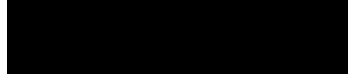




Between:-

15TACD2023



Appellant

and

Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) under section 146 of the Finance Act 2001 (as amended) against the determination of the Revenue Commissioners (“the Respondent”) concerning the open market selling price (“OMSP”) of a 2015 BMW [REDACTED] (“the vehicle”) for the purpose of calculating the appropriate charge to vehicle registration tax (“VRT”).
2. The appeal was heard on 23 September 2022 with the Commissioner having the benefit of the written and oral arguments of both parties. After the hearing, the Appellant was given liberty to furnish further information concerning the vehicle’s correct OMSP. The Appellant duly did so and the information furnished was considered in the making of this determination.

Background

3. The Appellant is a car dealer who on or about 9 November 2021 imported the vehicle, which was first registered in Japan. At the time of registration in the State it had 57,525 km on the clock. The date of manufacture of the vehicle was February 2015.

4. The matter under appeal is the Respondent's determination, given on first stage appeal, of 15 December 2021. This found the OMSP of the vehicle to be €50,700, with the resulting charge to VRT being €19,526. The rate of VRT charged was 37% of its OMSP, a figure arrived at by reference to the level of its CO2 and NOX emissions.
5. In making this determination, the Respondent considered three examples identified by the Appellant of other BMW ■ vehicles for sale. One was a BMW ■ with a "152" registration with 114,000 km on the clock. This was listed for sale for €48,995. The second was a BMW ■ Competition with a "152" registration with 79,823 km on the clock. This was listed for sale for €49,950. The third was a BMW ■ Competition with a "151" registration and 109,435 km on the clock. This was for sale for €49,999.
6. The Respondent did not consider these examples to be representative of the OMSP of the vehicle on the grounds that they had significantly higher mileages, thus lowering their value.
7. One of the documents submitted by the Appellant as part of the appeal before the Commission was an estimate of value from the private valuer VMS. This concluded that the "fair market value" of a BMW ■ from 2015 with 30,000 miles on the clock was €51,592. The "market range", based on vehicles then for sale, was listed as being between €49,950 for an example with 49,600 miles on the clock and €53,900 for an example with 32,062 miles on the clock.
8. In March 2022, after the bringing of this appeal, the Appellant submitted a further example of a 2015 BMW ■ for sale. This had 155,198 km on the clock and an asking price of €44,900.
9. The Appellant gave evidence at hearing that he knew of another dealer in Ireland who had sold a BMW ■ similar to the vehicle for €47,000. This dealer was, however, not present to give evidence and the Appellant produced no documentary material showing its having been advertised for sale.
10. The Appellant gave evidence that he purchased the vehicle for approximately €35,500. He said that ultimately he sold it for €50,000.00, thereby making a significant loss, which he attributed to the Respondent's excessive calculation of VRT. The Appellant claimed, without evidence, that he had paid €5,000 - €6,000 more in VRT for the same vehicle than any other dealer.
11. Following the appeal the Appellant provided a printout of a "VRT Calculator" estimate from the Respondent's website dated 11 March 2022. This showed a 2015 BMW ■ having an OMSP of €36,204.00 and, based on that, a VRT of €14,843.00.

12. Upon the submission of this additional documentary material, the Respondent made the replying observation that the BMW ■ used in this estimate was an earlier model with a different statistical code to the vehicle. The model used in the VRT Calculator estimate was in production from 01/12/2011 until 30/09/2012. The vehicle, by contrast, was in production from 01/03/2014 until 20/02/2015. Another feature distinguishing the two vehicles was their CO2 emissions, with the vehicle emitting 190 g/km and the model used in the VRT Calculator emitting 194 g/km .
13. Prior to the hearing of the appeal the Appellant and the Respondent engaged with one another with the result that the Respondent agreed to adjust the OMSP of the vehicle to the lowest price of the three comparator BMW ■'s identified by the Respondent, namely €48,995.00. At the hearing the Respondent indicated that the appeal could be determined on the basis that the OMSP was this amount, rather than the sum of €50,700.00 arrived at in the decision under appeal.

Legislation and Guidelines

14. Section 145 of the Finance Act 2001 (as amended) makes provision for an internal appeal of a decision of the Respondent regarding the payment of certain duties and taxes, including VRT. This right of appeal was availed of by the Appellant and resulted in the determination of the Respondent of 15 December 2021 that is under appeal to the Commission.
15. Section 146 of the Finance Act 2001 provides for an appeal of a determination of the Respondent under section 145 of the same legislation. The relevant part therein provides:-

“(1) Except where section 145(3) applies, any person who—

(a) has paid an amount of excise duty,

(b) has received a notice of assessment under section 99A, or is otherwise called upon by the Commissioners to pay an amount of excise duty that, in their opinion, that person is liable to pay, or

(c) has received a repayment of excise duty or has made a claim for such repayment that has been refused,

and is aggrieved by any of the matters referred to in paragraphs (a) to (c), may, subject to subsection (3), in respect of the liability to excise duty concerned or the amount of that liability, or the amount of the repayment or the refusal to repay, appeal to the Appeal Commissioners in accordance with section 949I of the Taxes Consolidation Act 1997 within the period specified in subsection (2).”

16. Section 133 of the Finance Act 1992 (as amended) provides:-

“(1) Where the rate of vehicle registration tax charged in relation to a category A vehicle or a category B vehicle is calculated by reference to the value of the vehicle, that value shall be taken to be the open market selling price of the vehicle at the time of the charging of the tax thereon.

(2)(a) For a new vehicle on sale in the State which is supplied by a manufacturer or sole wholesale distributor, such manufacturer or distributor shall declare to the Commissioners in the prescribed manner the price, inclusive of vehicle registration tax, which, in his opinion, a vehicle of that model and specification, including any enhancements or accessories fitted or

(2)(b) A price standing declared for the time being to the Commissioners in accordance with this subsection in relation to a new vehicle shall be deemed to be the open market selling price of each new vehicle of that model and specification.

(2)(c) Notwithstanding the provisions of paragraph (b), where a price is declared for a vehicle in accordance with this subsection which, in the opinion of the Commissioners, is higher or lower than the open market selling price at which a vehicle of a similar type and character is being offered for sale in the State at the time of such declaration, the open market selling price may be determined by the Commissioners for the purposes of this section.

(3) In this section— ‘new vehicle’ means a vehicle that has not previously been registered or recorded on a permanent basis—

(a) in the State under this Chapter or, before 1 January 1993, under any enactment repealed or revoked by section 144A or under any other provision to like effect as this Chapter or any such enactment, or

(b) under a corresponding system for maintaining a record for vehicles and their ownership in another state,

and where the vehicle has been acquired under general conditions of taxation in force in the domestic market

‘open market selling price’ means—

(a) in the case of a new vehicle referred to in subsection (2), the price as determined by that subsection,

(b) in the case of any other new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, would be determined

under subsection (2) in relation to that vehicle if it were on sale in the State following supply by a manufacturer or sole wholesale distributor in the State,

(c) in the case of a vehicle other than a new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail and, in arriving at such price—

(i) there shall be included in the price, having regard to the model and specification of the vehicle concerned, the value of any enhancements or accessories which at the time of registration are not fitted or attached to the vehicle or sold therewith but which would normally be expected to be fitted or attached thereto or sold therewith unless it is shown to the satisfaction of the Commissioners that, at that time, such enhancements or accessories have not been removed from the vehicle or not sold therewith for the purposes of reducing its open market selling price, and

(ii) the value of those enhancements or accessories which would not be taken into account in determining the open market selling price of the vehicle under the provisions of subsection (2) if the vehicle were a new vehicle to which that subsection applied shall be excluded from the price.”

Submissions

Appellant

17. The Appellant submitted that the OMSP determined by the Respondent was excessive. He pointed to the price of the aforementioned examples for sale as evidence of the excessive OMSP. He noted that two of the vehicles exhibited were, in contrast to his own, enhanced “Competition” variants that carried a premium on the market. Moreover, the vehicle was a Japanese import, further lowering its value. The true OSMP of the vehicle based on the evidence he had furnished was, in his submission, a maximum of €45,000. The Appellant highlighted that the level of the VRT meant that it was impossible for a profit to be made on the sale of the vehicle. In fact, in the end he had made a substantial loss on its sale.

Respondent

18. The Respondent submitted that the OMSP determined was reasonable. However it was prepared, in the circumstances of the case, to accept that it could be lowered to €48,995, that being the lowest of the three examples on the market identified by the Respondent.
19. The Respondent submitted that there was no evidence to support the Appellant's claim that the most the vehicle would have fetched in an arm's length transaction at the time of the charging of the tax would have been €45,000. While the Appellant had referred to an example known to him that had sold for around this amount, this was a bare assertion unsupported by any evidence. The BMW ■ identified by the Appellant for sale for this sum had a mileage greatly in excess of the vehicle and therefore could not be used as a reliable guide.
20. Regarding the VRT calculation on its website from March 2022, the Respondent submitted that this was irrelevant on the grounds that it related to an older version of the vehicle with a different classification. It too could not act as a guide as to the correct OMSP of the vehicle.
21. The Respondent submitted that the question of whether the Appellant made a profit or loss on his selling the vehicle was not relevant to the question of its OMSP at the time of the charging of the VRT.

Material Facts

22. The facts material to this appeal were as follows:-

- the Appellant imported a BMW ■■■■■, originally registered in Japan, on or about 9 November 2021;
- the VRT charged by the Respondent following the importation of the vehicle was €19,526.00. This was based on it having an OMSP of €50,700.00 at that time. The decision to charge this amount was affirmed by the Respondent at first stage appeal on 15 December 2021. It did so on the grounds that the lower list prices of comparator vehicles identified by the Appellant could be explained by higher mileages;
- the Appellant appealed this decision to the Commission on 21 December 2021;
- the Appellant sold the vehicle for a price of €50,000;

- the Appellant used the Respondent's VRT calculator on or about 11 March 2022 to estimate the VRT chargeable on a BMW [REDACTED] with a date of first registration of February 2015. This estimate gave an OMSP of €36,204.00 and a charge to VRT of €14,843.00. This vehicle however was a different variant of BMW [REDACTED], as evidenced by it having a different statistical code to that of the vehicle and a different CO2 emissions number.

Analysis

23. The Appellant in this appeal challenges the OMSP calculated by the Respondent. The first comment to make is that in this appeal, as in all tax appeals, the Appellant bears the burden of proof (see *Menolly Homes v Revenue [2010] IEHC 49* at paragraph 22). It is for the Appellant to demonstrate, on the balance of probabilities, that at the time the VRT was charged his vehicle would have fetched, as he suggested, a maximum price of €45,000 in a sale conducted at arm's length on the open market.
24. For the following reasons that Commissioner finds that the Appellant has failed to discharge this burden.
25. In challenging the decision of Revenue at first stage, the Appellant produced three comparator vehicles. These were again relied on in the appeal hearing before the Commissioner.
26. The first thing to note about these vehicles is that their asking prices, ranging from €48,995 - €49,999 were all in excess of the sum that the Appellant argued was correctly attributable to his vehicle. This fact does not itself contradict the Appellant's argument that the most that the OMSP of the vehicle could have been was €45,000. It is, after all, not unusual that the listed price of a vehicle is somewhat higher than the price ultimately fetched on the market. It would seem reasonable to conclude that, in the end, his comparator vehicles probably sold for something less than advertised.
27. However, as against this it is clear that each BMW [REDACTED] chosen as a comparator by the Appellant had a higher mileage than the one he chose to import.
28. In answer to this, the Appellant stressed two points. First, that two of the comparators were the desirable "Competition" variants, unlike his own. Secondly, that his car came from Japan and thus was less desirable, even accounting for its lower mileage.
29. The Commissioner can see how the provenance of a vehicle and its specification might, in some circumstances, outweigh differences in mileage of the kind evident between his vehicle and that of his chosen comparators. However, it was up to the Appellant to call

evidence as to the effect, if any, on the OMSP of the Japanese origin of the car. He did not do so. As regards the Competition variant, it was not clear to the Commissioner how this could be gleaned from the documentary information furnished and, in any event, the prices of the three comparator vehicles, whether Competition variant or not, were only different to a small extent.

30. Bolstering the Commissioner's view that the Appellant should not succeed in having the OMSP reduced to the level suggested by him is the fact that the VMS estimate he submitted calculated the "fair market value" of his vehicle to be €51,592.00, a price even higher than that accredited to it by the Respondent.
31. Moreover, it cannot be ignored that the Appellant himself gave evidence that the price fetched for the vehicle was €50,000, only €700 less than the OMSP. The vehicle was sold at a different time to that when the tax was charged, however this clearly is, to say the least, a strong indicator as to the correct OMSP at the relevant time.
32. As regards the results of the VRT Calculator furnished after the appeal, the Commissioner accepts that these appear to be based on a model of BMW ■■■ that differs from that imported by the Appellant. This is evidenced by their differing statistical codes and CO2 emissions figures. Nothing suggests, and the Appellant did not ultimately contend, that the OMSP of €36,204 ascribed by the calculator to that model of BMW ■■■ could be attributed to the vehicle. It would therefore appear to be of no relevance to the determination of this appeal.
33. The Commissioner finds that the revised OMSP of €48,995 accepted by the Respondent seems, in the circumstances, to be a fair one. It would appear to account for the argument made by the Respondent in relation to the significance of the gulf in mileage, and the likelihood that the comparator vehicle's actual sale price was somewhat less than advertised. The Commissioner finds that the evidence does not suggest that the vehicle would have sold for an open market price of €45,000 at the time VRT was charged and the fact that, subsequently, it sold for more is probative of this.
34. The result of this appeal, therefore, is that the Appellant's charge to VRT is to be adjusted to account for an OMSP of €48,995, a reduction of €1,705 from the OMSP assessed of €50,700. The consequence of this finding is that the Appellant is entitled to the refunding of VRT paid on the registration of the vehicle in the amount of €631 (€1,705 x 37%).

Determination

35. The OMSP of the vehicle is found to be €48,995. The Appellant has therefore overpaid VRT in the amount of €631 and is entitled to the repayment of this sum.

36. This appeal is determined under section 949AL 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.

A handwritten signature in black ink, appearing to read 'COHiggins', written in a cursive style.

Conor O'Higgins
Appeal Commissioner
02 November 2022