AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

151TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against an assessment to Value Added Taxation ("VAT") raised by the Revenue Commissioners ("the Respondent") on 5th April 2017.

2. The assessment covers the period 1st July 2007 to 31st August 2008 and the total VAT due on the assessment amounts to €36,161. The Appellant is appealing the assessment in accordance with section 25 Value Added Tax Act 1972, as amended ("VATA 1972"), (now section 119 (1) Value-Added Tax Consolidation Act 2010, as amended ("VATCA 2010")).

Background

3. The Appellant, which has two partners, operates as a partnership and its main business was the supply of sites which were developed into a new housing estate. The partnership was registered for VAT with effect from 1st July 2004 and the development consisted of 25 sites.

4. The Appellant supplied the sites and a development company ("the company"), which the members of the partnership were directors and shareholders in, constructed the houses on the sites supplied by the partnership.

5. The business model was that the Appellant sold the sites to purchasers and was paid for those sites by the purchaser. The purchaser of the site simultaneously entered into a development agreement with the company for the construction of a house on the supplied site and paid the company separately for those building works.

6. During the course of a revenue audit conducted by the Respondent, the Respondent queried the tax creditor figure of €36,161 entered in the Appellant's financial statements for the year ended 31st July 2008. The Appellant's agent provided a response to this query and advised the Respondent that the tax creditor figure represented the net VAT due on the sale of four sites by the Appellant.

7. The Appellant's agent subsequently made a disclosure in respect of the VAT liability of €36,161 at a meeting with the Respondent. That disclosure was not considered a valid disclosure as no payment accompanied the disclosure.

8. As the disclosure was not deemed valid and as the VAT was not paid on the sale of the four sites, the Respondent raised an assessment to VAT under section 23 VAT Act 1972 (now section 111 (1) VATCA 2010) covering the period 1st July 2007 to 31st August 2008 on 5th April 2017. That assessment sought to recover the VAT due on the sale of the four sites in the sum of €36,161.

9. On 7th July 2017, the Appellant who was not in agreement with the Notice of Assessment lodged an appeal with the Commission. The Appeal hearing was held remotely on 2nd August 2022 and the Appellant was represented by their agent. The Respondent was represented by two staff officials.

Legislation and Guidelines

10. The following legislation is relevant to this appeal.

Section 3(1) (c) VATA 1972 (Now section 19(2) VATCA 2010)

For the purposes of this Act "supply", in relation to immovable goods, shall be regarded as including the transfer in substance of—

(a) the right to dispose of the immovable goods as owner, or

(b) the right to dispose of the immovable goods.

Section 3 (7) VATA 1972 (Now S22 (3) (a) VATCA 2010)

Where, in the case of a business carried on, or that has ceased to be carried on, by an accountable person, goods forming part of the assets of the business are, under any power exercisable by another person (including a liquidator and a receiver), disposed of by the other person in or towards the satisfaction of a debt owed by the accountable person, or in the course of the winding up of a company, then those goods shall be deemed to be supplied by the accountable person in the course or furtherance of his or her business.

Section 14 VATA 1972 (Now section 80 VATCA 2010)

(1) A person who satisfies the Revenue Commissioners that—

(a) taking one period with another, at least 90 per cent of the person's turnover is derived from taxable supplies to persons who are not registered persons, or

(b) the total consideration which the person is entitled to receive in respect of the person's taxable supplies has not exceeded and is not likely to exceed €1,000,000 in any continuous period of 12 months,

may, in accordance with regulations, be authorised to determine the amount of tax which becomes due by the person during any taxable period (or part thereof) during which the authorisation has effect by reference to the amount of the moneys which the person receives during that taxable period (or part thereof) in respect of taxable supplies.

Section 19 (3) (b) VATA 1972 (Now section 76 (2) VATCA 2010)

A person who disposes of goods which pursuant to section 3 (7) are deemed to be supplied by an accountable person in the course or furtherance of his or her business shall—

(i) within 9 days immediately after the 10th day of the month immediately following a taxable period furnish to the Collector-General a true and correct return, prepared in accordance with regulations, of the amount of tax which became due by the accountable person in relation to the disposal, and such other particulars as may be specified in regulations and shall at the same time remit to the Collector-General, at the same time as so furnishing such return, the amount of tax payable in respect of that taxable period.

(ii) send to the person whose goods were disposed of a statement containing such particulars as may be specified in regulations, and

(iii) shall treat the amount of tax referred to in paragraph (a) as a necessary disbursement out of the proceeds of the disposal.

Section 23 VATA 1972 (Now section 111 VATCA 2010)

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

(a) the total amount of tax payable by the person was greater than the total amount of tax (if any) paid by that person;

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

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

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

(i) may, in accordance with regulations but subject to section 113, make an assessment in one sum of the total amount of tax which in his or her opinion should have been paid or the total amount of tax (including a nil amount) which in accordance with section 99 (1) should have been refunded, as the case may be, in respect of such period, and

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

(I) the total amount of tax so assessed,

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

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

(2) Where notice is served on a person under subsection (1), the following provisions shall apply:

(a) the person may, if he or she claims that the amount due is excessive, on giving notice to the inspector or other officer within the period of 21 days from the date of the service of the notice, appeal to the Appeal Commissioners, and

(b) on the expiration of the said period, if no notice of appeal is received or, if notice of appeal is received, on determination of the appeal by agreement or otherwise, the amount due or the amended amount due as determined in relation to the appeal, shall become due and payable as if the tax were tax which the person was liable to pay for the taxable period during which the period of 14 days from the date of the service of the notice under subsection (1) expired or the appeal was determined by agreement or otherwise, whichever taxable period is the later.

(3) Where a person appeals an assessment under subsection (1), within the time limits provided for in subsection (2), then—

(a) he or she shall pay to the Revenue Commissioners the amount which he or she believes to be due, and

(b) if—

(i) the amount paid is greater than 80 per cent of the amount of the tax found to be due on the determination of the appeal, and

(ii) the balance of the amount found to be due on the determination of the appeal is paid within one month of the date of such determination,

interest in accordance with section 114 shall not be chargeable from the date of raising of the assessment.

Section 30 VATA 1972 (now section 113 VATCA 2010)

(1) An estimation or assessment of tax under section 110 or 111 may be made at any time not later than 4 years—

(a) after the end of the taxable period to which the estimate or assessment relates, or

(b) if the period for which the estimate or assessment is made consists of 2 or more taxable periods, after the end of the earlier or earliest taxable period within that period.

(2) (a) Subject to paragraphs (b) and (c), in this subsection "neglect" means negligence or a failure to give any notice, to furnish particulars, to make any return or to produce or furnish any invoice, credit note, debit note, receipt, account, voucher, bank statement, estimate or assessment, statement, information, book, document, record or

declaration required to be given, furnished, made or produced by or under this Act or regulations.

(b) A person shall be deemed not to have failed to do anything required to be done within a limited time if the person did it within such further time (if any) as the Revenue Commissioners may have allowed.

(c) Where a person had a reasonable excuse for not doing anything required to be done, he or she shall be deemed not to have failed to do it if he or she did it without unreasonable delay after the excuse had ceased.

(d) Notwithstanding subsection (1), 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 tax, an estimate or assessment as referred to in that subsection may be made at any time for any period for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer.

…

Submissions

Appellant

11. The Appellant's agent advised that the Appellant's business activities were severely curtailed in line with the global recession which resulted in adverse trading conditions during the periods under appeal.

12. The Appellant's agent advised that the Appellant had sourced finance from a financial institution to assist it with the purchase of the sites and when the adverse trading conditions presented, the financial institution exercised their security and took the proceeds of the four site sales which they allocated against loan sums due to them from the Appellant.

13. The Appellant's agent submitted that as the Appellant was registered for VAT on a cash receipts basis then it was only accountable for VAT when it actually received sales proceeds. The Appellant's agent submitted that as it was the financial institution who received the sale proceeds from the four site sales, then the VAT liability properly rested with the financial institution and not the Appellant.

14. In support of this contention, the Appellant's agent referred to section 3 (7) and section 19 (3) (b) VATA 1972 which he submitted provided that where goods belonging to a party are disposed of under any power by another person in satisfaction of a debt owed by the owner

of the goods, then it is the person disposing of the goods who is ultimately responsible for the payment of any VAT liability arising.

15. The Appellant's agent advised that while he had prepared accounts for the Appellant and included within those accounts the VAT liability owed on the disposal of the four sites and also included that liability within the Appellant's Form 1 (an annual tax return on behalf of a partnership which includes a yearly return of assets and liabilities), that he had only done so to comply with accounting standards. The Appellant's agent stated while it was necessary to include the VAT due on the four site sales within the Appellant's accounts and tax returns that this did not necessarily mean that the Appellant itself was liable for payment of the VAT assessment.

16. The Appellant's agent advised that on a separate occasion the same financial institution in identical circumstances, albeit on different sites, took possession of the proceeds of sale in satisfaction of sums due to them. However, in that case the financial institution returned sufficient funds to the Appellant to enable it to discharge the associated VAT liability on those site sales. The Appellant's agent further advised that he was unsure why the financial institution in the instant transactions failed to do likewise.

17. The Appellant's agent concluded his submissions by stating that if the Commission found in the Respondent's favour, then he was of the view that the VAT assessment issued by the Respondent was void as it had been issued beyond the timeframe permitted by statue and as such should be vacated by the Commission.

Respondent

18. The Respondent stated that a VAT liability arose on the sale of the four sites in accordance with the provisions of section 19 (2) VATCA 1972. The Respondent noted that the Appellant did not dispute the fact that a VAT liability arose nor the quantum of the assessment in its submissions.

19. The Respondent submitted as the four sites were sold by the Appellant and it had received and lodged the proceeds of sale from its solicitor, then it was it, the Appellant and not the financial institution, who was liable for payment of the associated VAT liability. The Respondent submitted that the provisions of section 3 (7) VATA 1972 did not apply to the Appellant as it had supplied the four sites and were paid for those four sites. The Respondent submitted the fact the financial institution took the sale proceeds and appropriated them against liabilities owed to them by the Appellant did not negate the Appellant's obligation to remit the VAT component to the Respondent.

20. The Respondent submitted that the Appellant acknowledged that the VAT liability was due by it as it had included the VAT liability as a sum due in both its financial statements and associated tax return and had made a disclosure to them in respect of the liability under appeal. The Respondent submitted that to now say that the liability was not due by the Appellant was illogical.

21. The Respondent submitted that the time limits imposed by statue do not apply to the issuance of the assessment as the Appellant neglected to remit the VAT due of €36,161 which it had recognised and provided for in its financial statements for the year ended 31st July 2008.

22. The Respondent submitted that the onus of proof lay with the Appellant to prove that it complied with the provisions of section 3 (7) VATA 1972. The Respondent further submitted that as no supporting documentation was provided to them or the Commission which supported the Appellant's contention that the four sites in question were disposed of by the financial institution then the VAT liability properly rested with the Appellant.

23. Accordingly, the Respondent requested that the Commission uphold the assessment in the sum of €36,161.

Evidence Presented to the Commission

24. The Commission were provided with a copy of the Appellant's bank loan offer which it availed of to assist it with the acquisition of various sites which included the four sites forming the VAT assessment under appeal. The security detailed within that loan offer consists of legal charges over various plots of land held at different locations (which included the four sites giving rise to the instant VAT liability) and the assignment of a life assurance policy in the name of the Appellant's partners.

25. In addition, the Commission were presented with bank statements held with the same financial institution that provided the site loan. These bank statements are in the name of the Appellant and show the receipt of four separate sums which the Appellant states are the sale proceeds from the four sites being lodged from its solicitors' client account. On the same dates, the bank statements show two debits, which substantially total the amount of the four site sales, with an account number beside them and one transaction with a non-account numerical code beside it. The Appellant's agent informed the Commission that those withdrawals represent the financial institution taking the proceeds of the sale of the four sites.

26. At the conclusion of the hearing, the Commissioner requested the Appellant's agent to contact the Appellant's solicitor to gain an understanding as to why the financial institution

applied different treatment on the VAT portion of the site sales (see paragraph 16 above). This information was requested by the Commissioner to aide whether it was the Appellant or the financial institution who were responsible for payment of the VAT liability forming the assessment.

27. The Commission was subsequently presented with a letter from the Appellant's solicitor which stated that the financial institution unilaterally transferred the proceeds of the sales of the four sites forming the assessment without any notice to their client and as such they were unable to negotiate any terms with the financial institution regarding the VAT liability which had arisen on the sale of those sites. On subsequent disposals where the financial institution had seized the sale proceeds of those site sales and similarly appropriated those sums against liabilities owed by the Appellant, the Appellant's solicitor advised that as the landscape had softened over time, they were able to negotiate terms with the financial institution which included a provision that the financial institution would release sufficient funds to discharge the associated VAT liability on those sales. The Appellant's solicitor stated that the former treatment was "*outside the Appellant's control*" as they had not been given any opportunity to negotiate with the financial institution.

Material Facts

28. The Commissioner finds the following material facts:-

    28.1. The quantum of the VAT assessments, €36,161 is not in dispute between the Appellant and the Respondent.

    28.2. Four individual sites were sold by the Appellant in its financial year ending 31st March 2008 and the associated VAT liability on these sales was not remitted to the Respondent.

    28.3. The sale proceeds of those site sales were lodged into the Appellant's bank account.

    28.4. The Appellants were registered for VAT on a cash receipt basis.

    28.5. The Appellants disclosed a VAT liability of €36,161 in their financial statements and tax returns prepared for the period ended 31st March 2008.

    28.6. The bank loan offer which was availed of and used in part to fund the acquisition of various sites, which included the four sites in the instant appeal, contained legal charges over various plots of lands including the four sites which were subsequently sold by the Appellant.

28.7. The financial institution who provided the loan for the sites did not appoint a receiver or similar agent to dispose of the four sites and therefore did not dispose of those sites.

28.8. The financial institution did not return any funds to the Appellant on the disposal of the four sites to enable them to pay the associated VAT liabilities arising on the disposal.

Analysis

29. The issues to be considered by the Commissioner are whether the assessment is valid having regard to the time period in which it issued and if so valid, whether the undisputed VAT liability forming the assessment on the sale of the four sites is properly payable by the Appellant or the financial institution.

30. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49, at paragraph 22 Charleton J. stated:

> '*The burden of proof in this appeals 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*'

31. The rules for statutory interpretation are set out in the judgment of McDonald J. in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* ([2020] IEHC 552) ("*Perrigo*") where he summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> "*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:*
>
> > *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;*

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";

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;

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.

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;

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.

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"

32. Section 30 VATA 1972 provides that an assessment to VAT shall not be valid if it is issued beyond a four-year timescale from the date the return was due. However, subsection (d) of that section provides that where fraud or neglect has been committed by or on behalf of the person in connection with or in relation to tax, an assessment may be made **at any time for any period** [emphasis added], for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer.

33. The Commissioner notes that the VAT assessment was issued by the Respondent for the period 1st July 2007 to 31st August 2008 on 5th April 2017. As the July/August 2008 VAT return was ordinarily due to be submitted on or before the 19th September 2008, it follows that the assessment was issued beyond the four-year period permitted under statue and in order for the assessment to be valid it must be proven that fraud or neglect occurred. While the Commissioner is satisfied that fraud did not occur in this instance, he finds that neglect occurred by virtue of the Appellant (or the financial institution, if applicable – see below) not including the amount of VAT on the four sites in any VAT return for the periods which the Appellant was required to have included by virtue of being VAT registered. As this omission would be considered "neglect" the Commissioner determines that the VAT assessment which issued by the Respondent on 5th April 2017 was not constrained by the four-year timeframe specified under section 30 VATA 1972 and as such is a valid assessment.

34. In relation to the matter of whether that assessment is payable by the Appellant or the financial institution, the Commissioner had regard to the provisions of sections 3 (7) and section 19 (3) (b) VATA 1972. In applying the principles promulgated in *Perrigo*, the Commissioner determines that as those provisions are unambiguous and their meaning is self-evident, the words used in those provisions should be given their ordinary, basic and natural meaning.

35. In so doing, the Commissioner confirms that these provisions provide in circumstances where a business is carried on and goods forming part of that business are under any power exercisable by another person **disposed of by that other person** [emphasis added] in or towards satisfaction of a debt owed by the business owner, then the person disposing of the goods and not the business owner shall be liable for payment of the VAT liability on the sale of the goods. It follows that for those provisions to be applicable, a person must not only have the power to dispose of goods of the business but that person must also dispose of the goods in question.

36. By the Appellant's own evidence it advised that the four site sale proceeds were lodged into its bank account by its solicitor before being appropriated by the financial institution. In order for the provisions of sections 3 (7) and 19 (3) (b) VATA 1972 to be applicable it therefore follows that the financial institution would not only have been required to have a "*power exercisable*" to sell the four sites but would also have been required in its own capacity or through an agent such as a receiver, to have disposed of the sites. While the alleged taking of the proceeds of the site sales by the financial institution may equate to a "power exercisable" under the legislation, the fact that it was the Appellant and not the financial institution who disposed of the four sites means that those sites were not disposed of by the financial institution and as this requirement of the legislation is not fulfilled, then the Appellants may not avail of its provisions. Accordingly, the Commissioner determines that the accountable person liable for payment of the VAT assessment is the Appellants and not the financial institution.

37. It was further noted by the Commissioner from the supplementary information presented to him after the conclusion of the oral hearing that the financial institution on subsequent disposals of sites where the sales proceeds of the sites were taken by the financial institution returned funds to the Appellant sufficient to discharge the associated VAT liability on a concessionary basis. As a concession does not have the force of law, it therefore follows that responsibility for payment of the VAT assessment rests with the Appellant.

38. The Commissioner further considered the Appellant's submissions that it is not the accountable person for the VAT on the sale of the four sites on the grounds that it was registered for VAT on the cash receipts basis. However, the bank statements submitted by the Appellant clearly show lodgements into its bank account from its solicitor's client account in respect of the four site sales and accordingly the Commissioner discounts this submission on the grounds that the Appellant did receive the sale proceeds, albeit that the financial institution purportedly appropriated those proceeds against sums due to them the same day.

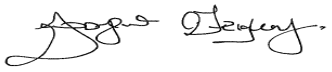
39. The Commissioner determines that the Appellant has not discharged the necessary burden of proof to vacate the assessment to VAT. As a result the Respondent's assessment to VAT in the sum of €36,162 is upheld.

Determination

40. The Commissioner determines that the assessment to VAT in the sum of €36,162 stands as the Appellant has not discharged the necessary burden of proof. Therefore, the appeal is denied and the assessment is upheld.

41. The Commissioner appreciates this decision will be disappointing for the Appellant but the Commissioner has no discretion and must, as stated above apply the provisions of the VAT Acts. The Appellant was correct to check to see whether its legal rights were correctly applied.

42. The appeal is determined in accordance with section 949AK Taxes Consolidation Act 1997 ("TCA 1997"). This determination contains full findings of fact and reasons 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.



Andrew Feighery
Appeal Commissioner
1st September 2022