



73TACD2021

BETWEEN/

[REDACTED]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeal Commission as an appeal against amended Notices of Assessment to VAT raised by the Respondent for the annual periods ending on the 30th of June 2009 and the 30th of June 2010, and against amended Notices of Assessment to Income Tax for the tax years 2009 and 2010.

B. Facts relevant to the Appeal

2. I heard evidence from the Appellant and from officers of the Respondent during the course of the hearing, along with submissions on behalf of both the Appellant and the Respondent.
3. The Appellant was a sole trader and traded as a publican at "██████████", ██████████ St., ██████████, Co. ██████████ during the years 2008, 2009 and 2010.
4. Arising from an audit of the Appellant's business, the Respondent formed the view that the Appellant's sales turnover had been understated in his returns for the years under appeal by the following amounts:-

Accounting Year ending	Amended Sales Turnover €	Original self- assessed Sales Turnover €	Under- declared Sales €
30 th June 2009	362,916	320,680	42,236
30 th June 2010	328,782	271,696	57,086
			99,322

5. On foot of the said audit, the Respondent raised amended assessments as follows:-

(a) In respect of VAT:



Year ending	Assessment of Total Tax €	Total Paid €	Additional Liability €
30 June 2009	34,791	28,828	5,963
30 June 2010	35,385	21,867	13,518
			19,481

(b) In respect of Income Tax:-

Period / Year	Assessment of Total Tax €	Total Paid €	Additional Liability €
2009	19,071	1,731	17,340
2010	22,397	(352)	22,749
			40,089

6. The Appellant appealed against the amended assessments raised by the Respondent and this is the appeal which now falls for determination.

C. Grounds of Appeal

7. The Appellant appealed against the amended Notices of Assessment raised by the Respondent on the following grounds:-



- (a) The Respondent's calculations are inconsistent with previous Revenue calculations;
- (b) The Respondent's calculations are theoretical, mathematical and hypothetical;
- (c) The Respondent's audit unveiled no evidence of unaccounted sales or lodgements;
- (d) Insufficient time was given by the Respondent to the Appellant's representatives to speak to the Appellant prior to the amended assessments being raised; and,
- (e) A report by the Appellant to An Garda Siochana in relation to alleged fraud/pilferage was not taken into account by the Respondent.

D. Relevant Legislation

8. Section 16(1) of the Value Added Tax Act, 1972 provides as follows:-

"Every accountable person shall, in accordance with regulations, keep full and true records of all transactions which affect or may affect his liability to tax."

9. Section 16(3) of the 1972 Act provides that:-

"Records and invoices kept by a person pursuant to this section and any books, credit notes, debit notes, receipts, accounts, vouchers, bank statements or other documents whatsoever which relate to the delivery of goods by the person or the rendering of services by the person and are in the power, possession or procurement of the person and, in the case of any such book, invoice, credit note, debit note, receipt, account, voucher or other document which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person shall be retained in his power, possession or procurement for a period of six years from the date of the latest transaction to which the records or invoices or any of the other documents relate:



Provided that this section shall not require the retention of records or invoices or any of the other documents in respect of which the Revenue Commissioners notify the person concerned that retention is not required, nor shall it apply to the books and papers of a company which have been disposed of in accordance with section 305 (1) of the Companies Act, 1963”

10. Regulations 8(1)(b)(i) and (ii) of the Value-Added Tax Regulations, 2006 (SI 548/2006), provide that:

“(1) The full and true records of all transactions which affect or may affect the taxable person's liability to tax, which every taxable person is required to keep in accordance with section 16 of the Act, shall be entered up to date and include—

...

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

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

(ii) a cross-reference to the relevant counter books, copies of sales dockets, cash register tally rolls or other documents which are in use for the purposes of the business,”

11. Section 81(2)(b) of the Taxes Consolidation Act, 1997 (hereinafter “TCA1997”) provides that:-

“Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—

...

(b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession;”

12. Section 886(2)(a)(i) of TCA1997 provides that:-



“(2) (a) Every person who—

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

...

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

13. Section 886(2)(c) further provides that:-

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

14. Sections 887 and 912 of TCA1997 both define “the Acts” as including *inter alia*, the Tax Acts and the Value Added Tax Act, 1972 and section 924 goes on to provide as follows:-

“(1) (a) Where the inspector discovers that—

(i) any properties or profits chargeable to income tax have been omitted from the first assessments,

(ii) a person chargeable—

(I) has not delivered any statement,

(II) has not delivered a full and proper statement,

(III) has not been assessed to income tax, or

(IV) has been undercharged in the first assessments, or

(iii) a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement or relief not authorised by the Income Tax Acts,

then, where the tax is chargeable under Schedule D, E or F, the inspector shall make an additional first assessment.



(b) Any additional first assessment made by the inspector in accordance with paragraph (a) shall be subject to appeal and other proceedings as in the case of a first assessment.

(2) (a) In this subsection, “neglect” means negligence or a failure to give any notice, to make any return, statement or declaration, or to produce or furnish any list, document or other information required by or under the Income Tax Acts; but a person shall be deemed not to have failed to do anything required to be done within a limited time if such person did it within such further time, if any, as the Revenue Commissioners or officer concerned may have allowed and, where a person had a reasonable excuse for not doing anything required to be done, such person shall be deemed not to have failed to do it if such person did it without unreasonable delay after the excuse had ceased.

(b) Subject to paragraph (c) and any other provision allowing a longer period in any class of case, an assessment or an additional first assessment may be made at any time not later than 10 years after the end of the year to which the assessment relates.

(c) In a case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to income tax, an assessment or an additional first assessment may be made at any time for any year for which by reason of the fraud or neglect income tax would otherwise be lost to the Exchequer.

(d) (i) In a case in which emoluments to which this subparagraph applies are received in a year of assessment subsequent to that for which they are assessable, paragraph (b) shall apply in the case of assessments or additional first assessments in respect of



the emoluments subject to the substitution of a reference to the end of the year of assessment in which the emoluments were received for the reference to the end of the year to which the assessment relates.

(ii) The emoluments to which subparagraph (i) applies are emoluments within the meaning of section 112(2), including any payments chargeable to tax by virtue of section 123 and any sums which by virtue of Chapter 3 of Part 5 are to be treated as perquisites of a person's office or employment, being emoluments, payments or sums other than those taken into account in an assessment to income tax for the year of assessment in which they are received, and for the purposes of this paragraph—

(I) any such payment shall, notwithstanding anything in section 123(4), be treated as having been received at the time it was actually received, and

(II) any such sums which are not actually paid to that person shall be treated as having been received at the time when the relevant expenses were incurred or are treated for the purposes of Chapter 3 of Part 5 as having been incurred.

(e) An objection to the making of any assessment or additional first assessment on the ground that the time limited for the making of that assessment has expired shall only be made on appeal against the assessment.

(3) Any assessments not made at the time when the first assessments are made shall as soon as they are made be added to the first assessments by means of separate forms of assessment."



E. Submissions of the Appellant

15.At the hearing of the appeal, the Appellant's agent submitted that the Respondent's calculations were premised on a five-day trading period, but that this had not in fact happened in reality.

16.The Appellant's agent submitted that the Appellant's business had suffered significantly during the periods for which the Respondent had raised amended assessments for the following reasons:-

(a) The on-licence trade had suffered significantly because of the dramatic downturn in the economy which had occurred in 2008 and subsequent years;

(b) The Appellant was involved in a [REDACTED] in 2008 which resulted in him being unable to work for an extended period;

(c) Flooding in [REDACTED] had negatively impacted the Appellant's business;

(d) A [REDACTED] opposite the Appellant's business had closed for in excess of a year during the periods under appeal and this had a significant negative effect on the Appellant's business; and,

(e) An issue of theft/pilferage in the Appellant's business had been discovered and had been reported to An Garda Síochána.



17.It was further submitted that the Appellant's previous agent had given poor information and, in particular, that the Appellant's previous agent had erroneously stated that the margins in the Appellant's business were "*in accordance with previous years*". The Appellant's agent submitted that this assertion was incorrect.

18.The Appellant's agent submitted that the Respondent had estimated that the turnover for 2009 should be increased from €320,680 (being the figure the Appellant had used in his return) to €362,916, which he submitted was not in line with the experience in the greater economy at that time. Similarly, the Appellant's agent pointed out that the Respondent had estimated an increase in turnover for 2010 from €271,696 (which the Appellant had used in his return) to €328,782, which he again submitted was not in line with the experience in the greater economy at that time.

19.In the course of the hearing, the Appellant gave evidence that there was a downturn in his business and that turnover in 2007, 2008 and 2009 declined. The Appellant objected to the fact that, in his view, the Respondent's figures provided for an increase in turnover and he submitted that, in the context of the global financial crisis, this contradicted the national experience and the experience of publicans in particular.

20.The Appellant further gave evidence that he had been in a [REDACTED] in 2008 which led to him being completely unable to work for a period of 6 months, following which he returned to work on a part-time basis.

21.In addition, the Appellant gave evidence that the premises adjacent to the [REDACTED] which was located across the road from [REDACTED] was



flooded and that the [REDACTED] was closed for 13 months. This, the Appellant stated, led to a significant decline in his business as the drinking public went elsewhere in the town of [REDACTED].

22. The Appellant also gave evidence that [REDACTED] had closed for a period of three months during the periods the subject matter of the amended assessments.

23. The Appellant further gave evidence that his business had by the date of the oral hearing ceased to trade.

F. Submissions of the Respondent

24. In its written submissions, the Respondent contended that:-

- (a)** the contested amended assessments were raised based on the Respondent's best judgement and on the basis of mark-up figures that were within the norm for the Appellant's trade;
- (b)** the accuracy and reliability of the sales figures forming the basis of the VAT and Income Tax returns submitted by the Appellant could not be verified by the Respondent because no proper cash book detailing business takings, cash expenses and owner's cash wages was available;
- (c)** that the auditors were told that primary supporting sales documentation, in particular cash register tally rolls and "Z readings", were also not available;
- (d)** the Appellant admitted that he habitually did not lodge the full takings of the business to his bank account and cash drawings were



estimated at year-end by his wife, who kept the basic books of the business;

(e) because of the absence of basic sales records (other than bank lodgement amounts), the Respondent had to test the Appellant's sales figures for the periods in question using a detailed analysis of purchase invoices and sales prices provided by the Appellant;

(f) the Appellant had agreed to a mark-up being based on current sales and purchase prices, given the absence of primary sales records and price-lists for the audit period;

(g) the Appellant agreed that his margins had actually fallen since the audit period as he absorbed a number of price increases imposed by his suppliers subsequent to the period under audit;

(h) having carried out a detailed analysis of the Appellant's purchase records for the periods in question and applying a mark-up based on sales and purchase prices at the time of the audit, it became apparent to the auditors that the turnover figure for the business was less than what would have been expected;

(i) according to the Appellant's accounts, the mark-up achieved on products bought for re-sale in each of the relevant accounting periods was 73%; however, based on the auditors' analysis, the Appellant could reasonably have been expected to achieve a mark-up in the region of 150% for the 2009 and 2010 periods;

(j) the auditors attempted to reach agreement with the Appellant by applying a mark-up of 110% to recorded purchases for both periods. This mark-up was used because, the Respondent submitted, it was within the norms for the pub trade in general and the town of [REDACTED] in particular during the audit period, and also to take into account any



business disruption caused by the serious flooding of the premises in November 2009; and,

(k) a report commissioned by the Drinks Industry Group of Ireland (Foley, Anthony, Dublin University Business School, *“Purchases of Inputs by the Drinks Industry”*, p22-23) showed the average pub mark-up in Ireland to be 122% in 2008, 127% in 2009 and 132% in 2010 (average gross margins were 55% in 2008, 56% in 2009 and 57% in 2010).

25.At the oral hearing, it was submitted on behalf of the Respondent that the Appellant’s previous agent had stated in July 2013 that approximately €100,000 (whether in stock or cash) had been stolen/pilfered from the Appellant’s business.

26.In addition, it was submitted by the Respondent that only five-day figures could be extracted from the till records available from the Appellant.

27.The Respondent submitted that it had initially calculated the income tax due on the basis of a mark-up of 150% but that it had reduced the mark-up which it had applied to 110% in an effort to be reasonable and to reach agreement with the Appellant. The Respondent pointed out that in 2009 and in 2010, the mark-up which the Appellant had applied was 73% each year, which equated to a gross margin of 42%.

28.The Respondent submitted that in analysing the purchases made by the Appellant in 2009, it had emerged that 37% of the purchases were spirits and minerals, which are higher margin products. In addition, a similar analysis for 2010 showed that 30% of the purchases were spirits and minerals. In relation



to this, the Respondent submitted that it had tried to be reasonable and had taken an average figure in order to come to a figure for the purchases of spirits and minerals for the periods in question.

29. The Respondent submitted that it was very important to note that there was, in its opinion, no decline in margin in 2009 and 2010 and that the Appellant's purchases in 2008 had been €194,022 and that the Appellant's purchase figures for 2009 and for 2010 were equivalent to those of 2008.

30. The Respondent further submitted that if theft/pilfering had occurred, VAT would still be payable but that if theft/pilfering had occurred, it would not seek to collect the income tax assessed.

31. The Respondent submitted workings of their calculations on which the amended assessments were based as follows:-

Account year ending 30th June 2009	Original Return	Respondent's calculation
Purchases	184,618	172,817
Sales	320,680	362,916
Mark-up (GP/Purchases)	73%	110%
Gross Profit (GP)	135,394	190,099
Margin (GP/Sales)	42%	52%
Sales VAT	70,429	76,212

Purchases Input VAT	41,421	41,421
VAT Due	28,828	34,791

Account year ending 30th June 2010	Original Return	Respondent's calculation
Purchases	156,562	156,562
Sales	271,696	328,780
Mark-up (GP/Purchases)	73%	110%
Gross Profit (GP)	114,816	172,218
Margin (GP/Sales)	42%	52%
Sales VAT	58,177	69,044
Purchases Input VAT	36,310	33,659
VAT Due	21,867	35,385

G. Analysis and findings

32.As in any appeal to the Tax Appeals Commission, the onus of proof lies on the Appellant.



- 33.** The statutory provisions in relation to the obligation to keep records for income tax and Value Added Tax purposes are set out in section *C supra*.
- 34.** The Appellant did not deny the issues raised by the Respondent in relation to the deficiencies in his record keeping and I believe it fair to characterise his appeal as being based primarily on the accuracy of the estimated figures utilised by the Respondent in coming to its amended assessments.
- 35.** The Appellant's submissions and evidence given in setting out why he contends that the Respondent's amended assessments are incorrect are detailed at paragraphs 15 to 23 *supra*.
- 36.** The Respondent's submissions and evidence given in setting out why it contends that the amended assessments which it raised are correct are set out at paragraphs 24 to 31 *supra*.
- 37.** Having carried out an analysis of the Appellant's purchases records, the Respondent applied a mark-up rate of 110% to the purchases to calculate the expected sales turnover for the periods under audit. The Respondent submits that this mark-up rate is within the norms for the pub trade and submits that it takes any business disruption caused by the serious flooding to the premises during the audit period into account.
- 38.** In the absence of primary sales books and records, the use of total purchases and a mark-up rate (hereinafter the "Estimation Method") is, in my opinion, a fair, reasonable and appropriate method for estimating the expected gross profit and therefore it is a reasonable method to use to calculate the expected total sales. An assessment raised using this method is based on the premise that the products



purchased are actually sold at the expected mark-up, and therefore the gross profit from these sales can be estimated accurately.

39. However, in order for this method to be accurate and robust, it is necessary for all of the purchases to have actually reached the sales counter and been sold. I must therefore consider the Appellant's submission that "*the Respondent's calculations are theoretical, mathematical and hypothetical*", and do not take account of all the circumstances particular to the Appellant for the periods under appeal.

40. The Appellant gave evidence that there were circumstances that occurred during the periods under appeal which led to exceptional stock losses, over and above the normal trading waste, in these periods. I accept the Appellant's evidence as being largely truthful and accurate in this regard.

41. Based on the testimony given at the appeal hearing and in the context of the well-documented diminished trading environment pertaining to the pub trade in rural Ireland at the time, I have identified three separate factors, particular to the Appellant, which gave rise to exceptional stock losses over and above any normal stock loss during the periods under appeal, namely:-

- (a)** Flooding damage and restocking costs;
- (b)** Increased waste due to part time and fragmented opening hours;
and,
- (c)** Fraud/pilferage of stock.

42. In my view, the Estimation Method used by the Respondent can only be accurate if and when a reduction is made to the Purchases total to reflect the fact that the Appellant had an increased level of stock loss in the years under appeal, and therefore



would not have derived any sales turnover from this portion of his purchases. Based on the evidence given before me, I am satisfied and find as a material fact that the aggregate of the exceptional stock loss factors noted above would have amounted to some 10% of purchases.

43. I have set out below my calculation of the likely expected sales, VAT due and Case I Income increase. In arriving at the figures below, I have used the Respondent's Estimation Method with the exception that, prior to applying the expected mark-up rate, I have reduced the total Purchases by 10%.

Accounting year ended 30 June 2009	Original Returns	Respondent's Calculation	TAC Determination (VAT)	TAC Determination (Increase in Case I)
Purchases	184,618	172,817	172,817	
Exceptional Stock Loss (10%)			17,282	
Purchases after adjustment for exceptional stock loss			155,535	
Sales	320,680	362,916	326,624	5,944
Mark-up	73%	110%	110%	
Gross Profit	135,394	190,099	171,089	
Margin	42%	52%	52%	
Sales VAT (21% or original if higher)	70,249	76,212	70,249	
Purchases Input VAT	41,421	41,421	41,421	
VAT Due	28,828	34,791	28,828	



Accounting year ended 30 June 2010	Original Returns	Respondent's Calculation	TAC Determination (VAT)	TAC Determination (Increase in Case I)
Purchases	156,562	156,562	156,562	
Exceptional Stock Loss (10%)			15,656	
Purchases adjustment after exceptional stock loss			140,906	
Sales	271,696	328,780	295,902	24,206
Mark-up	73%	110%	110%	
Gross Profit	114,816	172,218	154,996	
Margin	42%	52%	52%	
Sales VAT (21% or original if higher)	58,177	69,044	62,139	
Purchases Input VAT	36,310	33,659	33,659	
VAT Due	21,867	35,385	28,480	

44. I accept the Respondent's submission that the use of an expected mark-up of 110% is reasonable. However, I do not accept its contention that this expected mark-up of 110% takes adequate account of the exceptional stock losses particular to this appeal. My calculations, after the 10% exceptional stock loss adjustment, indicate the Appellant achieved a gross margin of 52% which, for a part-time pub trading in rural Ireland, is consistent with the findings of the Foley Report, referred to in paragraph 24(k) *supra*, which stated:-

"There are substantial variations across the pub population in food to drink ratios, gross margin ratios and expense to sales ratios.



The industry has generally regarded the desirable gross margin to be at least 50% and ideally well into the 50s but that is under pressure from the current weak economic climate. Our assessment identified gross margins ranging from 64% to 40% with an average of about 55%. The ASI measure of gross margin was 55% in 2008, 56% in 2009 and 57% in 2010 and an average over the three years of 56%."

H. Conclusion

45. Having carefully considered the facts of the case, the submissions made and the evidence given by both parties herein, I have for the reasons outlined above decided that the Appellant has, on the balance of probabilities, succeeded in discharging the burden of proof which rests upon him.
46. However, I do not accept that the Appellant has succeeded in establishing that the amended assessments raised by the Respondent were entirely incorrect.
47. I determine that the Appellant has been overcharged by reason of the amended assessments to VAT raised by the Respondent and I determine that the assessments should be reduced pursuant to section 949AK(1)(a) of the Taxes Consolidation Act, 1997 to reflect the following:
- i. 1 July 2008 – 30 June 2009: total amount of VAT due €28,828; and,
 - ii. 1 July 2009 – 30 June 2010: total amount of VAT due €28,480.
48. I further determine that the Appellant has been overcharged by reason of the amended assessments to Income Tax raised by the Respondent and I determine that



the assessments should be reduced pursuant to section 949AK(1)(a) of the Taxes Consolidation Act, 1997 to reflect the following:

- (a)** Total sales of €326,624 during the period from the 1st of July 2008 to the 30th of June 2009; and,
- (b)** Total sales of €295,902 during the period from the 1st of July 2009 to the 30th of June 2010.

Dated the 8th of January 2021

**MARK O'MAHONY
APPEAL COMMISSIONER**



