AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

01TACD2023

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission ("the Commission") by way of appeal pursuant to section 119 of the Value-Added Tax Consolidation Act, 2010 ("VATCA 2010") against a decision of the Revenue Commissioners ("the Respondent") to refuse the Appellant's claim for repayment of Value Added Tax ("VAT") in the sum of €27,472, in respect of the period March/April 2020.

2. The Commission received the Appellant's Notice of Appeal on 27th July 2020. The matter for determination is whether the Appellant was entitled to the repayment of VAT paid in the acquisition of professional services supplied in connection with the sale by a receiver of tonnage and kilowatts (explained hereunder). The Commission was not holding hearings at that time due to the global pandemic. That changed soon thereafter when it acquired the capacity to hear appeals remotely.

Background to the Appeal

3. The Appellant is a sea fisherman and was engaged in the business of marine fishing.

4. The Appellant is the owner of the [redacted] and was the holder of a sea fishing licence granted in respect of that vessel by the Department of Agriculture, Food and the Marine. This licence is a requirement for any boat intended to be used for commercial sea fishing.

5. The Appellant was also until December 2017 the owner of tonnage and kilowatts. The tonnage of a fishing vessel is the cubic capacity of the fishing vessel and is measured in cubic tonnes. The kilowatts is the measure of the horsepower of the main engine of the vessel. These measurements carry a commercial value and can be used as collateral against bank loans. Tonnage and kilowatts are a privately owned tradable asset that, with certain exceptions, may be sold, traded or realised as a financial asset on the tonnage market. When purchasing a fishing vessel it is a requirement to purchase tonnage and kilowatts to the equivalence of the size of that vessel. For the purposes of this determination, tonnage and kilowatts collectively are hereafter referred to as "capacity".

6. The Appellant had borrowings with the Bank of Ireland ("the bank"), which held a fixed charge over the capacity as security.

7. The Appellant was also the owner of a [redacted] fishing licence, which at a certain point around [redacted] was removed by the Minister for the Marine. The Appellant's evidence was that the removal of this licence prevented him pursuing his livelihood and, consequently, his ability to repay his borrowings with the bank. [redacted]

8. The Appellant registered for VAT on 1st June 2001 and filed returns for the periods from May 2001 to December 2010. The Appellant deregistered for VAT on the 3rd August 2012 with effect from 31st December 2010. The reason he did so was because he was no longer an accountable person, his fishing business having ceased to operate.

9. On 29th July 2015 the bank, as a consequence of the Appellant's failure to meet his repayment obligations, appointed [redacted] of [redacted] as receiver over the capacity of the [redacted]. [redacted] (hereafter "the Receiver") was not appointed as receiver over the fishing vessel itself.

10. The reason why the capacity was separated from the vessel and why the Receiver was appointed over the capacity only and not the vessel as well was not clear and there was no agreement in this respect between the parties. The Commissioner however is satisfied that nothing turns on this question in this appeal.

11. The sale of the capacity was completed on 4th December 2017 for a price of €871,000.

12. In conducting this sale, the Receiver acquired legal and consultancy services giving rise to fees including VAT that were deducted from the amount that went toward paying the sum owed to the bank. In addition, the Receiver's own fees, which again included VAT, were deducted from the proceeds of the sale reducing the Appellant's indebtedness. In total the services acquired to carry out the sale of the capacity included €27,472.00 of VAT. The full list of services acquired and the dates of the relevant invoices were:-

Date	Supplier	The name and address on the Invoice
30th July 2015	[redacted]	[redacted]
21st December 2015	[redacted]	[redacted]
21st December 2016	[redacted]	[redacted]
29th June 2018	[redacted]	[redacted]
2nd January 2018	[redacted]	[redacted]
21st December 2018	[redacted]	[redacted]

30th July 2019	[redacted]	[redacted]
4th September 2019	[redacted]	[redacted]

13. The Receiver did not register for or account for VAT on the sale of the capacity as he took the view that the sale was outside the scope of VAT. The Receiver paid capital gains tax on the sale. This too was deducted from the sum put toward the satisfaction of part of the debt owed to the bank.

14. On or about December 2019 the Receiver provided the Appellant with the aforementioned invoices connected with the sale of the capacity.

15. The Appellant re-registered for VAT with effect from 1st March 2020. Thereafter, the Appellant filed a VAT return for the period March/April 2020 seeking repayment of the VAT incurred on the services acquired in effecting the sale.

16. On 23 April 2020 the Respondent notified the Appellant that it had selected his VAT repayment claim for verification in accordance with the *Code of Practice for Revenue Audit and Other Compliance Interventions*. The Respondent requested that the Appellant submit the relevant invoices in respect of the VAT repayment claim, which the Appellant duly did.

17. The Respondent notified the Appellant by letter dated 4th June 2020 that the repayment claim had been disallowed. The reason given for the rejection was that the invoices furnished were issued in the name of the Receiver who had been appointed over the assets and not in the name of the Appellant.

18. The Appellant duly appealed this decision to the Commission.

Grounds of Appeal

19. The Appellant's Notice of Appeal specified the following grounds of appeal:-

    (a) the Appellant was the taxable person and owner of the fishing vessel and property which was sold;

(b) the invoices issued in respect of the VAT repayment claim were in the name of the Receiver, and in the name of the fishing vessel the [redacted] and in the name of the Appellant;

(c) the Receiver could not be treated as a taxable person, it was the mortgagor who remained the taxable person;

(d) the VAT on the services provided in respect of the sale was paid by the Receiver, on the Appellant's behalf and that the Appellant was the person who was entitled to reclaim the VAT paid, not the Receiver.

Administrative Matters Concerning the Appeal

20. The Commission notified the parties by email dated 11 h November 2020 that the appeal had been selected to be determined without the need for an oral hearing, in accordance with section 949U of the Taxes Consolidation Act 1997. In order to determine the matter and to gain a full understanding of the matters in dispute the Commission sought further information from the parties by email dated 9th June 2021.

21. Having received the responses of the parties (in particular the response from the Respondent), it became apparent that the appeal required an oral hearing given its factual and unfolding legal complexity. This decision to hold a hearing was communicated to the parties by email dated 2nd July 2021. The Commission considers that the correct decision was made to hold a hearing due to the complexity of the matters in this appeal.

22. On 2nd July 2021 the Appellant wrote to the Commission stating:-

> "…it beggars belief that after 15 months since this VAT was requested and the tax appeals office stating that they were going to make a decision remotely, this is now going to a hearing, and delaying the repayment by another month and all the requested documentation has to be reissued and produced again. It seems nothing more like a delaying and frustrating tactic to me".

23. On 5th July 2021 the Commission replied to the Appellant stating:-

> "The Commission anticipated to be able to determine your appeal based on the documentation but due to the issues relating to the accountable person and the lack of clarity in terms of the vessel and the licence it was decided that a hearing was necessary. This decision was to ensure that the Chairperson understood the matter in hand and to ensure that the situation could be adjudicated on. This is to ensure the correct administration of justice for you as an appellant".

24. A remote hearing took place on 28th July 2021. At the hearing, the Commissioner noted that the position of the Respondent on certain issues was unclear and required elaboration. Specifically, the Respondent referenced at the hearing the existence of a particular EU Regulation which supported its contention that the sale of the capacity was an "exempt" transaction, with the effect that there could be no repayment of the VAT on the services acquired to give effect to it.

25. However, despite making this submission, the Respondent was unable to produce this EU Regulation at the hearing. The Commissioner suggested that in the interest of fully understanding the Respondent's position, it seek input from its Solicitor's Division and provide further detailed written submissions thereafter. The Commissioner adjourned the hearing for this purpose and directed the Respondent to furnish its submissions within 21 days.

26. On 17th August 2021, the Commission received a request from [redacted] of the Revenue Solicitor's Office seeking a six-week extension to the time frame for making their submissions. [redacted] stated as follows in her request:-

> "I understand that a period of 21 days was provided to the Inspector within which to revert with a submission. I also note that this deadline expires tomorrow. It will not be possible to comply with this deadline and therefore, I am requesting that a further period of 6 weeks to comply with the Direction. I confirm that I have just now received instructions in the case. An extension for a period of 6 weeks will allow me to review the Inspectors file, seek the views of RLS and revert with a detailed submission".

27. On 18th August 2021 the Appellant wrote to the Commission objecting to the granting of the extension. The Appellant stated in this correspondence that he did:-

> "… not agree to any extension of 6 weeks for any submissions to be made by revenue, as Revenue have paid scant regard for deadlines in this situation and had been given 21 days to provide a document that [redacted] stated that he had, but didn't have it at hand on the day of the hearing".

28. The Appellant went on to state in the same correspondence that the Respondent had:-

> "*…failed to comply with this instruction, and has paid scant regard for the appellant's situation or respect for the Chairman and this appeal hearing.* [The Respondent's] *solicitor sends a letter 10 minutes before the deadline is up for* [it] *to have provided the requested documentation, requesting a further 6 weeks is a complete abuse of power".*

29. The Commissioner considered the request from the Respondent and the objection from the Appellant. Having done so, the Commissioner decided in light of the importance of the information sought, the complexity and uniqueness of the matter under appeal to grant the six-week extension sought. The Appellant was himself granted a corresponding period of 6 weeks to provide replying submissions.

30. The Appellant wrote to the Commission on 20h August 2021 further objecting to the granting of the extension on the grounds that the Respondent:-

> "…failed to comply with this instruction from the chairman, and if this was a High Court hearing […] Revenue would be dismissed. It was [the Respondent] that stated that he had this regulation, but now […] has failed to provide it, and the appeals commission are now violating my right to fair procedure by allowing Revenue a further 6 weeks delay to come up with submissions".

31. The Appellant also stated in the same correspondence:-

> *"…to allow any further delay in the conclusion of this appeal completely violates my rights to fair procedure. Revenue were given 21 days and are guilty of deliberate delay turning 21 days, 3 weeks into 9 weeks, and are being aided and abetted by the appeals commission".*

32. The Commission replied to the Appellant on 24th August 2021 stating that:-

> "The Chairperson considers that this was a reasonable course of action on behalf of the Revenue officer due to the complexity of the matter and it was reasonable to afford the extension in order for the solicitors to be briefed and prepare a response. The Chairperson noted that at the hearing the Revenue officer was not able to provide the regulation on which he relied on in respect of your appeal. The direction of 21 days was granted at that time. The Revenue officer has since instructed the Revenue Solicitor's Office. If you as the appellant had instructed solicitors and sought additional time that would have also been considered favourably. It is important that all parties if they seek legal advice and assistance are afforded that opportunity and hence additional time is granted". Additionally the Commission advised the Appellant; "it is important that the Tax Appeals Commission are provided by the Revenue Commissioners with their reasoning for the tax that has been charged….a short period or additional time to respond to the Chairperson's request for fulsome information as to what law the Revenue Commissioners are relying on in respect of the tax charged and the treatment in relation to an insolvency matter is not unreasonable in all the circumstances".

33. Submissions were received from the Respondent on 1st October 2021. Replying submissions were received from the Appellant on 4th October 2021.

34. Having reviewed the submissions, the Commissioner advised the parties that the appeal would be progressed by way of a reconvened hearing. The Appellant objected to this course by email dated 6th October 2021 in the following terms:-

> "The Chairman is not entitled to disregard what [the Respondent] stated in his evidence to the hearing, and to state that she wants to give me a chance to examine revenue on their submission, is a complete farce on proper procedure".

35. The parties were subsequently advised by email dated 11th October 2021 that:-

> "*The Chairperson is satisfied that the Appellant has had the opportunity to make submissions in the correspondence dated 6 October and the document entitled submissions and the Appellant has now provided every indication that he does not seek a reconvened hearing. As such, the Chairperson is satisfied that a reconvened hearing is not now required and is further content there is enough information to proceed with the determination".*

36. The Commissioner notes that the position of the Respondent changed significantly during the course of proceedings. The Appellant was initially advised by the Respondent that the repayment claim had been refused on the basis that the relevant invoices were issued in the name of the Receiver and not in the name of the Appellant. The Respondent maintained this position in their Statement of Case to the Commission. The Respondent subsequently advised that the sale of the capacity was exempt from VAT and therefore there was no entitlement to recover input VAT. In submissions filed after the hearing the Respondent once again changed its position and argued that the sale of the capacity was a taxable transaction and that it was the Receiver who was accountable for the VAT on the sale and the person entitled to recover the input VAT. This complicated the matter for both the Appellant and the Commissioner. A more detailed outline of the Respondent's submissions is provided below under the heading "Submissions". It was not ideal that the Respondent changed its submissions. But, the Commissioner's role is a statutory one and is to determine whether there is a charge to tax and if so, what is the correct amount of tax payable. As such, in line with that statutory role to ensure the correct tax is payable, it can reduce or increase any assessment to tax or allow the assessment to stand. It is not prohibited by the submissions of the parties in discharging its statutory function in ensuring the correct tax is charged.

37. As set out below, it was a notable feature of this appeal that the Appellant argued that the transaction giving rise to the deduction claim was "exempt" (i.e. it was not a taxable transaction). The Respondent initially adopted the same view but could not identify the legislation supporting this, as referred to above. The Commissioner could surmise as to whether, section 6 of the VATCA 2010 may have had some influence on the formation of the view initially that the transaction was exempt. Section 6 provides that persons whose supplies consist exclusively of sales to accountable persons of fish caught in the course of sea-fishing are non-accountable unless the elect to be so. This applies also to supplies by such a person of fish together with "machinery, plant or equipment" used in the course of their sea-fishing business. It does not, however, apply in the same fashion to services supplied in the course of a sea-fishing business unless those services fall under the threshold for VAT accountability. This was not the case in this instance and the presumption of non-accountability could not apply therefore to the sale of the Appellant's capacity.

38. In any event, after initially adopting the same view as the Appellant, the Respondent contended, by contrast, that the transaction was taxable. However, the Respondent maintained its objection to the claim for repayment on three other grounds as set out in the section on Submissions below. But in summary, the Respondent's final objections were firstly, on the basis that the Receiver was the accountable person. Secondly, on a failure to comply with what might be characterised as the "formal" rather than "substantive" requirement that the invoices contain specified information. Thirdly, on the contention that the goods and services in respect of which the Appellant sought to deduct VAT was not linked to any transaction in respect of which VAT was charged. As stated above, it was not ideal that the Respondent changed its position but that does not negate or influence the Commissioner's statutory role with respect to an appeal.

Legislation

Relevant European Union legislation

39. Article 1 of the Council Directive 2006/112EC of 26 November 2006 on the common system of value added tax ("*the VAT Directive"*) is entitled "Subject Matter and Scope" and provides:-

> "…On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components..."

40. Article 25 of the VAT Directive provides:-

"A supply of services may consist, inter alia, in one of the following transactions:

(a) the assignment of intangible property, whether or not the subject of a document establishing title;

(b) the obligation to refrain from an act, or to tolerate an act or situation;

(c) the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law."

41. Title X of the VAT Directive is entitled "Deductions" and Chapter 1 therein is entitled "Origin and Scope of the Right of Deduction". Article 167 in that Chapter provides:-

"A right of deduction shall arise at the time the deductible tax becomes chargeable."

42. Article 168 of the VAT Directive provides:-

"…in so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

Chapter 4 of the VAT Directive is entitled "*Rules Governing the Exercise of the Right of Deduction".* Article 178 therein provides:-

"In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240"

43. Article 179 in the same Chapter of the VAT Directive provides:-

"The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178."

Relevant Domestic Legislation

44. Section 2 of the VATCA 2010 is a general interpretation section and defines "goods" to mean "all movable and immovable objects (other than things in action or money)". A

taxable person is defined as "*a person who independently carries on a business in the Community or elsewhere*".

45. Section 3 of the VATCA 2010 is the general charging provision for VAT and provides:-

"Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and the regulations, chargeable, leviable and payable on the following transactions:

(a) the supply for consideration of goods by a taxable person acting in that capacity when the place of supply is the State;

(b) the importation of goods into the State;

(c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State;

(d) the intra-Community acquisition for consideration by an accountable person of goods (other than new means of transport) when the acquisition is made within the State;

(e) the intra-Community acquisition for consideration of new means of transport when the acquisition is made within the State."

46. Section 5 of the VATCA 2010 is entitled *"Persons who are, or who may become accountable persons*" and provides:-

"(1)(a)Subject to paragraph (c), a taxable person who engages in the supply, within the State, of taxable goods or services shall be—

(i) an accountable person, and

(ii) accountable for and liable to pay the tax charged in respect of such supply."

Section 6 of the VATCA 2010 is entitled "*Persons not accountable persons unless they so elect".*

Subsection (1) therein, in so far as relevant to the issues arising in this appeal, provides:-

"Subject to subsections (2) and (3) and section 9, 10, 12, 14(1) and 17(1), and notwithstanding section 5(1), the following persons shall not, unless they otherwise elect and then only during the period for which such election has effect, be accountable persons:-

…(b) a person whose supplies of taxable goods or services consist exclusively of—

(i) supplies, to accountable persons and persons to whom section 102 applies, of fish (not being at a stage of processing further than that of being gutted, salted and frozen) which he or she has caught in the course of a sea-fishing business, or

(ii) supplies of the kind specified in subparagraph (i) and of either or both of the following:

(I) supplies of machinery, plant or equipment which have been used by him or her in the course of a sea-fishing business;

(II) supplies of other goods and services the total consideration for which is such that such person would not, because of paragraph (c) or (d), be an accountable person if such supplies were the only supplies made by him or her;"

(c)

(*i) subject to subparagraph (ii) , a person for whose supply of taxable goods (other than supplies of the kind specified in section 30(1)(a)(i)) and services, the total consideration has not exceeded and is not likely to exceed the goods threshold in any continuous period of 12 months,*

(ii) subparagraph (i) shall apply only if at least 90 per cent of the total consideration referred to therein is derived from the supply of taxable goods (other than goods chargeable at any of the rates specified in section 46(1)(a) and (c) which were produced or manufactured by the person referred to in subparagraph (i) wholly or mainly from materials chargeable at the rate specified in section 46(1)(b));

(d) a person (other than a person to whom paragraph (a), (b) or (c) applies) for whose supply of taxable goods and services the total consideration has not exceeded, and is not likely to exceed, the services threshold in any continuous period of 12 months.

47. Section 20 VATCA 2010 is entitled "*Transfers, etc. deemed not to be supplies*" and subsection (2) therein provides:-

The transfer of ownership of goods—

… (c) being the transfer to an accountable person of a totality of assets, or part thereof, of a business (even if that business or part thereof had ceased trading) where those transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis,

shall be deemed, for the purposes of this Act, not to be a supply of the goods.

48. Section 22 VATCA 2010 is entitled "*Special rules in relation to supplies of goods*" and provides:-

(3)

(a) 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.

49. Section 25 VATCA 2010 is entitled "*Meaning of supply of services"* and provides:-

(1) In this Act "*supply*", *in relation to a service, means the performance or omission of any act or the toleration of any situation other than—*

(a) the supply of goods, and

(b) a transaction specified in section 20 or 22(2).

50. Section 26 VATCA 2010 is entitled "*Transfer of intangible business assets deemed not to be supply of services*" and provides:-

(2)The transfer of goodwill or other intangible assets of a business, in connection with the transfer of the business or part thereof (even if that business or that part thereof had ceased trading), or in connection with a transfer of ownership of goods in accordance with section 20(2)(c), by—

(a) an accountable person to a taxable person who carries on a business in the State,

or

(b)a person who is not an accountable person to another person,

shall be deemed, for the purposes of this Act, not to be a supply of services".

51. The Respondent cited section 28 of the VATCA 2010 in its submissions as being applicable to the sale by a receiver of business assets. Subsection 4 therein provides:-

> *(4) Where, in the case of a business carried on, or that has ceased to be carried on, by an accountable person, services (being services that are supplied using the assets or part of the assets of an accountable person) are, under any power exercisable by another person (including a receiver or liquidator), supplied by that other person in or towards the satisfaction of a debt owed by the accountable person, or in the course of winding up of a company, then those services shall be deemed to be supplied by the accountable person in the course or furtherance of his or her business.*

52. Section 59 VATCA 2010 is entitled "*Deduction for tax borne or paid*" and provides:-

> *(2)Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—*
>
> *(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her.."*

53. Section 65 VATCA 2010 is entitled "Registration" and subsection (4) therein provides:-

> *"Every person who disposes of goods or supplies services which pursuant to section 22(3) or 28(4) or (5) are deemed to be supplied by an accountable person in the course of his or her business shall, within 14 days of the disposal or the supply of a service, furnish in writing to the Revenue Commissioners the particulars specified in regulations as being required for the purpose of registering the person for tax."*

54. Section 66 VATCA 2010 is entitled "*Issue of invoices and other documents*" and provides:-

> *(1)(a) An accountable person—*
>
> *(i) who supplies goods or services to—*
>
> *(I) another accountable person,*
>
> *(II) a public body,*
>
> *(III) a person who carries on an exempted activity,*

(IV) a person (other than an individual) in another Member State in such circumstances that tax is chargeable at any of the rates specified in section 46(1), or

(V) a person in another Member State who is liable to pay value-added tax pursuant to the VAT Directive on such supply,

or

(ii) who supplies goods to a person in another Member State in the circumstances referred to in section 30(1)(a)(ii),

shall issue to the person so supplied, in respect of each such supply, an invoice, in paper format or subject to subsection (2) in electronic format, and containing such particulars as may be specified by regulations.

55. Section 20 VAT regulations 2010 (S.I No. 639 of 2010) is headed *"Invoices and other documents"* and provides:-

(2)The following particulars are specified for purposes of section 66(1) of the Act and are required to be included in every invoice issued, or deemed to be issued, by an accountable person:

(a)the date of issue of the invoice,

(b) a sequential number, based on one or more series, which uniquely identifies the invoice

(c) the full name, address and registration number of the person who supplied the goods or services to which the invoice relates,

(d) the full name and address of the person to whom the goods or services were supplied,

(e) in the case of a reverse charge supply, the value-added tax identification number of the person to whom the supply was made and an indication that a reverse charge applies,

(f) in the case of a supply of goods, other than a reverse charge supply, to a person registered for value-added tax in another Member State, the person's value-added tax identification number in that Member State and an indication that the invoice relates to an intra-Community supply of goods,

(g) the quantity and nature of the goods supplied or the extent and nature of the services rendered,

(h)the date on which the goods or services were supplied or, in the case of supplies specified in section 70(2) of the Act, the date on which the payment on account was made, in so far as that date differs from the date of issue of the invoice."

56. Section 76 VATCA 2010 is headed "Returns and remittances" and subsection (2) therein provides:-

"(2) [A person who disposes of goods or supplies services which pursuant to section 22(3) or 28(4) or (5)], are deemed to be supplied by an accountable person in the course or furtherance of his or her business shall—

(a) within 9 days immediately after the 10th day of the month immediately following a taxable period—

[(i)furnish to the Collector-General—

(I) a true and correct return, prepared in accordance with regulations, of the total amount of tax which became due in that taxable period, by—

(A)the accountable person in relation to the disposal of the goods or the supply of the services, and

(B)the receiver, liquidator or other person exercising a power, in relation to any adjustment required under Chapter 2 of Part 8 or section 95(4)(c),

and

(II)such other particulars as may be specified in regulations,]

and

(ii)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"

57. Section 24(2) of the Conveyancing Act 1881 was also cited by the Appellant. This provision, headed "*Appointment, powers, remuneration and duties of receiver*" provides:-

"The receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides".

Hearing

58. A remote hearing took place on 28th July 2021. The Appellant was unrepresented at the hearing. Three officers from the Revenue Commissioners were in attendance.

59. Some technical difficulties arose at the hearing in respect of the sound quality from the Respondent's side making it difficult for the Appellant and the Commissioner to hear on occasion the Respondent. But the hearing did proceed, albeit with those recognised challenges.

60. As mentioned earlier the Respondent made a submission at the hearing regarding the existence of an EU Regulation which suggested that the sale of the capacity was VAT exempt. The Respondent could not however produce this Regulation or the relevant part therein at the hearing. Given the significance and importance of this submission the Commissioner adjourned the hearing in order to allow the Respondent time to do so and to obtain the assistance of its solicitor's office. Further submissions were received from the Respondent and the Appellant as outlined below.

Submissions

Appellant

Whether the Appellant was the taxable and accountable person

61. The Appellant submitted that he was entitled to claim the repayment of the VAT charged on the services supplied in connection with the sale of the capacity amounting to €27,472.00.

62. The Appellant stated, firstly, that the Respondent initially refused the VAT repayment on the basis that the relevant VAT invoices were not issued to him, but rather the Receiver. The Appellant disputed this and submitted that the invoices were in fact issued in the name of the Receiver, the name of the fishing vessel *and* in the name of the Appellant.

63. In any event, the Appellant submitted that regardless of who the invoices were addressed to on their face, the critical fact was that the Receiver was at all times acting in the stead of the Appellant as his agent. In this regard the Appellant cited section 24(2) of the Conveyancing Act 1881, which provides:-

"The receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides".

64. The Appellant also cited section 108(2) of the Conveyancing Law Reform Act 2009 which provides:-

"A receiver appointed under subsection (1) is the agent of the mortgagor who is solely responsible for the receiver's acts or defaults unless the mortgage provides otherwise".

65. The Appellant submitted that the consequence of this was that he was both the taxable person and accountable person entitled to make the claim for repayment. He owned the capacity, which was sold to satisfy his debts.

66. In support of the above submission, the Appellant relied on the judgment of the Court of Appeal of England and Wales in *Sargent v Customs and Excise Commissioners,* [1995] 1 WLR 821 ("Sargent"). In that case it was held that a receiver over a fixed charged asset, acting as agent of a mortgagor, could not be treated as a taxable person. The taxable person was, rather, the person over whose assets the receiver had been appointed.

67. In respect of his contention that he was the accountable person the Appellant submitted the following;

"*As it states in VATCA 2010 and in the case law that I have provided to this appeal, it states that VAT that is paid by a receiver on assets sold to pay a debt shall be deemed to be paid by the accountable person, who is the person that owned the property, and not the receiver, in the furthering and carrying on of that business*

….In the case law that I have provided to this appeal, it was found that the receiver cannot claim back VAT that has been paid through a receivership, or use that VAT for paying a bank either. It is only the person who owned the property, the accountable person that can claim back the vat that has been paid by the receiver.

….If the receiver did not pay this VAT, the owner of the property would be liable for that VAT due on these services, not the receiver.

The same would be the case regarding Capital Gains Tax, even though this appeal is not about Capital Gains Tax, it is about VAT paid by the receiver on behalf of the owner of the business i.e. the accountable person. The receiver steps into the shoes of the owner of the business, the accountable person. If the receiver did not pay the capital gains tax, the owner of the business would be liable for it, not the receiver"

68. The Appellant submitted that his status as the taxable (and thus the accountable) person was evidenced by the fact that the Receiver, upon his discharge by the mortgagee, furnished him with the VAT invoices in respect of the acquired services. This was done so he could attempt to claim back the VAT that was paid out of his account.

69. The Appellant submitted that the VAT included in the cost of the services provided was:-

> "…charged to [redacted]'s account, as the receiver acted on behalf of [redacted]. The VAT incurred on the services was paid by the receiver on behalf of [redacted], as if [redacted] was paying the VAT himself, as is allowed and stated in S22(3) of VATCA 2010".

70. The Appellant also submitted that section 22(3) of the VATCA 2010 supported his contention that he was the person entitled to claim the repayment of the VAT incurred by the Receiver. This provision deems goods disposed of by a receiver on behalf of an accountable person as having been disposed of by that accountable person. By parity of reasoning, the goods and services acquired also had to be viewed as being in his name.

Whether the transaction was exempt

71. The sale of the capacity was, in the submission of the Appellant, the sale of an intangible asset.

72. The Appellant further submitted that the sale of this intangible asset was in connection with the transfer of his business within the meaning of section 26(2) of the VATCA 2010. Under this provision, the transfer of intangible assets constituting undertakings capable of being operated "on an independent basis" shall be deemed not to amount to the supply of a good or service. This provision, and section 20 of the VATCA 2010 relating to the transfer of assets constituting goods, represent the State's availing of the option under Article 19 of the VAT Directive for Member States to deem transfers involving a "totality of assets" of an undertaking not to be the supply of a good or a service for the purposes of VAT. The consequence of this, according to the Appellant, was that the transfer of the capacity constituted a transaction exempt from VAT, with the effect that:-

> *"If the sale was exempt from VAT, there should have been no vat paid, and the Revenue should not be holding onto somebody else's money, which is not theirs."*

73. The Appellant referred to the case *Minister for Justice and Equality, Commissioner of An Garda Siochána v Workplace Relations Commission* C-378/17 which he submitted was relevant to the determination of the appeal.

74. The Appellant further submitted that to deny him the VAT repayment is a breach of the European Convention on Human Rights Act 2003. The Appellant also stated that in his opinion the Respondent was not entitled to treat a person who has a part of their business in receivership differently to a person who was not in receivership regarding entitlement to the repayment of VAT.

Respondent

The submissions as outlined in the Respondent's Statement of Case

75. The Respondent's initial reason for refusal was that the Appellant was not entitled to repayment as the relevant invoices issued in respect of the services acquired in the sale of the capacity were *"not in the name of the taxpayer, but instead the receiver, who had been appointed to assets of the taxpayer"*. This was repeated in its Statement of Case.

76. In its initial written argument the Respondent agreed with the Appellant that the sale of the capacity was an "exempt transaction", but disagreed as to consequences of this. In the submission of the Respondent the effect of the transaction being one that was exempt and in respect of which no VAT was chargeable was that no claim for repayment could be allowed.

77. In support of its submissions, the Respondent referred to section 22(3) of the VATCA 2010, section 59(2) of the VATCA 2010, and section 20(2) of the VAT Regulations 2010. In this regard it appeared to take the view that the transaction was the sale of a tangible asset, rather than one that was intangible.

Submission of the Respondent on foot of direction for further information

78. On the basis of the foregoing, the appeal was initially thought to be suitable for adjudication without a hearing in accordance with section 949U TCA 1997. However, having reviewed the submissions, the Commissioner required greater clarity regarding the arguments raised by the Respondent. On 9 June 2021 the Commission issued a direction to the Respondent pursuant to section 949E TCA 1997 seeking further information. This direction stated:-

> *"The Chairperson is reviewing the submissions from the parties in respect of the above referenced appeal with a view to issuing a determination on the matter shortly. In this regard, the Chairperson seeks some further information from the Respondent as follows;*

1. In your statement of case you have quoted S22(3) of the VATCA 2010 as follows;

(a) 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.

Please now advise how the above legislation applies to the circumstance of this appeal

2. Please advise who you regard as the accountable person in respect of the sale of the vessel

3. Please advise if VAT was accounted for on the sale of the vessel, and by whom

4. Please advise if the receiver claimed VAT input credits relating to the sale of the vessel

5. Please provide copies of the emails listed in paragraph 4 of your statement of case which form part of the written materials which you intend to rely on"

79. The Respondent provided the following reply to the above direction on 22 June 2021:-

"*1. The Receiver accounts for any tax due on the disposal, and the Receiver does this by registering for tax under a new number and accounts for any tax liabilities that may arise. Which was CGT in this case.*

2. The Receiver is the accountable person and he accounted for CGT on the disposal of the asset, i.e. the fishing licence, not the vessel

3. This was an exempt sale. The Receiver only sold the licence, not the vessel. The fishing vessel was deemed unseaworthy by the Dept of Fisheries, so the receiver was permitted to separate the licence from the vessel and then sell the licence. No VAT arose on the sale of the licence as it was an exempt sale. The sale of the fishing licence is considered to be the sale/transfer of an intangible asset and on that basis would

come within the meaning of Section 26(2) of the Value-added Tax Consolidation act 2010, and as a consequence shall be deemed not to be a supply of a service.

4. No, the Receiver didn't claim VAT input credits in relation to the sale of the licence. This was an exempt sale. The vessel remained with [redacted] *and wasn't sold by the Receiver."*

80. It is clear from point 3 of this submission that the Appellant and the Respondent were at this point in agreement that the sale of the capacity was not a taxable transaction on the grounds that it constituted a "transfer of business" and thus was "exempt".

Post-hearing submissions

81. After the conclusion of the hearing the Respondent submitted, in contradiction to what it had argued up to that point, that the sale of tonnage and kilowatts was a taxable supply. The Receiver, in treating it as an exempt transaction, had erred in not charging the purchaser of the capacity VAT at the standard rate.

82. The Respondent further submitted that the right to deduct the VAT incurred on the costs associated with the sale of the capacity was premised on it being a taxable supply. The right to repayment of VAT did not arise in circumstances where there had been a failure to account for VAT on that supply.

83. The Respondent pointed to the fact that the Receiver was appointed to sell the tonnage and kilowatts only and that the vessel itself was not sold by the Receiver. The Respondent stated that the tonnage and kilowatts constituted the sale of an intangible asset.

84. The Respondent submitted that the "exemption" provided under section 26(2) of the VATCA 2010 in respect of the sale of intangible assets constituting a transfer of business did not apply to the circumstances of the case. This was so because:-

"it cannot be said that the sale of the tonnage and kilowatts constitutes an undertaking capable of carrying on an independent activity. In order for it to be capable of carrying out such an independent activity, it would need to have been transferred with a vessel and associated licences to carry out such an activity. Therefore, the sale of the tonnage and kilowatts is merely the sale of an asset that does not qualify for transfer of business relief under s26(2)".

85. In support of this contention that the sale of the capacity was not an exempt transaction, the Respondent relied on the judgment of *Zita Modes* (Case C-497/01). There it was held that a "*transfer of a totality of assets or a part thereof*" had to be understood as follows:-

> "The context […] and purpose of the [VAT Directive], as set out in paragraphs 36 to 38 of this judgment, make it clear that that provision is intended to enable the Member States to facilitate transfers of undertakings or parts of undertakings by simplifying them and preventing overburdening the resources of the transferee with a disproportionate charge to tax which would in any event ultimately be recovered by deduction of the input VAT paid.
>
> "Having regard to this purpose, the concept of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof must be interpreted as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products."

86. The Respondent stated that the Receiver was obligated to register for VAT pursuant to section 65(4) of the VATCA 2010 and to file a VAT return in respect of the sale of the capacity pursuant to section 76(2) of the VATCA 2010. The Respondent further indicated that had the receiver complied with his obligations in this respect, he would have been entitled to deduct any input VAT properly incurred for the purposes of making this taxable supply. The output VAT on the sale would of course have been a far larger figure than the VAT on the services acquired to give effect to it.

87. The Respondent further submitted that the Appellant was not entitled to re-register for VAT and claim a deduction for the VAT incurred on the services supplied in connection with the sale of the tonnage and kilowatts. This was so because the Appellant was not entitled to 'step into the shoes' of the Receiver.

88. The Respondent also submitted that notwithstanding their position that the Appellant was not entitled to obtain the VAT refund claimed, the Appellant's claim was made outside of the statutory four-year time limit for doing so (in accordance with section 99 VATCA 2010), in respect of the following invoices:-

30th July 2015	[redacted]	600.00	138.00	738.00

21st December 2015	[redacted]	5,592.00	1,286.16	6,878.16

89. The Respondent then submitted that there are three conditions which must be satisfied in order for an entitlement to deduct VAT paid to exist. These are:-

    a. VAT must have been incurred by an accountable person;

    b. the input VAT must have been incurred for the purpose of taxable supplies by the accountable person; and

    c. the invoice must be prepared in the manner prescribed by legislation.

90. The Respondent pointed to the fact that the Appellant de-registered for VAT with effect from 31st December 2010 and did not reregister for VAT until March 2020. The invoices against which the Appellant sought a VAT deduction were issued during the period July 2015 to September 2019. The Appellant therefore was not registered for VAT at the time that the invoices were issued. The Respondent submitted that Article 167 of EU Council Directive 2006/112/EC sets out that a right to deduction arises at the time the deductible tax becomes chargeable. As the Appellant was not registered for VAT at the time that the right to deduction for VAT arose, the Appellant is not entitled to claim a deduction.

91. The Respondent submitted that section 66 of the VATCA 2010 sets out the requirements with regard to the content of invoices. Section 66(1) states that an accountable person who supplies goods or services to another accountable person:-

    "…*shall issue to the person so supplied, in respect of each supply, an invoice, in paper format or subject to subsection (2) in electronic format, and containing such particulars as may be specified by regulations".*

92. The Respondent further submitted that Regulation 20 of S.I No. 639 of 2010 specifies the particulars that are required to be included in every invoice. These are: the date of issue of the invoice; a sequential number, based on one or more series, which uniquely identifies the invoice; the full name, address and registration number of the person who supplied the goods or services to which the invoice relates; and the full name and address of the person to whom the goods or services were supplied.

93. The Respondent submitted that the invoices were not issued in the name of the Appellant, as the supplies were not made to the Appellant. The Appellant therefore was not entitled to claim a deduction with regard to any of these invoices.

Material Facts

94. While the background to this appeal is lengthy and was at times the subject of dispute, the following material facts are clear:-

- the Appellant was engaged in the [redacted] fishing business until sometime in 2010, when he ceased to be so engaged;
- in order to carry on the business of [redacted] fishing, the Appellant possessed both a vessel and a tonnage and kilowattage licence (together referred to as capacity) that permitted him to fish;
- the Appellant ceased to carry on the business of [redacted] fishing on or about the end of 2010;
- on or about 2015 the Bank of Ireland, which had a charge over the capacity as security for the Appellant's borrowings, appointed the Receiver to conduct its sale;
- on or about 4 December 2017 the capacity was sold for the sum of €871,000 to an entity from [redacted] named [redacted];
- the Receiver did not charge VAT on the sale as he considered it not to be a taxable supply;
- in conducting the sale the Receiver acquired supplies in the form of solicitor's, consultant's and receiver's fees in respect of which VAT in the aggregate amount of €27,472.00 was charged and paid;
- following the sale of the capacity, the Receiver supplied the VAT invoices relating to these supplies to the Appellant. The invoices were addressed either to the Receiver, the Receiver acting in respect of certain assets of the Appellant or certain assets of the Appellant, in receivership;
- on or about 1 March 2020 the Appellant re-registered as an accountable person for VAT;
- shortly thereafter the Appellant submitted a VAT 3 return for the period March/April 2020 in respect of which he sought the repayment of the full amount of VAT paid in respect of supplies procured in the conduct of the sale of the capacity;
- the Appellant's claim for a VAT refund in respect of the period March/April 2020 was the subject of a compliance check carried out by the Respondent. Thereafter, on 4 June 2020 the Respondent decided that the Appellant was not entitled to

repayment on the grounds that the VAT receipts in question were addressed to the Receiver, which it viewed as the relevant accountable person;

- the Appellant appealed this decision to the Commission on 27 July 2020.

Analysis

95. The question that the Commissioner has been asked to determine in this appeal is whether the Appellant was entitled to the repayment of VAT in the amount of €27,472.00, paid for services supplied so as to permit the Receiver to effect the sale of the Appellant's capacity to a third party purchaser.

96. In answering this, it is necessary to begin by citing certain fundamental principles relating to VAT, in so doing referring to a number of cases in addition to those cited by the parties to this appeal.

97. VAT is a tax on consumption that is intended to be imposed on the final consumer only. It is not intended to burden "taxable persons" involved in "economic activities" (see *Rompleman (Case C-268/83)* at paragraph 19).

98. The system of deduction, set out at Article 1 of the VAT Directive, is designed to ensure that the cost of the supply of goods and services to consumers does not incorporate VAT charged on goods and services used by a taxable person in making their supply. A taxable person has the right to deduct from the VAT they charge on their supplies of goods or services in a particular period the VAT which they themselves pay to others for the purpose of making their supplies. This removes it from the price of the good or service ultimately supplied to the consumer.

99. It is clear, however, that a taxable person's right to deduct presupposes the existence of an output taxable supply that has, as a component of its price, the cost of input VAT on goods or services used for the purpose of making that supply. This was explained in *Rompleman* at paragraph 16 in the following terms:-

> *"As the Court pointed out in its judgment of 5 May 1982 in Case 15/81 (Schul v Inspecteur der Invoerrechten en Accijnzen, [1982] ECR 1409), a basic element of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of the VAT borne directly by the cost of the various components of the price of the goods and services and that the deduction procedure is so designed that only taxable persons may deduct the VAT already charged on the goods and services from the VAT for which they are liable."*

100. The same point was made by the CJEU in *Iberdrola Immobiliaria Real Estate Investments* (Case C-132/16) at paragraph 28:-

> *"In accordance with settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (judgments of 29 October 2009, SKF, C-29/08, EU:C:2009:665, paragraph 57, and of 18 July 2013, AES-3C Maritza East 1, C-124/12, EU:C:2013:488, paragraph 27)."*

101. The requirement for a "direct and immediate link" between a specific taxable output supply and the VAT on a good or service acquired for input is qualified where a good or service acquired is part of a taxable person's "overheads" or "general costs". In such circumstances, the VAT on the service acquired can be viewed as a component part of the price of all of a taxable person's supplies of taxable goods and services. In other words it is an input relating to all of a taxable person's output. This was the position in *Abbey National (Case C-169/040)*, a case in which an insurance company that also was involved in the leasing of commercial property in Aberdeen sold off that latter part of its business in its entirety. A question arose as to whether the VAT incurred by the insurance company in giving effect to the transaction, which was accepted to be a "transfer of business", could be deducted from the VAT due on its taxable supplies in respect of its separate insurance undertaking. While there was no "direct and immediate link" between the VAT which Abbey National sought to deduct in effecting the sale of the property leasing undertaking and its insurance undertaking, it was held by the Court that the services acquired were "taxable overheads" forming a component of the price of all of the insurance company's taxable economic activities. As such, Abbey National was entitled to deduct the proportion of the input VAT at issue attributable generally, rather than directly and immediately, to its taxable economic activities in which it was engaged during the relevant taxable period.

102. It was a notable feature of this appeal that the Appellant argued that the transaction giving rise to the deduction claim was "exempt" (i.e. it is not a taxable transaction). After initially adopting the same view, the Respondent contended, by contrast, that it was taxable. However, the Respondent objected to the claim for repayment on three grounds. Firstly, on the basis that the Receiver was the accountable person. Secondly, on a failure to comply with what might be characterised as the "formal" rather than "substantive"

requirement that the invoices contain specified information. Thirdly, on the contention that the goods and services in respect of which the Appellant sought to deduct VAT was not linked to any transaction in respect of which VAT was charged.

103. Considerable time was spent on the question of whether the Receiver or the Appellant was the person capable of making the claim for the repayment of VAT. On this, the Commissioner has doubts regarding the merit of the Respondent's general contention that only the receiver acting on a mortgagee's behalf can make claims for repayment.

104. Section 2 of the VATCA 2010 defines a "taxable person" as a person who independently carries on a business in the Community or elsewhere. Section 5 of the same legislation defines an "accountable person" as one who engages in the taxable supply of goods or services.

105. Section 28(4) of the VATCA 2010 is a deeming provision that attributes services provided by a receiver acting on behalf of an accountable person to that accountable person. The underlying logic of this provision would appear to be that a receiver, in performing their duties, does not take on the mantle of an accountable person carrying on a taxable activity. This, it should be noted, is entirely consistent with the view taken by Court of Appeal of England and Wales in the case of *Sargent.* Although there appears to be no provision in the VATCA 2010 which states that chargeable services *acquired* by a receiver in the performance of their function should be deemed attributable to the person for whom they act as agent, if the question is who is the accountable person capable of making a claim for repayment under the deduction system, it would appear to the Commissioner that this would have to be the person for whom they acted. The Commissioner stresses however that these comments are *obiter,* as the appeal at hand can, for reasons set out further on in this determination, be decided on other grounds.

106. Considerable time was also spent on the question of whether the sale of the capacity was a taxable transaction. Article 19 of the VAT Directive allows member states to deem a transaction involving the transfer of the totality of assets or a part thereof, as one where no supply of goods or services has taken place. The purpose and scope of this "no supply rule" was explained by the CJEU in *Zita Modes,* mentioned earlier in this Determination. In essence, only where a taxable person transfers assets that are capable of being operated independently as a business, will the no supply rule apply. Deeming such transactions not to be supplies of a goods or services, but rather the continuation of an existing enterprise, ensures that no large sum in VAT will be charged by the transferor upon the sale of a business that is destined subsequently to be claimed back in full by the transferee.

107. Ireland availed of the option to transpose the no supply rule by way of sections 20 and 26 of the VATCA 2010, the former of which, in conformity with the test expressed in *Zita Modes,* expressly refers to "a totality of assets" meaning assets capable of independent operation.

108. The position adopted by the Respondent in submission was that capacity, in essence a licence or permission to engage in the economic activity of commercial fishing, was an asset incapable of independent operation and thus could not qualify the transaction as a transfer of business constituting a 'non-supply' for the purposes of VAT. The Respondent submitted that only if the vessel and the license belonging to the Appellant had transferred in tandem would the transaction have been deemed by operation of section 20(2) and/or 26(2) of the VATCA 2010 to be a transfer of business.

109. The Commissioner can see some merit in this argument but also wishes to sound a note of caution. At paragraph 40 of *Zita Modes,* the Court referred to the no supply rule not applying to *"…the simple transfer of assets, such as the sale of a stock of products".* However, at paragraph 44 it added:-

> "…the transfers referred to in the [no supply] provision are those in which the transferee intends to operate the business or the part of the undertaking transferred and not simply to immediately liquidate the activity concerned and sell the stock, if any."

110. Thus, in considering whether a sale was more than a "simple transfer of assets" constituting a transfer of business, the Court in *Zita Modes* also took into consideration the intention of the purchaser regarding the use of what was purchased. This was not a question that received the attention of the parties in this appeal.

111. Moreover, one case that was not brought to the attention of the Commissioner was the judgment of the Second Chamber in *Schriever (Case C-444/10),* a case post-dating *Zita Modes.* This concerned the transfer of a German retail business selling sports equipment, with the question being whether the transfer of sports stock, along with the lease on a premises that could be terminated by either party at a year's notice, constituted a transfer of business.

112. In answering this in the affirmative, the Second Chamber of the CJEU observed at paragraph 29 that:-

> *"…a transfer of assets may* […] *take place if the business premises are made available to the transferee by means of a lease contract, or if the transferee itself has appropriate premises to which all of the goods transferred can be moved and where the transferee may continue to carry on the economic activity concerned.* [Emphasis added]

113. Thereafter, the Court stated at paragraph 32 that:-

> *"…an overall assessment must be made of the factual circumstances of the transaction at issue in order to determine whether it is covered by the concept of the transfer of a totality of assets for the purposes of the Sixth Directive. In that context, particular importance must be attached to the nature of the economic activity which it is sought to continue."*

114. The analysis in *Schriever* suggests that it is not necessarily the case that, in order to constitute a transfer of business, everything transferred by the transferor must be capable of its own independent operation. Rather, there may be instances where the transferee already possess an asset or assets that permits the continuation of the business already in being that is transferred. In light of this, and in addition the Second Chamber's emphasis on the intention of the transferee to continue the enterprise and individual circumstances, the Commissioner believes that there is room for doubt that the transfer of a capacity to another fishing operation without the transfer of a vessel would necessarily prohibit it from being taken to be a part of business capable of operation on an independent basis within the meaning of section 20 and/or 26 of the VATCA 2010. While the Commissioner has no exact information as to the use of the fishing capacity by the purchaser, [redacted], there clearly exists the possibility that it was bought and utilised in conjunction with another fishing vessel, such that the existing economic activity was continued.

115. As with the question of who is the person capable of making the claim for repayment of VAT, the Commissioner, however, does not intend to make a finding on this question either, firstly, because of the obvious paucity of information provided in relation to the precise use of the capacity after purchase and, secondly, because its determination would not have an impact on the outcome of the appeal for the following reasons.

Scenario 1 – if the sale of the capacity was a taxable supply

116. If the Respondent is correct in regarding the sale of the capacity as a taxable supply, there can be no question of the Appellant claiming repayment of the €27,472.00 VAT paid by the Receiver on acquired supplies under the deduction system.

117. Article 168 of the 2006 Directive states expressly that a right to deduct VAT exists only "*in so far as the goods and services are used for the purposes of the taxed transactions of the taxable person"* [emphasis added]. If the sale of the capacity was a taxable transaction, there would be no doubt as to the existence of a "direct and immediate link" to the various services acquired by the Respondent in respect of which he paid VAT. However, the direct and immediate link would not lead to any "taxed" supply from which to deduct because it is not in dispute that the Receiver, whether rightly or wrongly, viewed the transaction as

being outside the scope of VAT and charged no VAT on the sale of the capacity to the transferee. In short, there would be nothing from which the Appellant could deduct the sum of €27,472.00. No tax has been paid by the Appellant and it would be anathema to the deduction system that a deduction on services acquired would be permitted without a corresponding taxed supply.

Scenario 2 – if the sale of the capacity was a deemed non-supply

118. The alternative scenario, of course, is that the sale of the capacity should have been regarded as a transfer of business, in respect of which there was deemed to be no supply of goods or services.

119. The Appellant's written arguments suggest that he is of the view that if the sale of the capacity was "exempt" from VAT, then it must follow that no VAT should have been paid by the Receiver in respect the services acquired to effect the sale and/or he should be entitled to the full repayment of the same. For example, in correspondence dated 30 July 2020 sent to the Respondent prior to bringing the appeal, the Appellant stated:-

> *"If the sale was exempt from VAT, there should have been no vat paid, and the Revenue should not be holding onto somebody else's money, which is not theirs."*

120. Later, in written submissions to the Commission dated 12 July 2021, the Appellant stated he should be repaid the VAT because:-

> *"The sale of the goods was not vatable, but the expenses incurred VAT for the services provided in the sale of the goods."*

121. Such a contention is misconceived. Any entitlement the Appellant might have to the repayment of VAT in this case emanates from section 59 of the VATCA 2010, which gives effect to the right under Article 168 of the VAT Directive to deduct VAT charged on goods and services used *in respect of taxable supplies.* The Receiver, acting on the Appellant's behalf, did not have the right to pay no VAT on goods or services acquired, simply because the sale of the capacity did not constitute a taxable supply itself.

122. As *Abbey National* indicates, it would not be correct either to suggest that if the sale of the capacity were deemed a non-supply, the VAT paid on services acquired by the receiver in effecting the sale could never be deducted. The crux of *Abbey National* was that where on the transfer of a business the transferor incurs VAT on supplies in the nature of "overheads" or "general costs", attributable to all of its taxable economic activity, the transferor may be able to deduct that from the VAT charged on all its taxable supplies without the need for a direct or immediate link to a precise taxable transaction.

123. Ostensibly, the VAT at issue in this appeal was paid in respect of services acquired by the Receiver resembling the type of "general costs" found to be deductible in *Abbey National.*

124. In this instance, the VAT paid by the receiver that the Appellant sought to deduct became chargeable upon delivery of VAT invoices on 30 July 2015, 21 December 2015, 21 December 2016, 2 January 2018, 29 June 2018, 21 December 2018, 30 July 2019 and 4 September 2019 respectively.

125. Section 59(2)(a) of the VATCA 2010 provides that in computing the amount of tax payable for a taxable period, the accountable person may deduct from the VAT charged by him or her on services provided during that taxable period the VAT charged to him or her *during the same period* by other accountable persons in respect of the acquisition of good or services used in the making of the supplies. This reflects the terms of Article 179 of the VAT Directive, which also prescribes that the VAT charged by a taxable person and corresponding services acquired arise from the same taxable period.

126. The Appellant in this case was unregistered for VAT until on or about March 2020. It would appear impossible therefore that the Appellant had any taxable economic activity prior to this point and, crucially, during any of the relevant taxable periods from which he could seek to deduct the VAT incurred by the Receiver in giving effect to the sale of the capacity. It may also be worth noting that the absence of any such economic activity tallies with the fact that the Appellant seeks repayment of the entire amount of VAT paid and appears to maintain that he is entitled to repayment simply because the sale of capacity was "exempt". This being so, the Appellant can have no right to repayment because, as Article 168 of the VAT Directive makes plain, deduction is available only in so far as goods and services are used for the purpose of taxed transactions. Without any taxable economic activity arising from the same period there can be no "general costs" of the kind identified in *Abbey National* and, therefore, no deduction of the VAT incurred on the services acquired to give effect to the sale of the capacity.

127. Moreover, the Commissioner refers to the judgment of the High Court in *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, at paragraph 22, where 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".*

128. In this appeal the Appellant has not provided any evidence, whether oral or documentary, indicating that he was engaged in any taxable economic activity for the periods mentioned above in respect of which he charged VAT. Indeed, he has shown no such economic activity from any other period. Consequently, he has failed to meet the burden on him to prove that there is something from which he might be capable of deducting the cost of the services acquired by the Receiver in effecting the sale of the capacity in 2015.

129. For this reason, even were the sale of the capacity to be a non-supply under section 20 and/or section 26 of the VATCA 2010, the appeal of the decision of the Respondent must be refused. As already noted in paragraph 118 of this determination, if the sale was a taxable supply, no repayment could be allowed either in circumstances where the transaction giving rise to the deduction claim was not a taxed supply.

130. Finally, for completeness, the Commissioner has considered the impact of the VAT Directive and hence has considered the jurisdictional implications of the case cited of *Minister for Justice and Equality, Commissioner of An Garda Siochána v Workplace Relations Commission* C-378/17. The Commissioner does not find any domestic legislation to be in contravention of European law in this appeal.

131. The Commissioner does not find that the Appellant is due a repayment of VAT due to the statutory provisions (both domestic and European) and its statutory role to consider the charge to tax only and the amount payable (*Lee v Revenue Commissioners* 2021 IECA 18). Any self standing finding with respect of European Convention on Human Rights Act 2003 is a matter for another forum, namely the courts in any event. Due to the material findings of fact and the application of the relevant statutory provisions (both domestic and European), the Commissioner has made the determination set out below. The Appellant has the right to appeal any determination to the High Court (as set out below) on a point of law, and if relevant, the High Court could consider any self-standing application with respect to the European Convention on Human Rights Act 2003 with respect to a VAT repayment claim. The Appellant will no doubt be aware of all implications on costs in the superior courts, having disclosed at the hearing his familiarity with these forum.

Determination

132. The Appellant in this case sought the repayment of €27,472.00 in VAT paid by a Receiver in effecting the sale of the Appellant's capacity, over which he had been appointed. The decision of the Respondent to refuse the repayment must stand affirmed on the grounds that:-

(a) if the sale of the capacity was a taxable supply, no deduction of the VAT paid on the services acquired can be allowed in circumstances where the sale of the capacity was untaxed; and

(b) if the sale of the capacity was not a supply by operation of the "no supply rule" under sections 20 or 26 of the VATCA 2010, there is no evidence of taxable supplies during the periods applicable to the invoices of 30 July 2015, 21 December 2015, 21 December 2016, 2 January 2018, 29 June 2018, 21 December 2018, 30 July 2019 and 4 September 2019 from which the Appellant could seek to deduct.

(c) The Appellant was not registered for VAT until after the period of the invoices in question, again underlying the challenges for him in reclaiming VAT.

133. The Commissioner appreciates that the Appellant is likely to be disappointed with this appeal but he was correct to check his legal entitlements.

134. This appeal is determined under section 949 of the 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 within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Marie-Claire Maney
Appeal Commissioner
Chairperson
6th October 2022

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.