AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

84TACD2022

Between

[redacted]

Appellants

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter originally came before the Tax Appeals Commission (hereinafter "the Commission") as two separate appeals.

2. The first appeal under reference number [redacted] was an appeal against an assessment to Value Added Taxation ("VAT") raised by the Revenue Commissioners ("the Respondent") on the 6th December 2017.

3. That assessment covered the periods 1st November 2013 to 31st December 2014 inclusive and the total VAT due on the assessment amounts to €13,764. The Appellants are appealing that assessment in accordance with section 119 (1) Value-Added Tax Consolidation Act 2010, as amended ("VATCA 2010").

4. The second appeal under reference number [redacted] was an appeal against assessments to Income Tax raised by the Respondent on the 6th November 2018.

5. Those assessments covered the tax years 2013 and 2014 and as the Appellants' business was operated as a partnership, both of the Appellants were assessed to additional income tax in the sum of €7,347 for 2013 and €12,664 for 2014. The total income tax under appeal was €40,022. The Appellants are appealing those assessments in accordance with section 933 Taxes Consolidation Act 1997 ("TCA 1997").

6. The Appeal was held remotely on the 13th April 2022. At the commencement of the hearing, the Commissioner, for the purpose of efficacy, asked the Appellants and the Respondent if there were any objections to the two appeals, which has been listed for two days, being merged into one hearing as identical circumstances gave rise to the issuance

of both the VAT and Income Tax assessments. Both the Appellants and the Respondent consented to this treatment and it was agreed that both appeals would be heard together under the merged reference number [redacted].

Background

7. The Appellants operate a Chinese takeaway business as a partnership under the trading name "[redacted]" from [redacted] in [redacted].

8. Notice of a Revenue Audit ("audit") issued to the Appellants on the 14th June 2016 and initial interviews were conducted between the Appellants and the Respondent on the 14th July 2016. The scope of the audit was all relevant taxes and duties for the 2013 and 2014 years of assessment.

9. During the audit interview, the Appellants denied operating "dual accounts" with a supplier. Dual accounts in this context means the operation of separate accounts with a single supplier, often on the basis of a credit account whereby goods are paid for on credit, and a separate cash account whereby goods are paid for by cash on delivery.

10. As the denial of the existence of dual accounts contradicted information in the possession of the Respondent, which indicated the Appellants appeared to have operated dual accounts with at least one supplier, the Respondent examined the business records of the Appellants' business.

11. The examination of the business records provided by the Appellants revealed that purchase invoices in respect of a suspected dual account of a named supplier where goods were paid for by cash on delivery were excluded from those records.

12. The Respondent provided the Appellants with the opportunity to disclose any dual accounts they may have had but the Appellant continued to deny the existence of any such accounts with suppliers.

13. On the 14th February 2017, the Respondent served a notice under section 902 TCA 1997 ("notice") to one of the Appellants' suppliers. A notice under this section requires the recipient within 30 days of the date of receiving the notice to deliver to the Respondent such books, documents, records or other documents as specified by the Respondent. In this instance, the notice required the supplier to deliver the following:

    - All sales invoices and supplier statements for the period from the 1st January 2013 to the 31St December 2014 in relation to all accounts held by the Appellants.

    - All correspondence, statements of account, records of monies received and paid out, and reports generated referred to the invoices and supplier statements referred to above.

14. The supplier's subsequent response to the Respondent confirmed the existence of a dual account with the Appellants. The two accounts held consisted of a credit account and a cash account and the Respondent calculated that goods paid for by cash on delivery by the Appellants amounted to €16,700 in 2013 and €24,429 in 2014.

15. The Respondent confirmed from a further examination of the Appellants' business records, that all of the cash purchases in respect of this supplier had been excluded from the books of account and as a result had not been included in the Appellants' VAT or Income Tax returns.

16. The Respondent communicated with the Appellants' tax Agent ("Agent") and advised that the suppressed purchases derived from the omitted cash purchases would be marked-up by the mark-up percentage declared in the accounts submitted with the Appellants' original tax returns for 2013 and 2014 in order to establish their correct tax liabilities.

17. The Respondent examined the Appellants' accounts and established that the gross profit margin reflected in the accounts for 2013 and 2014 was 75% and 74% respectively. These gross profit margins equated to mark-up percentages of 300% for 2013 and 285% for 2014.

18. The Appellants' Agent argued with the Respondent in respect of the mark-up percentages they proposed to use on the ground that he was of the view those margins were excessive. The Appellants' Agent requested that the Respondent apply a lower mark-up that was in his opinion more realistic to the Appellants' business.

19. In order to facilitate a settlement of the matter under dispute, the Respondent agreed to reduce the mark-up to 234% (which equated to a gross profit margin of 70%) for both the 2013 and 2014 years of assessment. The reduced mark-up was agreed with the Appellants' Agent by means of a telephone conversation held between the Agent and the Respondent on the 28th November 2017.

20. The Respondent subsequently applied the agreed mark-up to the supressed purchases and this gave rise to additional Case I assessable income for the Appellant of €39,078 for 2013 and €57,163 for 2014.

21. The effect of the increase to the 2013 Case I assessable income figure resulted in additional liabilities arising for the Appellants in the sum of €14,692 representing additional income tax (to be split equally between the Appellants as they operated an equal share partnership) and €5,020 representing additional VAT (to be paid by the partnership).

22. Similarly, the effect of the increase to the 2014 Case I assessable figure resulted in additional liabilities arising for the Appellants in the sum of €25,330 representing additional income tax (to be split likewise equally between the Appellants) and €7,343 representing additional VAT.

23. The total additional income tax sought by the Respondent as a result of the adjustments for the supressed purchases derived from the omitted dual supplier account amounted to €40,022 and in respect of VAT the sum of €12,363.

24. Separately and distinct to the additional income tax and VAT liabilities computed from the supressed purchases, the audit examination conducted by the Respondent also included an analysis of the drinks purchased by the Appellants for resale. It was agreed between the Appellants' Agent and the Respondent that a lower mark-up of 100% would be applied to drink sales rather than the mark-up which has been agreed in respect of food sales (234%).

25. When the Respondent applied the agreed mark-up in respect of drink purchases, the projected sales were higher than those returned by the Appellants in the sum of €2,823 in 2013 and €3,329 in 2014. These projected sales included VAT liabilities of €650 for 2013 and €767 for 2014, resulting in an additional overall VAT liability arising in respect of drink sales for both years in the sum of €1,417.

26. Combining the additional VAT liability arising from the drink sales (€1,417) and from the supressed purchases (€12,363) gave a total additional VAT liability for the years 2013 and 2014 of €13,780. Owing to an error, this sum was recorded on the additional VAT assessment issued by the Respondent on the 6th December 2017 as €13,764 which represented an under-declaration of the liability of €16.

27. As the Appellants and the Respondent could not agree upon the additional Income Tax and VAT liabilities arising, the Respondent proceeded on the 6th November 2018 to make and issue assessments to Income Tax in accordance with section 959Y and section 959AC TCA 1997, and on the 6th December 2017 issued assessments to VAT in

accordance with section 111 VATCA 2010 which showed the overall sum of €40,022 due in respect of Income Tax and the sum of €13,764 due in respect of VAT by the Appellants.

28. Subsequently, the Respondent noted that the assessments which issued out on the 6th November 2018 relating to Income Tax due under the audit for 2013 and 2014 contained an error as the notice of assessments incorrectly referred to the assessments as having being made under Chapter 4 of Part 41A TCA 1997, specifically section 959U of that Act.

29. The errant notices of assessment contained the following narrative:

> "*…the assessment to which this notice refers was made in accordance with matters contained in a return made by you or in accordance with figures agreed with you. Section 959AI or section 959AG (as appropriate) Taxes Consolidation Act 1997 provides that no appeal may be made against such an assessment.*"

30. As the adjustments arising from the audit were not considered "matters contained in a return" nor were the figures agreed between the Appellants and the Respondent, the assessments clearly contained an error and in order to cure this defect, the Respondent issued perfected notices of assessment for Income Tax for the tax years 2013 and 2014 on the 6th December 2018 in accordance with the provisions of section 959Y and section 959AC TCA 1997.

31. The Appellants were dissatisfied with the additional VAT assessments and the additional (original) Income Tax assessments and hence appealed the matter to the Commission on the 14th November 2018.

Legislation

32. The following Legislation is relevant to this appeal:

<u>Section 111 VATCA 2010</u>

"(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."

<u>Section 113 VATCA 2010</u>

"*(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."

Section 959U TCA 1997

"***Self assessment by Revenue officer in relation to chargeable person***.

(1)Where a chargeable person, or a person to whom section 959T applies, delivers a return but does not include a self assessment in the return, a Revenue officer, subject to section 959AA(1)—

(a) shall, where section 959S applies, an

(b) may, in any other case,

make the self assessment in relation to the chargeable person.

(2)Where a self assessment is made under this section, a Revenue officer shall give notice of the assessment in accordance with section 959E.

(3)Any self assessment made by a Revenue officer under this section shall be deemed to be a self assessment made by the chargeable person and references in the Acts to the self assessment of a chargeable person shall be treated as including a self assessment made under this section."

Section 959AI TCA 1997

"***Chargeable persons and other persons: no appeal against agreed amounts.***

"No appeal may be made against the amount of any income, profits or gains or, as the case may be, chargeable gains, or the amount of any allowance, deduction, relief or tax credit specified in an assessment or an amended assessment made on a person for a chargeable period where either—

(a) a Revenue officer has determined the amount by accepting without alteration of and without departing from the statement or statements, or the particular or particulars with regard to income, profits or gains or, as the case may be, chargeable gains, or allowances, deductions, reliefs or tax credits specified in the return delivered by the person for the chargeable period, or

(b) the amount has been agreed between the Revenue officer and the person, or any person authorised by the person in that behalf, before the making of the assessment or the amendment of the assessment, as the case may be."

Section 959AG TCA 1997

"***Chargeable persons: no appeal against self assessment.***

No appeal may be made against—

(a) a self assessment made under section 959R, section 959T or section 959U,

(b) a self assessment amended under section 959V,

(c) the amount of any income, profits or gains or, as the case may be, chargeable gains, or the amount of any allowance, deduction, relief or tax credit specified in such an assessment."

Section 959Y TCA 1997

"***Chargeable persons and other persons: assessment made or amended by Revenue officer***.

(1)Subject to the provisions of this Chapter, a Revenue officer may at any time—

(a) make a Revenue assessment on a person for a chargeable period in such amount as, according to the officer’s best judgment, ought to be charged on the person,

(b) amend a Revenue assessment on, or a self assessment in relation to, a person for a chargeable period in such manner as he or she considers necessary, notwithstanding that—

(i) tax may have been paid or repaid in respect of the assessment, or

(ii) the assessment may have been amended on a previous occasion or on previous occasions.

(2)For the purpose of making an assessment on or in relation to a chargeable person for a chargeable period or for the purpose of amending such an assessment, a Revenue officer—

(a)may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(b)may assess any amount of income, profits or gains or, as the case may be, chargeable gains, or allow any allowance, deduction, relief or tax credit by reference to such statement or particular.

(3)The amendment of an assessment by a Revenue officer does not preclude that Revenue officer or any other Revenue officer from further amending the assessment in such manner as he or she considers necessary.

(4)(a)Where any amount of income, profits or gains or, as the case may be, chargeable gains is omitted from, or not properly reflected in, an assessment for a chargeable period or the tax stated in an assessment is less than the tax payable by the chargeable person for the chargeable period, then a Revenue officer may make such amendments to the assessment as are necessary to ensure that the assessment includes the correct amount or to ensure that the tax stated in the assessment is equal to the tax payable by the chargeable person for the chargeable period.

(b)For the purposes of paragraph (a), the amendment of an assessment by a Revenue officer may include the addition of an amount of income, profits or gains or, as the case may be, chargeable gains that is not reflected in the assessment.”

<u>Section 959 AC TCA 1997</u>

“***Chargeable persons: Revenue assessment and amendment of assessments in absence of return, etc***.

(1)In this section ‘information’ includes information received from a member of the Garda Síochána.

(2)Notwithstanding section 959AA, where in relation to a chargeable person—

(a) the person fails to deliver a return for a chargeable period,

(b) a Revenue officer is not satisfied with the sufficiency of a return delivered by the person having regard to any information received in that regard, or

(c)a Revenue officer has reasonable grounds for believing that a return delivered by the person does not contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period,

then a Revenue officer may, at any time, make a Revenue assessment on the chargeable person for the chargeable period in such sum as, according to the best of the officer’s judgment, ought to be charged on that person.

(3)Where a Revenue officer makes a Revenue assessment on a chargeable person under this section in the event of the failure of the person to deliver a return, it shall not be necessary to set out in the notice of assessment any particulars other than the amount of tax payable by the person for the chargeable period on the basis on that assessment.

(4)In any of the circumstances referred to in subsection (2), a Revenue officer may, at any time, amend a Revenue assessment on, or a self assessment in relation to, a chargeable person for the chargeable period involved in such manner as the officer considers necessary."

Submissions

Appellants

33. The Appellants were represented by their Agent during the course of the hearing. The Agent advised that he was not acting for the Appellants when they had their audit and they were then represented by a previous Agent (the "previous Agent").

34. The Appellants' Agent advised that the previous Agent when completing the financial statements which formed the basis for the original 2013 and 2014 tax returns artificially increased the margins of the business so the "figures made sense".

35. The Appellants' Agent submitted that as the margins used in completing the financial statements were "made up", the percentages should be reduced from those originally returned (75% in 2013 and 74% in 2014) to a figure of 70% for each year as 70% was a more realistic figure for the industry type.

36. The Appellants' Agent advised that the proposed reduced margin figure reflected the fact that the Appellants offered "buy one get one free" promotions on the sale of all main meals purchased within the Appellants' business and this promotion was offered on a daily basis rather than being confined to say, weekends.

37. The Appellants' Agent submitted that the profit figures derived by the Respondent applying the increased margins for 2013 and 2014 was not achievable by a business of a type operated by the Appellants and was more suitable to franchised pizza sales type businesses.

38. The Appellants' Agent submitted that the supressed purchases included goods for personal use and should be deducted from the business purchases since they were personal in nature. He submitted that an appropriate figure to use was €100 per week based on a 52 week year and accordingly that the supressed purchases for both 2013 and 2014 should be reduced by €5,200 for both years before those purchases were grossed up by the profit margin to derive "missing sales". The proposed €100 per week figure was the Agent's estimation of the amount of meals consumed by the Appellants during each week of the year.

39. The effect of reducing the supressed purchases by the amount deemed consumed for personal purposes was that the resultant "missing" sales figure would be discounted down not only by the amount of the personal purchases but also the margin to be applied to same and this would have the effect of the assessments to both income tax and VAT being proportionality reduced.

Respondent

40. The Respondent advised that the Appellants commenced business in [redacted]. They advised that the business did not have a merchant acquirer such as a VISA card machine and all sales of the business were operated on a "cash only" basis.

41. The Respondent advised that when they examined the books and records of the business, they noted the cash book was not balanced and that cash purchases and pay-outs were not recorded within the cash book. They further noted that all purchases and payments for the business were also on a "cash only" basis.

42. The Respondent advised that the audit revealed that the Appellants had bank accounts, a credit union account and a credit card which their previous Agent was unaware of and as such these records were not included in any of the tax returns (VAT or Income Tax) of the business. The Respondent also noted that the Appellants had purchased a motor vehicle and property neither of which were disclosed to their previous Agent nor disclosed on their income tax returns.

43. The Respondent produced before the Commission a copy of the business records maintained by the Appellants. They consisted of handwritten records showing on a daily basis the separate food and drink sold by the business and sporadic expense payments for the business. It was noted by the Respondent that the expense payments listed in the cash book did not include any purchases for resale and this was reflected in the documentation furnished to the Commission.

44. In order to establish the income and expenditure of the business, the Respondent firstly requested and wrote up the purchases from the purchase invoices provided by the Appellants. The resultant figure was increased by the amount of the supressed purchases and the Respondent then sought to apply an agreed margin to derive estimated sales for the years under audit.

45. The Appellants' previous Agent advised that he was having difficulty in getting the Appellants' to agree the figures but suggested that a gross profit margin of 80% should be applied to the revised purchases figure to conclude matters.

46. Subsequently, the previous Agent was replaced by the current Agent who represented the Appellants before the Commission. The Respondent communicated with the new Agent and provided an overview of the audit to date and advised that a margin needed to be agreed between the parties to derive the unrecorded sales. The Agent advised as the previous Agent "made up" the margins of the business when preparing the financial statements, he was of the view that this margin was without foundation and a more appropriate figure to use was that originally agreed with the Respondent, being a mark-up of 234% which equated to a gross profit margin of 70%.

47. The Respondent with a view to reaching agreement and progressing the audit agreed to use the margins proposed by the Agent.

48. Subsequently, the Respondent applied the agreed margin to the calculated purchases and this resulted in additional Case I assessable income of €39,078 in 2013 and €57,163 in 2014.

49. The income tax payable on the revised Case I assessable income was computed at €14,692 for 2013 and €25,330 for 2014. Those amounts represented the tax payable between the two partners and as they operated the partnership on an equal basis was split evenly between them for the two years of assessment.

50. VAT was also payable by the partnership on the basis of the revised sales and this equated to €5,020 for 2013 and €7,343 for 2014.

51. The Respondent additionally advised that the audit included and examination of the drinks purchased and sold by the business. The sales price used in the computation of the mark-up was the price advised by the Appellants. The exercise conducted identified an additional VAT liability on the partnership of €650 for 2013 and €767 for 2014.

52. In summation, the Respondent submitted that the income tax returns submitted by the Appellants for the period under review (2013 and 2014) understated their assessable

income and the VAT returns returned by the Appellants for the period under review were erroneous as the VAT on sales had been understated.

Evidence at the Hearing

53. The Respondent presented the following evidence at the hearing which was not contested by the Appellants:

- The Appellants operated their business on a cash only basis and failed to disclose to their previous Agent the existence of bank, credit union and credit card accounts.
- The Appellants operated a dual account with a supplier and the cash purchases derived from this account (€16,700 for 2013 and €24,429 for 2014) were not included in their VAT or income tax returns.
- Inadequate business records were maintained by the Appellants for the periods under review being the tax years 2013 and 2014.
- The audit revealed that the Appellants purchased property and a motor vehicle which they neither disclosed in their financial statements nor within their tax returns.

Material Facts

54. The Commissioner found the following material facts:

- The availability of the Appellants' bank, credit union and credit card accounts would have been material to the Agent when preparing their financial statements and of assistance to the Commission in confirming their tax position.
- The Gross Profit Margin calculated from the financial statements prepared by the Agent was 75% for 2013 and 74% for 2014. The Respondent in an attempt to settle matters agreed to reduce figure to 70% for both years. Subsequently, the Appellants disagreed with the figures and no agreement was reached between the Appellants and the Respondent.
- The confirmation of the dual account held with the Appellants' supplier revealed that the Appellants attempted to conceal business purchases when preparing and lodging their tax returns with the Respondent.
- In examining the drink purchases, the Respondent calculated additional VAT liabilities on the sales figure derived from applying the revised margin but did not raise additional income tax assessments on the deemed excess unrecorded drink sales.
- The original notices of assessment which issued to the Appellants on the 6th November 2018 contained an error which the Respondent subsequently sought to rectify.

Analysis

55. The Appellants failed to comply with numerous taxation obligations placed on them as business owners and taxpayers. Examples of such failures include non-compliance with section 886 TCA 1997 and section 84 VATCA 2010 which place respective obligations and duties on the Appellants to maintain and keep proper books of account, and the non-disclosure of the acquisition of chargeable assets, notably the properties, which were required to be disclosed by the Appellants when they submitted their tax returns.

56. The difficulties encountered by the Respondent as a result of the failures who was required to engage in arduous efforts in an attempt to establish the Appellants' correct tax liabilities are evident. This was further compounded by the Appellants refusal to engage with the

Respondent and the Appellants subsequently reneging on the previously agreed margins to be applied to the supressed sales for the periods under review.

57. The central issues to be determined by the Commissioner is whether the Respondent cured the defective assessments which issued by them on the 6th November 2018 and whether the Respondent's additional assessments to both VAT and income tax are accurate factoring in the individual circumstances of the appeal.

58. In relation to the income tax assessments, the Commissioner determines that section 959 AC TCA 1997 permits in circumstances where an officer of the Respondent "*is not satisfied with the sufficiency of a return delivered by a person having regard to any information received in that return… at* ***any time [emphasis added]*** *to make a Revenue assessment on the chargeable person for the chargeable period in such sum as, according to the best of the officer's judgment, ought to be charged on that person.* Accordingly, the Commissioner determines that the effect of issuing out the amended notices of assessment to income tax to the Appellants on the 6th December 2018 had the effect of curing the defects contained within the earlier notices of assessment which issued one month earlier on the 6th November 2018.

59. Additionally, the Commissioner finds that the notices of assessment seeking additional VAT issued within the time periods stipulated in section 113(1) VATCA 2010 and are therefore valid assessments.

60. 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.*'

61. Turning to the quantum of the income tax assessments, section 959 AC TCA 1997 requires the Respondent to calculate the additional tax to be assessed which "*according to the best of the officer's judgment ought to be charged to that person*".

62. The Commissioner finds that the Respondent used their best judgment in assessing the Appellants to income tax but accepts the Appellants' submission that €5,200 per annum of the supressed purchases represent goods for own use for each of the years 2013 and 2014 and directs that supressed purchases are reduced down by that amount for both years of assessment.

63. The Commissioner notes that the Respondent only agreed to reduce the gross profit margins in calculating the additional liabilities from those shown in the 2013 and 2014 accounts, being 75% and 74% to 70% for both years in an attempt to conclude matters. As the Appellants chose not to conclude matters and noting that no credible evidence was presented before the Commission which would justify the reduction, the Commissioner determines that the appropriate gross profit margins to be utilised for the purpose of establishing the Appellants' additional income tax and VAT liabilities are those originally derived from their financial statements for the years 2013 (75%) and 2014 (74%).

64. In establishing the correct income tax liability, the Commissioner finds that the additional "drink sales" identified by the Respondent in their reconciliation works should be included in the additional assessments.

65. 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".*

66. 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.

67. 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.

68. As the dual purchase invoices were not included in the Appellants' books of account for the period under review and this was not contested by the Appellants, 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.

69. Regarding the second-limb of the test, the Commissioner is satisfied that reasonable opinion was used in establishing the assessment, but determines that an allowance should be made to the Respondent's figures to give an allowance of €5,200 for each of the years 2013 and 2014 representing goods acquired for personal purposes and that the margins used in the computation of the additional liabilities should be increased to reflect those figures originally returned on the Appellants' income tax returns.

70. The Commissioner attaches at Appendix 1, a revised computation of both the additional income to be assessed on the Appellants for the years 2013 and 2014 and a computation of the additional VAT liability arising.

71. These figures show that the Appellants should be assessed to additional Case I income of €37,323 for 2013 and €58,057 for 2014. As the Appellants' operate an equal share partnership, the Commissioner finds that the additional Case I income should be split equally between the partners, resulting in each Appellant being assessed to additional Case I income of €18,661 for 2013 and €29,028 for 2014 and the additional income tax computed accordingly.

72. In relation to VAT, in accordance with Appendix 1, the Commissioner finds that the assessment for 2013 should be decreased to €4,789 for 2013 and €7,422 for 2014 to reflect an allowance for both years in respect of goods for personal use and an increase to the liability reflecting the increased margins to be applied from that originally proposed by the Respondent. The total VAT arising for both years 2013 and 2014 is therefore €12,211 which represents a reduction in the VAT liability of €1,569 for both years 2013 and 2014.

Determination

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

74. As a result, the Commissioner determines that the Appellants' Case I income should be increased by the amount of €18,661 for each Appellant in respect of 2013 and €29,028 for each Appellant in respect of 2014, from the figures originally returned by the Appellants in their 2013 and 2014 income tax returns.

75. In addition, the Commissioner determines that the Appellants' liability to VAT for the tax year 2013 should be reduced to reflect a net additional liability of €4,789 for 2013 and €7,422 for 2014.

76. 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
10th May 2022

Appendix 1

1. Calculation of Additional Sales

		2013	2014	
	Supressed purchases	16,700	24,429	
Less:	Goods for own use	5,200	5,200	
	Revised supressed purchases	11,500	19,229	
	Margin per Accounts	75%	74%	
	Effective mark-up	300%	285%	
	Deemed sales	46,000	73,957	
Add:	"Additional" drink sales	2,823	3,329	
	Total Additional Sales	**48,823**	**77,286**	

2. Computation of additional assessable profit

	Additional sales (as 1)	48,823	77,286	
Less:	Purchases (as 1)	11,500	19,229	
	Additional Assessable Case 1	**37,323**	**58,057**	**95,380**

3. Computation of additional VAT Liability

	Additional food sales	46,000	73,957	
	VAT component @ 9%	4,140	6,656	
	Additional drink sales	2,823	3,329	
	VAT component @ 23%	649	766	
	Total Additional VAT	**4,789**	**7,422**	**12,211**