



61TACD2022

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 the 15th August 2018.
2. The assessment cover the periods 1st November 2016 to 31st October 2017 inclusive and the total VAT due on the assessment amounts to €14,309. The Appellant is appealing the assessment in accordance with section 119 (1) Value-Added Tax Consolidation Act 2010, as amended (“VATCA 2010”).

Background

3. Since 2013, the Appellant has operated a Public House providing beverage sales and light snacks (crisps and such like) in [REDACTED]. The business is operated as a sole trade under the trading name [REDACTED].
4. On the 20th April 2018, an examination of the Appellant’s records was initiated by the Respondent to verify the accuracy of the VAT returns for the period ended 31 October 2017.

5. The Respondent considered the Appellant's mark-up, 62%, as calculated from the 31st October 2017 Financial Statements, was not in line with the industry norm as it was lower than expected.
6. In order to ascertain whether the margins of the business were accurate, the Respondent reviewed the purchase invoices for the year ended 31st October 2017. An examination of the purchase dockets for this period showed that some delivery dockets for the purchase of spirits, specifically Smirnoff vodka, appeared not to have been entered as purchases in the business's accounting system.
7. The cashbook was also examined and it was shown that there were 13 days on which a negative balance was shown in the closing balance column. When queried with the Appellant's accountant, he advised that the formulae used contained an error which he subsequently corrected, and he supplied an updated cashbook to the Respondent showing no negative closing balances.
8. Owing to the perceived low mark-up and apparent missing spirit purchases, the Respondent prepared a weighted mark-up computation using what they believed were more appropriate percentages, which they considered to be the industry norm.
9. The Respondent reviewed the overall sales and product split for the period and came to the initial conclusion that spirit sales were below that which would have been expected given the nature of the business.
10. To ascertain the position, the Respondent examined the purchases ledger in detail and noted that there were unrecorded purchases as there were a number of purchase dockets on the invoice files which had not been entered in the business's purchase ledger. These omitted purchases amounted to €2,806, excluding VAT and related mainly to vodka purchases. The Respondent then estimated that there were additional vodka purchases for the period of €752 which give them what they believed represented total purchases of vodka for the period, €3,558. From a further examination of the purchase invoices, they then estimated that the sum of €7,116 was appropriate for whiskey and gin purchases and €1,610 appropriate in respect of other purchases of spirits. This gave the Respondent a total figure of €12,284 for deemed total spirit purchases in the period under review. The Respondent then applied the mark-up applicable to spirit sales (250% which they deemed to be the industry norm) to the calculated spirit purchases and this established that spirit sales should have been in the order of €42,994 for the period.
11. The Respondent then took the total purchases for the business for the period and reduced this figure by the amount of deemed spirit purchases (€12,284). This gave revised total

purchases of €124,668 which they subsequently split across the various categories of products sold using estimated product splits and this provided them with deemed purchases of each category of good sold. Similarly, they applied what they considered the industry norm mark-up for each category of good sold, and this gave them total non-spirit sales of €240,262 for the period.

12. In combining the deemed spirit sales of €42,994 and deemed other sales of €240,262 for the period, this gave projected sales for the business of €283,256 for the period under review. The Respondent then compared this figure to the total sales figure returned in the Appellant's financial statements for the year ended 31st October 2017 and determined that a shortfall of €62,215 arose.
13. As all of the Appellant's sales were liable to VAT at the standard rate (23% for the period under review), the Respondent deemed that the calculated sales shortfall produced an underpayment of VAT for the period of €14,309. As the parties could not reach agreement on this figure the Respondent issued a notice of assessment to the Appellant on the 15th August 2018.
14. The Appellant disagreed with the assessment as she believed that the business recorded all its sales in its "tills" (Electronic Point of Sale - "EPOS" system) and accordingly the correct amount of VAT was paid "in full and on time". The Appellant further stated that she disagreed with the Inspector's estimation of the purchases for resale and that she could not follow the figures provided.
15. Accordingly, the Appellant appealed the assessment to the Commission on the 23rd August 2018.

Legislation and Guidelines

16. Section 111 VATCA 2010 provides:

"(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.”

17. Section 113 VATCA 2010 provides:

“(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

18. The Appellant advised that she ran the business with the help of her husband and two teenage children or the occasional part-time seasonal worker. She stated that the Public

House was a “typical rural pub” and particularly during the winter months primarily serviced the locality.

19. The Appellant stated that some 90% of her business consisted of the sale of “pints” and that spirits and light snack sales formed the balance.
20. The Appellant stated that she was at a loss to understand how the Respondent had assessed her to additional VAT as all sales were recorded in the business’s EPOS system and she had regular stock checks and stocktakes completed by an external specialist firm which did not produce any anomalies.
21. The Appellant advised that she was unsure how any purchase dockets or invoices were omitted from the accounting system in place but submitted that this was most likely caused by human error.
22. In response to the perceived low mark-up which the Respondent alleged, the Appellant advised that there were a number of factors as to why her business would be below the industry norm. These included that the business was located in a rural village, offered promotions on certain products, provided customer appreciation nights (where regular patrons were offered free or reduced price drink), provided bottles of spirits to good causes at Christmas and for football matches in order to attract custom, reduced prices.
23. The Appellant advised while her EPOS system had buttons for recording the various drinks that the business sold, on occasion she or her husband but more frequently their children misclassified the sale and entered the product being sold under the wrong classification. The Appellant advised that the “miscellaneous button” on the EPOS system was used significantly for promotional sales rather than for example, the “any 3 for €10.50” (which was one of the promotions offered on spirit sales) button, and this explained why the Respondent formed the incorrect view that spirit sales, when compared to the purchases, were below that expected.
24. The Appellant provided the Commission with a copy of her EPOS Z reads for the financial year ended 31 October 2017. An examination of these Z reads showed that alcohol sales were classified according to their types and sales price, for example the number of pints of Bulmer’s sold on a particular day and the price charged for such. A sample review of these daily summaries showed significant use of the miscellaneous sales classification category in addition to various levels of sales of most spirits, including Sambuca, Vodka, Whiskey, Gin, Bacardi, Baileys, Captain Morgan, Jagermeisir and Brandy.
25. The Appellant also provided the Commission with a copy of her purchase invoices for the year ended 31st October 2017 split across the various bi-monthly VAT periods. In addition,

to the Appellant highlighting the sales of the various spirits in each period, she additionally provided a highlight of the spirit purchases in an attempt to reconcile the sales and purchases of spirits.

26. The Appellant submitted she believed that she had paid the correct amount of VAT on sales as she stated all sales of the business were recorded on the EPOS system. The Appellant further submitted that all purchases, save the unexplained “missing delivery dockets” were recorded in her accounting system and that she failed to understand the Respondent’s calculations in respect of the deemed VAT underpayment.

Respondent

27. The Respondent stated in compiling the detailed reconciliation works undertaken by them that they examined the cashbook of the business which demonstrated for 13 days the closing balance was recorded as a negative figure.

28. In order to establish the correct mark-up for the business, the Respondent stated that they undertook a review of the Appellant’s sales and purchases. The following discrepancies were observed:

- (i) The examined Z reads obtained from the EPOS system did not show any instances where the promotional offers which the Appellant stated were offered to customers were reflected in the reads.
- (ii) There were a number of delivery dockets placed on the purchases file, specifically in relation to spirit purchases, which did not have invoices attached to them and were excluded from the purchases total.
- (iii) Based upon the recorded purchases of spirits (as adjusted by the omitted delivery dockets), sales of spirits obtained from the EPOS system, specifically vodka, whiskey and gin, appeared too low.

29. In forming the conclusion the business records maintained were unreliable, the Respondent submitted that they had to adjust the business records to reflect what they considered was the more accurate position. The considered that the method which they used was the most practicable factoring all the circumstances.

30. The Respondent also stated that they believed the payment in respect of Sky TV packages offered in the Pub contained an element of private expenditure and sought to disallow the VAT component of same. However, during the course of the hearing, the Respondent conceded that any private use of the Sky TV channels was incidental in nature and as such, they were not seeking to disallow any element of VAT claimed by the business in respect of this expenditure.

31. In summation, the Respondent submitted that the VAT returns returned by the Appellant for the period under review were erroneous as the VAT on sales had been understated.

Material Facts

The Commissioner found the following material facts:

- The purchase dockets omitted from the Appellant's purchase listing were signed as the goods having been received by either the Appellant or her staff.
- After the correct listings were furnished by the Appellant's accountant in respect of the negative cash balances, the revised listings had no material effect on either the business's sales or purchases for the period under review.
- No reconciliation of receipts or payments ("bank/cash reconciliation") was undertaken by the Respondent as part of their review.

Analysis

32. The central issue to be determined by the Commissioner was whether the Appellant had understated the VAT due on her sales for the period under review and if so proven, whether the Respondent's calculations were accurate factoring in the individual circumstances of the appeal.

33. The Commissioner finds that the notice of assessment issued within the time periods stipulated in section 113(1) VATCA 2010 and is therefore a valid assessment.

34. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments/estimates raised by the Respondent are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated: '*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*'

35. Section 111 VATCA 2010 permits the Respondent where they have "*reason to believe that an amount of tax is due and payable to the Revenue Commissioners*" in circumstances where "*the total amount of tax payable by the person was greater than the total amount of tax (if any) paid by that person*" to "*make an assessment in one sum of the total amount of tax which in his or her opinion should have been paid*".

36. In terms of statutory interpretation, the approach to be applied is a literal one based on the relevant jurisprudence including inter alia, *Bookfinders Limited v Revenue Commissioners*

[2020] IESC 60, *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, *Inspector of Taxes v Kiernan* [1982] ILRM 13 and *Revenue Commissioners v Doorley* [1933] IR 750.

37. In interpreting section 111 VATCA 2010, the Commissioner in applying the literal approach must firstly establish that the Respondent has “reason to believe that an amount of tax is due and payable” by the Appellant to them. Secondly, it must be established in interpreting the legislation on a balance of probabilities standard of proof basis that the opinion used in establishing the quantum due by the Appellant was established by reference to reasonable opinion.
38. As the omitted purchase delivery dockets and associated invoices were not included in the Appellant’s books of account for the period under review and this was not contested by the Appellant (who admitted it was most likely caused by human error), it follows that the VAT returns for the period are erroneous and must be corrected to reflect the true position. This satisfies the first requirement of section 111, VATCA, 2010.
39. Regarding the second-limb of the test, the Commissioner is not satisfied that reasonable opinion was used in establishing the assessment as the computation prepared by the Respondent contains discrepancies which the Commissioner does not consider would satisfy the “reasonable test”.
40. The Commissioner noted numerous discrepancies in the methodology used by the Respondent in calculating the additional VAT payable, including that no allowance was provided for spoilt or wasted drink by virtue of the split of sales being calculated on 100% of the purchase invoices and that they never factored in any allowance for promotions or charitable causes.
41. While acknowledging that the Respondent was hampered in the calculation of an accurate product sales split by virtue of the Appellant’s deemed misuse of the miscellaneous EPOS system button, the Commissioner finds that the “reasonable test” would not be satisfied by using estimated spirit purchases and deemed other product purchase appropriations to calculate the resulting sales having regard to the fact more reliable data exists which in the opinion of the Commissioner would present a more accurate position.
42. The Appellant only provided stock reports for the period 12th March 2019 to 19th July 2019 and these periods fell outside the period of review upon which the VAT assessment was based. However, absent any other reliable information, and assuming that the nature of the trade did not alter, from the period of assessment to the period covered by the reports, nor were there any extraordinary events during the period under review, such as the Covid pandemic, the Commissioner considers that it is reasonable to use the information

contained within the stock reports for the purpose of preparing revised computations of the liability arising.

43. The Respondent did not undertake a reconciliation of the business's receipts and payments for the period under review. This was a deficit on the part of the Respondent and as such the Commissioner is limited in having regard to information which he considers pertinent, such as whether the lodgements to the business's bank account exceeded the amount of the returned or recalculated sales as this would give some degree of comfort to the veracity of the figures used in establishing the Appellant's additional VAT liability.

44. The Commissioner considers the approach detailed in *Appendix One* to this Determination to be a more reasonable calculation of the amount of VAT underpaid by the Appellant for period under appeal as it considers the following:

- The average product split by percentage sold by the Appellant referenced for a period of time;
- The average mark-up obtained by the Appellant's business over a period of time factoring in the range of products sold by the business;
- The average mark-up by its nature reflects allowances not considered by the Respondent in their calculations in providing allowances for spoiled drink, customer promotions and such like;
- The purchases are based upon the actual purchases for the period under review as increased by the "missing" purchase dockets which in the opinion of the Commissioner is the only reliable figure which can be utilised;
- The revised purchases are increased by the average mark-up obtained by the business which should result in the actual sales of the business for the period of assessment;
- The VAT calculation for additional sales is computed by reference to comparing the deemed actual sales for the business to those returned in its financial statements for the period under assessment;
- A VAT deduction is provided for the amount of the deemed unrecorded purchases noted by the Respondent during the course of their inspection on the assumption that the Appellant subsequently produced valid purchase invoices permitting the said deduction;

- The resultant VAT payable forming the basis of assessment is the amount of the VAT on deemed unrecorded sales less the amount due on the unrecorded purchases.

45. While the Appellant in this appeal has been unsuccessful in showing that additional tax is not payable, the Commissioner finds that the amount of VAT due for the period of appeal should be reduced from that sought by the Respondent, €14,309 to that calculated by the Commissioner, €10,257 which represents a reduction in the liability of €4,052.


Determination

46. Having considered the facts and circumstances of this appeal, together with the evaluation of the documentary evidence as well as the submissions from the Appellant and the Respondent, the Commissioner has concluded that the Appellant has partly succeeded in discharging the burden of proof in relation this appeal.

47. As a result, the Commissioner determines that the Appellant's assessment to VAT for the period 1st November 2016 to 31st October 2017 should be reduced to reflect a net liability of €10,257.

48. It is understandable that the Appellant might be disappointed with the outcome of this appeal but the Commissioner has no discretion to stray beyond the legislation. It is hoped however that the reduction in the VAT liability will assist the Appellant in having the matter concluded. The Commissioner notes that it would have been helpful if the Respondent had conducted an Income Tax assessment at the same time in order to assist the Appellant to resolve all her tax matters.

49. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949AK thereof. 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
14 April 2022

Appendix 1

1. ██████████ Stock Reports - Split of product sales and average gross profit percentage

	<i>11/2/2019- 12/3/2019</i>	<i>12/3/2019- 15/05/2019</i>	<i>15/5/2019- 19/07/2019</i>	<i>Average</i>
Draft Ale, Cider Stout	71.33	69.81	71.00	70.71
Bottled Beer	10.29	13.47	14.77	12.84
Minerals	6.36	6.01	4.86	5.74
Spirits	7.80	7.14	5.08	6.67
Open Drink	1.55	0.21	0.00	0.59
Off Sale Cans	0.00	0.94	1.75	0.90
Snacks	2.45	2.12	2.12	2.23
Wine & Champagne	0.22	0.30	0.42	0.31
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	100.00	100.00	100.00	100.00
Average Gross Profit Percentage	48.27	48.98	47.86	48.37

2. VAT on Sales Computation

Cost of Sales - 31 October 2017	135,790
"Missing purchases"	<u>2,806</u>
Revised purchases	138,596
Mark-up (equates to a gross profit percentage of 48.37%)	93.68%
Revised Sales	<u><u>268,441</u></u>

3. Calculation of Increased Sales

Revised Sales as (2)	268,441
Sales Returned for Y/E 31 October 2017	<u>221,041</u>
Deemed Under-returned Sales	<u><u>47,400</u></u>

4. Additional VAT Computation

VAT on Additional Sales (47,400 x 23%)	10,902
VAT on missing purchases (2,806 x 23%)	<u>-645</u>
Additional VAT Liability	<u><u>10,257</u></u>