29TACD2021

APPELLANT

APPELLANT

V

REVENUE COMMISSIONERS

RESPONDENT

DETERMINATION

Introduction

1. This is an appeal against a decision by the Respondent to refuse to grant Employment and Investment Incentive (EII) relief for an investment of €150,000 in new shares issued by APPELLANT ('Company') on 28 April 2017. The Respondent refused to certify the Company as a 'qualifying company' and as a result the investments made by the investors would not qualify for the income tax relief available under the EII scheme.

2. The Respondent is of the view that the Company would not be considered a 'qualifying company' per section 494 (4A) TCA 1997. This section states that a company must comply with paragraphs 5 and 6 of Article 21 of EU Regulation No. 651/2014, commonly referred to as the General Block Exemption Regulation ('GBER').

3. The Appellant received formal refusal of the relief on 12 January 2018 and duly appealed the decision to the Tax Appeals Commission on 13 February 2018.

4. This appeal was heard by remote hearing by the Tax Appeals Commission ('TAC') on 26 November 2020.

Background

5. On 1 May 2017 the Company submitted an EII1 Application for shares issued on 28 April 2017 to the Respondent.

6. The Respondent issued a letter to the Appellant on 20 June 2017 requesting a copy of the company's Original Business Plan and referring the Appellant to Paragraph 6(b),

Article 21 of the General Block Exemption Regulation No 651/2014 of 17 June 2014 (GBER).

7. On 31 July 2017, the Company submitted an Appendix of Financial Projections from the Original Business Plan (1992), to the Respondent. In this correspondence the Appellant stated that at the time the Company had envisaged three additional equity issuances following the original. The Appellant stated that they understood their business would struggle to raise debt and as a result most of their funding would be from retained earnings and new equity issuance.

8. The Appendix of Financial Projections included a Profit and Loss, Balance Sheet and Cash flows for Years 0 to Year 7. The envisaged equity on the Balance Sheet amounted to IR£360,000 by year 4 and would remain at that level by year 7.

9. On 2 August 2017 the Respondent requested a complete copy of the Company's business plan. In a response on 3 August 2017 the Appellant submitted further details as to the exact breakdown of the equity investment envisaged by them at that time. The Appellant stated that for the first seven years of operation, funding would be made up of IR£360,000 BES in four separate issues and the remainder would consist of a bank loan of IR£160,000 and overdraft of IR£130,000. The Appellant also stated in this response that beyond that seven year horizon it was their intention to continue with further BES issues to allow them to expand.

10. The Appellant also stated that in the seven years that were covered in the Original Business Plan they have raised the amount of equity finance which was envisaged in that Business Plan and that in the following eighteen years they have exceeded that amount.

11. In correspondence with the Appellant, the Respondent stated that they were refusing the relief as "*the Company does not meet the requirements of Article 21 paragraph 6 (b) of GBER as the "original business plan" did not foresee the need to raise additional risk finance to that already raised. Risk finance investment, within the meaning of Article 21, means State Aid that has been approved by the EU as risk finance investment.*"

12. The Company's EII Application was refused by the Respondent on 12 January 2018, on the grounds that the company was not a 'qualifying company' per section 494(4A) of the TCA 1997.

13. In the refusal letter, the Respondent also stated that "*The company to date has been the beneficiary of €2.439 million in State-aid in the form of Employment and Investment Incentive (Ell) and BES. It is seeking certificates in respect of a further share issue on 28 April 2017 that raised €150,000.*"

14. The Appellant received formal refusal of the relief on 12 January 2018 and duly appealed the decision to the TAC on 13 February 2018.

Legislation

15. Section 494 TCA97 – Qualifying companies for Employment and Investment Incentive (EII) relief purposes provides as follows:

    (4A) A company that does not meet the requirements of paragraphs 5 and 6 of Article 21 of Commission Regulation (EU) No. 651/2014 of 17 June 2014 shall not be a qualifying company.

16. Article 21, EU Commission Regulation No. 651/2014, commonly known as the 'General Block Exemption Regulation' (GBER) deals with the rules as to access to risk finance aid for SMESs. This is reproduced in Appendix 1.

Evidence

Sworn evidence was provided by two directors of the Company. They were:

DIRECTOR A

DIRECTOR B

17. Based on their evidence I established the following matters of fact:
    - The Appellant Company had developed an original business plan in 1992. The Company has operated since then for the last 25 years up to the Appeal. The Appellant does not have a copy of the original business plan. It would have prepared a business plan for the IDA at the time. The Appellant consulted with the IDA about obtaining their copy but they do not have a copy either.
    - The Appellant explained that they relied on family and friends for investment. Possibly seven members of the family would have invested in the Company through BES investment. Investment occurred in staged amounts. The bulk of the investment was made by DIRECTOR A and DIRECTOR B.

- When raising the money from family members, the directors would have advised that the company would initially be loss-making; that the investment was a long-term investment and investors would not expect to be getting any immediate return.
- DIRECTOR A works within the Appellant Company in a finance capacity and his brother DIRECTOR B is the managing director.
- DIRECTOR B, trained in REDACTED. He worked as an engineer for REDACTED initially as an engineer, then in marketing. Later he saw an opportunity to set up a manufacturing operation. So he and his brother, with the support of family, setup the APPELLANT business. This is a MANUFACTURING company which operates in the MANUFACTURING industries.
- The manufacturing process requires the development of REDACTED makes use of heavy equipment; requires significant engineering research and development. The company prepares and develops MANUFACTURED PRODUCTS. This is a complicated process involving MANUFACTURING PROCESS.
- MANUFACTURING PROCESS. A lot of their equipment is used in the REDACTED. The Company would have made frequent visits to German manufacturers in relation to seeking out equipment for use in its business.
- The Appendix of Financial Projections put forward as evidence in this appeal, sets out in detail the cash flow and investment projected in the original business plan for the first, second, third and fourth years. These were originally envisaged as risk investment at the time the original business plan, which was developed in year zero REDACTED.
- The additional investments were required to bring more of the production process in-house. Initially they outsourced certain processes and the 4 investment tranches in year 1 to 4 allowed them to purchase equipment.

Submissions – Appellant

18. The following are extracts from the submissions made by the Appellant:

> *““...Incentives and Financial Services section of the Business Taxes Policy & Legislation Division has declined to issue E112 and Ell3 certificates because he claims "the original business plan did not foresee the need to raise additional risk finance to that already raised,"*

This assertion is completely without foundation.

From the outset, we knew we would need to make significant capital investment at periodic intervals. Indeed in the first five years alone, we raised equity on eight separate occasions. The multiple issues arose from our persuading friends and family to support us in our venture, each in their own small way. We have made further investments in the years since. All these actions are consistent with our foreseeing "the need to raise additional risk finance."

We have not managed to find the original business plan which spelled out this intention. However, that plan was crafted 26 years ago! Would it be realistic to ask a Government department to produce a document it published 26 years ago and which it has not had occasion to use for over 20 years? Article 21 of GBER did not have companies like ours in mind when it was drafted. If we were to keep every document we ever had over the intervening period, we would have no office space left! We absolutely expected to have to raise additional risk finance when we raised our first risk finance. We simply can't find that document after 26 years…

…The Company is strongly of the opinion that it has satisfied the requirements of Paragraph 6(b) of Article 21 of the GBER."

19. The Appellant made reference to the Appendix of Financial Projections:

"I draw your attention to the second line in the Balance Sheet. It clearly anticipates that new equity would be issued in Year 2, in Year 3 and in Year 4. By any reasonable interpretation, the company has demonstrated that it planned to raise additional risk finance to that already raised in Year 0…
(The Respondent*) is insisting on our providing "a complete copy of the company's business plan drawn up in 1992". Is it reasonable to expect a company to have retained a document for 25 years on the off chance that it might be required? I know of no firm keeping documents beyond seven years…*
Nowhere in Article 21 is it stated that "a complete copy the original business plan" needs to be furnished. We have included the appendix which contains the financial projections which demonstrate very clearly that the company planned to raise additional finance…

…Ours is a small firm operating in a capital-intensive industry. We did not have the resources to make all the necessary investments at the outset. Instead, we planned to invest over the years according as we had the capacity to do so. We had always

foreseen the need to reinvest and we have done so on a number of occasions since 1992…

Revenue have declined to issue EII 2 and EII 3 certificates because they insist on our furnishing a "complete copy of the company's business plan drawn up in YEAR 0". We contend that we have furnished the relevant part of that plan which clearly evidences our intention to raise additional risk finance. And, furthermore, our track record since then of repeated small investments is consistent with that intention…

…Revenue's (main ground for) *objecting to the granting of EII relief* (is):

…APPELLANT could not provide a copy of the business plan evidencing its intention to make follow-on investments subsequent to the initial investment…

…We produced the spreadsheet which accompanied the original business plan which clearly demonstrated our intention to make follow-on investments as our means allowed and use same to acquire the necessary capital equipment. And we made the follow-on investments we said we would - the amounts and timing were only slightly different from those in the plan. I accept we couldn't produce the original business plan from 25 years earlier; however, if I were to ask Revenue to produce a document from that period - particularly one for which they thought they had no further requirement - could they do so? Is it reasonable to expect this of us? The narrative in the business plan would merely expand on the logic behind the numbers in the spreadsheet. That we did in fact make follow-on investment is surely evidence of the intention to do so…"

Submissions – Respondent

20. The following are extracts from submissions made by the Respondent

Relevant case law

- *Case C-110/13 HaTeFo GmbH v Finanzamt Haldensleben [2014];*
- *Case C-91-01 Italy v Commission [2004];*
- *Case T-137/02 Pollmeier Malchow GmbH & Co. KG v Commission [2004]; and*
- *Case T-198/01 Technische Glaswerke Ilmenau GmbH v Commission [2004]…*

"…The application for EII Relief was refused on 12 January 2018 on the grounds that:

The company would not be considered a qualifying company per section 494(4A) Taxes Consolidation Act 1997. Subsection (4A) states a company must comply with paragraph 5 and 6 of Article 21 Commission Regulation (EU) No. 651/2014 (GBER). The company to date has been the beneficiary of €2.439 million in State-aid in the form of Employment and Investment Incentive (EII) and BES. It is seeking certificates in respect of a further share issue on 28 April 2017 that raised €150,000. The issue in this case is that the company does not meet the requirements of Article 21 paragraph 6(b) of GBER as the 'original business plan' did not foresee the need to raise additional risk finance to that already raised. Risk finance investment, within the meaning of Article 21, means State aid that has been approved by the EU as risk finance investment.'…

This is an appeal against a determination issued to the Appellant on the 12 January 2018, refusing their application for relief against the investment of €150,000 for new shares issued on the 28 April 2017 under the Employment Investment Incentive ("EII") scheme.

The Appellant's appeal raised one issue; namely whether an acceptable business plan as required under the legislation existed that foresaw the necessity for the level of risk finance investment that the company has sought to date.

The Appellant company was incorporated in Year -2 and per documents received from the company also begun to trade in Year-2.

BES/EII Funding has been raised previously during this 30-year period.
Since incorporation the appellant has raised in excess of €2.4 million by way of equity-based investments, namely BES/EII. Details of investments more recently sought and provided for below:

Date:	*Value £/€*
BES	
2007	*€160,000*
2008	*€175,000*
2009	*€170,000*

2010	*€100,000*
2011	*€120,000*
EII	
2012	*€150,000*
2013	*€150,000*
2014	*€150,000*
2015	*€150,000*
2016	*€173,100*
2017	*€150,000 (amount under appeal, EII Certification refused)*

…In response to the question raised by the respondent as to whether the company had raised the amount of equity finance which was envisaged in the original business plan, the appellant stated 'Over our 25 years in operation, we have raised the amount of equity finance which was envisaged in the 1992 business plan covering the seven-year period, Year 0-Year 7, and exceeded this amount in the subsequent 18 years.'…

Finance Act 2015 amended the EII legislation to bring it within GBER. Prior to Finance Act 2015, EII was a notified and approved State Aid… The key FA15 amendment was the introduction of Section 494 (4A) TCA 1997 which provides that:

> *'A company that does not meet the requirements of paragraphs 5 and 6 of Article 21 of Commission Regulation (EU) No. 651/2014 of 17 June 2014 shall not be a qualifying company'…*

In interpreting both paragraph 5 and paragraph 6 of GBER it is necessary to be cognisant of the criteria set out in paragraph 14(c) of Article 21 GBER:

> *'Risk finance measures shall ensure profit-driven financing decisions. This is the case where all the following conditions are fulfilled:*
> *Risk finance provided to the eligible undertakings shall be based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;'*

Revenue guidance and application forms

On foot of these requirements Revenue introduced additional questions to the application form required for EII investments. Question 7(c) on the Form EII1 in use in February 2017 requests confirmation be provided that 'the possibility of follow-on *investments was foreseen in the original business plan' and that a copy of the original business plan, or where not available other evidence which supports this condition being satisfied should be submitted with the application'…*

Revenue Tax and Duty Manual Part 16-00-10 provides guidelines that:
'when any follow-on EII investments are being raised, these investments are only eligible for relief where the possibility of follow-on EII investments was foreseen in the undertaking's original business plan (being the business plan first used to raise financing under BES, SCS, SURE or EII) [s. 494(4A)]'

… Paragraph 6 … requires that the possibility of raising follow-on risk finance aided investments must have been foreseen in the original business plan of the company. Original business plan, in this context, means the business plan upon which the first risk finance aided investment was made. The phrase "business plan" must be interpreted in line with paragraph 14(c) of Article 21. It states that risk finance aid shall only be given in respect of investments based on a viable business plan must contain details of profit, sales and profitability development, establishing ex-ante financial viability.

The business plan provided by the appellant does not satisfy the criteria as set out by Article 21 of GBER.

The Business Plan provided in July 2017 and covering the first seven years beginning from the date of the company's commencement of trade in Year-2, provides the following detail. It envisages investment in the form of equity in Yr.1 of £90,000. It goes on to foresee the necessity for further equity funding in Yr.2 to 4 in the amounts of £120,000, £90,000 and £60,000 respectively. It does not envisage any equity investment beyond Yr. 4.
Furthermore, the purpose of this funding appears to be for the purposes of purchasing new equipment.

The documentation provided is only the Appendix to the original Business Plan. The appellant did not have a copy of the original business plan in its entirety. Considering this, the respondent requested further clarity on that which was already provided prior to making a determination as to the appellants eligibility for EII.

…the appellant …clarified that there was a necessity to purchase three pieces of capital equipment, with a total cost of £670,000. It was to be funded several ways with the breakdown provided as follows:

Ord Shares raised through 4 BES Issues:	*£360,000*
Loan:	*£160,000*
Overdraft:	*£130,000*

As previously noted, the appellant has already raised in excess of €2.4m BES/EII investment in the period from incorporation to date.

The total amount foreseen as required in the Original Business Plan amounts to IR£360,000…

EII as a State aid is governed by GBER. The respondent can only act within the limits of GBER. The respondent has no leeway in applying any of the obligations as set out under GBER. The requirement for follow-on investment to be foreseen is set out in Article 21, paragraph 6(b) and in interpreting this the respondent must consider the contents of paragraph 14 (c)…

The documentation provided is not sufficient to satisfy the criteria as set out under GBER. As the appellant states in their appeal submission it would be difficult to provide a document that was created over 26 years ago and 'for which it has not had occasion to use for over 20 years', yes, it is difficult, but we respectively contend that is the intention of GBER. EII is a State aid. The EU Commission in general do not allow state aid, but in very limited circumstances and for our purposes the rules governing those exemptions are contained in GBER…

As detailed above, paragraph 5 of Article 21 is the first set of criteria that must be fulfilled in determining if an SME can avail of this relief. Paragraph 5 requires that the SME should ultimately be a 'new' SME
'(a) the have not been operating in any market;
(b) they have been operating in any market for less than 7 years following their first commercial sale;'

It would stand to reason that this criterion is in place with the intention that company's move away from risk finance investment. It would not be their intention to support an entity throughout the entirety of their existence by way of state aid. The concept of EII is that it is for start-up SME's, newly entering the market or entering *new markets, they are engaging in risk and therefore require risk finance aid. If an entity is continuing with the same thing 7 years or later, it would not be meeting the aims of GBER.*

GBER does allow for follow-on risk finance, it does not simply state that an entity can receive one round of risk finance with no possibility for follow-on. It allows that follow-on, but only in a circumstance where it has been foreseen in that original business plan.

However, the respondent is also aware that circumstances can arise where a proper business plan may not have been included, for example in cases where the company was already engaged in raising risk finance or equity investments prior to the application of GBER. The EII Application form at Question 7(c) asks for a "copy of the original business plan, or where not available, other evidence which supports this condition being satisfied." …

It is still a requirement that what is provided is fleshed out, specific and detailed. Vague assertions, or expressions of intent to fund raise without matched consideration of how the amounts are to be invested or utilised are not enough. A statement that it was the intention to continue with further BES issues to enable expansion is not enough. It would be the respondents view that all companies wish to grow and expand. It must have been foreseen at the time of the initial investment and when the original business plan was prepared and detailed as to what may have been envisaged and how that was intended to happen. Documentation to support this has not been provided by the appellant…

The documentation provided is the Appendix to the original business plan. It provides a set of financials, with the accompanying emails providing the narrative (in the present date) as to the intention that that investment was required for. The only details are provided for capital equipment over the first 7 years. No more detail is provided in terms of costing, future purchase, build, the purpose of such equipment is needed for.

If anything, less than that set out in 14(c) and as interpreted by the respondent as sufficient were accepted, it would result in most everyone qualifying, and it would not matter whether the business plan was a bland statement or even viable. This would not be compatible with the overall scheme of GBER.

The appellant further states that it should be taken that 'actions speak louder than words'. The respondent respectably contends that it is prohibited from doing so under GBER. If it was the case, then companies could raise relief without any consideration given to the necessity for such risk finance…

Further to this, as it is a requirement that the respondent must assess the business plan prior to the granting of any relief, it would logically follow that such information must be provided in writing… "

21. At the Hearing the Respondent argued that as the original business plan foresaw risk finance needs of €360,000 but the company had received €2.4m of relief under BES/EII, well in excess of what the business plan indicated, so therefore the 2017 investment does not comply with S.494 and paragraph 6 of Article 21 of GBER.

22. The Respondent argued that State aid can only be allowed under strict conditions; that Article 21 of GBER sets out the rules; that the Appellant does not meet those requirements and only envisaged four rounds of risk finance investments. The claims in respect of €2.4m were made over 30 years, which is well in excess of 7 years. If Article 21 was not enforced strictly then everyone would qualify. This is not compatible with GBER. General statements regarding future investments are not sufficient.

23. The Respondent argued that Paragraph 5 of Article 21 suggests that the relief applies to new SMEs. Old SMEs must have envisaged the risk finance requirement and ensure it is specific, well documented; that it was not intention of GBER to provide indefinitely funding on a permanent basis for companies which had originally qualified.

24. I asked the Respondent whether and how it was possible for Old SMEs to apply for EII relief. The Respondent replied, that there was a provision for Expansion Risk Finance (ERF) within EII but the Appellant did not make such an application under that section. This would involve new products, upskill new staff, new market, etc. The Appellant had applied as follow-on risk finance; has already exceeded the original investment of €360,000 and raised €2.4m. The Appellant now wants an additional €150,000 relief and the documentation submitted does not support this.

Analysis and Conclusion

25. This is an appeal against a decision by the Respondent to refuse to grant Employment and Investment Incentive (EII) relief for an investment of €150,000 in new shares issued by APPELLANT ('Company') on 28 April 2017. The Respondent refused to certify the Company as a 'qualifying company' and as a result the investments made by the investors would not qualify for the Income Tax relief available under the EII scheme.

26. EII is an income tax relief for investors in certain qualifying corporate trades. For an EII qualifying investment in shares issued after 13 October 2015 and before 31 December 2018 certain rules applied. The Irish tax rules prior to and subsequent to this period, differ.

27. To qualify for relief, the company issuing the shares must be a 'qualifying company' and must meet the conditions set out in Section 494 TCA97 as enacted, at that time.

28. Articles 107 to 109 of The Treaty on the Functioning of the European Union ('TFEU') contain the competition provisions that prohibit State Aid, except in certain circumstances. These Articles were introduced by the "Treaty of Lisbon" and are effective from 1 December 2009. Such State Aid is considered to be incompatible with the EU internal market. In accordance with the definition of State Aid, set out in Article 107(1) TFEU, the former Business Expansion Scheme ('BES') and the later EII are classified as State Aid.

29. With effect from 1 July 2014, the EU revised its State Aid rules, providing for new General Block Exemption Rules ("GBER") whereby Member States no longer have to seek EU approval for State Aid schemes if they come within the criteria for GBER.

30. Article 21, paragraph 6(b) of Commission Regulations (EU) No.651/2014 of 17 June 2014 of GBER, declared certain categories of aid compatible with the internal market, commonly referred to as the General Block Exemption Regulation ('GBER'), in the application of Articles 107 and 108 of the treaty.

31. I have set out in Appendix 1 the text of Article 21.

32. EII is risk finance based State Aid which comes within Article 21 of GBER. EII is exempt from the notifications requirement of Article 108(3) of the TFEU, provided the conditions laid down in Article 21 and Chapter 1 of GBER are fulfilled.

33. Certain changes were made to the Irish EII tax rules to comply with GBER.

34. Section 507(1) TCA 1997 was amended to ensure reporting of EII reliefs complied with Article 11 EU regulation 651/2014, State Aid Reporting linked to GBER.

35. Provisions were also included in section 494TCA 1997 to ensure qualifying companies comply with GBER.

36. Section 18 Finance Act 2015 inserted subsection 4A into Section 494 TCA 1997, defining "qualifying companies" for EII. For shares issued after 13 October 2015, the criteria set out in paragraph 5 and 6 of Article 21 of EU Regulation No. 651/2014, commonly referred to as the General Block Exemption Regulation ('GBER') must be satisfied before a subscription for shares in a company will qualify for EII.

37. The Respondent is of the view that the Company would not be considered a 'qualifying company' per section 494 (4A) TCA 1997. It was accepted by the Respondent that the Appellant complied with the conditions set out in paragraph 5 and the issue in this appeal was whether the Appellant complied with paragraph 6 (b). The Respondent is of the view that the Appellant does not comply with paragraph 6 (b) in respect of the share issue under appeal.

38. The Company is of the opinion that it has satisfied the requirements of paragraph 6 (b) of Article 21 of GBER.

39. Paragraph 6 of Article 21 sets out the conditions that must be met for follow-on investments made subsequent to the initial investment. All of these conditions must be met.

> '6*. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned in paragraph 5(b), if the following cumulative conditions are fulfilled:*
>
> *(a) the total amount of risk finance mentioned in paragraph 9 is not exceeded;*
>
> *(b) the possibility of follow-on investments was foreseen in the original business plan;*
>
> *(c) the undertaking receiving follow-on investments has not become linked, within the meaning of Article 3(3) of Annex I with another undertaking other than the financial intermediary or the independent private investor providing risk finance under the measure, unless the new entity fulfils the conditions of the SME definition.'*

It was accepted by both parties that the initial investment in this appeal was circa 1992 and that the investment in 2017 under appeal was a follow-on investment. The issue for the Respondent was that it believed that the investment did not comply with condition (b) above.

40. The Appellant Company was unable to provide the Respondent with the original business plan as it was prepared 25 years ago. The Company did however, manage to find a written Appendix of Financial Projections to this original plan, which the Appellant submitted to the Respondent. The Respondent accepted at the hearing that the Appendix of Financial Projections was part of the original written business plan.

41. The Appellant argued that the financial projections set out in the Appendix shows that it did foresee, *ex ante*, the need to raise additional finance.

42. The Respondent submits that the Appendix of Financial Projections provided does not constitute the "original business plan" as the Respondent asserts is required by paragraph 6 (b). The Respondent also submitted that the phrase 'business plan' must be interpreted in accordance with paragraph 14(c) of Article 21 and that the Appendix of Financial Projections provided by the Appellant does not satisfy the criteria set out in paragraph 14. The Respondent argued that if anything, less than that set out in 14(c) and as interpreted by the Respondent as sufficient, were accepted, it would result in most everyone qualifying, and it would not matter whether the business plan was a bland statement or even viable. The Respondent argued that this would not be compatible with the overall scheme of GBER.

43. Article 14(c) reads

> *'risk finance provided to the eligible undertakings shall be based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;'*

The Respondent submitted that it would not be GBER's intention to support an entity throughout the entirety of their existence by way of state aid. The concept of EII is that it is for start-up SME's, newly entering the market or entering new markets, they are engaging in risk and therefore require risk finance aid. If an entity is continuing with the same thing 7 years or later, it would not be meeting the aims of GBER.

44. I cannot understand this argument from the Respondent made at the hearing given that Irish Revenue published a set of FAQs dealing with changes to EII and GBER in December 2015. Later in 2017, the Revenue Tax and Duty Manual – Part 16-00-10,

updated on 2 June 2017, contained Appendix 4 – GBER FAQ's. This sets out the Respondents' published views on the operation and interpretation of section 494 (4A) TCA97 at the time the relief, in this appeal, was refused. Included therein were the following:

> ***'Q. What impact do these new rules have on a company raising EII funding for the second time?***
>
> *A. There are two sets of conditions to be met.*
> *Firstly, a company is only eligible to raise EII funding a second time if it previously raised funding through EII/BES/SURE (all of which are found in Part 16 TCA 1997) where, at the time of that funding, it met the conditions of paragraph (5) of GBER. For most companies, that will mean that they raised EII/BES/SURE within 7 years of their first sale. Other companies will meet this test if they used their first EII/BES/SURE funding to expand into new markets or launch new products, and have met the 50% of turnover threshold…'*

This implies that the Respondent did envisage that an SME could raise EIIS investment outside the 7 years at the time the relief, in this appeal, was refused.

45. Counsel for the Respondent noted that Old SMEs (in existence for more than 7 years) could avail risk finance but in general the scheme applied to new start-ups. According to the Respondent, an old SME must do new things (with new products or, markets, etc.) as envisaged by paragraph 5 (c) of Article 21. I asked the Respondent whether and how it was possible for Old SMEs to reapply for the relief. Counsel for the Respondent noted that there was a provision for Expansion Risk Finance (ERF) within EII but the Appellant did not make such an application under that section. This would involve new products, upskill new staff, new market, etc. but the Appellant applied as follow-on risk finance.

46. I find this line of argument curious given that the Respondent did not dispute that a qualifying condition of paragraph 5 had been met by the Appellant. I believe this argument is more appropriate for how the EII tax relief applies from 2019 onwards. However, it does not sit easily with the law as it applied at the time the investment within this appeal was made.

47. The Appellant submitted that by making the provision of the original business plan a condition of obtaining the relief the Respondent is applying the conditions of GBER retrospectively. I reject this argument from the Appellant. The investment under

appeal was made after the enactment of the Finance Act 2015 so no retrospection applies.

48. When compiling the original business plan, the Appellant could not have foreseen that GBER would be introduced 23 years later. The Appellant submitted that it is unreasonable to expect them to be able to provide such an old document and unreasonable that its absence should be used as a reason for denying the relief. Furthermore, the Appellant submits that the Appendix of Financial Projections provided should allow the Respondent to draw logical inferences as to the Company's business plans as these are set out numerically in the projections. I agree with this argument.

49. The Appendix of Financial Projections to the original business plan compiled by the Appellant in Year 0, sets out in considerable detail, projections for the development of the Company from year zero up to Year 7 (an eight year period). It shows an initial risk investment equity of €90,000 in year 0, followed by follow-on investments of €120,000, €90,000 and €60,000 in Years 2, 3 and 4 respectively.

50. These projected follow-on investments, which appear to have been subsequently made, although not explicitly confirmed to me during the appeal, fall full square within the wording of paragraph 6(b) of Article 21 of GBER.

51. Although not explicitly required by section 494 (4A) TCA 97, those equity investments amount to in my view '*risk finance provided to the eligible undertaking(s)… based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;'* as envisaged by Article 14.

52. The requirements as set out in paragraph 5 and 6 are clear in the necessity for all entities to have a viable business plan. I believe that based on the submissions and credible testimony of the Appellant, the Appellant had such a detailed plan at the time of the initial risk investment and that plan, as evidenced by the Appendix of Financial Projections to that plan presented to me, clearly shows that the "possibility of following investment" was foreseen in that original plan.

53. The Respondent's determination of refusal was made on the grounds that the original business plan did not foresee the need to raise additional risk finance by way of EII to that which had already been raised by the company. The Respondent submits that the Appellant is not in compliance with paragraph 6(b) and 14(c) of Article 21 of GBER. I

reject that argument as the wording of paragraph 6(b) speaks only of "*the possibility of follow-on investments was foreseen in the original business plan...*" The possibility of follow-on investment from the initial investment of €90,000 was foreseen.

54. In their Statement of Case the Appellants argued:

'Revenue have declined to issue EII 2 and EII 3 certificates because they insist on our furnishing a "complete copy of the company's business plan drawn up in 1992". We contend that we have furnished the relevant part of that plan which clearly evidences our intention to raise additional risk finance…'

I accept that argument.

55. The Respondent in its written submissions cited a number of EU law cases. In determining what the EU regards as an SME the following are insightful.

C-91-01 Italy v Commission [2004];
"46. Point 1.2 of the SME Guidelines states that the favourable consideration given by the Commission to State aid to SMEs is justified by the imperfections in the market which lead to their having to suffer a number of handicaps and which thus limit the socially and economically desirable development of such enterprises.
47. Point 3.2 of the SME Guidelines states that, in order to qualify as an SME under those guidelines, an enterprise must satisfy three tests: number of persons employed, the financial test and the independence test."

Case T-137/02 Pollmeier Malchow GmbH & Co. KG v Commission [2004];
"In the present case, it is clear in particular from the 18th, 19th and 22nd recitals in the preamble to Recommendation 96/280 and from point 3.2 of the SME guidelines that the purpose of the independence test is to ensure that the measures intended for SMEs genuinely benefit enterprises for which size represents a handicap and not those which belong to a large group and which therefore have access to funds and assistance not available to competitors of equal size but which do not belong to a large group. It is also apparent from those provisions that, in order to apply only to enterprises which in fact constitute independent SMEs, it is necessary to eliminate legal arrangements in which SMEs form an economic group stronger than such an undertaking and it is necessary to ensure that the definition of SMEs is not circumvented for purely formal reasons"

56. These EU case above addressed, among other things, the criteria for determining which type of company constituted an SME under EU State Aid rules. It appears to me that the Respondent, by accepting that the Appellant Company met the conditions of

paragraph 5 of Article 21, at no stage inferred that the Appellant was not an SME for EU state aid purposes.

57. The Respondent in its submissions stated:

> *'The EU Commission in general do not allow state aid, but in very limited circumstances and for our purposes the rules governing those exemptions are contained in GBER."*

58. However, it is my view, in interpreting section 494 TCA97, the Respondent must, in determining entitlement to EII relief and the GDBR rules as they apply, confine themselves to the provisions of paragraphs 5 and 6 of Article 21 only to determine those rules. This precludes the Respondent from applying criteria for EII relief outside those paragraphs, which it believes may come within the broad ambition of GBER.

59. I find as a material fact that the Appellant had a business plan prepared in 1992 and that the possibility of follow-on risk finance, in the form of equity investment, after the initial investment of €90,000 in Year 0, was foreseen in the original business plan. The follow-on investments envisaged relate to risk investment equity BES finance for years 1994, 1995 and 1996 in the amounts of €120,000,€90,000 and €60,000 respectively.

60. Accordingly, the Appellant meets the conditions of paragraph 6 (b) of Article21of Commission Regulations (EU) No.651/2014 of 17 June 2014 of GBER. Since the Respondent did not dispute that the Appellant met the other conditions within paragraph 6 and had also accepted that the Appellant met the conditions in paragraph 5, I have concluded that the Appellant is entitled to EII relief for the investment under appeal.

Determination

61. I determine that the decision by the Respondent to refuse to grant Employment and Investment Incentive (EII) relief for an investment in 2017 of €150,000 in new shares issued by APPELLANT ('Company'), should not stand and that EII relief should be allowed in respect of this investment.

62. This determination is made in accordance with the provisions of 949AL TCA 1997.

Paul Cummins
Appeal Commissioner
Designated Public Official

27th JANUARY 2021

Appendix 1

GBER

Aid for access to finance for SMEs

Article 21

Risk finance aid

1. *Risk finance aid schemes in favour of SMEs shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided the conditions laid down in this Article and in Chapter I are fulfilled.*

2. *At the level of financial intermediaries, risk finance aid to independent private investors may take one of the following forms:*

   (a) *equity or quasi-equity, or financial endowment to provide risk finance investments directly or indirectly to eligible undertakings;*

   (b) *loans to provide risk finance investments directly or indirectly to eligible undertakings;*

   (c) *guarantees to cover losses from risk finance investments directly or indirectly to eligible undertakings.*

3. *At the level of independent private investors, risk finance aid may take the forms mentioned in paragraph 2 of this Article, or be in the form of tax incentives to private investors who are natural persons providing risk finance directly or indirectly to eligible undertakings.*

4. *At the level of eligible undertakings, risk finance aid may take the form of equity, quasi-equity investments, loans, guarantees, or a mix thereof.*

5. *Eligible undertakings shall be undertakings which at the time of the initial risk finance investment are unlisted SMEs and fulfil at least one of the following conditions:*

   (a) *they have not been operating in any market;*

   (b) *they have been operating in any market for less than 7 years following their first commercial sale;*

(c) they require an initial risk finance investment which, based on a business plan prepared in view of entering a new product or geographical market, is higher than 50% of their average annual turnover in the preceding 5 years.

6. The risk finance aid may also cover follow-on investments made in eligible undertakings, including after the 7 year period mentioned in paragraph 5(b), if the following cumulative conditions are fulfilled:

(a) the total amount of risk finance mentioned in paragraph 9 is not exceeded;

(b) the possibility of follow-on investments was foreseen in the original business plan;

(c) the undertaking receiving follow-on investments has not become linked, within the meaning of Article 3(3) of Annex I with another undertaking other than the financial intermediary or the independent private investor providing risk finance under the measure, unless the new entity fulfils the conditions of the SME definition.

7. For equity and quasi-equity investments in eligible undertakings, a risk finance measure may provide support for replacement capital only if the latter is combined with new capital representing at least 50 % of each investment round into the eligible undertakings.

8. For equity and quasi-equity investments as referred to in paragraph 2(a), no more than 30% of the financial intermediary's aggregate capital contributions and uncalled committed capital may be used for liquidity management purposes.

9. The total amount of risk finance referred to in paragraph 4 shall not exceed EUR 15 million per eligible undertaking under any risk finance measure.

10. For risk finance measures providing equity, quasi-equity or loan investments to eligible undertakings, the risk finance measure shall leverage additional finance from independent private investors at the level of the financial intermediaries or the eligible undertakings, so as to achieve an aggregate private participation rate reaching the following minimum thresholds:

(a) 10% of the risk finance provided to the eligible undertakings prior to their first commercial sale on any market;

(b) 40% of the risk finance provided to the eligible undertakings referred to in paragraph 5(b) of this Article;

(c) *60% of the risk finance for investment provided to eligible undertakings mentioned in paragraph 5(c) and for follow-on investments in eligible undertakings after the 7-year period mentioned in paragraph 5(b).*

11. *Where a risk finance measure is implemented through a financial intermediary targeting eligible undertakings at different development stages as referred to in paragraph 10 and does not provide for private capital participation at the level of the eligible undertakings the financial intermediary shall achieve a private participation rate that represents at least the weighted average based on the volume of the individual investments in the underlying portfolio and resulting from the application of the minimum participation rates to such investments as referred to in paragraph 10.*

12. *A risk finance measure shall not discriminate between financial intermediaries on the basis of their place of establishment or incorporation in any Member State. Financial intermediaries may be required to fulfil predefined criteria objectively justified by the nature of the investments.*

13. *A risk finance measure shall fulfil the following conditions:*

(a) *it shall be implemented via one or more financial intermediaries, except for tax incentives to private investors in respect of their direct investments into eligible undertakings;*

(b) *financial intermediaries, as well as investors or fund managers shall be selected through an open, transparent and non-discriminatory call which is made in accordance with applicable Union and national laws and aimed at establishing appropriate risk-reward sharing arrangements whereby, for investments other than guarantees, asymmetric profit sharing shall be given preference over downside protection;*

(c) *in the case of asymmetric loss-sharing between public and private investors, the first loss assumed by the public investor shall be capped at 25 % of the total investment;*

(d) *in the case of guarantees falling under point 2(c), the guarantee rate shall be limited to 80% and total losses assumed by a Member State shall be capped at a maximum of 25% of the underlying guaranteed portfolio. Only guarantees covering expected losses of the underlying guaranteed portfolio can be provided for free. If a guarantee also comprises coverage of unexpected losses, the financial intermediary shall pay, for the part of the guarantee covering unexpected losses, a market-conform guarantee premium.*

14. Risk finance measures shall ensure profit-driven financing decisions. This is considered to be the case where all of the following conditions are fulfilled:

(a) financial intermediaries shall be established according to the applicable laws.

(b) the Member State, or the entity entrusted with the implementation of the measure, shall provide for a due diligence process in order to ensure a commercially sound investment strategy for the purpose of implementing the risk finance measure, including an appropriate risk diversification policy aimed at achieving economic viability and efficient scale in terms of size and territorial scope of the relevant portfolio of investments;

(c) risk finance provided to the eligible undertakings shall be based on a viable business plan, containing details of product, sales and profitability development, establishing ex-ante financial viability;

(d) a clear and realistic exit strategy shall exist for each equity and quasi-equity investment.

15. Financial intermediaries shall be managed on a commercial basis. This requirement is considered to be fulfilled where the financial intermediary and, depending on the type of risk finance measure, the fund manager, fulfil the following conditions:

(a) they shall be obliged by law or contract to act with the diligence of a professional manager in good faith and avoiding conflicts of interest; best practices and regulatory supervision shall apply;

(b) their remuneration shall conform to market practices. This requirement is presumed to be met where the manager or the financial intermediary is selected through an open, transparent and non-discriminatory selection call, based on objective criteria linked to experience, expertise and operational and financial capacity;

(c) they shall receive a remuneration linked to performance, or shall share part of the investment risks by co-investing own resources so as to ensure that their interests are permanently aligned with the interests of the public investor;

(d) they shall set out an investment strategy, criteria and the proposed timing of investments;

(e) investors shall be allowed to be represented in the governance bodies of the investment fund, such as the supervisory board or the advisory committee.

16. A risk finance measure providing guarantees or loans to eligible undertakings, shall fulfil the following conditions:

(a) as a result of the measure, the financial intermediary shall undertake investments that would not have been carried out or would have been carried out in a restricted or different manner without the aid. The financial intermediary shall be able to demonstrate that it operates a mechanism that ensures that all the advantages are passed on to the largest extent to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates;

(b) in the case of loans, the nominal amount of the loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9;

(c) in the case of guarantees, the nominal amount of the underlying loan is taken into account in calculating the maximum investment amount for the purposes of paragraph 9. The guarantee shall not exceed 80% of the underlying loan.

17. *A Member State may assign the implementation of a risk finance measure to an entrusted entity.*

18. *Risk finance aid for SMEs that do not fulfil the conditions laid down in paragraph 5 shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that*

(a) at the level of the SMEs, the aid fulfils the conditions laid down in Regulation (EU) No 1407/2013; and

(b) all the conditions laid down in the present Article, with the exception of those set out in paragraphs 5, 6, 9, 10, and 11, are fulfilled; and

(c) for risk finance measures providing equity, quasi-equity or loan investments to eligible undertakings, the measure shall leverage additional financing from independent private investors at the level of the financial intermediaries or the SMEs, so as to achieve an aggregate private participation rate reaching at least 60% of the risk finance provided to the SMEs.