62TACD2020

BETWEEN/

APPELLANT

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

1. This is an appeal against a Notice of Assessment to Value Added Tax (VAT) dated 14 February 2018 for the period 1 February 2013 to 31 January 2014 and 1 February 2014 to 31 January 2015. The tax amount in dispute is €30,200. The assessment was made on the basis that the Appellant, who operates a menswear clothing retail shop, had understated sales in 2014 and 2015. The Appellant appealed the assessment.

2. This is an appeal against a Notice of Estimation of PAYE/PRSI/USC for the year 2014 and 2015. The tax amount in dispute is €53,453. The assessment was made on the basis that, arising from the understated sales in 2014 and 2015, the Appellant made payments of emoluments on which PAYE/PRSI/USC should have been deducted and remitted. The Appellant appealed the assessment.

Background

3. The Appellant company was incorporated on [DATE *redacted*] and operates a menswear clothing retail shop from a premises at [ADDRESS *redacted*]. The original directors and shareholders of the Appellant were [MR. X] and his wife, [MRS. X]. In 2012, the shares in the Appellant were transferred to [NAME *redacted*], a daughter of [MR. X] and [MRS. X]. [MR. X] and [MRS. X] also resigned as directors of the Appellant. However, [MR. X] continued to work in the retail shop and retain control of the Appellant. It is noted that the Statement of Case delivered to the Tax Appeals Commission on 25 March 2019 bears a typed signature of [MR. X]. At the hearing, the Appellant's representative stated that although [MR. X] did not receive a salary from the Appellant since 2013 it was a condition of the payment of a pension to [MR. X] that he would continue to work in the retail shop. The Appellant also has [NUMBER *redacted*] part-time employees.

4. The matters in dispute in the appeal are the quantum of sales of the Appellant and whether the Appellant made a payment of emoluments for which the Appellant was required to deduct and remit tax.

5. At the hearing, no evidence was produced to corroborate the statements on the facts made by the Appellant's representative, other than a hard-back book being the daily cash book. No oral evidence was given for the Appellant.

Legislation

6. Section 111 of the Value Added Tax Consolidation Act, 2010 provides:

Assessment of tax due

"***111***. *(1) Where, in relation to any period, the inspector of taxes, or such*

other officer as the Revenue Commissioners may authorise to exercise the powers conferred by this section (in this section referred to as "other officer"), has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person in any of the following circumstances:

(a) *the total amount of tax payable by the person, including tax (if any) payable in accordance with section 108C(3), was greater than the total amount of tax (if any) paid by that person;*

(b) *the total amount of tax refunded to the person in accordance with section 99(1) was greater than the amount (if any) properly refundable to that person;*

(c) *an amount of tax is payable by the person and a refund under section 99(1) has been made to the person;*

(d) *the total amount of tax refunded to the person in accordance with an order under section 103 was greater than the amount (if any) property refundable to that person,*

then, without prejudice to any other action which may be taken, the inspector or other officer –

(i) *may, in accordance with regulations but subject to section 113, make an assessment in one sum of –*

(I) *the total amount of tax, including tax (if any) payable in accordance with section 108C(3), which in his or her opinion should have been paid,*

(II) *the total amount of tax (including a nil amount) which in accordance with section 99(1) should have been refunded, or*

(III) *the total amount of tax (including a nil amount) which in accordance with the order under section 103 should have been refunded,*

as the case may be, in respect of such period, and

(ii) may serve a notice on the person specifying –

(I) the total amount of tax so assessed,

(II) the total amount of tax (if any) paid by the person or refunded to the person in relation to such period, and

(III) the total amount so due and payable (referred to subsequently in this section as "the amount due")."

7. Section 990 of the Taxes Consolidation Act, 1997 provides:

"***990. Estimation of tax due for year***

(1) Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as "other officer") has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respective income tax months comprised in any year of assessment was greater that the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer –

(a) may make an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and

(b) may service notice on the employer specifying:

(i) the total amount of tax so estimated,

(ii) the total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and

(ii) the balance of tax remaining unpaid."

Books and Records

8. At the hearing, the Appellant's representative submitted that the assessments were made by the Revenue Commissioners on the basis that there were no books and records maintained by the Appellant. It was submitted that this was incorrect as the books and records of the Appellant comprised a manual daily cash book, a manual stock book and bank statements.

9. The method of recording sales by the Appellant was described in the following terms: - the retail shop has an antique brass till which does not store information. At the end of each day [MR. X] totals the cash in the till, deducts the cash float, adds the total of the credit card receipts and manually records a daily sales figure in a hard-back book. On that basis, the Appellant submits that the statutory requirements on keeping records that may affect a liability to tax has been met. Furthermore, the Appellant submits that there are no understated sales for 2014 and 2015 as the declared sales are in accordance with the books and records.

10. The Revenue Commissioners submit that the difference between the parties on the books and records is that the Revenue Commissioners consider that the books and records maintained by the Appellant are not adequate to verify the accuracy of the sales and, consequently, the liability to tax, particularly as the method of recording sales means there are no records of the number of individual sales per day, the amount paid on individual sales per day or the individual products sold to customers.

Mark-Up

11. During the course of the revenue intervention, the Appellant stated to the Revenue Commissioners that the selling price of a product in the retail shop was calculated

by applying a multiplier of between 2.5 and 3 times the net cost (excluding VAT) and that one-third of products were discounted by 50%.

12. At the hearing, the Appellant's representative stated that the retail shop was operated on the basis that [MR. X] had a relationship with the customers, who were repeat customers over the years, and as such, [MR. X] would offer discounts to customers on an individual basis. No evidence was presented in support of this statement. It was further stated that the Appellant would offer discounted selling prices, perhaps two or three per year, and the discount on products could be 50% or as high as 75%. No evidence was presented in support of this statement. The Appellant's representative repeated that the selling price of a product in the retail shop was calculated by applying a multiplier of between 2.5 and 3 times the net cost (excluding VAT). The Appellant's representative submit that these factors should be reflected in a calculation of a mark-up percentage.

13. The Revenue Commissioners produced an analysis based on a sample of nine products selected from a walkabout of the retail shop. The Revenue Commissioners described the retail shop as comprising [NUMBER *redacted*] floors – [REDACTED]. The Revenue Commissioners submit that the products selected for the analysis were representative of the products in the retail shop.

14. The analysis produced a multiplier of 3 times the net cost in arriving at the selling price of a product. The multiplier calculation was based on the selling price (including VAT) divided by the net cost (excluding VAT). If the multiplier calculation was the net price (excluding VAT) divided by the net cost (excluding VAT) a multiplier of between 2.5 and 3 times of the net cost (excluding VAT) would be produced.

15. The analysis produced an average mark-up percentage of 147% across the nine products, with the mark-up percentages varying from 118% to 181%. The calculation of the mark-up percentage was gross profit divided by net cost (excluding VAT). The figures for gross profit and net cost (excluding VAT) were not disputed. Therefore, based on the formula of gross profit divided by net cost (excluding VAT) the mark-up percentage is a mathematical outcome. The Revenue Commissioners adjusted the average mark-up percentage on the basis of one third of products being discounted at 50%, in accordance with the stated position of [MR. X], to arrive at an adjusted mark-up percentage of 106%. The mark-up percentage applied in the calculation of the liability to tax was 105%. The Revenue Commissioners submit that mark-up is a standard methodology for the type of business operated by the Appellant.

16. The Appellant submits that the analysis of the Revenue Commissioners does not take into account lower margin products (including socks, hats, ties, handkerchiefs) and does not reflect that the Appellant sold products in 2014 and 2015 at greater than a 50% discount in order to dispose of older stock. The Appellant submits that the analysis of the Revenue Commissioners does not take into account that the Appellant had non-margin costs (including clothes hangers, price tags). The Revenue Commissioners submit that the analysis was based on details provided by [MR. X], which was accepted, even though the Revenue Commissioners considered the multiplier and discount to be high by industry norm. The Revenue Commissioners submit that no reference was made to discounts greater than 50% or the non-margin costs during the revenue intervention. The Revenue Commissioners accepted that the non-margin costs could have a bearing on the amount of the liability to tax, but not on the calculation of the mark-up percentage.

17. The Revenue Commissioners produced a separate analysis of the mark-up percentages based on the Form CT1 delivered by the Appellant for the years 2011, 2012, 2013, 2014, 2015 and 2016. The calculation of the mark-up percentages was

gross profit divided by cost of sales. The analysis produced the following mark-up percentages:

Year	Sales	Gross Profit	Mark-Up
2011	€285,564	€136,854	92%
2012	€255,980	€113,380	80%
2013	€226,469	€80,184	86%
2014	€222,980	€88,626	66%
2015	€214,734	€71,515	50%
2016	€214,464	€96,974	83%

18. The Revenue Commissioners submit that the deviation in the mark-up percentages in 2014 and 2015 from the other years demonstrates that the Appellant had understated sales. The Revenue Commissioners submit that the fluctuation in the mark-up percentages across the years was indicative of the failings in the adequacy of the books and records maintained by the Appellant. The Revenue Commissioners accepted that prevailing market conditions could impact on mark-up percentages, however, this would not explain the extent of the deviation in 2014 and 2015 for the Appellant.

19. The Appellant submits there is no discrepancy in the mark-up percentages in 2014 and 2015 from the other years as it simply reflected poor sales by the Appellant in 2014 and 2015. No evidence was presented in support of this submission. The sales declared on the Form CT1 delivered by the Appellant are detailed above. The Appellant submits that the average cost of sales mark-up percentage over the period 2006 to 2017 was 72%. No evidence was presented in the support of this submission.

20. The Appellant submits that the mark-up percentages in 2014 and 2015 reflect that obsolete stock was written off at year end 2013 and the stock reduced to net realisable value given the age of products. The abridged balance sheet of the Appellant for the relevant years provides:

At 31 January 2014	Stocks	2014	€[REDACTED]	2013	€[REDACTED]
At 31 January 2013	Stocks	2013	€[REDACTED]	2012	€[REDACTED]

The closing stock in 2012 of €[NUMBER *redacted*] was the opening stock in 2013. The closing stock in 2013 of €[NUMBER *redacted*] was not the opening stock in 2014. The opening stock in 2014 was €[NUMBER *redacted*]. The difference of €[NUMBER *redacted*] was stated by the Appellant to represent obsolete stock. There was no accompanying note in the Companies Registration Office accounts to explain the stock position.

21. The Appellant submits that the obsolete stock was not material and, as such, there was no requirement to include an accompanying note in the Companies Registration Office accounts. The Appellant submits that the write off of obsolete stock demonstrates that the Appellant had a build-up of stock which the Appellant had to sell in 2014 and 2015. The Appellant's representative stated that it was difficult to establish whether a product sold was old stock or new stock and this factor should be reflected in the calculation of a mark-up percentage. The Revenue Commissioners submit that the write off of obsolete stock was significant and has a bearing on the calculation of the mark-up percentage.

Emoluments

22. The Revenue Commissioners submit, given the control exercised by [MR. X], it is reasonable to treat the amount of the understated sales as being the payment of emoluments by the Appellant on which PAYE/PRSI/USC should have been

deducted and remitted by the Appellant. The Revenue Commissioners deducted the balances standing in the directors current account in calculating the amount of emoluments.

23. The Appellant submits that it must be established that there was a payment of emoluments for the Appellant, as an employer, to be required to deduct and remit PAYE/PRSI/USC. The Appellant submits the fact of understated sales (which was denied) does not mean there was a payment of emoluments by the Appellant. The Appellant's representative stated that the Revenue Commissioners indicated in recent correspondence that if the PAYE/PRSI/USC assessment did not stand, the Revenue Commissioners intended assessing the income on [MR. X].

Assessment

24. In calculating the liability to VAT, the Revenue Commissioners applied the mark-up percentage of 105% to the cost of sales declared in the Form CT1 and arrived at a sales figure which was €52,446 greater than the sales figure declared in the Form CT1 for 2014 and €78,865 greater than the sales figure declared in the Form CT1 for 2015. VAT at 23% was applied to €52,446 and €78,865 to arrive at VAT of €12,062 for 2014 and €18,138 for 2015. The total VAT is €30,200.

25. In calculating the liability to PAYE/PRSI/USC, the Revenue Commissioners calculated the income as €64,508 for 2014 and €97,003 for 2015, being the VAT inclusive amount of the understated sales. After deducting balances standing in the directors current account, the tax was calculated on the amount of €14,353 for 2014 and €88,649 for 2015. The PAYE/PRSI/USC was calculated at €7,464 for 2014 and €45,989 for 2015. The total PAYE/PRSI/USC is €53,453.

Burden of Proof

26. 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*".

27. 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. There is a separate requirement to retain records in accordance with the requisite statutory provisions.

Analysis and Findings

28. At the hearing, no evidence was produced to corroborate the statements on the facts made by the Appellant's representative, other than a hard-back book being the daily cash book. No oral evidence was given for the Appellant.

29. The Appellant submits that determination 05TACD2019 is relevant to the appeal herein. Determination 05TACD2019 determined that assessments should be reduced to a sum representing 45% of the aggregate value of the assessments. In that determination, the Appeal Commissioner had the benefit of evidence at the hearing. I am satisfied that determination 05TACD2019 is factually different to the

appeal herein and that the determination in that appeal does not establish a benchmark by which the Appellant's appeal should be determined.

30. There is no dispute that the Appellant has a cost price for products and a selling price for products, and that the selling price is a multiple of the cost price. There is no dispute that the Appellant generates a gross profit. The formula for the calculation of mark-up percentage is gross profit divided by cost multiplied by 100. This produces a mathematical outcome. This is a calculation for new products. The dispute between the parties in relation to mark-up percentage is the extent to which various factors should be taken into account in adjusting the mark-up percentage calculation including sampling and discounting. The extent to which a mark-up percentage should be adjusted, if at all, to reflect various factors must be considered in the context of the facts pertaining to a particular Appellant.

31. In establishing a corroborative metric on the quantum of sales of a retail shop, a measurement is mark-up percentage. The calculation of a mark-up percentage for new products is straightforward. Adjustments to a mark-up percentage is less straightforward. I am satisfied that the Revenue Commissioners applied a methodology in adjusting the mark-up percentage in accordance with the information provided by [MR. X]. I am further satisfied that there are other factors which should be reflected in the adjustment of the mark-up percentage for the Appellant, including the other smaller products not included in the analysis and market conditions. In the circumstances, and based on the facts pertaining to the Appellant, I am satisfied that the mark-up percentage for the years 2014 and 2015 should be adjusted to 98%.

32. The Income Tax (Employments) (Consolidated) Regulations, 2001 apply to an employer who makes a payment of emoluments. Section 112 provides that 'emoluments' means anything assessable to income tax under Schedule E. A similar meaning of emoluments is provided in section 983 (within *Chapter 4, Part*

42 – Collection and recovery of income tax on certain emoluments (PAYE system)]. Tax on emoluments is deducted and remitted by the employer on the making of a payment of emoluments. However, regulation 35 provides that an assessment under Schedule E may be made on a person in respect of his or her emoluments. For an assessment on the Appellant, as an employer, under section 990 of the Taxes Consolidation Act, 1997 to stand it must be that the amount of tax which the Appellant was liable to remit was greater than the amount of tax paid by the Appellant. The requirement to deduct and remit derives from the Appellant making a payment of emoluments. The fact that an employer may not come within the regulations requiring the employer to deduct and remit tax on emoluments does not mean there is no taxable emolument. A comprehensive analysis of taxable emoluments and the application of section 112 was delivered in determination 29TACD2019. As described therein, taxable emoluments are not confined to emoluments from the employer but embrace emoluments from the office or employment. The circumstances under which section 112 may apply must be considered in the context of the wording of section 112. In this appeal, the matter under appeal is a Notice of Estimation of PAYE/PRSI/USC made on the Appellant, as an employer, in respect of the payment of emoluments. In the circumstances, I am not satisfied that it has been established that there was a payment of emoluments by the Appellant to come within the requirement to deduct and remit tax.

Determination

33. In respect of the appeal against the Notice of Assessment to Value Added Tax for the period 1 February 2013 to 31 January 2014 and 1 February 2014 to 31 January 2015 I determine that the mark-up percentage be reduced to 98% and the assessment reduced accordingly.

34. In respect of the appeal against the Notice of Estimation to PAYE/PRSI/USC for the year 2014 and 2015 I determine that the Appellant has been overcharged by the

inclusion of the amounts of €14,353 and €88,649 as payments of emoluments by the Appellant.

35. This appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

9 JANUARY 2020