AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

04TACD2023

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") against a refusal by the Revenue Commissioners ("the Respondent") to refund Value Added Tax ("VAT") in the sum of €341,847.

2. In 2006, the Appellant issued a number of licences to third party companies for the purposes of carrying out building works. However, subsequent events occurred, such that works in accordance with the licences were not carried out. Consequently, credit notes issued to the companies in December 2017 and a refund of VAT was sought by the Appellant in his VAT return filed in January 2018 with the Respondent. The timeline in relation to events is set out below in the Background section to this Determination.

3. The Appellant claims that said credit notes are the basis upon which he has an entitlement to a refund of VAT paid, in the sum of €341,847. The Respondent has refused the refund in accordance with the provisions of section 99(4) of the Value Added Tax Consolidation Act 2010 ("VATCA 2010") on the basis that the relevant taxable period is

November/December 2006 not November/December 2017, as contended for by the Appellant.

4. A hearing of the appeal took place on Monday 26 September 2022 and both parties were represented. The Appellant was not present at the hearing of the appeal, due to health reasons. The Commissioner heard evidence and submissions on behalf of the Appellant and submissions on behalf of the Respondent.

Background

5. In December 2006, the Appellant entered into three agreements over lands owned by him, relating to the granting of licences to third party companies namely, [redacted] and [redacted]. The licences were granted for the purpose of allowing the companies carry out building works on the lands.

6. The licences were granted for a total consideration of €2,383,328, inclusive of VAT (€1,969,693 exclusive of VAT, being in the sum of €413,635). This sum was invoiced to the companies in December 2006 and VAT in the sum of €413,635 was accounted for by the Appellant in his November/December 2006 VAT return, which was filed with the Respondent in January 2007.

7. During the years 2007 to 2017, the Appellant and the companies remained in discussions in relation to the lands. However, on 12 December 2017, the Appellant states that three separate credit notes issued to the companies, as the building works agreed under the licences could not carried out. The Appellant submits that this was due to a forced sale of the lands in late 2016. The credit notes, all dated 12 December 2017, reflect the total amount of VAT being in the sum of €341,847 and which amount matches the refund claim.

8. Thereafter, in January 2018, the Appellant filed his November/December 2017 VAT return showing repayment in the amount of €341,847. The Appellant states that the aforementioned licence agreements and subsequent credit notes are the basis for the VAT refund amounting to the total sum of €341,847.

9. On 8 February 2018, the Respondent corresponded with the Appellant notifying him that his VAT repayment claim for the period November 2017/December 2017, in the amount of €341,847, has been selected for a verification check. The Respondent requested certain documentation of the Appellant in this regard, which in turn, was provided by the Appellant by way of correspondence dated 16 February 2018.

10. On 8 June 2018, the Respondent wrote to the Appellant notifying him that an audit will commence in relation to the Appellant's tax affairs for the years 2015 and 2016.

Thereafter, correspondence ensued between the parties which concluded in June 2020, with the Respondent denying the Appellant the refund in full.

11. On 30 April 2020, the Respondent corresponded with the Appellant to advise that the VAT repayment claim is not allowable under section 99(4) VATCA 2010, on the basis of the 4 year rule in that provision, as it relates to the taxable period November/December 2006. The correspondence provided the Appellant with a further opportunity to make a submission before the repayment claim was formally disallowed.

12. Thereafter on 16 June 2020, the Respondent formally disallowed the repayment claim in the sum of €341,847 and on 13 July 2020, the Appellant duly appealed to the Commission.

13. The Appellant argues that the correct interpretation of section 99(1) VATCA 2010, is that a claim for a refund is not being made here and accordingly, section 99(4) VATCA 2010 does not apply. This is on the basis that section 59(1) VATCA 2010 states that a refund shall be made in accordance with section 99(1) VATCA 2010, which distinguishes between a claim and a filing. Further, the Appellant argues that in any event the taxable period is November/December 2017 not November/December 2006, having regard to the credit notes that issued in December 2017 and which as a subsequent event, serve to re-establish the taxable period in relation to the claim for a refund, to the latter date of 2017.

14. The Respondent argues that the claim for a refund relates entirely to the VAT accounted for by the Appellant on his November/December 2006 VAT return, and relates to the same transactions. Thus, the time period for the purposes of section 99(4) VATCA 2010 runs from the end of the November/December 2006, as the VAT at issue was accounted for on that return. Further, the Respondent states that any particular reasoning or motivations of the Appellant for not reclaiming VAT earlier, are irrelevant to the application of section 99(4) VATCA 2010, due it being mandatory in nature. The Respondent relies on previous decisions of the Commission in this regard.

Legislation and Guidelines

15. The legislation relevant to this appeal is as follows:

16. Section 59 VATCA 2010, Deduction for tax borne or paid, provides:-

…….

(5) Where, in relation to any taxable period, the total amount deductible under this Chapter exceeds the amount which, but for this Chapter, would be payable in respect of such period, the excess shall be refunded to the accountable person in accordance with section 99 (1), but subject to section 100.

17. Section 67 VATCA 2010, Amendments to invoices, provides:-

(1) Where, subsequent to the issue of an invoice by a person to another person in accordance with section 66 (1), the consideration as stated in that invoice is increased or reduced, or a discount is allowed, whichever of the following provisions is appropriate shall have effect:

(a) if the consideration is increased, the person shall issue to that other person another invoice in such form and containing such particulars as may be specified by regulations in respect of the increase;

(b) if the consideration is reduced or a discount is allowed—

(i) the person shall issue to that other person a document (in this Act referred to as a "credit note") containing particulars of the reduction or discount in such form and containing such other particulars as may be specified by regulations, and

(ii) if that other person is an accountable person, the amount which the accountable person may deduct under Chapter 1 of Part 8 shall, in accordance with regulations, be reduced by the amount of tax shown on that credit note.

18. Section 99 VATCA 2010, General provisions on refund of tax, provides:-

(1) Subject to subsections (2) and (3), where in relation to a return lodged under Chapter 3 of Part 9 or a claim made in accordance with regulations, it is shown to the satisfaction of the Revenue Commissioners that, as respects any taxable period, the amount of tax (if any) actually paid to the Collector-General in accordance with Chapter 3 of Part 9 together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8, the Commissioners shall refund the amount of the excess less any sums previously refunded under this subsection or repaid under Chapter 1 of Part 8 and may include in the amount refunded any interest which has been paid under section 114.

.....

(4) A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates.

(5) Where the Revenue Commissioners refund any amount due under subsection (1) or section 100 , they may, if they so determine, refund any such amount directly

into an account, specified by the person to whom the amount is due, in a financial institution.

(6) The Revenue Commissioners shall not refund any amount of tax except as provided for in this Act or any order or regulations made under this Act.

19. Article 90, Council Directive 2006/112/EC of 28 November 2006 ("the VAT Directive") provides:-

1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1

Submissions

Appellant

20. [redacted]. [redacted] gave the following evidence on behalf of the Appellant:-

(i) He stated that he has worked at [redacted]. since approximately 1990/1991. He said that the Appellant inherited a farm in the early 1990s from his mother and he farmed the lands, approximately 90 acres, just on the outskirts of [redacted], until the early 2000s. He then applied and was granted planning permission to construct houses, commercial buildings and crèches on the lands. He mentioned how the Appellant's health has deteriorated over the last number of years.

(ii) He gave evidence that the Appellant entered into three licence agreements, two of said licence agreements were with one company known as [redacted] and the other with [redacted]. Invoices were issued for the licence agreements and deposits paid, equivalent to the VAT elements of the invoices. VAT was paid to the Respondents, and the income was noted on the Appellant's accounts. He stated that [redacted]. filed all VAT returns. He stated that part of the licence agreements were that the deposit would be paid in cash to cover the VAT liability, and the remaining payment for the licence agreement would be in houses, so that when the construction companies built the houses, they would give the Appellant a certain number of those houses in exchange for the licence agreement.

(iii) He mentioned that in order to obtain a grant of planning permission, the Appellant took out a loan from [redacted] In addition, he had to buy some adjacent land to assist with securing said planning permission. He said that the cost of planning was €4.1 million in total and that the purchase of the adjacent land was €700,000, which he said the Appellant part funded. He stated the Appellant secured a loan from [redacted] for €4.5 million, the majority of which went to the engineering firm who obtained the grant of planning permission for him. However, in 2008 building and income stopped.

(iv) He mentioned that in 2014, he attended a meeting in the Appellant's house with representatives from [redacted], in relation to a request from [redacted] that the Appellant indicate how he was going to proceed to repay the loan. He said that it was discussed that he had assets such as land and other houses and it was suggested that the Appellant would commence disposing of his assets in order to repay the loan. Thereafter, in 2014 and 2015, the Appellant disposed of a number of assets with all proceeds going to [redacted].

(v) He stated that in 2016, he was contacted by a tax advisor who had been engaged by [redacted] to establish facts in relation to the potential sale of the remainder of the land and it was at that point, that the land, relating to the licences was sold in late 2016. Thereafter, in November 2017, he said that he started to prepare the 2016 accounts for the Appellant and it was agreed that the licence agreements could no longer be fulfilled, because the land had been sold. He said that the credit notes were then prepared in December 2017 and issued to the companies, with the VAT return being filed in January 2018. He said that the Respondent's query then arose and the subsequent audit commenced thereafter. Reference was made to the abridged accounts for [redacted], which were filed with the Companies Office.

(vi) During cross examination by Counsel for the Respondent, the witness accepted that he was not involved in the application for planning permission or the costings associated with the grant of planning permission, nor a signatory or party to any of the documents that were referred to in evidence, such as the licence agreements. In addition, he accepted that he was not involved in any of the transactions referred to with the companies. He said that he was also not involved in any conveyance or negotiations about the price of the land or construction on the lands or negotiations with [redacted], but for a meeting he attended in 2014. He confirmed that he was not involved in any extensions to said licence agreements. He said that it was [redacted]. that issued the credit notes but that he made the request that said invoices be issued. He confirmed that he was directly involved in the tax

return for the year 2016.

21. [redacted] gave the following evidence on behalf of the Appellant:-

(i) She confirmed that she is a Bookkeeper with [redacted] and that for many years, she has dealt with the Appellant's tax affairs. She stated that she drew up the aforementioned invoices in 2006, in addition to the credit notes in December 2017, which she issued to the companies. She mentioned that over the years, she would have had responsibility for filing the Appellant's VAT returns and that she filed the VAT return in January 2018.

22. [redacted] gave the following evidence on behalf of the Appellant:-

(i) He confirmed that in 2016, he was an employee of [redacted] and had the role of tax advisor to [redacted]. He stated that he advised [redacted] on the tax implications of the sale of lands held by the Appellant. He stated that he was involved in calculating the tax liability of the Appellant for [redacted] to submit on its tax returns. He stated that the lands were sold in 2016.

(ii) During cross examination by Counsel for the Respondent, the witness confirmed that he did not have any documentation to provide to the Commission concerning the transfers of the sale of land, the [redacted] loans or any enforcement mechanisms that [redacted] took.

23. The Appellant's representative made the following legal submissions on behalf of the Appellant:-

(i) The license agreements were entered into in 2006 and in January 2007, the Appellant received part payment in the sum of €413,365 of the overall consideration in the form of cash. The remainder in the sum of €1,969,693 was included as debtors in the Appellant's financial accounts, which terminated on the issue of the credit notes referred to. This was recognised in a public document of [redacted], which was filed with the Companies Office, where it has acknowledged that money was owed to the Appellant. Following the sale of lands, credit notes issued in December 2017, when it became clear that the building works under the licence agreements could not be carried out. Reference was made to the interactions between [redacted] and the Appellant.

(ii) Reference was made to section 59(5) VATCA 2010, that the section provides for a mandatory refund and that it makes no reference to a requirement for a claim. When a VAT return was filed in January 2018, showing an overpayment, the Appellant was automatically entitled to a refund and there is no requirement for a

claim to be made. Reference was made to the decision in *Abnett v British Airways* [1996] 206 N.R 211, the key point being that if there is an exception to the rule it must state it in the main rule.

(iii) Reference was made to section 99(1) VATCA 2010 and that it provides that in relation to a refund arising on foot of a VAT period, the making of a repayment claim is not an obligatory prerequisite to an entitlement of a refund. Therefore, section 99(4) VATCA 2010 is not applicable, as the time limit applies only where there is a prerequisite obligation to make a VAT repayment claim, a claim which must in general be made within four years from the end of the Vatable period. The present is not a claim but a filing which results in an entitlement to a refund with no time limit imposed. This is evident from the language of section 99(1) VATCA 2010 namely the use of the word "or" between filing and claim which is significant.

(iv) Reference was made to sections 39 and 67 VATCA 2010 and consideration being reduced. This is the net effect of the credit notes which issued in December 2017.

(v) Reference was made to Article 90 of the VAT Directive and certain decisions of the Court of Justice of the European Union ("CJEU") namely, *Case C-246/16, Enzo Di Maura v Agenzia delle Entrate* ("*Enzo di Maura*"), in particular to paragraphs 12 and 13, joined Cases *C-123 and 330/87 Léa Jorion, née Jeunehomme, and Société anonyme d'étude et de gestion immobilière (EGI) v Belgian State* ("*Jorion*"), in particular paragraphs 17 and 18, Case *C-672/17* and *Nto de Águas Residuais do Ave SA v Autoridade Tributaria e Aduaneira* ("*Águas Residuais*"), in particular paragraph 33. The principles enunciated in the case law are that you cannot have legal technicalities which attempt to thwart the fundamental principles of fiscal neutrality, and also Article 90 of the VAT Directive.

(vi) That reflecting the fundamental principles as referred to above, the Vatable period at issue here is November/December 2017. Therefore, even in the event of a VAT refund not being an obligatory prerequisite, the said claim was made within the four year time limit. Reference was made to Case C-518/14 *Senatex GMBH v Finanzamt Hannover-Nord* ("*Senatex GMBH")* and that it supports the position that a corrected invoice relates not to the year in which the invoice was drawn up, but to the year in which it was corrected. That is what occurred here, it has been substituted by the credit note and that is the reason for the credit note. It is the taxable period in which the credit note was issued. The displacement/correction of the invoices via the issue of credit notes has the effect of re-establishing the taxable period to November/December 2017. The conclusion is that what is at issue here,

is a subsequent event to when the original issues were issued, and that is critical. The credit note could only be validly issued after the sale of the land in 2016, which in itself is within the four years.

(vii) Reference was made to the decision in Case *C-717/19 Boehringer Ingelheim RCV GmbH & Co. KG Magyarországi Fióktelepe v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* ("*Boehringer*") by way of submission and reference to a one page summary document.

Respondent

24. The Respondent made the following submissions:-

(i) Section 99(4) VATCA 2010 governs refunds and repayments of tax. The taxable period in this case is the four year period from the date the VAT was paid, which is the December 2006 VAT return. The claim for the refund of VAT was made in a January 2018 return, some 11 or more years later, which is outside the four year time period, which the legislation mandates.

(ii) No Authority has been produced by the Appellant to justify his contention that the taxable period can be treated in the way that is contended for. The taxable period is four years from the date of the VAT return, where the VAT was paid, i.e. in December 2006.

(iii) Reference was made to section 99(6) VATCA 2010, and that claims for refunds of VAT under VATCA 2010, or any regulations made thereunder, can only be made in accordance with the provisions of section 99(4) and (6) VATCA 2010. That is the overarching position. There are some limited carve outs but they are not relevant to this appeal. Nevertheless, section 99(4) VATCA 2010 is the overarching position, and it is clear by its terms, that a refund can only be made by the Respondent, in accordance with the Act.

(iv) It is clear by the wording used in section 59 VATCA 2010 that any claim for refund under the Act, can only be made in accordance with the provisions of section 99(1) VATCA 2010. Therefore, section 99(1) trumps section 59(5), such that there is no automatic entitlement to a refund. If that were the case, the Respondent could be dealing with a VAT reclaim from 20 years, 30 years or 40 years previous. It is a dangerous contention to make that there is some automatic right to a refund here. Certainty has to prevail in tax matters.

(v) Section 99 VATCA 2010 also applies to section 39 VATCA 2010, the provision in respect of consideration.

(vi) The VAT Directive was enacted here pursuant to EU law. It is important to note that Article 90(1) states that certain conditions shall be determined by the Member States. Therefore, Member States are entitled to put in place their own conditions. In addition, in Article 90(2) there is a derogation. But most important to empathize is, the point about conditions which shall be determined by Member States.

(vii) No authority has been submitted which supports the propositions that have been advanced in this appeal. It is the case that previous determinations of the Commission are applicable to this appeal, as they deal with the mandatory nature of section 99(4) VATCA 2010.

(viii) The cases opened are distinguishable on their own facts. In addition, none of the cases deal with an equivalent provision akin to section 99(4) VATCA 2010 and the impact that a time limit may have on a claim for a refund of VAT. For example, the case of *Enzo Di Maura* concerned unforeseen lengthy insolvency proceedings, which is not what is at issue here. Again, *Águas Residuais*, pertains to a failure to produce certificates for insolvency judgments on time. The case of *Senatex GmbH* concerned the amendment of invoices. That is not what we are dealing with in this appeal. In any event, Article 90 of the VAT Directive expressly permits Member States to impose their own conditions regarding refunds, and Ireland has chosen to do that via section 99(4) VATCA 2010.

(ix) The burden of proof is on the Appellant and reference was made to the decision in *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49. In addition, reference was made to various determinations from the Commission that deal with section 99 VATCA 2010 and its impact on claims for VAT refunds.

Material Facts

25. The Commissioner makes the following material findings of fact:-

(i) In December 2006, the Appellant entered into three licence agreements with third party companies, over lands owned by him, for the purpose of allowing the companies carry out building works on the lands.

(ii) The licences were granted for a total consideration of €2,383,328, inclusive of VAT (€1,969,693 exclusive of VAT, being in the sum of €413,635).

(iii) This sum was invoiced to the companies in December 2006.

(iv) VAT in the sum of €413,635 was accounted for by the Appellant on his November/December 2006 VAT return, which was filed with the Respondent in January 2007.

(v) On 12 December 2017, three separate credit notes issued to the companies, reflecting the total amount of VAT being in the sum of €341,847.

(vi) In January 2018, the Appellant filed his November/December 2017 VAT return showing repayment in relation to the amount of €341,847.

(vii) On 16 June 2020, the Respondent formally disallowed the repayment in the sum of €341,847.

Analysis

26. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd* 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".*

27. The Appellant's appeal relates to a refund of VAT in the sum of €341,847. There is a complex history in relation to the facts of this appeal, wherein the Appellant entered into licence agreements with third party companies in 2006, which were not fulfilled, and culminated in the issuing of credit notes in December 2017 to the companies. Unfortunately, due to health reasons, the Appellant was not in a position to attend at the hearing of the appeal to provide evidence in respect of the historical background and subsequent events, which resulted in credit notes being issued and a refund of VAT sought in the aforementioned sum.

28. The dispute arises in relation to the Appellant's claim for a refund, such that the Appellant argues that the refund is not subject to the provisions of section 99(4) VATCA 2010. Further the Appellant argues that even if it were, the issuing of credit notes in December 2017, supersedes the payment of VAT in 2006, thus the net effect being that a new taxable period is established, namely November/December 2017, which is within the 4 year period as provided for under section 99(4) VATCA 2010.

29. The issues for consideration in this appeal are twofold namely, the interpretation of section 99(1) VATCA 2010 and whether November/December 2006 is the taxable period as contended for by the Respondent or whether the November/December 2017 VAT return, filed in January 2018, can be characterised as a return with the effect that the taxable

period is now November/December 2017, having regard to the credit notes that issued in December 2017. The Commissioner considers the first issue is a matter purely of statutory interpretation and the second matter being a mix of both fact and law.

Interpretation of section 99(1) VATCA 2010

30. The definition of a "taxable person" is contained in section 2 VATCA 2010 as meaning "a person who independently carries on a business in the community or elsewhere".

31. Section 59(2) VATCA 2010 makes reference to the right to deduct by reference to a taxable period. Subsection (5) provides a right to a refund in relation to any excess where the amount deductible exceeds the amount which would be payable in respect of any period. The Commissioner notes the use of the word "shall" in subsection (5) in relation to any refund and in particular, the reference to section 99(1) VATCA 2010. The Commissioner is satisfied that section 59(5) VATCA 2010 must be read in conjunction with section 99(1) VATCA 2010.

32. Section 99(1) VATCA 2010 again makes reference to the right to a refund of the amount of excess tax paid. Notably, section 99(1) VATCA 2010 also uses the words "shall" in relation to any refund. The Appellant submits that section 59(5) VATCA 2010 "*links back to section 99 and confirms the obligation imposed on Revenue ("the excess shall be refunded") where a refund has been correctly sought, which we believe it has. There is no discretion for Revenue – note the use of the word shall*". The Commissioner does not disagree with that statement, such that section 59(5) VATCA 2010 makes reference to section 99(1) VATCA 2010 and it is mandatory in terms of the language used in relation to a refund.

33. The Appellant argues that the word "or" in section 99(1) VATCA 2010, in relation to "*a return lodged…. **or** a claim made*" (Emphasis added), is significant. It is argued that the word "return" refers to the normal return filing obligations as set out in Chapter 3 of Part 9 of VATCA 2010, and the subsection distinguishes between this and a claim made. Moreover, the Appellant argues that it is noteworthy that the word "claim" is repeated in section 99(4) VATCA 2010. The Appellant states that the significance of the word "or" in section 99(1) VATCA 2010 is such that it triggers a refund for the Appellant, in circumstances where the four year rule does not apply, as it is not a "claim". The Appellant submits that there is a distinction between a claim and a filing, such that a claim is subject to the provisions of section 99(4) VATCA 2010, the latter is not.

34. If the Commissioner determines that section 99(4) VATCA 2010 is applicable to the refund sought by the Appellant, the statutory language used in section 99(4) VATCA 2010 in

particular the use of the word "only" indicates an absence of discretion in the application of the provision. The wording of the provision does not provide for extenuating circumstances in which the four year rule might be mitigated. In short, the Commissioner does not consider that she has discretion to direct that a repayment be made to the Appellant, where the claim for repayment is outside the four year periods specific in section 99(4) VATCA 2010. The Commissioner is further persuaded that any refund shall only be made in accordance with this Act, as provided for by section 99(6) VATCA 2010.

35. Previous determination of the Commission have addressed the matter of repayment in the context of the four year statutory limitation period and can be found on the Commission's webpage.[1]

36. The Commissioner has no doubt that both sections 59(5) and 99(1) VATCA 2010 impose a mandatory obligation on the Respondent to refund any excess of tax paid. This is not a controversial statement. The question that arises is the significance of the word "or" in section 99(1) VATCA 2010. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. In coming to this conclusion, the Commissioner has had regard to the well-established principles of statuary interpretation and in particular to the recent decision in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, wherein McDonald J., from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation at paragraph 74

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that:*

[1] www.taxappeals.ie

"… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

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

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

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

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

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

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

37. Having regard to the aforementioned principles, the Commissioner finds that the language of section 99(1) VATCA 2010, in particular the word "or", does not distinguish between a filing and claim for the purposes of a refund of tax paid, such that section 99(4) VATCA 2010 is inapplicable to a "filing" and applies merely to a "claim". The Commissioner has considered the Appellant's arguments in detail in this regard. The Commissioner considers that it would be absurd and an affront to common sense to infer such a meaning into the wording of section 99(1) VATCA 2010, such that it would operate to negate the time period applicable to a refund of tax and provide an automatic right to a refund, deprived of any time limit. In light of the wording as provided for in sections 99(4) and 99(6) VATCA 2010, this cannot be correct. Moreover, the Commissioner is satisfied that had the Oireachtas intended for an exemption to be applicable to the time limits imposed by section 99(4) VATCA 2010 in the manner in which the Appellant argues, it would have done so expressly and that policy reasons would suggest that the section is drafted in such a way, so as to protect the exchequer's resources such that claims for a refund cannot go all the way back to the dawn of time unless expressly provided for. Certainty, to the extent that it can be achieved, is a necessity for all parties to a taxation scheme.

38. Consequently, the Commissioner is satisfied that section 67(5) and 99(1) VATCA 2010, must be read in light of section 99(4) and (6) VATCA 2010 and that any refund due and owing to the Appellant is subject to the provisions of section 99(4) VATCA 2010. Given its mandatory language, there is no room for discretion as to its application on the part of the Commissioner. The law is not subjective in this regard. The Commissioner agrees with the Respondent that certainty has to prevail in tax matters.

The Taxable period

39. In relation to the correct taxable period, the Commissioner has considered the testimony of the witnesses and the arguments put forward by both parties to this appeal. The Appellant argues that a new taxable period was established in December 2017, following the issuing of the credit notes to the companies. [redacted] testimony was that he issued instructions to [redacted] to draw up said credit notes. [redacted] confirmed during her evidence that she did in fact draw up the credit notes and issued the credit notes to the companies. Thereafter, in January 2018, a VAT return was filed for November/December 2017 seeking a refund of VAT in the sum of €314,847, the amount which is reflected in the combined total of the three credit notes that issued to the companies. [redacted] confirmed that she filed the return on behalf of the Appellant. The Commissioner found the witnesses evidence credible and convincing and accepts that the credit notes as described, issued in December 2017.

40. The Commissioner having accepted that the credit notes issued in December 2017, now turns to consider whether the credit notes establish a new taxable period for the purposes of a refund of tax, such that the refund does not fall foul of section 99(4) VATCA 2010 as it relates to the period November/December 2017 and not November/December 2006. The Appellant argues that sections 39 and 67(1)(b) VATCA 2010 apply to the facts of this appeal. The Commissioner does not disagree with this argument. Section 39 VATCA 2010 deals with general provisions on consideration. It sets out what the taxable amount should be when the actual consideration was more than the price that was agreed and provides for relief when the consideration is adjusted downwards. Section 67(1) VATCA 2010 sets out the rules in relation to amendments to invoices such as when a price changes after the issue of the original invoice or when a wrong rate of VAT was charged. The Commissioner considers that both sections are relevant to the Appellant's circumstances. However, notably, neither section mentions section 99(4) VATCA 2010 nor provides any derogation from the provisions of section 99(4) VATCA 2010.

41. The Commissioner considered in detail the various cases which the Appellant referred to. The Commissioner is not in a position to agree with the Appellant's submissions that these decisions are relevant to the issues within this appeal. The Commissioner is satisfied that the decisions are distinguishable on their own facts and do not support the Appellant's arguments herein. The Commissioner found it unsatisfactory that the Appellant's representative introduced a number of decisions at the hearing of the appeal only and not in accordance with the Commissions procedures that all information that is to be relied on, is provided to the parties in advance of the hearing. This is in accordance with fair procedures. What was most unsatisfactory was the submission by the Appellant's representative of a summary document only of the decision in *Boehringer*.

42. The Appellant also argues that the principles of fiscal neutrality and equal treatment apply when construing VATCA 2010 and when considering whether the Appellant is entitled to the repayment sought as a matter of EU law. The Commissioner considers that Article 90 of the VAT Directive expressly permits Member States to impose their own conditions regarding refunds, and Ireland has chosen to do that via section 99(4) VATCA 2010.

43. The Commissioner is satisfied that the provisions relating to the issuing of a credit notes do not provide that the net effect is the re-establishment of a taxable period. No authority was submitted by the Appellant for the Commissioner's consideration, which would allow the Appellant rely on any extension to the taxable period, such that it could be argued that the taxable period only commenced, for example, when the land was sold. Moreover, neither a single authority was submitted that suggests that it is only when, for example, the credit notes issued in this case that a claim for a refund could issue. The Commissioner

cannot accept the Appellant's arguments in this regard and is satisfied that the taxable period is four years from the November/December 2006 VAT return, when the VAT was paid. It is not any later period.

44. Accordingly, in the absence of authority or a legislative provision expressly providing for the creation of a new taxable period, subsequent to the issue of a credit note, the Commissioner is satisfied that the credit note issued in December 2017 and reflected in the subsequent VAT return filed in January 2018, does not constitute a new taxable period (November/December 2017) and/or a claim made (January 2018). It is the right to deduct that leads to the refund and the taxable period to which the refund relates is the period during 2006 when the right to deduct arose. Consequently, the Commissioner finds that it does not bring the Appellant within the four year period in accordance with the provisions of section 99(4) VATCA 2010 and an entitlement to a refund.

45. Whilst there has been mention in evidence of a forced sale of lands by the Appellant as a result of the Appellant's dealings with [redacted] and the Commissioner notes the objections of the Respondent, that the Appellant was not present to give any direct evidence as to the reasons why the building works were not carried out in accordance with the licences and why the sale of the land occurred. However, the Commissioner is satisfied that this background is not pertinent to the Commissioner's considerations in this appeal namely, the interpretation or section 99(1) VATCA 2010 and the correct taxable period having regard to the credit notes.

46. The Commissioner finds that it is clear from the provisions of section 99(4) VATCA 2010 that it applies to a claim for a refund of tax paid, save for certain exceptions expressly provided for and not relevant to this appeal. Accordingly, the Commissioner is satisfied the Respondent was correct to refuse the refund sought in the sum of €341,847.

Determination

47. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal. The Respondent was correct to refuse the Appellant's claim for a refund of VAT in the sum of €341,847, as the claim was made outside of the 4 year period provided for in section 99(4) VATCA 2010.

48. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax. The Appellant was correct to check to see whether his legal rights were correctly applied.

49. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Claire Millrine
Appeal Commissioner
19 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