

*[(5) This Chapter shall not require the retention of records or invoices or any of the other documents in respect of which the Revenue Commissioners notify the person concerned that retention is not required.]*

## **Finance Act 2012 S84 VATCA 2010**

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

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

*(3) The following:*

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

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

*(c) in the case of any such book, invoice, credit note, debit note, receipt, account, voucher, or other document, which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person, shall, subject to subsection (4) [and notwithstanding any other law], be retained in that person's power, possession or procurement for a period of 6 years from the date of the latest transaction to which the records, invoices, or any of the other documents, relate.*

*(4) Notwithstanding the retention period specified in subsection (3), the following retention periods shall apply:*

*(a) where a person acquired or developed immovable goods to which section 4 of the repealed enactment applied, the period for which the person shall retain records pursuant to this Chapter in relation to that person's acquisition or development of those immovable goods shall be the duration that such person holds a taxable interest in such goods plus a further period of 6 years;*



- (b) where a person exercised a waiver of exemption from tax in accordance with section 7 of the repealed enactment, the period for which the person shall retain records pursuant to this Chapter shall be the duration of the waiver plus a further period of 6 years.*
- [(5) This Chapter shall not require the retention of records or invoices or any of the other documents in respect of which the Revenue Commissioners notify the person concerned that retention is not required.]*

### **Finance Act 2013 Regulation 27**

- (1) The full and true records of all transactions that affect or may affect the accountable person's liability to tax and entitlement to deductibility, which every accountable person is required to keep in accordance with Chapter 7 of Part 9 and section 124(7) of the Act, shall be entered up to date and include—*
- (a) in relation to consideration receivable from registered persons—*
- (i) the amount receivable from each such person in respect of each transaction for which an invoice or other document is required to be issued under Chapter 2 of Part 9 of the Act, and*
- (ii) a cross-reference to the copy of the relevant invoice or other document,*
- (b) in relation to consideration receivable from unregistered persons—*
- (i) a daily total of the consideration receivable from all such persons,*
- (ii) a cross-reference from that daily total to the relevant books or other documents which are in use for the purposes of the business, and*
- (iii) where the accountable person uses an electronic cash register or point of sale system, the complete record of each entry on that register or system, uniquely identified by sequential number, date and time of such entry,*
- ...*
- (l) in relation to discounts allowed, or price reductions made, to unregistered persons—*
- (i) a daily total of the amount so allowed, and*
- (ii) a cross-reference to the goods returned book, cash book or other record used in connection with the matter,*

### **Finance Act 2012 Regulation 27**

- (1) The full and true records of all transactions that affect or may affect the accountable person's liability to tax and entitlement to deductibility, which every accountable person is required to keep in accordance with Chapter 7 of Part 9 and section 124(7) of the Act, shall be entered up to date and include—*
- (a) in relation to consideration receivable from registered persons—*



*(i) the amount receivable from each such person in respect of each transaction for which an invoice or other document is required to be issued under Chapter 2 of Part 9 of the Act, and*

*(ii) a cross-reference to the copy of the relevant invoice or other document,*

*(b) in relation to consideration receivable from unregistered persons—*

*(i) a daily total of the consideration receivable from all such persons,*

*(ii) a cross-reference from that daily total to the relevant books or other documents which are in use for the purposes of the business, and*

*(iii) where the accountable person uses an electronic cash register or point of sale system, the complete record of each entry on that register or system, uniquely identified by sequential number, date and time of such entry,*

*...*

*(l) in relation to discounts allowed, or price reductions made, to unregistered persons—*

*(i) a daily total of the amount so allowed, and*

*(ii) a cross-reference to the goods returned book, cash book or other record used in connection with the matter,*

