34TACD2021

BETWEEN/

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to value-added tax ('VAT') and to income tax. The VAT assessments totalling €118,551 relate to the tax years of assessment 2008 to 2012 and the assessments to income tax totalling €178,765 relate to the tax years of assessment 2008 to 2011.

2. The VAT and income tax assessments were raised in relation to payments received by the Appellant from [company name redacted] Ltd., (hereafter 'ABL'') during the years 2008 to 2012. The nature of these payments was a matter of dispute between the parties. The Appellant claimed the payments were received on foot of a profit sharing joint venture agreement between the Appellant and ABL and were not subject to VAT. The Respondent contended that the payments related to the provision of consulting and training services by the Appellant and were subject to VAT accordingly.

3. In relation to the assessments to income tax, the Appellant claimed that the joint venture was a continuation of his sole tradership in the manufacture and provision of fitted kitchens. The Appellant submitted that the losses generated in that business

were available for offset against his share of the alleged joint venture profits pursuant to section 382 TCA 1997. The Respondent submitted that the trade in which the losses were generated, was not the same trade as the trade against which the Appellant sought to offset the losses.

4. The third issue between the parties related to the sale of machinery by the Appellant on which VAT had been charged but not returned. The Appellant's position was that he was taxed on a receipts basis but had not received payment in respect of the invoice. The Appellant instituted proceedings against ABL for the outstanding sum. The proceedings were settled and the settlement of the proceedings formed part of a settlement agreement dated in September, 2018. Pursuant to the settlement agreement, ABL agreed to pay the Appellant €550,000 in full and final settlement of all claims.

5. Following an audit, the Respondent raised VAT assessments on 30 October, 2013, and income tax assessments on 23 November, 2013. The Appellant duly appealed.

Background

6. The Appellant operated as a sole trader trading under the style and title of '[redacted]' in relation to the manufacture and provision of fitted kitchens since approximately [year redacted]. During the years 2004 to 2008 the appellant incurred significant losses in this trade.

7. On or about June 2008, ABL entered into an arrangement with Bank of Ireland Finance Limited. The Respondent submitted that ABL through this arrangement, took over the financing arrangements that had been in place between the Appellant and [finance company]. The Appellant's position was that ABL agreed to make payments to [finance company] on the Appellant's behalf. On 28 June 2006, the Appellant sold certain machinery to ABL. The Appellant invoiced ABL for €200,000 plus VAT of €42,000 by invoice of same date. The Appellant stated that he did not sell all of his machinery but merely those items detailed on the invoice.

8. The Appellant agreed to train ABL staff in the use of the machinery and in a sales capacity. The Appellant received round sum payments from ABL of between €10,000 and €13,700 per month in relation thereto. The Appellant claimed that these

payments arose from a profit sharing joint venture while ABL claimed that the payments related to the provision of consulting and training services by the Appellant. The payments made to the Appellant were made without deduction of tax. The Appellant raised invoices during 2008 – 2010 in which he charged VAT however he did not return this VAT to the Respondent. ABL claimed an input credit for the VAT element of the payments made. The Appellant did not include the income received from ABL in his income tax returns and did not file VAT returns in respect of the VAT charged on the invoices raised.

9. An audit letter issued to the Appellant on 18 May 2012, and the audit meeting took place on 8 June 2012. While there have been numerous meetings and exchange of correspondences, the parties remain at odds in relation to the nature of the sums received and their liability to VAT and to income tax. The Appellant in his correspondence and submissions detailed at length his disagreement with the Revenue officials who conducted the audit. He alleged that the audit had been conducted incorrectly, unfairly and contrary to the charter of rights.

10. The Appellant stated that ABL did not discharge the sum of €242,000 in respect of the sale of the machinery and that litigation ensued. He stated that this claim was settled as part of a mediated settlement agreement entered into on in September 2018. A copy of the settlement agreement was furnished by the Appellant.

Legislation

11. The relevant legislation is contained in sections 111 and 113 the Value Added Tax Consolidation Act 2010 as amended ('VATCA2010') and in sections 382 and 924 of the Taxes Consolidation Act 1997, as amended ('TCA 1997'), relevant excerpts of which are set out below.

Submissions

Joint venture

The Appellant submitted that the agreement between he and ABL was a profit sharing joint venture agreement and that the monthly round sum payments received constituted his share of the profits to be ascertained. He submitted that on this basis, the monies were not subject to VAT.

12. The Respondent submitted that the monthly payments received by the Appellant were payment for the provision of services to ABL (namely, the provision of training and consulting services) and that these services were subject to VAT. The Respondent did not accept that there was a joint venture as alleged, and the Respondent put the Appellant on proof of the existence and operation of the alleged joint venture.

Losses

13. The Appellant sought to offset pre-2008 losses generated in his trade of the manufacture and provision of fitted kitchens, from profits generated post-2008 in relation to the payments received from ABL, on the basis that both trades were the same. For the offset to be allowable in accordance with section 382(1) TCA 1997, the trade in which the losses were generated must be the same trade as the trade in which profits were generated.

14. The Respondent submitted that the trades were not the same. The Respondent did not accept that there was a joint venture in existence between ABL and the Appellant. The Respondent submitted that the trade with ABL comprised the provision by the Appellant of training and consulting services to ABL staff and was not the same trade as the trade in which the losses were generated namely, the trade of the manufacture and provision of fitted kitchens.

Vat on sale of machinery

15. By invoice dated 26 June 2008, the Appellant sold certain machinery to ABL including machinery compressor, dryer, extraction system, press and vacuum lift. The Appellant issued an invoice in the sum of €200,000 plus VAT at 21% of €42,000.

16. The Respondent included the VAT element of the invoice in the VAT assessment for 2008. The Appellant's position in relation to the assessment was that he had not received payment in relation to the invoice and that as he was taxed on a payments

received basis, he was not liable for the VAT until the invoice was discharged. The Respondent confirmed that the Appellant was liable to VAT on a receipts basis.

17. In 2014, the Appellant commenced proceedings in the High Court (record number [redacted]) to recover payment in respect of this invoice. The settlement of these proceedings formed part of a mediated settlement agreement entered into on in September 2018. Pursuant to the settlement agreement, ABL agreed to pay the Appellant €550,000 in full and final settlement of all claims. At hearing before the TAC on 24 February 2020, the Appellant confirmed that he had received €350,000 of the €550,000 due on foot of the settlement agreement.

Evidence

18. Evidence was provided by the Appellant in person. The Appellant stated that he was a sole trader since [year redacted], carrying on the business of the manufacture and provision of fitted kitchens trading as '[trade name redacted] '.

19. He stated that in 2008 he entered into an agreement with ABL. He stated that this agreement was a profit sharing joint venture and that the weekly and monthly round sum payments received from ABL constituted an advance or a drawdown of profits to be ascertained. He stated that in his view, the joint venture agreement with ABL was a continuation of his business as a sole trader.

20. He accepted that in 2008-2010 he invoiced ABL and that the invoices purported to be for the provision of consultancy services. He stated that as soon as Revenue brought this to his attention he changed the invoices and the references to consultancy were removed.

21. He accepted that he charged VAT on these invoices and did so at the incorrect lower rate. He stated that he was never told of the correct VAT rate. However, the Respondent opened a letter which demonstrated that the Appellant had been informed by the Respondent on 1 February 2013, that the standard rate of VAT was the appropriate rate. The letter requested the Appellant to re-compute the liability, to submit computations and to submit outstanding returns.

22. The Appellant stated that even though he had raised VAT invoices, there was no VAT due in relation to the payments received as the payments arose from a profit sharing joint venture. However, the Appellant accepted that he had described the payments as consultancy fees in his tax returns. He stated that this had been a mistake. The Appellant did not accept that the payments related to the provision of consulting and/or training services.

23. The Appellant stated that he was liable to VAT on a receipts basis and the Respondent confirmed that this was the case. In relation to the sale of machinery and the charge to VAT contained on invoice no. 08240 dated 28 June 2008, the Appellant stated that he did not receive payment and that he commenced proceedings against ABL for the payment of these monies. He stated that this claim was settled as part of a mediated settlement on in September 2018. A copy of the settlement agreement was furnished by the Appellant. Pursuant to the settlement agreement, the Appellant was to receive €550,000 in full and final settlement in respect of a number of outstanding claims. At the TAC hearing in February 2020, the Appellant stated that pursuant to the settlement agreement, he had at that point received €350,000 of the €550,000 sum.

24. On the issue of the offset of trading losses, the Appellant stated that he regarded the payments received from ABL as a continuation of his business as a sole trader. He stated that he sought to deduct the trading losses on the basis that they arose from the same trade.

ANALYSIS

Joint venture

25. It is not disputed that from May 2008 to April 2012, the Appellant received payments of between €10,000 and €13,700 per month from ABL. The payments were made without deduction of tax. The Appellant raised invoices in relation to these payments in 2008-2010, which charged VAT however, the Appellant did not return this VAT to the Respondent.

26. The Appellant submitted that the payments he received from ABL were profit sharing payments received on foot of a joint venture agreement between he and ABL. In this regard he relied upon a written agreement with ABL, clauses of which are set out below. Initially the Appellant furnished an unsigned copy of the agreement to the Respondent and to the TAC. The Appellant furnished a signed copy of the agreement on 9 September, 2019, on foot of a direction by the TAC dated 7 August, 2019. There were numerous wording and formatting differences between the draft agreement and the signed agreement.

27. As regards the execution of the alleged joint venture agreement, I note that the signatures to the agreement are not witnessed and that the agreement is neither sealed nor stamped. The agreement is titled '*Agreement between* [ABL] *and* [the Appellant]' and the signatures are dated 21 June, 2008. The agreement, which contains a number of spelling, formatting, and punctuation errors, contains *inter alia* the following clauses which are set out below as they appear in the signed version of the agreement;

> ***'Purpose of joint venture between*** **[the Appellant]** ***and*** **[name redacted A]** ***of*** **[ABL].**
>
> *The Manufacture and sale of all* [Company C] *worktops and all other related products i.e.: other worktops, tooling, sinks and accessories.*
>
> ***Venture Company set up***
>
> *A Company is to be set up with the directors and share holders been*
>
> [name redacted B], [the Appellant's spouse]
>
> [name redacted A], [the Appellant]
>
> *Or in the event that Accountants' for both parties can agree to an alternative structure*
>
> *Share holding is to be held equal between parties.*

> *The Company shall pay to* [the Appellant's spouse] *the sum of 1.5 million euro at a minimum rate of 25% of its annual profit till sum is paid in full. This sum is to be adjusted down in accordance with schedule one*
>
> *The name of the company upon approval by* [Company C] *shall be*
>
> [Company C Innovation] *Ltd…. or alternative.*
>
> *Date of set up is to be following the Transition period being 1st May 2009 unless an extension period to the transition period is to be agreed by* [the Appellant] *and* [ABL].'

28. The above clause provides that a company was to be incorporated, titled '[Company C Innovation] Ltd.' and that this company was to be the vehicle for the joint venture. The Respondent stated that this company had never been incorporated and did not exist.

29. In the Appellant's reply to the Respondent's outline of arguments, he placed particular reliance on the wording: '*Or in the event that Accountants' for both parties can agree to an alternative structure'* in support of his submission that there was a joint venture in existence with ABL based on an agreement with ABL. He stated that it was agreed that ABL would manage the venture and pay fixed sums to the Appellant. However, the Appellant did not call any independent evidence in support of the existence of the joint venture. As regards the letter from ABL dated 30 November, 2012, which is at odds with the Appellant's submission, his answer was that the letter was unreliable.

30. The clause identified as clause (1) in the agreement provides in part:

> *'The* [Company C] *agency to supply exclusively into Republic and Northern Ireland during the Transition/Trial period will be as follows:-*
>
> *a) The agency is between* [the Appellant] *and* [company name redacted] *in* [location redacted]
>
> ..
>
> *h)* [the Appellant] *under this agreement may do his own thing in relation to The supply of worktops outside the island of Ireland*

…

l) [ABL] *must at all times preserve the integrity of* [the Appellant] *in the Market place.*

m) [the Appellant] *at all times must preserve the integrity of* [ABL] *at all times in the market place'*

31. This excerpt appears above as it appears in the signed agreement. The agreement provided for a transition period from 1 May, 2008, to 30 April, 2009. During the transition period the agreement provided that '*no profit sharing or payback will be paid to either* [the Appellant] *or* [the Appellant's spouse] *but trading figures on worktops are to be made available*. The agreement continues as follows;

'As and from the 30th April payback sum (1.5million euro at a minimum rate of 25% of its annual profit till sum is paid in full) to be paid to [the Appellant's spouse].

As and from 1st July all worktop sales by [ABL] *come under this agreement.*

Purpose of period:

(1) To evaluate the workings of the factory environment for the purpose of manufacturing Worktops with the overlap of use of machinery for [ABL] *production of other products.*
(2) To determining if without setting up a new company if a Working Template can be put in place that would both profit share and pay back to [the Appellant's spouse] *the sum of 1.5 million euro at a minimum rate of 25% of annual profit from worktop and associated sales till sum is paid in full. (Subject to schedule one)*

As and from the 01.05.08 during transition period [ABL] *shall:*

(a) Take control of all stock materials
(b) Take control of all sales

(c) Take control of all manufacturing
(d) Make a payment 240,000 ex vat to [finance company] *on behalf of* [the Appellant] *and receive a letter of authorisation to remove dismantle or remove machinery from* [location redacted] *factory.*
(e) Make provisions for all machinery to be moved
(f) To pay ESB charges in relation to worktop production in [location redacted]
(g) On the issuing of invoice from [the Appellant] *to pay Vat element only in order to take stock and Machinery Compressor, dryer, extraction system, press and vacuum lift off my books.*
(h) To pay [the Appellant] *upon invoicing a Consultancy fee Ex VAT of the following for the months of*

May June €1000 per week

July November €1,500 per week

From December 08 to April 09 €2000 per week

(i) [the Appellant] *shall be supplied with office space on the first floor in the main office area at* [ABL].'

As from 01.05.08 [the Appellant] *shall during transition period.*

(1) Train [ABL] *staff*
(2) Be available for Machine consultancy
(3) Be available for Marketing, Consultancy
(4) To provide Marketing Truck excluding expenses outside road insurance, motor tax and truck up-keep

(6) Pay the rent and rates for [location redacted] *factory for may 08 and June 08.'*

32. Again, the above excerpt is set out as it appears in the agreement.

33. The remaining clauses in the agreement deal with *inter alia*, machinery, intellectual property and restraint of trade. Schedule one referred to above, provides for the payment to [finance company] of €240,000.

34. The signed agreement (hereafter 'the agreement') was not formally proved in evidence. The co-signatory to the document, Mr. [name redacted A], was not called by the Appellant to give evidence in relation to the agreement, its execution and operation, nor was any other director or representative of ABL called to give evidence. In addition, other than the Appellant, none of the nominated shareholders gave evidence. In addition, the Appellant did not secure a letter from ABL confirming the validity, execution and/or operation of the agreement. The only view expressed by ABL with which the TAC was furnished, was the view contained in their letter of 30 November 2012 to the Respondent. That letter provides as follows;

> *I refer to our recent discussions and set out hereunder the following responses to your queries as raised on the 6th November last in respect of the business arrangement between* [ABL] *and Mr.* [the Appellant] *of* [address redacted].
>
> 1. *In respect of how the costs for* [the Appellant] *have been accounted for – These have been accounted as an overhead on the business and reflected in the Profit & Loss account as a cost to the business. These have been reflected under consultants as reflected in the Profit & Loss account of the company.*
> 2. *The nature of the service for which* [ABL] *were making the payment is in relation to consultancy. The payments are not being made for the purchase of a trade. The payments are being made for* [the Appellant] *to carry out the following function for* [ABL].
>
> *a) At the very start of the business arrangement, he came in and he trained staff in relation to how to use machinery that* [ABL] *had purchased from him and he also trained staff in the various categories and styles of worktop that are available so the main purpose was that he would transfer his knowledge that he had gained over the years in the worktop business to senior members of staff within* [ABL] *on the production floor.*
> *b) He was also involved in the training and managing of the sales representatives for* [ABL] *so that they were sufficiently knowledgeable of the worktop business and also of the products that* [ABL] *started selling from the business arrangement with* [the Appellant]. *The Reps received training*

and knowledge in relation to the worktop products that [ABL] *were manufacturing and also that* [ABL] *were distributing.*

c) *He was also involved in meeting with the Sales Reps and Customers as* [ABL] *did not have extensive knowledge in relation to the worktop business and the terminology and it took almost a year if not two years for the Reps and the company to get up to date in relation to all aspects of the worktop business.*

3. *In respect of the VAT rate applicable on the inputs being claimed and the payments made to* [the Appellant] *were at 21% and 23% and you might please note that this has been a contentious issue over the last number of years as* [ABL] *have on a number of occasions requested that the invoices be submitted in relation to the payments and the appropriate wording on same and this has not always been the case. Only a number of months ago* [ABL] *issued* [the Appellant] *an ultimatum that payment would stop unless invoices that were outstanding were provided to* [ABL] *on a weekly basis rather than being grouped together and I have attached a copy of an invoice that was submitted by* [the Appellant] *in September 2010.*
4. *In relation to the assets transferred to* [ABL], *there was certain equipment invoiced by* [trade name redacted] *to* [ABL]*. on the 26th June 2008, and these mainly consisted of a beam saw, a compressor air system, an air dryer, a tank, hot pressure press, a dust extraction system, a vacume life, glue spreader and some other equipment and I have attached a copy of the invoice that was issued by* [trade name redacted] *to* [ABL]*. Also please note that* [the Appellant] *had finance on some machinery with* [finance company] *and on the 25th of June 2008, Bank of Ireland Finance requested that* [the Appellant] *give a letter on his headed paper stating that he authorised Bank of Ireland Finance to pay* [finance company] *for the sum of €240,000 plus VAT.* [ABL] *took out a lease for five years on this equipment and* [ABL] *have made the payments each month since August 2008 when the lease commenced and this agreement will finish in June 2013.*

   You might please note that these assets were not transferred from [the Appellant] *to* [ABL] *but it was actually* [ABL] *that took over the leases through Bank of Ireland Finance that were held by* [the Appellant] *with* [finance company] .

If you have any queries regarding the attached, please do not hesitate to contact me.

Yours etc.'

...

35. The Appellant in this appeal submitted that there was a profit sharing joint venture in existence between he and ABL however, the content of this letter is directly at odds with that submission.

36. The law on the onus of proof in tax cases was clearly articulated by Charleton J. in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, where at para. 22, Judge Charleton stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

37. Thus the onus of proof in this tax case as in all tax cases, rests on the Appellant and it is the Appellant who must prove that the assessments to tax are incorrect.

38. As regards the agreement (leaving aside the fact that the agreement was not formally proved), it appears that material aspects of the agreement were not implemented for example, the setting up of [Company C Innovation] Ltd. The Appellant in his submissions confirmed that the company was not established. The Appellant also placed reliance on the wording: '*Or in the event that Accountants' for both parties can agree to an alternative structure'* in support of his submission that there was a joint venture in existence with ABL based on an agreement with ABL. In this regard the evidence of the existence and operation of such an agreement is considered below.

39. The evidence, is that based on the day to day operation of the agreement, the actions of the parties were not consistent with the operation of a profit sharing arrangement and in this regard I refer specifically to the raising of invoices by the Appellant for consultancy services which charged VAT in respect thereof. The Appellant filed income tax returns which described the payments received from ABL as consultancy payments which is similarly inconsistent. The Appellant submitted that the

consultancy payments were chargeable only during the transition period and up to April 2009, as per the written agreement and that thereafter, the invoices were raised in error and the payments received constituted shared profits on foot of the alleged joint venture agreement.

40. The position of ABL, as stated in correspondence dated 30 November 2012, was that in exchange for services provided by the Appellant, regular payments were made to the Appellant in agreed round sum amounts for which the Appellant was required to invoice and for a period, did invoice. The services provided comprised the training of staff in the use of the machinery purchased and the training and management of sales representatives for ABL. The Appellant was also required to attend meetings with sales representatives and customers to lend knowledge and expertise. ABL claimed an input credit deduction for the VAT element of the payments made.

41. The Appellant did not call any director or representative of ABL to provide evidence at hearing in relation to the existence or otherwise of the joint venture agreement nor did he call any other witness in corroboration of his interpretation of the business relationship between he and ABL.

42. The Appellant invoiced ABL from 2008 to 2010, and these invoices included VAT albeit at the incorrect rate. The Respondent wrote to the Appellant on 1 February 2013, and informed him that the standard rate of VAT was the appropriate rate. The letter requested the Appellant to re-compute the liability, to submit revised computations and to submit a payment plan in relation to the tax outstanding.

43. The Appellant's submission in relation to the VAT charged was that he charged the VAT in error on all such invoices during these years. From 1 January 2011, he revised the wording on his invoices and he ceased charging VAT on the invoices. When asked to explain why he described the payments as consulting, his answer was that it was an error.

44. Further, the payments were received on a weekly and monthly basis in the same recurring round sum amounts which the Respondent submitted, was not indicative of the existence of a profit sharing agreement. The Appellant's submission was that the recurrent payments constituted an advance or a drawdown of profits yet to ascertained. As against this, and as stated in the letter of 30 November 2012, ABL's

view was that the payments were made in exchange for the provision of consultancy services. Accordingly, ABL treated the payment as a business expense and deducted the cost from the profit and loss account. In addition, ABL deducted in their VAT returns, the VAT element of the fees paid.

45. One of the difficulties for the Appellant in the submission he seeks to advance, is that his actions in prior years are not consistent with his submission that the payments he received arose from a joint venture. From 2008 to 2010 he raised invoices which purported to relate to consultancy payments and he charged VAT thereon. He filed income tax returns which also described these payments as arising from consultancy. He characterised his actions as '*an error*' but his errors in this regard continued repeatedly over several years.

46. In addition, there is the position of ABL as set out in their letter to the Respondent dated 30 November 2012. Their position is completely at odds with the submission of the Appellant that the payments he received from ABL arose from a joint venture.

47. The Appellant at hearing placed reliance on a settlement agreement dated in September 2018, reached between the Appellant and ABL whereby ABL agreed to pay €550,000 to the Appellant in full and final settlement of all claims. The claims settled pursuant to this agreement included the summary summons proceedings (record number redacted) commenced by the Appellant for the sum of €200,000 plus VAT of €42,000 in relation to the sale of certain kitchen component manufacturing machinery. The relevant clauses of the settlement agreement are set out hereunder as follows;

> *'1. The Parties acknowledge the termination of their agreement entered into on the 21st day of June, 2008 and the termination of all and/or any variations of the said agreement entered into thereafter.*
>
> *2. The Applicant will pay to the Respondent the sum of €550,000 in the following manner: -*
>
> *(a) €100,000 on the 8th October, 2018*
> *(b) Eight months at €50,000 per month payable on the 8th day of the month.*

(c) One month at €40,000 to take into account an advance of €5,000 paid on 7th September, 2018 and a contribution to the Mediator's costs.

3. The said sums to be in full and final settlement of all claims howsoever arising between the Parties including but not limited to claims for machinery, fees due and notice period.

4. The Respondent agrees to discontinue the proceedings between the Parties, Record No. [redacted].'

48. The terms of the settlement agreement make no reference to the existence of a joint venture agreement and without further evidence as to the existence of such an agreement, I cannot see that the settlement advances the Appellant's case as to the existence of the joint venture.

49. In this appeal, the Appellant must prove that for the relevant tax years of assessment, the tax assessed is not due and payable and in this regard, the Appellant contended that there was a profit sharing joint venture in operation with ABL and that the payments received were thus not subject to VAT.

50. The evidence adduced by the Appellant in support of this claim in addition to his oral evidence included the written agreement dated 21 June, 2008 and the settlement agreement dated in September, 2018. However, neither of these documents proves the existence or operation of a joint venture agreement.

51. In addition to the documents adduced, the Appellant's actions during the relevant tax years of assessment (in raising VAT invoices for consultancy and in characterising the payments as arising from consultancy in his returns) are inconsistent with the claim he now seeks to advance namely, there was a joint venture agreement in operation.

52. Further, there is the matter of the other party to the alleged joint venture being directly at odds with the Appellant on the fact of the existence of the joint venture. As set out in their letter of 30 November, 2012, ABL treated the payments to the Appellant as a deductible business expense and claimed VAT deductions on the VAT element of the payments made. The Appellant claimed that the letter was unreliable

however, he did not call any witness to contest it, nor did he call any witness in corroboration of his interpretation of the business relationship between he and ABL.

53. On the matter of the existence of the joint venture, I find that the evidence in support of the Appellant's claim is insufficient to establish the existence and operation of such a venture and I find that the regular payments received by the Appellant for the tax years of assessment 2008 to 2012, were received in exchange for services rendered namely, consulting services.

54. It follows that VAT should have been charged and returned by the Appellant in relation to this taxable supply of services and I determine that the quantum on the VAT assessments 2008 – 2012 which is represented by VAT on consulting services shall stand.

Losses

55. The Appellant sought to offset losses generated in his sole tradership pre-2008 from profits generated post-2008 in relation to the payments received from ABL.

56. For the reasons set out above, I have determined that the payments received from ABL post-2008 constitute payments for the provision of taxable services namely, consulting services.

57. The Appellant placed significant reliance on the fact that losses did in fact occur and in his reply to the Respondent's outline of arguments, he emphasised the fact that the Respondent did not deny that losses had been incurred by him in his sole tradership. The Appellant stated that he did not cease his fitted kitchens business in 2008 and that he was continuing to file C2 certificates.

58. As is clear from section 382(1) TCA 1997, the relevant question is whether losses from the pre-2008 sole tradership, may be offset against profits from the provision of consulting services post-2008. For the offset to be allowed, the trade in which the losses arose must be the same trade as the trade in which profits were generated. This is clear from the wording of section 382(1) TCA 1997, which provides as follows:

> *(1)Where, in any trade or profession carried on by a person, either solely or in partnership, such person has sustained a loss (to be computed in the like manner as profits or gains under the provisions of the Income Tax Acts applicable to Cases I and II of Schedule D) in respect of which relief has not been wholly given under section 381 or under any other provision of the Income Tax Acts, such person may claim that any portion of the loss for which relief has not been so given shall be carried forward and, in so far as may be, deducted from or set off against the amount of profits or gains on which such person is assessed under Schedule D <u>in respect of that trade or profession</u> for any subsequent year of assessment, except that, if and in so far as relief in respect of any loss has been given to any person under this section, that person shall not be entitled to claim relief in respect of that loss under any other provision of the Income Tax Acts.*

[Emphasis added]

59. The provision of consulting services cannot be characterised as the same trade as the Appellant's trade in the manufacture and provision of fitted kitchens. The trade in consulting was a supply of services, while the trade in fitted kitchens was a trade in the supply of both products and services. Further, the nature of the consulting service (which involved staff training, the sharing of expertise and the Appellant's attendance at various meetings) is not the same as the services he supplied as part of his sole tradership, namely the manufacture and provision of fitted kitchens.

60. The Respondent submitted that even if was established that a joint venture was in existence between the Appellant and ABL, the provisions of section 69 TCA 1997 prevented the post-2008 trade from being treated as the same trade as the Appellant's sole tradership pre-2008. The Appellant objected to the Respondent's reliance on section 69 TCA 1997, which deals with changes of proprietorship. I have determined for the reasons set out above, that there is insufficient evidence of the existence or operation of the joint venture as alleged, and as a result, it is not necessary for me to make a determination in relation to the interpretation and/or application of section 69 TCA 1997.

61. In the circumstances, I am satisfied and I determine that the trades are not the same and that the losses are not available for offset pursuant to section 382 TCA 1997.

VAT on sale of machinery

62. By invoice dated 26 June 2008, the Appellant sold certain machinery to ABL including machinery compressor, dryer, extraction system, press and vacuum lift. The Appellant issued an invoice in the sum of €200,000 plus VAT at 21%, of €42,000.

63. The Respondent included the VAT element of the invoice in the VAT assessment for 2008. The Appellant's position in relation to the assessment was that he had not received payment in relation to the invoice and that as he was taxed on a payments received basis, he was not liable for the VAT until the invoice was discharged. The Respondent confirmed that the Appellant was liable to VAT on a receipts basis.

64. In 2014, the Appellant commenced proceedings in the High Court (record number [redacted]) to recover payment in respect of this invoice. The settlement of these proceedings formed part of a mediated settlement agreement entered into on in September 2018. Pursuant to the settlement agreement, ABL agreed to pay the Appellant €550,000 in full and final settlement of all claims.

65. At hearing before the TAC on 24 February 2020, the Appellant confirmed that he had received €350,000 of the €550,000 due. As the Appellant was liable for VAT on a receipts basis, I determine that the Appellant is liable to discharge VAT on a proportional basis in relation to the sum of the €42,000 namely, €26,727.27 calculated as follows: €42,000 x 350,000/550,000. I determine that this element of the 2008 VAT assessment shall stand.

66. If it is the case that the total sum of €550,000 pursuant to the settlement agreement has been received by the Appellant on or before the date of issue of this determination, I determine that the Appellant shall be liable to return the full VAT element of the invoice, namely €42,000 in total and that this sum as it is contained on the VAT assessment shall stand.

67. If the full amount has not yet been received but an additional sum has been discharged between the hearing of this appeal and the issue of this determination then I determine that a further proportional sum of VAT shall be due to the Respondent in

addition to €26,727.27 and that that sum shall be calculated on the same proportional basis as the sum of €26,727.27.

68. In short, if the monies have been paid in full, I determine that that portion of the VAT assessment incorporating the VAT element of the invoice namely. €42,000 shall stand. If the monies have been partially discharged then then I determine that that portion of the VAT assessment incorporating a proportional amount of the VAT element of the invoice, shall stand.

Miscellaneous

69. The Appellant in his correspondence and submissions detailed at length his disagreement with the Revenue officials who conducted the audit. He stated that the audit had been conducted incorrectly, unfairly and contrary to the charter of rights. He stated that the doctrine of laches applied and that the assessments should be set aside.

70. Insofar as the Appellant seeks that the Tax Appeals Commission set aside the assessments on grounds of unfairness or on basis of the operation of the doctrine of laches, it is important to reiterate that the scope of the jurisdiction of an Appeal Commissioner (as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626, Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49 and the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577)* does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings. As such, grounds of appeal of this nature do not fall within the jurisdiction of the TAC and do not fall to be determined as part of this appeal.

71. The Appellant submitted that the charge to VAT on the consulting invoices was irrelevant because there would be 'no loss to Revenue' and he sought to avail of the 'no loss to Revenue' concession contained in the Revenue Code of Practice for Revenue Audit and Compliance Interventions. The Respondent submitted that there was a loss

to Revenue as ABL had taken input credit deductions for the VAT element of the payments made. The Respondent submitted that the Appellant did not satisfy the requirements of the concession and that the concession did not apply.

72. As regards this submission, the position is that as the concession is not a matter over which the Tax Appeals Commission may exercise jurisdiction it cannot form part of the determination of this appeal.

Determination

73. On examination of the evidence, the facts and circumstances and taking into consideration also the submissions of the parties on the matter of the existence and operation of the joint venture, I find that the evidence in support of the Appellant's claim is insufficient to establish the existence and operation of a profit sharing joint venture agreement and I find that the payments received by the Appellant for the tax years of assessment 2008-2012 were received in exchange for services rendered namely, consulting services. It follows that VAT should have been charged and returned by the Appellant in relation to this supply of taxable services and I determine that the VAT assessments 2008 – 2012 shall stand.

74. On the matter of the offset of losses arising in the sole tradership pre-2008 from profits generated from the provision of consulting services post-2008, I determine that the provisions of offset pursuant to section 382(1) TCA 1997, are not available to the Appellant as the trades are not the same. Accordingly, I determine that the assessments to income tax shall stand.

75. In relation to the charge to VAT of €42,000 in relation to the sale of machinery by invoice dated 26 June, 2008, I determine that if the monies have been paid in full then that portion of the 2008 VAT assessment incorporating the VAT element of the invoice, namely €42,000 shall stand. If the monies have been partially discharged then then I determine that that portion of the VAT assessment incorporating a proportional amount of the VAT element of the invoice, shall stand.

76. This appeal is hereby determined in accordance with s.949AL TCA 1997.

COMMISSIONER LORNA GALLAGHER

4th day of January 2021

The Tax Appeals Commission has not been requested to state and sign a case for the opinion of the High Court in respect of this determination.