149TACD2020

BETWEEN/

REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments for value added tax for the period January to December 2013.

2. This appeal is adjudicated without a hearing in accordance with section 949U of the Taxes Consolidation Act, 1997.

3. The amount of tax in dispute is €4,758.

Background

4. The Appellant and another person jointly owned a property described in Folio REDACTED since 1 July 2005. The property was developed into residential units between 2007 and 2010 by REDACTED Construction Ltd in which both joint owners were directors and shareholders. REDACTED Construction Ltd ceased business on 23 April 2010.

5. The developed properties owned by the Appellant and another were disposed of on 1 February 2013 for €80,000.

6. The Respondent carried out an audit of the Appellant's taxes for the years 2013 to 2016 and raised an assessment on 1 May 2019, for Value Added Tax in respect of the Appellant's share of the properties disposed of in 2013.

7. The Respondent computed a VAT liability for 2013, taking the Appellants share as being 50% and deemed this as being inclusive of VAT at 13.5% in arriving at the liability €4,758 the subject of this appeal.

8. The Tax Appeals Commission (TAC) received and accepted a late appeal against the assessment on 20 June 2019.

Legislation

9. **Section 94 Value-Added Tax Consolidation Act 2010**

   See appendix 1 for full text

10. **Section 22 Value-Added Tax Consolidation Act 2010**

    See appendix 2 for full text

Submissions by the Appellant

11. The Appellant submitted that REDACTED Construction Ltd sold the developed properties to the Appellant and his partner. The Appellant stated in his appeal that the apartments were registered to the Appellant and his partner. The Appellant further submitted that a loan was advanced from REDACTED for €750,000 which was lodged to the account of REDACTED Construction Ltd.

12. The Appellant submitted that the partnership was registered for VAT but did not recover any VAT on the purchase of the properties from REDACTED Construction Ltd.

13. The Appellant further submitted that the Appellant and his partner were unable to repay the loan. The bank called in the loan, sold the properties under duress and all proceeds went in full to the bank concerned.

14. The Appellant submitted that in these circumstances the sale is a forced sale and the bank is obliged to pay the VAT on the sales proceeds.

Submissions by the Respondent

15. The Respondent submitted that the Appellant and his partner were the full owners of the property since 1 July 2005 according to the Land Registry documents presented as evidence of such ownership.

16. The Respondent submitted that the properties were disposed of to a third party for a consideration of €80,000 on 1 February 2013. The Respondent submitted evidence of this from the Self Assessed Return for Stamp Duty presented to Revenue in respect of the stamp duty declaration on the transaction.

17. The Respondent submitted that the property was developed by REDACTED Construction Ltd. As the sites were owned by the Appellant and his partner it is the Respondent's position that a construction service was supplied by the construction company to the Appellant and his partner in relation to the properties constructed on the site.

18. The Respondent submitted that the constructed properties were sold by the Appellant and his partner and are so liable to VAT as per section 94(8)(b) of the VAT Consolidation Act 2010.

19. The Respondent submitted that the Appellant failed to provide any evidence of a forced sale in the form of a deed of appointment [of a receiver or mortgagee in possession]. The Respondent advised the TAC in its Statement of Case that the agent for the Appellant advised that no receiver was appointed for the sale of the properties.

Burden of Proof

20. In appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the relevant tax is not payable. In the High Court judgment of *Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners* [2010] IEHC 49 (at paragraph 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*".

21. The Appellant, being the person with access to the facts and documents relating to their tax affairs, and the taxation system developed on the premise of self-assessment, must present evidence in support of the appeal in order to meet the burden of proof. If an Appellant cannot demonstrate that an assessment is incorrect, the assessment stands.

Analysis and Findings

22. Section s94(8)(b) VAT Consolidation Act confirms that sales of residential properties by the developers of those properties are liable to VAT where
    a. The owner developed the immovable goods in the course of a business of developing immovable goods or is a person connected with that person; and
    b. The owner was entitled to recover VAT on its acquisition or development of the immovable goods.

23. Section s22(3) VAT Consolidation Act confirms that the liability to VAT on sales of residential properties is transferred in certain circumstances to a receiver or mortgagee in possession. In circumstances where the asset is disposed of by a receiver and VAT is due in relation to that supply, the receiver is obliged to submit the VAT return in relation to the disposal and to remit the tax due.

24. The Respondent has submitted evidence that the properties were transferred by the Appellant and his partner to a third party.

25. The Appellant has stated that the bank forced the sale of the properties and he actually got no consideration at all from the proceeds as the proceeds were used by the bank, to discharge the loan taken out.

26. I have determined that there was no appointment of a receiver or mortgagee in possession by the Bank in relation to the sale of the properties over which it clearly held some form of lien or guarantee from the Appellant and his partner. In these circumstances the Appellant cannot rely on s22(3) VAT Consolidation Act to transfer the VAT liability for the sale of the properties to the Bank.

27. The Appellant as the owner of the properties had developed the properties in the course of business and was entitled to recover the VAT on the development of the properties. Accordingly, liability on the consideration received for the properties is the responsibility of the Appellant as outlined in s94(8)(b) VAT Consolidation Act.

Determination

28. Having considered the facts and circumstances of this appeal, together with the documentary evidence and submissions, I determine that the Assessment to Value Added Tax for the period 1 February 2013 to 31 January 2013 shall stand.

29. This Appeal is hereby determined in accordance with Part 40A TCA 1997 and in particular, s.949AK thereof.

CHARLIE PHELAN

APPEAL COMMISSIONER

12 JUNE 2020

Appendix 1

Legislation

Section 94 Value-Added Tax Consolidation Act 2010

94.—(1) In this section—

"completed", in respect of immovable goods, means that the development of those goods has reached the state, apart from only such finishing or fitting work that would normally be carried out by or on behalf of the person who will use them, where the goods can effectively be used for the purposes for which the goods were designed, and the utility services required for those purposes are connected to the goods;

"occupied", in respect of immovable goods, means—

(*a*) occupied and fully in use following completion, where that use is one for which planning permission for the development of those goods was granted, and

(*b*) where those goods are let, occupied and fully in such use by the tenant.

(2) Subject to *subsections (3), (5), (8)* and *(9)* and *section 95 (7)(a)*, tax is not chargeable on the supply of immovable goods—

(*a*) that have not been developed within 20 years prior to that supply,

(*b*) being completed immovable goods, the most recent completion of which occurred more than 5 years prior to that supply, and those goods have not been developed within that 5 year period,

(*c*) being completed immovable goods that have not been developed since the most recent completion of those goods, where that supply—

(i) occurs after the immovable goods have been occupied for an aggregate of at least 24 months following the most recent completion of those goods, and

(ii) takes place after a previous supply of those goods on which tax was chargeable and that previous supply—

(I) took place after the most recent completion of those goods, and

(II) was a transaction between persons who were not connected within the meaning of *section 97* ,

(*d*) being a building that was completed more than 5 years prior to that supply and on which development was carried out in the 5 years prior to that supply where—

(i) such development did not and was not intended to adapt the building for a materially altered use, and

(ii) the cost of such development did not exceed 25 per cent of the consideration for that supply,

or

(*e*) being a building that was completed within the 5 years prior to that supply where—

(i) the building had been occupied for an aggregate of at least 24 months following that completion,

(ii) that supply takes place after a previous supply of the building on which tax was chargeable and that previous supply—

(I) took place after that completion of the building, and

(II) was a transaction between persons who were not connected within the meaning of *section 97* ,

and

(iii) if any development of that building occurred after that completion—

(I) such development did not and was not intended to adapt the building for a materially altered use, and

(II) the cost of such development did not exceed 25 per cent of the consideration for that supply.

(3) Where a person supplies immovable goods to another person and in connection with that supply a taxable person enters into an agreement with that other person or with a person connected with that other person to carry out a development in relation to those immovable goods, then—

(*a*) the person who supplies the goods shall, in relation to that supply, be deemed to be a taxable person,

(*b*) the supply of the goods shall be deemed to be a supply to which *section 3* applies, and

(*c*) *subsection (2)* does not apply to that supply.

(4) *Section 6 (1)* and *(2)* does not apply in relation to a person who makes a supply of immovable goods.

(5) Subject to *subsection (9)*, where a taxable person who carries on a business in the State supplies immovable goods to another taxable person who carries on a business in the State in circumstances where that supply would otherwise be exempted because of *subsection (2)*, or *section 95 (3)* or *(7)(b)*, then, notwithstanding those provisions, tax is chargeable on that supply, but only if the supplier and the taxable person to whom the supply is made have, no later than the 15th day of the month after the month during which the supply occurred, entered into an agreement in writing to opt to have tax chargeable on that supply (in this Act referred to as a "joint option for taxation").

(6) Where a joint option for taxation is exercised in accordance with *subsection (5)*, then—

(*a*) the person to whom the supply is made shall, in relation to that supply, be an accountable person and shall be liable to pay the tax chargeable on that supply as if that person supplied those goods, and

(*b*) the person who made the supply shall not be accountable for or liable to pay such tax.

(7)(*a*) In this subsection—

"owner" means the accountable person referred to in *section 22 (3)*;

"purchaser" means the person to whom the immovable goods that are referred to in *paragraph (b)* are supplied;

"vendor" means the person referred to in *section 22 (3)*, not being the accountable person referred to in that section, who disposes of the immovable goods that are referred to in *paragraph (b)*.

(*b*) Where a supply of immovable goods is a supply to which *section 22 (3)* applies and that supply would otherwise be exempted because of *subsection (2)*, or *section 95 (3)* or *(7)(b)*, then, notwithstanding those provisions, tax is chargeable on that supply where—

(i) the purchaser is a taxable person, and

(ii) the vendor and the purchaser have, no later than the 15th day of the month after the month during which the supply occurred, entered into an agreement in writing to opt to have tax chargeable on that supply.

(*c*) Where *paragraph (b)* applies—

(i) the purchaser shall, in relation to that supply, be an accountable person and shall be liable to pay the tax chargeable on that supply as if that purchaser supplied those goods,

(ii) neither the vendor nor the owner shall be accountable for or liable to pay that tax,

and

(iii) *sections 65 (4)* and *76 (2)* shall not apply.

(*d*) *Paragraph (b)* shall not apply where the purchaser is a person connected (within the meaning of *section 97 (3)*) with either the vendor or the owner.

(*e*) Where a supply of immovable goods is a supply to which *section 22 (3)* applies and that supply would otherwise be exempted because of *subsection (2)*, then, notwithstanding that provision, tax is chargeable on that supply where—

(i) the immovable goods are buildings designed as or capable of being used as a dwelling,

(ii) the owner is a person who developed those immovable goods in the course of a business of developing immovable goods or is a person connected with that person within the meaning of *section 97 (3)*, and

(iii) the owner was entitled to a deduction under *Chapter 1* of *Part 8* for tax chargeable to that person in respect of that owner's acquisition or development of those immovable goods.

(8)(*a*) In this subsection and in *subsection (9)*—

"recipient" has the meaning assigned to it by *section 16 (1)(a).*

"relevant supply" has the meaning assigned to it by *section 16 (1)(a)*.

(*b*) Where a taxable person supplies immovable goods to another person in circumstances where that supply would otherwise be exempt in accordance with *subsection (2)*, tax shall, notwithstanding that subsection, be chargeable on that supply where—

(i) the immovable goods are buildings designed as or capable of being used as a dwelling,

(ii) the person who makes that supply is a person who developed the immovable goods in the course of a business of developing immovable goods or a person connected with that person within the meaning of *section 97 (3)*, and

(iii) the person who developed those immovable goods was entitled to a deduction under *Chapter 1* of *Part 8* for tax chargeable to that person in respect of that person's acquisition or development of those immovable goods.

(*c*) In the case of a building to which this subsection would apply if the building were supplied by the taxable person at any time during the capital goods scheme adjustment period for that building—

(i) *section 64 (4)* and *(5)* shall not apply, and

(ii) notwithstanding *section 64 (2)*, the proportion of total tax incurred that is deductible by that person shall be treated as the initial interval proportion of deductible use.

(*d*) Where a relevant supply is a supply of immovable goods to which this subsection would apply, the recipient shall be treated thereafter, for the purposes of this subsection in respect of those immovable goods, as if that recipient were a person connected (within the meaning of *section 97 (3)*) to the person who developed those immovable goods.

(9)(*a*) Where a relevant supply occurs and that supply would otherwise be exempt in accordance with *subsection (2)*, then—

(i) the recipient may opt to tax that supply (in this subsection referred to as an "option for taxation"), and

(ii) if that option is exercised—

(I) notwithstanding *subsection (2),* tax shall be chargeable on that supply, and

(II) *subsection (5)* shall not apply.

(*b*) The option for taxation shall not apply to relevant supplies that are exempt in accordance with *section 93 (2)* or *95 (3)* or *(7)(b).*

(*c*) The option for taxation shall be deemed to be exercised by the recipient in relation to a relevant supply which would otherwise be exempt in accordance with *subsection (2)(b)* to *(e).*

Appendix 2

Legislation

Section 22 Value-Added Tax Consolidation Act 2010

22.(1)Where an agent or auctioneer makes a sale of goods in accordance with *section 19(1)(b),* the transfer of those goods to that agent or auctioneer shall be deemed to be a supply of the goods to the agent or auctioneer at the time that the agent or auctioneer makes that sale.

(2)Where a person (in this subsection […][1] referred to as the "*owner*")—

(a)supplies financial services of the kind specified in *paragraph 6(1)(e)* of *Schedule 1* in respect of a supply of goods within the meaning of *section 19(1)(c),* and

(b)enforces the owner's right to recover possession of the goods,

then the disposal of the goods by the owner shall be deemed, for the purposes of this Act, to be a supply of goods to which *paragraph 12* of *Schedule 1* does not apply.

(3)(a)Where, in the case of a business carried on, or that has ceased to be carried on, by an accountable person, goods forming part of the assets of the business are, under any power exercisable by another person (including a liquidator and a receiver), disposed of by the other person in or towards the satisfaction of a debt owed by the accountable person, or in the course of the winding up of a company, then those goods shall be

deemed to be supplied by the accountable person in the course or furtherance of his or her business.

(b)A disposal of goods under this subsection shall include any assignment or surrender that is deemed to be a supply of immovable goods as provided by *section 95(5).*