AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

103TACD022

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to sections 111 and 119 of the Value Added Tax Consolidation Act 2010 ("VATCA 2010") by [redacted] ("the Appellant") against the refusal of the Revenue Commissioners ("the Respondent") to allow claims for the repayment of Value Added Tax ("VAT") in accordance with the Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266/2012). The total amount of tax at issue is €1,048,455.

2. The appeal proceeded by way of a hearing on 17 and 18 May 2022.

Background

3. On 27 February 2020, the Respondent notified the Appellant that it was refusing VAT refund claims made by the Appellant under SI 266/2012 for the year 2019 in the total amount of €569,135. The Appellant appealed the refusal to the Commission on 25 March 2020.

4. On 14 December 2020, the Respondent issued a Notice of Assessment under SI 266/2012 to the Appellant for the year 2016 in the amount of €290,720. The Appellant appealed the assessment to the Commission on 12 January 2021.

5. On 14 December 2020, the Respondent issued a Notice of Assessment under SI 266/2012 to the Appellant for the year 2017 in the amount of €11,500. The Appellant appealed the assessment to the Commission on 12 January 2021.

6. On 14 December 2020, the Respondent issued a Notice of Assessment under SI 266/2012 to the Appellant for the year 2018 in the amount of €177,100. The Appellant appealed the assessment to the Commission on 12 January 2021.

7. In respect of each of the above, the Respondent's ground for the refusal/assessment was that the Appellant was not a "qualifying person" for the purposes of SI 266/2012, as it was not "*engaged in the business of carriage for reward of tourists by road under contracts for group transport*."

Legislation

8. The following legislative provisions are engaged in this determination:

    European Union legislation

    Directive 2006/112/EC ("the VAT Directive")

    Domestic primary legislation

    Value Added Tax Consolidation Act 2010 ("VATCA 2010")

    Public Transport Regulation Act 2009

    Domestic secondary legislation

    Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266/2012)

    The following repealed domestic secondary legislation is also considered:

    Value-Added Tax (Refund of Tax) (No. 19) Order, 1986 (SI 68/1986)

    Value-Added Tax (Refund of Tax) (No. 26) Order, 1994 (SI 165/1994)

    Value-Added Tax (Refund of Tax) (No. 28) Order, 1996 (SI 98/1996)

9. Article 371 of Directive 2006/112/EC ("the VAT Directive") provides that:

> "*Member States which, at 1 January 1978, exempted the transactions listed in Annex X, Part B, may continue to exempt those transactions, in accordance with the conditions applying in the Member State concerned on that date."*

10. Part 2 of Schedule 1 of the VATCA 2010 includes, under "Exemptions by derogation in accordance with Article 371 of the VAT Directive", *inter alia*:

> "*14(3) Transporting passengers and their accompanying baggage*."

11. Article 110 of the VAT Directive provides that:

> *"Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.*
>
> *The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."*

12. The Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266/2012) provides *inter alia*:

> *"2. In this Order—*
>
> *"Act" means Value-Added Tax Consolidation Act 2010 (No. 31 of 2010);*
>
> *"qualifying person" means a person who is established in the State and who—*
>
> *(a) is engaged in the business of carriage for reward of tourists by road under contracts for group transport, and*
>
> *(b) has complied with all the obligations imposed on the person by the Act, the Income Tax Acts, the Corporation Tax Acts or the Capital Gains Tax Acts, and any instruments made under those Acts, in relation to-*
>
> *(i) the payment or remittance of taxes, interest and penalties required to be paid or remitted, and*
>
> *(ii) the delivery of returns;*
>
> *"qualifying vehicle" means—*

(a) a single-deck touring coach having dimensions as designated by the manufacturer of not less than 2,700 millimetres in height, not less than 8,000 millimetres in length, not less than 775 millimetres in floor height and with an underfloor luggage capacity of not less than 3 cubic metres, or

(b) a double-deck touring coach having dimensions as designated by the manufacturer of not more than 4,300 millimetres in height and not less than 10,000 millimetres in length.

3. (1) … a qualifying person who has borne or paid tax on—

(a) the supply to such person,

(b) the intra-Community acquisition or importation, or

(c) the hiring or leasing,

of a qualifying vehicle which is for use (for a period of not less than one year where subparagraph (a) or (b) apply, and for a period of not less than 6 consecutive months where subparagraph (c) applies), by such person in the State in the business of the carriage for reward of tourists by road under contracts for group transport shall, subject to the conditions specified in Article 4, be repaid the full tax borne or paid provided that—

(i) the supply, intra-Community acquisition or importation of the vehicle which gave rise to the tax occurred when the vehicle was not more than 2 years old, or

(ii) the hiring or leasing of the vehicle which gave rise to the tax was on the basis of a contract for hire or lease first entered into when the vehicle was not more than 2 years old.

[…]

4. The conditions to be fulfilled by a person in order to obtain a repayment of tax under this Order in accordance with Article 3(1) are that the person shall:

[…]

(b) establish to the satisfaction of the Revenue Commissioners that that person is a qualifying person;

[…]

5. This Order does not apply to vehicles used, or intended to be used, primarily for the provision of transport services other than transport services consisting of carriage for reward of tourists by road under contracts for group transport.

[…]"

Section 2 of the Public Transport Regulation Act 2009 provides *inter alia* that

'"public bus passenger service" means the use of a bus or buses travelling wholly or mainly on public roads for the carriage of passengers in such a manner that—

(a) each journey is open to use by members of the public,
(b) a charge or charges are paid in respect of each passenger, and
(c) save where the Authority otherwise determines,
(i) the service is provided on a regular and scheduled basis, and
(ii) carriage is provided for passengers between specified terminal points or along a specified route or otherwise in accordance with a published timetable,

and is not a bus service solely for carrying children to or from school.'

Submissions

13. At the oral hearing the Commissioner heard evidence from witnesses for the Appellant as well as submissions from counsel for the Appellant and for the Respondent. There was no evidence presented on behalf of the Respondent.

Appellant's Evidence

[redacted]

14. [redacted] gave the following evidence:

15. He is the managing director of the Appellant as well as a director of [redacted] ("the Licence Holder"). The Appellant and the Licence Holder are subsidiary companies of [redacted]. The Appellant was incorporated on [redacted] and the Licence Holder was incorporated on [redacted]

16. The Licence Holder holds route licence number [redacted] from the National Transport Authority ("NTA"), granted under the Public Transport Regulation Act 2009, for an "Interurban-Express" bus route between [redacted] and Dublin Airport. The licence operates for three

years and is renewable. The current licence commenced [redacted] Previously, the Licence Holder held licences from [redacted] and from [redacted].

17. For the [redacted] to Dublin Airport route, there are two set-down stops in Dublin City before the airport. For Dublin Airport to [redacted] there is one pick-up stop in Dublin City and one set-down stop at [redacted]. There is also an express route that travels non-stop between [redacted] and Dublin Airport (and *vice versa*). Consequently, the service provides for travel between [redacted] but not within a city.

18. The Appellant is named as the sole sub-contractor on the licence. The NTA is therefore aware that the Appellant is a sub-contractor of the Licence Holder and regulates the Appellant's obligations under the licence. The Appellant operates the services on behalf of the Licence Holder. It provides the coach, driver, fuel and maintenance. The Licence Holder sells tickets to passengers either online or through its office. Cash fares are also accepted; the Licence Holder supplies the ticket machines and the Appellant's driver issues the ticket to the passenger. The fare is retained by the Licence Holder in all instances.

19. There is a Sub-Contractor Agreement in place between the Appellant and the Licence Holder. There have been three agreements in total, from [redacted], [redacted] and [redacted]. The last paragraph of the agreement provides that:

    "*In consideration of the Sub-Contractor* [i.e. the Appellant] *providing the aforementioned services the Operator* [i.e. the Licence Holder] *does hereby agree to pay the Sub-contractor the appropriate commercial rate as will be agreed by both parties.*"

    For the relevant years, the Appellant and the Licence Holder verbally agreed the rate of €[redacted] per round trip between [redacted] and Dublin, which represents the cost of the service plus a [redacted] mark-up. This amount is paid by the Licence Holder to the Appellant for every round trip, irrespective of the number of passengers per trip.

20. This division between licence-holder and coach-provider is common in the industry and is an appropriate way of running the business. As sub-contractor, the Appellant is obliged to comply with the conditions of the route licence.

21. The Appellant provides luxury specification coaches for the route, as these are required by the Licence Holder given the nature of the business. Given the number of passengers who travel to and from Dublin Airport, good luggage capacity is necessary. Additionally, the direct nature of the service means that a toilet on board the coaches is required by the Licence Holder. [redacted] believed that these coaches would be properly classified as

"touring coaches", which, in his view, are luxury vehicles with reclining seats, WiFi, foot rests, a toilet and a luggage compartment. As they get older, the coaches are downgraded by the Appellant from long distance to commuter services.

22. [redacted] agreed that the licence held by the Licence Holder is for a "public bus passenger service", as defined in the Public Transport Regulation Act 2009, and that consequently each journey is open to use by members of the public. The Appellant does not identify who the passengers are, so therefore does not know how many could be classified as tourists. However, in [redacted] view, the passengers are not commuters. A return trip is [redacted] hours, so it is unlikely that many of the passengers are day-trippers or shoppers.

[redacted]

23. [redacted] gave the following evidence at the hearing:

24. She is operations manager for the Licence Holder and does not work for the Appellant. She stated that it was common in the industry for a route licence holder to have one or more sub-contractors appointed under the licence.

25. The Licence Holder carries a large tourist market on the Dublin Airport – [redacted] – Dublin Airport route, including inbound and outbound tourists as well as domestic tourism between the two [redacted]. About 50% of the passengers go to the airport and she believes that are a large majority of these are tourists. The Licence Holder is aiming for the tourist market with this route service.

26. The Licence Holder pays the Appellant [redacted] per round trip; this rate was agreed orally in 2015. The Licence Holder takes online bookings and the Appellant then provides the transport for The Licence Holder's groups of passengers to take them on the route. The passenger's contract is with the Licence Holder, not with the Appellant.

27. The Licence Holder calculated that, on the Dublin to [redacted] route in 2019, 56% of its passengers commenced their journey from Dublin Airport, and 44% in Dublin City. In 2018, 53% commenced their journey from the airport, and 47% from the city. In 2017, 52% of its passengers commenced their journey from the airport, and 48% commenced their journey from the city.

28. [redacted] carried out an analysis of the Licence Holder's passengers on the [redacted] to Dublin route to estimate what percentage travelled to Dublin Airport compared to Dublin City. While the breakdown could be seen directly for tickets bought onboard the bus, for those tickets bought online or the return portion of a "driver ticket" it was not possible to directly ascertain if passengers travelled to Dublin City or the airport. For those

passengers, it was necessary to review the bus manifest, which was a list of the passengers booked on a particular service, which showed if the passenger was travelling to the airport or Dublin City.

29. An analysis was carried out for one week per quarter (i.e. March, June, August and October) for each of 2017, 2018 and 2019. For each week, she reviewed the bus manifest for all services on a manual basis to ascertain what percentage of passengers who had booked online travelled to Dublin City compared to Dublin Airport. Averaging the figures out, for 2019, 55% of online passengers travelled to the city and 45% to the airport; for 2018, 53% of online passengers travelled to the city compared to 47% to the airport; and for 2017, 52% of online passengers travelled to the city compared to 48% to the airport.

30. These estimates were then added to the figures for tickets bought onboard the bus. The total breakdown for 2019 was 50% to the airport and 50% to the city; for 2018 it was 49% to the airport and 51% to the city; and for 2017 it was again 49% to the airport and 51% to the city.

31. The Licence Holder does not survey its passengers. However, given the proportion that travel to and from the airport, the luggage that some passengers bring with them, and also that return tickets might have a return date a week or two later, there is certainly an element of the tourist market travelling on the coaches.

32. There may be an element of day tripping between the two [redacted], including students and people travelling for medical appointments. But there is also an element of domestic tourism, e.g. [redacted] passengers travelling to Dublin Zoo or tourists making onward connections from Heuston Station. Overall, given the volume of passengers travelling to the airport, [redacted] believed that a majority of their passengers on the route, or at least half of them, are tourists.

33. Given this market, the Licence Holder required the Appellant to provide touring coaches with a luxury specification, including space for luggage and passenger comfort as well as a toilet on board. However this specification is not a requirement of the route licence.

Appellant's Submissions

34. Counsel for the Appellant submitted that the case was essentially one of statutory interpretation. SI 266/2012 entitles any taxpayer coming within its terms to seek a refund of VAT in circumstances where the provision of passenger transport services is an exempt supply under VATCA 2010 and Article 371 of the VAT Directive. The Appellant falls within the definition of "qualifying person" in SI 266/2012 as well as the spirit and purpose of the statute, and therefore should be entitled to claim refunds under its provisions.

35. Regarding the definition of "qualifying person" in SI 266/2012, there was no dispute about paragraph (b). What was at issue was paragraph (a), i.e. whether the Appellant "*is engaged in the business of carriage for reward of tourists by road under contracts for group transport.*" Additionally, there was no dispute that the vehicles in respect of which the Appellant had sought to make a reclaim were "qualifying vehicles" under SI 266/2012. The definition of "qualifying vehicles" demonstrates that SI 266/2012 is directed at the tourist market. Likewise, the Appellant uses these vehicles because its services are also aimed at the tourist market.

36. The purpose of SI 266/2012 was to upgrade Ireland's national fleet of touring coaches, so that tourists would be provided with newer and better quality vehicles. The Appellant is aimed at the tourist market so it is important that it upgrades its fleet and provides facilities that one would not expect of a normal hop-on-hop-off public transport service around a city.

37. The Appellant operates a scheduled service on behalf of the Licence Holder between [redacted] and Dublin Airport which by its nature is directed at the tourist market. Furthermore, it operates under a contract for group transport, being the contract between the Appellant and the Licence Holder. Whereas the Licence Holder operates under individual contracts with its passengers, the Appellant was entitled under the Public Transport Regulation Act 2009 to operate under a contract for group transport. It was accepted by the Appellant that the Licence Holder would not be entitled to claim refunds under SI 266/2012, even if it provided its own coaches, as it does not operate under a group contract.

38. There is nothing in SI 266/2012 to state that services being provided by a qualifying person may not be scheduled services or public transport services. This was the central dispute between the Appellant and the Respondent. There was no dispute that the Appellant was engaged in "*carriage for reward*" or that it travelled "*by road*". Additionally, the evidence showed that the only contract under which the Appellant operates is the contract with the Licence Holder, which is a group contract.

39. There are four elements to the definition of qualifying person: (i) carriage for reward (ii) of tourists (iii) by road (iv) under contracts for group transport. The Appellant meets each element of the definition and thereby should be entitled to refunds under SI 266/2012. The Respondent was seeking to introduce an extra test so that SI 266/2012 does not apply to people involved in the provision of public passenger transport services. This was incorrect as a matter of law. The definition of qualifying person was clear and the Respondent was seeking to insert extra words in order to disapply the plain meaning of the definition.

40. Furthermore, the Respondent had argued that "*contracts for group transport*" should be read as implying that the tourists had to be in groups; however, counsel for the Appellant submitted that this was not the wording of SI 266/2012. A passenger can pay a fare to a tour provider to travel on a coach and in doing so travel under an individual contract, while the tour provider can in turn contract with a coach provider so that the coach travels under a contract for group transport. Under the Licence Holder's licence from the NTA, there was no requirement that the Appellant as sub-contractor should also charge an individual fare in respect of each customer. The NTA had not identified any issue regarding the Appellant's compliance with the licence. Even if it had, it was not a requirement of SI 266/2012 that a qualifying person had to be in compliance with the provisions of the Public Transport Regulation Act 2009.

41. Counsel for the Appellant submitted that it was entitled to the refunds sought under a literal interpretation of SI 266/2012. In the event that the Commissioner considered the wording of SI 266/2012 to be ambiguous, a purposive approach should be applied. The purpose of the statute is set out in the words of the statute and counsel submitted that under a purposive approach the Appellant was entitled to seek refunds for the upgrading of its coaches.

42. The passenger analysis showed that 50% travelled to and from the airport, and the Appellant is entitled to say that 100% of these passengers, to the nearest percent, are travelling for the purposes of tourism. "Tourist" is not defined in SI 266/2012, but other relevant definitions are available. For example, Regulation (EU) 692/2011 requires Member States to collect, compile, process and transmit harmonised statistics on tourism. Article 2 of the Regulations provides:

> "*1(f): 'tourism' means the activity of visitors taking a trip to a main destination outside their usual environment, for less than a year, for any main purpose, including business, leisure or other personal purpose, other than to be employed by a resident entity in the place visited."*

"Usual environment" is defined at 1(e):

> *"'usual environment' means the geographical area, though not necessarily a contiguous one, within which an individual conducts his regular life routines and shall be determined on the basis of the following criteria: the crossing of administrative borders or the distance from the place of usual residence, the duration of the visit, the frequency of the visit, the purpose of the visit."*

43. The Central Statistics Office ("CSO") states on its website that

"*Tourism encompasses most short-term travel away from a person's normal place of work or residence and includes not just holiday, leisure and recreational travel, but also travel for the purposes of visiting friends and relatives, business, education, religious, health or other reasons.*

The United Nations World Tourism Organisation (UN-WTO) defines 'tourism' as the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes not related to the exercise of an activity remunerated from within the place visited."

44. The UNWTO website states:

"What is the difference between travel and tourism? Travel refers to the activity of a traveller while tourism refers to the activity of visitors…

A traveller is someone who moves between different geographic locations for any purpose and any duration. A visitor is a traveller taking a trip to a main destination outside his or her usual environment for less than a year for any main purpose, business, leisure or personal purpose other than to be employed by a resident entity in the country or place visited."

45. Tourism Ireland's website states:

"Tourism is a social, cultural and economic phenomenon which entails the movement of people to countries or places outside their usual environment for personal or business/professional purposes. These people are called visitors which may be either tourists or excursionists, residents or non residents, and tourism has to do with their activities, some of which involves tourism expenditure."

46. [redacted] of the Licence Holder contacted the CSO to seek further clarity on the definition of tourism and whether it could be applied to the Licence Holder's passengers. [redacted], a statistician in the CSO, replied to [redacted] by email on 16 June 2021. He referenced the definition of tourism set out in Regulation (EU) 962/2011 and stated:

"*I would expect that the great majority of passengers availing of your [redacted] coach service would fall under the statistical definition of 'tourist'. The only exceptions would be commuters (i.e. any who travel these routes daily for work or educational purposes) or migrants (entering or leaving the country). I would imagine these exceptions would be few and far between*."

Counsel submitted that this was correct and an inference which must be drawn from the evidence in this case.

47. Counsel then addressed the legislative history of the scheme. The original order was the Value-Added Tax (Refund of Tax) (No. 19) Order, 1986 (SI 68/1986). This stated *inter alia* that a person qualifying for a refund of tax shall establish "*that he is engaged in the business of carriage of persons, including tourists, by road under contracts for group transport*." It was clear from this that the scheme always envisaged that there would be tourists and non-tourists on these buses.

48. The next significant change was the Value-Added Tax (Refund of Tax) (No. 26) Order, 1994 (SI 165/1994), which replaced the previous statutory instruments and changed the definition of a qualifying person to one "*who is engaged in the business of carriage for award of persons by road under contracts for group transport*." Therefore, the requirement that tourists be carried was removed, before being reintroduced in 1996.

49. The Value-Added Tax (Refund of Tax) (No. 28) Order, 1996 (SI 98/1996) defined a qualifying person as inter alia "*a person who is engaged in the business of carriage for reward of tourists by road under contracts for group transport*." Therefore, the 'tourist' requirement was reintroduced. Importantly, SI 98/1996 introduced a "disapplication clause" at paragraph 5:

> *"This Order shall not apply to vehicles used or intended to be used primarily for the provision of public transport services."*

50. If this disapplication clause was still in being, the Appellant accepted that it would have no right to claim refunds. Therefore, it was manifestly significant that the wording of the disapplication clause had been amended in SI 266/2012. This states at paragraph 5 that:

> *"This Order does not apply to vehicles used or intended to be used primarily for the provision of transport services other than transport services consisting of carriage for reward of tourists by road under contracts for group transport."*

51. The Appellant accepts that the vehicles have to be used primarily for the provision of transport services to tourists. But it is significant that the disapplication clause for public transport services no longer applies. It appeared that the Respondent's case was that the previous disapplication clause from SI 98/1996 should continue to inform the interpretation of SI 266/2012, but this was incorrect.

52. The use of "primarily" in paragraph 5 of SI 266/2012 properly meant that if less than 50% of the passengers were tourists, then the disapplication clause would apply. However, if 50% of the passengers were tourists, then that was sufficient to meet the relevant limb of the test under "qualifying person". It was submitted that the evidence strongly suggested that at least 50% of the passengers travelling on the Appellant's coaches were tourists. It

could not be the case, given the wording of paragraph 5, that the reference to "tourists" in respect of qualifying persons meant exclusively tourists.

53. Counsel opened a number of authorities to the Commissioner on statutory interpretation, including *Crilly v T & J Farrington Ltd* [2001] 3 IR 251, *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60, *Renehan v T&S Taverns Ltd (t/a Red Cow Inn)* [2015] IESC 8, *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *DPP v Quilligan* [1986] IR 495, and *Commission v Spain (C-360/11).* The wording of SI 266/2012 was not ambiguous. Therefore, a literal interpretation of the Order should be applied. This meant that a strict, but not a narrow, reading of the Order should be carried out.

54. As counsel submitted that SI 266/2012 was not ambiguous, a purposive interpretation of it was not required; however, such a purposive interpretation would, in any event, favour the Appellant. Counsel referred to Dodd's *Statutory Interpretation in Ireland*, where, at paragraph 6.32, the author stated:

> *"Occasionally a purposive interpretation is associated with a sprinkling of language and is sometimes spoken of as something opposed to the literal interpretation. This association is not merely without foundation. It has been said 'when counsel talk about the purposive approach, what they usually want is a small rewriting, a minor modification or a few extra words to smooth out the text.'"*

Counsel submitted that this was what the Respondent was seeking to do in this case; it was seeking to encourage what could be described as a "vibe interpretation" or a "paradigmatic interpretation" to the concept of group transport. The Respondent had suggested that it would be "clearer" if the definition of qualifying person referred to "groups of tourists", but counsel for the Appellant reiterated that such an understanding would not be clearer; it would be different.

55. Additional arguments had been raised in written submissions provided prior to the hearing, but counsel for the Appellant confirmed that he was seeking to rely only on his oral submissions to the Commissioner at the hearing.

Respondent's Submissions

56. Counsel for the Respondent submitted that it was important to bear in mind that this case concerned a derogation from the general rule that if a supplier does not charge VAT, it does not get the benefit of any input credits or deductions that it might otherwise get if it did charge VAT. This was a unique and special privilege, and should be viewed as such. A derogation had to be strictly interpreted and it was not permissible to expand a derogation beyond what was intended.

57. It is clear from a reading of paragraph (a) of the definition of "qualifying person" in SI 266/2012 that it is not a four-limbed test as argued by the Appellant. This had been outlined by the Respondent to the Appellant since the beginning of the dispute. In an email Sh 24 March 2020 from the Respondent to the Appellant's solicitor, in response to a letter from the Appellant's solicitor, the Respondent stated that "*It is not practicable to separate the different parts of the definition of a 'qualifying person'."*

58. The definition in paragraph (a) is one phrase; there are no commas within that phrase, it is not broken down into individual parts. Therefore it is incumbent on the Appellant to show as a whole that it is engaged in the business of carriage for reward of tourists by road under contracts for group transport.

59. The wording of paragraph (a) refers to "*contracts for group transport*" rather than a contract. Therefore, the Appellant must be a party to contracts, plural, for the carriage of tourists. It is not enough to have one contract. The definition requires the Appellant to be carrying groups of tourists under contracts.

60. The Appellant had accepted that the Licence Holder would not come within the definition of a qualifying person for the purposes of SI 266/2012. Consequently, the Appellant was contending that the legislature had intended that the derogation would apply to sub-contractors like it, but not to a principal licence holder such as the Licence Holder.

61. The derogation as set out under SI 266/2012 allowed a qualifying person to claim input credits, which was akin to being zero rated. Certain goods that have a social benefit, like food and clothing, tend to be zero rated, and therefore it can be said that there is a social policy behind zero rating goods. This can be seen from Article 110 of the VAT Directive which provides that exemptions from VAT *"must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."*

62. The Respondent agreed with the Appellant that the purpose of this particular derogation was to improve the Irish tourism industry, by encouraging the creation of a fleet of high-quality touring coaches.

63. The European Union's ultimate objective, in respect of VAT, is harmonisation across the Union so that there would be no derogations. This is why it is not permitted to expand the scope of a derogation; it can only be narrowed. This is a particularly important point in the context of the Appellant's submissions regarding paragraph 5 of SI 266/2012 vis-à-vis paragraph 5 of SI 98/1996. The Appellant had accepted that paragraph 5 of SI 98/1996 would, if still operative, disapply its entitlement to claim refunds. However, it could not be

the case that paragraph 5 in SI 266/2012 expands the nature of the derogation. Therefore, if the Appellant came within the terms of paragraph 5 of SI 98/1996, then it also came within the terms of paragraph 5 of SI 266/2012, such that its claim for refunds was disapplied. The proper interpretation of paragraph 5 of SI 266/2012 was that it had the same effect as paragraph 5 of SI 98/1996.

64. The Respondent agreed with the Appellant that derogations must be strictly interpreted. If a taxpayer wants to come within an exemption, it is incumbent on the taxpayer to come precisely within the wording of the legislation; *Revenue Commissioners v Doorley* [1933] IR 50. Other authorities referred to on behalf of the Respondent included *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60, *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *Perrigo Pharma International Activity Company v McNamara* [2020] IEHC 552, and *National Irish Bank Ltd v Graham* [1994] 2 ILRM 109.

65. The title of SI 266/2012, "Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012" demonstrates that the refunds are meant for touring coaches. "Touring coaches" are not defined within SI 266/2012 but its ordinary meaning would involve a group of tourists touring around Ireland or a part of Ireland, staying together as a group on the bus and then getting off at another point.

66. The definition of "qualifying person" has three limbs: (i) you must be tax compliant, (ii) you must comply with paragraph (a), and (iii) you must comply with paragraph (b). Regarding paragraph (a), what is required is that you must carry tourists under contracts for group transport. *Per* McKechnie J in *Dunnes Stores v Revenue Commissioners* [2019] IESC 50 (at para. 66), it is presumed that the legislature did not intend to use surplusage or to have words or phrases without meaning. Therefore, it is important to note that the definition of qualifying person refers to "contracts for group transport". However, the evidence of the Appellant was that it operated under one contract for group transport. SI 266/2012 requires contracts for groups of transport but this is not what the Appellant could demonstrate.

67. Paragraph 5 of SI 266/2012 means that if you are primarily providing transport services for something other than the carriage of tourists under contracts for group transport, you are not entitled to a refund. This is a rephrasing of paragraph 5 in SI 98/1996, but it does not materially change the earlier provision. The Appellant's submission that there was a "50% test", such that if 50% of passengers were tourists then the requirement under SI 266/2012 for tourists was met, was not in SI 266/2012 and was entirely without basis.

68. Regarding the definition of "tourists" in SI 266/2012, it was not appropriate to invite the Commissioner to make a finding of fact that a person is a tourist because he or she is on a bus to an airport. A person travelling to Spain on holidays will certainly be a tourist when

in Spain, but it was not clear that such a person was a tourist when travelling on a bus from [redacted] to Dublin Airport. The Commissioner should not be invited to make findings of fact based on a tentative or tenuous suggestion that because passengers are travelling to an airport, they are tourists.

69. The Respondent believed that the literal meaning of "qualifying person" under SI 266/2012 was clear. But if the Commissioner did not agree, he should proceed to consider the purpose of the legislation. And it was clear that the purpose of SI 266/2012 was to ensure a good fleet of touring coaches for groups of tourists.

70. The use of "primarily" in paragraph 5 of SI 266/2012 means in the first place, or first and foremost; *National Irish Bank Ltd v Graham* [1994] 2 ILRM 109. Therefore, if in the first place, you are doing something other than carrying tourists under group transport, then the derogation does not apply to you. In this instance, the Appellant is a subcontractor of a route licence, bringing members of the public from [redacted] to Dublin. If they are carrying tourists, that is very much a secondary aspect of their business. First and foremost, the Appellant's business is providing a public, scheduled bus service. This is demonstrated by its compliance with the conditions of the licence granted under the Public Transport Regulation Act 2009.

Material Facts

71. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

71.1 The Licence Holder holds a licence issued by the NTA under the Public Transport Regulation Act 2009 to carry on a public bus passenger service on route number [redacted] between [redacted] and Dublin Airport. The Appellant is named as a sub-contractor on the licence.

71.2 The Sub-Contractor Agreement between the Licence Holder and the Appellant provides that the Appellant agrees to provide the services under the same terms and conditions as are applicable to the Licence Holder.

71.3 At any given three-year period within the relevant timeframe for this appeal, there was one contract in being between the Licence Holder and the Appellant. There was no direct contractual relationship between the Appellant and the passengers carried on the route between [redacted] and Dublin Airport.

71.4 A majority of the passengers carried by the Appellant on behalf of the Licence Holder on the [redacted] to Dublin City/Airport route for the years 2017, 2018 and 2019 were travelling as tourists.

Analysis

72. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners* [2010] IEHC 49, Charleton J. stated at paragraph 22: "*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*."

73. Article 371 of the VAT Directive permits EU Member States to maintain exemptions from VAT which existed prior to 1 January 1978. Paragraph 14(3) of Schedule 1 to the VATCA 2010 exempts from VAT "*Transporting passengers and their accompanying luggage."* This exemption from VAT has been in place in Ireland since before 1978 and is therefore permitted by Article 371 of the VAT Directive.

74. Article 110 of the VAT Directive allows Ireland to retain certain VAT exemptions and reduced rates that existed prior to 1 January 1991. The Value-Added Tax (Refund of Tax) (No. 19) Order, 1986 (SI 68/1986) provided for a refund to exempt coach operators, subject to certain conditions, from VAT paid in respect of the acquisition of new touring coaches of certain dimensions. SI 68/1986 was subsequently replaced from time to time and the currently operative statutory instrument is the Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266/2012).

75. The parties were in agreement that this case essentially concerns the correct statutory interpretation of a "qualifying person" under SI 266/2012. In the recent judgment in *Perrigo Pharma International Activity Company v McNamara* [2020] IEHC 552, McDonald J, from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation at paragraph 74:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express*

terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

76. Paragraph 2 of SI 266/2012 defines a "qualifying person" as someone who, *inter alia, "(a) is engaged in the business of carriage for reward of tourists by road under contracts for group transport.*" The parties disagreed on how this should be interpreted. The Appellant contended that it consisted of four limbs, and that if the Appellant satisfied each limb, it by necessity satisfied the definition. The Respondent contended that it was not practicable to separate out the elements of the definition and that it should be read together, as one phrase.

77. The Commissioner notes that the paragraph is not separated into sub-clauses or individual elements, whether by way of commas, sub-numbering etc. In Dodd's *Statutory Interpretation in Ireland*, the author states at paragraph 3.45:

> "*In Ireland, for the most part, punctuation is treated as deliberate and intended, in much the same way as the words chosen by the Oireachtas. The normal rules of statutory interpretation apply to the legislature's use of punctuation as they do to the words used. Punctuation must be presumed to be correct, and accurately reflect the intention of the Oireachtas*."

78. The Commissioner considers it significant that there is no punctuation within paragraph (a) of the definition of qualifying person that operates to separate it into sub-clauses. Therefore, the Commissioner is satisfied that the correct approach to interpreting the paragraph is not to separate it into four limbs, as argued by the Appellant, but rather to read it as a whole.

79. Nevertheless, it is necessary to apply the various elements of the paragraph to the facts in this case. There was no dispute that the Appellant was engaged in "*the business of carriage for reward*" and that it operated "*by road*". Therefore, the critical elements are whether the Appellant was carrying "*tourists*" and whether it was operating "*under contracts for group transport.*"

"Tourists"

80. "Tourists" is not defined in SI 266/2012. [redacted] gave evidence that, for the years 2017 to 2019, just over 50% of the passengers travelling from Dublin to [redacted] boarded at Dublin Airport. Her evidence was that it was not possible to directly ascertain the proportion of passengers boarding in [redacted] that travelled to the airport compared to Dublin City, as

this was not apparent on the face of tickets bought online. Therefore, [redacted] carried out a sample assessment based on a review of the bus manifests for four separate weeks in 2017, 2018 and 2019 in order to extrapolate the percentage of travellers from [redacted] to Dublin Airport compared to Dublin City. Her evidence was that the analysis demonstrated that the split between passengers travelling to the airport versus the city was approximately 50/50.

81. Counsel for the Appellant submitted that it had to be the case that the vast majority of the passengers travelling from or to Dublin Airport (approximately 50% of the total) were travelling for the purposes of tourism. He further submitted that it would offend reason to presuppose that tourism was not a significant reason for travel between [redacted] and Dublin City. Against this, counsel for the Respondent submitted that the evidence was not sufficient to find that a passenger was a tourist because they were travelling to the airport.

82. The Commissioner considers that the evidence is sufficient to infer, based on the balance of probabilities, that a majority of the passengers travelling on the Appellant's coaches on route number [redacted] for the years 2017 – 2019 were travelling as tourists. It did not appear to the Commissioner that the Respondent directly challenged the evidence of [redacted] regarding the Licence Holder's passengers, and certainly no evidence to contradict the Appellant's case in this regard was proffered. The Commissioner agrees with the Appellant that it is reasonable to assume that the vast majority of passengers to and from the airport were travelling as tourists. Additionally, given the evidence on behalf of the Appellant that some of those travelling between [redacted] and Dublin City were travelling for tourism, it appears reasonable to the Commissioner to find that a majority of the passengers during the years 2017-2019 were travelling as tourists.

83. In making this finding, the Commissioner has had regard to the definitions of tourism provided by the Appellant in written submissions and at the hearing. The Commissioner considers these definitions to be relatively broad, e.g. the definition in Regulation (EU) 692/2011 that

> *" 'tourism' means the activity of visitors taking a trip to a main destination outside their usual environment, for less than a year, for any main purpose, including business, leisure or other personal purpose, other than to be employed by a resident entity in the place visited.*"

84. Additionally, the Commissioner notes that the Oxford English Dictionary defines a tourist as *inter alia*

"*One who makes a tour or tours; esp. one who does this for recreation; one who travels for pleasure or culture, visiting a number of places for their objects of interest, scenery, or the like…"*

85. The Commissioner is satisfied that these definitions would include, for example, a day-trip between [redacted] and Dublin for the purposes of visiting Dublin Zoo. Consequently, he is satisfied, on the basis of the evidence before him, that he is entitled to find, on the balance of probabilities, that a majority of the passengers travelling to and from Dublin and [redacted] on the Appellant's coaches on route [redacted] for the years 2017, 2018 and 2019 were travelling for the purposes of tourism. However, as no similar evidence was provided by the Appellant for 2016, no finding on whether or not the majority of passengers were travelling for tourism purposes is made for that year.

"Under contracts for group transport"

86. The Appellant provided services to the Licence Holder pursuant to its sub-contractor agreement. The evidence demonstrated that there were three sequential contracts between the Appellant and the Licence Holder; for the years [redacted], [redacted] and [redacted]. However, for any given three-year period, the Appellant operated under one contract only. The evidence showed that the Licence Holder pays the Appellant €[redacted] per round trip, irrespective of the number of passengers (if any) on the coach. The Appellant submitted that this constituted a group contract under SI 266/2012, and that, as it did not enter into any contractual relationship with the individual passengers, this satisfied this element of the definition of a qualifying person.

87. The Respondent submitted that SI 266/2012 referred to "contracts" (plural) and that, as the Appellant had demonstrated the existence of only one contract at any given time, it did not meet the definition under SI 266/2012. Additionally, the Respondent contended that the proper reading of paragraph (a) of the definition was that a qualifying person had to be carrying groups of tourists.

88. The Appellant objected to the Commissioner taking the Respondent's submission regarding "contracts" (plural) versus "contract" (singular) into consideration, on the ground that it was not raised by the Respondent until its counsel's oral submissions at the hearing, and therefore the Appellant did not have sight of it before the hearing. However, the Commissioner notes that the Appellant bears the burden of proof to show that it is entitled to the refunds under SI 266/2012 (*per Menolly Homes Ltd v Appeal Commissioners* [2010] IEHC 49), and therefore he is satisfied that it is for the Appellant to demonstrate that it meets the definition of a qualifying person under SI 266/2012.

89. The Commissioner is conscious of McKechnie J's *dictum* in *Dunnes Stores v Revenue Commissioners* [2019] IESC 50 at paragraph 66 that "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*." Consequently, the Commissioner considers it significant that SI 266/2012 refers to "*contracts for group transport",* and is satisfied that it is necessary to show the existence of such contracts (plural) to come within the definition of a qualifying person. The Commissioner envisages that, to satisfy this requirement, a qualifying person might show, for example, a contract to transport a group to a particular location on a particular day, and then another contract to transport a group to another location the following day or week.

90. Therefore, as the Commissioner is satisfied that the evidence demonstrates that the Appellant has only ever operated under one contract for group transport during any given three-year period, he finds that it does not satisfy this element of the definition of a qualifying person under SI 266/2012.

91. Furthermore, the Commissioner notes that the requirement that there be "*contracts for group transport*" has remained consistent since the relevant refund provision was originally set out in 1986. SI 68/1986 stated that a person seeking a repayment of VAT should

> "*establish that he is engaged in the business of carriage of persons, including tourists, by road under <u>contracts</u> for group transport*" (emphasis added).

Subsequent statutory instruments amended the description of the persons to be carried by road. In 1994, SI 165/1994 provided that a "qualifying person" should *inter alia* be

> "*engaged in the business of carriage for reward of persons by road under <u>contracts</u> for group transport"* (emphasis added).

In 1996, SI 98/1996 amended the definition of a "qualifying person" to someone

> "*engaged in the business of carriage for reward of tourists by road under <u>contracts</u> for group transport*" (emphasis added).

The Commissioner considers it notable that it has been a consistent requirement since 1986 that persons qualifying for VAT refunds must be operating under contracts (plural) for group transport, notwithstanding other amendments made to the relevant definition.

92. The Commissioner is conscious of the *dictum* of Kennedy CJ in *Doorley v Revenue Commissioners* [1933] IR 750, as quoted by McDonald J in *Perrigo*, that:

> "*The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express*

terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible."

As the Commissioner finds that the Appellant does not meet the definition of a qualifying person under SI 266/2012, he is satisfied that the Respondent was correct to refuse the Appellant's applications for VAT refunds under SI 266/2012.

Paragraph 5 - The 'Disapplication Clause'

93. Given that the Commissioner is satisfied that the Appellant does not come within the definition of a qualifying person under paragraph 2 of SI 266/2012, it follows that he is satisfied that the Respondent was entitled to refuse the Appellant's applications for VAT refunds. However, the Commissioner considers it appropriate to also consider whether paragraph 5 of SI 266/2012, described by counsel for the Appellant as the 'disapplication clause', is applicable.

94. Paragraph 5 provides that "*This Order does not apply to vehicles used, or intended to be used, primarily for the provision of transport services other than transport services consisting of carriage for reward of tourists by road under contracts for group transport.*"

95. The parties disagreed on how "primarily" in paragraph 5 should be interpreted. Counsel for the Appellant submitted that if less than 50% of passengers were tourists, then the disapplication clause would apply, but that if 50% or more were tourists, then it did not. Counsel for the Respondent submitted that this "50% test" did not exist in SI 266/2012 and was wrong in law. Instead, she drew the Commissioner's attention to *National Irish Bank Ltd v Graham* [1994] 2 ILRM 109, which concerned the definition of a family home under the Family Home Protection Act 1976.

96. The Commissioner does not agree with the Appellant that the "50% test" is the correct way to interpret whether or not the disapplication clause applies, as he is satisfied that it does not exist in SI 266/2012 itself and no authority was opened to suggest that this is how "primarily" should be interpreted. The Commissioner notes that the Oxford English Dictionary defines "primarily" as *inter alia*

"To a great or the greatest degree; for the most part, mainly."

The Commissioner considers that this definition more closely matches the definition suggested by counsel for the Respondent arising from *National Irish Bank Ltd v Graham,* i.e. in the first place or first and foremost, albeit he is conscious that that case concerned a different statutory scheme to what is at issue here.

97. The Licence Holder's route licence was granted by the NTA under the Public Transport Regulation Act 2009 to carry on a public bus passenger service. The definition of a "public bus passenger service" is set out at section 2 of the 2009 Act:

> *'"public bus passenger service" means the use of a bus or buses travelling wholly or mainly on public roads for the carriage of passengers in such a manner that—*
>
> *(d) each journey is open to use by members of the public,*
> *(e) a charge or charges are paid in respect of each passenger, and*
> *(f) save where the Authority otherwise determines,*
> *(iii) the service is provided on a regular and scheduled basis, and*
> *(iv) carriage is provided for passengers between specified terminal points or along a specified route or otherwise in accordance with a published timetable,*
>
> *and is not a bus service solely for carrying children to or from school.'*

As set out in the Licence Holder's licence as well as the sub-contractor agreement, the Appellant is bound by the conditions of the Licence Holder's licence.

98. The Commissioner is satisfied that the correct understanding of the business of the Appellant is that it is primarily engaged in the provision of a public bus passenger service, as it is primarily engaged in transporting members of the public between [redacted] and Dublin on a regular and scheduled basis, along a specified route and in accordance with a published timetable, as stipulated in the route licence. Consequently, the Commissioner is satisfied that the Appellant's vehicles are not primarily used for the provision of "*transport services consisting of carriage for reward of tourists by road under contracts for group transport*". While the Commissioner has found as a matter of fact that the majority of passengers travelling on the Appellant's coaches on the route in the years 2017-2019 were travelling as tourists, he is satisfied that this was not the primary purpose, from the point of view of the Appellant's business. Rather, he is satisfied that the Appellant's primary business is transporting members of the public between [redacted] and Dublin pursuant to a licence for a public bus passenger service.

99. Counsel for the Appellant argued that removal of the explicit disapplication for vehicles used "*primarily for the provision of public transport services*", which was introduced in the SI 98/1996 but removed in SI 266/2012, was significant. However, the Commissioner does not consider that the removal of the explicit reference to provision of public transport services should be read to mean that such services now necessarily come within the scope of SI 266/2012. It is still necessary to apply paragraph 5 of the SI 266/2012 to the specific facts in a particular case, and for the reasons set out herein, the Commissioner is satisfied

that the Appellant's vehicles are used primarily for the provision of transport services other than transport services consisting of carriage for reward of tourists by road under contracts for group transport, and thus the Appellant is not entitled to refunds under SI 266/2012. It seems to the Commissioner that the amendment to paragraph 5 in SI 266/2012 compared to SI 98/1996 acts to potentially broaden the scope of the disapplication clause, and therefore narrow the scope of the derogation. Previously, only vehicles used primarily for the provision of public transport services were affected, but since 2012 any vehicles used primarily for a purpose other than carriage for reward of tourists by road under contracts for group transport are excluded from the scope of SI 266/2012.

100. In conclusion, the Commissioner finds that the Appellant is not a qualifying person for the purposes of paragraph 2 of the SI 266/2012 as it does not operate under contracts for group transport, and furthermore the Commissioner finds that paragraph 5 of SI 266/2012 is applicable to the Appellant as its vehicles are used primarily for the provision of transport services other than transport services consisting of carriage for reward of tourists by road under contracts for group transport. Therefore, the Commissioner is satisfied that, based on a literal interpretation of SI 266/2012, the Appellant is not entitled to the VAT refunds sought. Consequently, it is not necessary to consider a purposive interpretation of SI 266/2012.

Determination

101. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent is correct to refuse to allow claims for the repayment of VAT for the years 2016 to 2019 in the total amount of €1,048,455, in accordance with the Value-Added Tax (Refund of Tax) (Touring Coaches) Order 2012 (SI 266/2012). Therefore, those refusals/assessments stand.

102. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
20/06/2022.