



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

30TACD2023

████████████████████

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the “Commission”) as an appeal against a decision made on 23 June 2022 by the Revenue Commissioners (hereinafter the “Respondent”) refusing a claim for a refund of Value Added Tax (hereinafter “VAT”) by [REDACTED] (hereinafter the “Appellant”).
2. The VAT refund is sought by the Appellant under the rules established by the European Union (hereinafter the “EU”) for the refund of VAT to taxable persons not established in the Member State of refund but established in another Member State under the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter the “2006 Directive”) and Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (hereinafter the “2008 Directive”) as provided for in section 101 of the Value Added Tax Consolidation Act 2010 (hereinafter the “VATCA2010”).
3. The total amount of tax under appeal is €63,845.36.

Background

4. The Appellant is a company registered in Northern Ireland and trading from Northern Ireland. The Appellant is registered for VAT under the UK number [REDACTED].
5. On 10 May 2022 the Appellant wrote to the Respondent and asked for the deadline date for submitting 2021 EU VAT refund claims.
6. On 10 May 2022 the Respondent replied stating:

“The deadline for receipt of 2021 EVR applications for goods is 30/06/2022 and it is the same date for VAT 60 OEC applications for services.

Note: The application must be on our system or received in the office on or before this date as otherwise it may be refused.”
7. On 17th May 2022 the Appellant corresponded with the Respondent by email requesting contact details of the correct person to speak to in relation to submitting a claim for a VAT refund for 2020.
8. On 18 May 2022, the Respondent replied asking the Appellant to forward a detailed account of the circumstances pertaining to their query along with the necessary documentation and an explanation as to the Appellant’s delay in addressing the issue.

9. On 24 May 2022 the Appellant replied to the Respondent as follows:

“- The HMRC portal was down for a period in early 2021 following Brexit and we were unable to submit any claims for 2020 for an extended period

- No notification was given when this would be opened up and we had to check various times to see if the service had been resumed.

- Previously the deadline for the claim was 30th September following the year of claim. For 2020 claims this was reduced by three months to 30th June without any notification to us.

- We attempted to submit 2020 claims in July 2021; but had missed the deadline at this point. You can hopefully see this on your system.

- Previous accountant was working from home due to COVID restrictions and off on Maternity Leave in the first half of 2021

- A new accountant (myself) began working with the company in October 2021.

- The fact that the entirety of the 2020 diesel VAT claim had been missed only came to light in the last few weeks, hence why we are only appealing the decision now.

- Previously all claims had been submitted in a timely manner.

- Given the size of the VAT refund due (€65k), it will put our company under severe financial pressure if we do not receive it.

- We purchase the vast majority of our diesel in the south and spending between €35k-€40k per month currently”

10. On 25 May 2022, the Respondent replied to the Appellant as follows:

“Our understanding is that the HMRC indicated that 2020 VAT claims from UK had to be submitted via EVR by 31st March 2021.

In certain circumstances, IE Revenue accepted VAT 60 OEC's for 2020 claims up to and including 30th September 2021. The usual deadline for VAT 60 OEC applications is 6 months after the calendar year has passed. i.e. 30th June 2021 for 2020 claim. We extended this for 2020 claimants until 30th of September 2021.

Unfortunately, there is no extension beyond the 30th September 2021 for 2020 claims.”

11. On 30 May 2022, the Appellant submitted a request for reconsideration of the Respondent's decision to refuse the VAT claim for 2020.

12. On 23 June 2022 the Respondent replied as follows:

“I refer to your e-mail received 30th May 2022 requesting a reconsideration of Revenue’s decision to refuse [REDACTED] VAT claim for 2020.

I have taken this opportunity to review, without prejudice, your claim for 2020 and the decision to refuse same.

Under the Withdrawal agreement claims for costs incurred in 2020 must be submitted through the Electronic VAT Refund system by 31/3/2021. This was agreed under the transition period/withdrawal agreement and outlined on HMRC website.

The NI Protocol allows for refund of goods under Council Directive 2008/9/EC of 12 February 2008. The Directive lays down the detailed specific rules for the refund of VAT to taxable persons not established in the Member State of Refund but established in another EU Member State including the deadlines around the treatment of VAT refund claims. Article 15 of the Council Directive states that a VAT refund application must be submitted to the Member State of Establishment, in this case the UK, by the latest 30 September of the calendar year following the refund period for immediate onward transmission to the Member State of Refund. Section 101 (6) (b) of the VAT Consolidation Act, 2010 implements the provision of Article 15 of the 2008 Directive. In line with this Revenue accepted claims from companies trading under the NI Protocol businesses up to 30th September 2021.

While I appreciate the difficulties posed the onus is on the claimant to ensure they meet their obligations under the arrangement. Given the facts outlined above and the significant time which has lapsed since the deadline, unfortunately refusal of 2020 claim stands.”

13. On 29 June 2022, the Appellant submitted a Notice of Appeal to the Commission appealing the Respondent’s decision of 23 June 2022. The hearing took place on 2 December 2022.

Legislation and Guidelines

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

Section 101 VATCA2010 – Intra-Community refunds of tax:

“For the purposes of this section—

“applicant” means a taxable person who—

(a)not being established in the Member State of refund, but being established in another Member State, and

(b)having entered into transactions that give rise to a right of deduction in that other Member State,

makes a refund application;

“deductible transactions” means transactions that give rise to a right of deduction in the Member State concerned;

“Member State of refund”, in relation to an applicant, means the Member State in which value-added tax (as referred to in the VAT Directive) was charged to the applicant in respect of—

(a)goods or services supplied to the applicant by other taxable persons in that Member State, or

(b)the importation of goods into that Member State;

“non-deductible transactions” means transactions that do not give rise to a right of deduction in the Member State concerned;

“refund application” means an electronic application submitted for a refund of tax charged in the Member State of refund to an applicant in respect of goods or services supplied to the applicant by taxable persons in that Member State or in respect of the importation of goods into that Member State.

(2)The Revenue Commissioners shall, in accordance with this section and regulations (if any), make a refund to an applicant of tax charged to the applicant by accountable persons in the State or tax charged to that applicant on the importation of goods into the State, in cases where a full and correct refund application has been received by them from the Member State in which the applicant is established.

(3) (a)Subject to paragraph (b), where the State is the Member State of refund, the amount of tax that is refundable in accordance with subsection (2) is the amount of tax charged to an applicant by an accountable person in respect of supplies of goods or services in the State, or on the importation of goods by the applicant into the State, if those goods or services are used by the purpose of the applicant’s business, but only to the extent that the applicant would be able to deduct that amount under Chapter 1 of Part 8 if the applicant were an accountable person in the State.

(b)Where an applicant undertakes in the applicant's Member State of establishment both deductible transactions and non-deductible transactions, the amount to be refunded by the Member State of refund is the proportion of tax attributable to the deductible transactions as determined in accordance with the law of the applicant's Member State of establishment.

(4)An applicant who wishes to claim a refund of tax may apply for the refund only through the electronic portal set up for the purpose by the applicant's Member State of establishment.

(5) (a)Where an applicant who carries out transactions of the kind referred to in subsection (3)(b) makes a refund application and the proportion of tax referred to in that subsection is subsequently adjusted, the applicant shall make a correction to the original amount that was applied for or has already been refunded.

(b)The applicant shall make the correction in a refund application during the calendar year following the period for which the relevant refund application was made or, if the applicant makes no refund applications during that calendar year, by lodging a separate declaration via the electronic portal established by the Member State of establishment of the applicant.

(6) (a)(i)Where the State is the Member State of refund, the applicant shall ensure that the refund application covers tax charged in respect of supplies of goods or services invoiced to the applicant and importations by the applicant during a refund period, being a period of not more than one calendar year and, subject to subparagraph (ii), not less than 3 calendar months.

(ii)A refund period may be less than 3 calendar months if the application in respect of the period relates to the last quarter of a calendar year.

(b)A refund application may be lodged only on or before September in the calendar year following the refund period.

(c)A refund application may cover tax charged in respect of transactions omitted from the applicant's previous refund applications, but only if those transactions were completed during the relevant calendar year.

(7) (a)An applicant is not entitled to make a refund application under this section for an amount less than €400 if the claim is for a period of less than one calendar year but at least 3 months.

(b)An applicant is not entitled to make a refund application under this section for an amount less than €50 if the claim is for a period that represents a full calendar year or the last quarter of a calendar year.

(8)As soon as is practicable after deciding not to forward to another Member State a refund application made by an applicant established in the State on the grounds that the applicant is not entitled to a refund, the Revenue Commissioners shall notify the decision to the applicant by electronic means.

(9) (a)This subsection applies to a refund application in respect of which the State is the Member State of refund.

(b)As soon as is practicable after receiving from an applicant a refund application to which this subsection applies, the Revenue Commissioners shall notify the applicant by electronic means of the date on which they received the application.

(c)Within 4 months after the date on which they received a refund application from an applicant, the Revenue Commissioners shall, except as otherwise provided by this subsection—

(i)decide whether or not to approve the application (whether wholly or partly), and

(ii)notify their decision to the applicant by electronic means.

(d) (i)At any time within 4 months after the date on which they received a refund application from an applicant established in another Member State, the Revenue Commissioners may request additional information in support of the details provided in the application.

(ii)A request referred to in subparagraph (i) may be made to the applicant, the competent authority of the Member State where the applicant is established or any other person whom the Revenue Commissioners reasonably believe to be capable of providing relevant information.

(e)Where the Revenue Commissioners request additional information in accordance with paragraph (d), they shall, except when paragraph (g) applies—

(i)decide whether or not to approve the application (whether wholly or partly), and

(ii)notify their decision to the applicant by electronic means,

within 2 months after the relevant date.

(f)For the purpose of this subsection, the relevant date is—

(i)where the Revenue Commissioners receive the requested information within one month after the date on which the request was notified to the recipient, the date on which the Commissioners received the additional information,

(ii)where the Revenue Commissioners do not receive the requested information within one month after the date on which the request was made to the recipient, the date on which that period ends,

(iii)where the Revenue Commissioners receive the requested information within one month referred to in subparagraph (i), or that period expires without the Commissioners having received that information, the date that is 6 months after the date on which the refund application was made.

(g)Where the Revenue Commissioners consider it necessary to do so, they may, at any time before they make a decision with respect to a refund application, request any of the persons referred to in paragraph (d) to provide further additional information concerning the application or the applicant.

(h)Where the Revenue Commissioners request further additional information with respect to a refund application or the applicant as provided by paragraph (g), they shall—

(i)decide whether or not to approve the application (whether wholly or partly), and

(ii)notify their decision to the applicant by electronic means,

within 8 months after the date on which they received the refund application.

(i)Where the Revenue Commissioners have reasonable doubts about the validity or accuracy of a refund application, they may request the original or a copy of the relevant invoice or importation document to be produced for inspection.

(j) Without limiting the grounds on which the Revenue Commissioners may refuse a refund application, they may refuse to approve such an application on the ground that a request made by them under this subsection has been refused or has not been complied with within a reasonable time.

(k) Where the Revenue Commissioners notify an applicant of their decision to approve a refund application either wholly or partly, they shall refund the amount due not later than 10 working days after the notification of the decision to the applicant.

(l) Where the Revenue Commissioners decide to refuse to approve a refund application either wholly or partly, they shall include in their decision the grounds for the refusal.

(10) Where the State is the Member State of refund, and the applicant requests payment of the refund to be made in another Member State, the Revenue Commissioners shall deduct from the refund amount any bank charges in respect of the payment.

(11) (a) An applicant who has obtained a refund from the Revenue Commissioners based on an incorrect refund application containing an erroneous claim or declaration (whether or not the error was made intentionally, recklessly or carelessly) shall—

(i) repay to the Commissioners the amount incorrectly obtained as a refund, and

(ii) pay an amount of interest to the Commissioners.

(b) Any such interest is to be calculated at the rate provided for in section 114(2) from the date on which the refund was made to the day on which the applicant repays to the Revenue Commissioners the amount incorrectly obtained as a refund.

(c) The liability imposed on an applicant by this subsection is in addition to the liability imposed by section 116 or 116A, as appropriate.

(12) While an applicant to whom subsection (11) applies continues to fail to pay the Revenue Commissioners an amount payable under that subsection, the Commissioners shall withhold any further refund to that applicant up to the amount that is due from the applicant under that subsection.

(13) (a) *Subject to paragraph (b), where the Revenue Commissioners refund an amount due to an applicant but not within the time limits prescribed by subsection (9), they shall pay an amount of interest to the applicant calculated at the rate provided for in section 105(4) from the day following the last day of the period within which payment of the amount due is required to be made to the day on which the amount due is paid to the applicant.*

(b) *Paragraph (a) does not apply if the applicant—*

(i) provides additional information in accordance with a request made by the Revenue Commissioners but not within one month after the date on which the request was notified to the applicant, or

(ii) fails to provide all of the additional information requested within that period.

(14) *This section does not apply to an applicant who supplies—*

(a) goods or services in respect of which the place of supply is the Member State of refund, other than—

(i) goods or services for which the person who receives them is liable,

(ii) services, the supply of which is taxable in accordance with section 34(kc), to which the Union scheme (within the meaning of section 91A) applies, or

(iii) goods, the supply of which is taxable in accordance with section 30, to which the import scheme (within the meaning of section 91A) applies, or

(b) a transport service, or a service ancillary to such a service, that is exempted in the Member State of supply in accordance with Article 144, 146, 148, 149, 151, 153, 159 or 160 of the VAT Directive.”

Council Directive 2008/9/EC of 12 January 2008:

“Article 7

To obtain a refund of VAT in the Member State of refund, the taxable person not established in the Member State of refund shall address an electronic refund application to that Member State and submit it to the Member State in which he is established via the electronic portal set up by that Member State.

Article 8

1. The refund application shall contain the following information:

- (a) the applicant's name and full address;*
- (b) an address for contact by electronic means;*
- (c) a description of the applicant's business activity for which the goods and services are acquired;*
- (d) the refund period covered by the application;*
- (e) a declaration by the applicant that he has supplied no goods and services deemed to have been supplied in the Member State of refund during the refund period, with the exception of transactions referred to in points (i) and (ii) of Article 3(b);*
- (f) the applicant's VAT identification number or tax reference number;*
- (g) bank account details including IBAN and BIC codes.*

2. In addition to the information specified in paragraph 1, the refund application shall set out, for each Member State of refund and for each invoice or importation document, the following details:

- (a) name and full address of the supplier;*
- (b) except in the case of importation, the VAT identification number or tax reference number of the supplier, as allocated by the Member State of refund in accordance with the provisions of Articles 239 and 240 of Directive 2006/112/EC;*
- (c) except in the case of importation, the prefix of the Member State of refund in accordance with Article 215 of Directive 2006/112/EC;*
- (d) date and number of the invoice or importation document;*
- (e) taxable amount and amount of VAT expressed in the currency of the Member State of refund;*
- (f) the amount of deductible VAT calculated in accordance with Article 5 and the second paragraph of Article 6 expressed in the currency of the Member State of refund;*
- (g) where applicable, the deductible proportion calculated in accordance with Article 6, expressed as a percentage;*

(h) nature of the goods and services acquired, described according to the codes in Article 9.

Article 9

1. In the refund application, the nature of the goods and services acquired shall be described by the following codes:

1 = fuel;

2 = hiring of means of transport;

3 = expenditure relating to means of transport (other than the goods and services referred to under codes 1 and 2);

4 = road tolls and road user charge;

5 = travel expenses, such as taxi fares, public transport fares;

6 = accommodation;

7 = food, drink and restaurant services;

8 = admissions to fairs and exhibitions;

9 = expenditure on luxuries, amusements and entertainment;

10 = other.

If code 10 is used, the nature of the goods and services supplied shall be indicated.

2. The Member State of refund may require the applicant to provide additional electronic coded information as regards each code set out in paragraph 1 to the extent that such information is necessary because of any restrictions on the right of deduction under Directive 2006/112/EC, as applicable in the Member State of refund or for the implementation of a relevant derogation received by the Member State of refund under Articles 395 or 396 of that Directive.

...

Article 11

The Member State of refund may require the applicant to provide a description of his business activity by using the harmonised codes determined in accordance with the second subparagraph of Article 34a(3) of Council Regulation (EC) No 1798/2003 (1).

...

Article 15

- 1. The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.*
- 2. The Member State of establishment shall send the applicant an electronic confirmation of receipt without delay.”*

AGREEMENT on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community L29/7 (hereinafter the “Withdrawal Agreement”)

“TITLE III

ONGOING VALUE ADDED TAX AND EXCISE DUTY MATTERS

Article 51

Value added tax (VAT)

- 1. Council Directive 2006/112/EC (29) shall apply in respect of goods dispatched or transported from the territory of the United Kingdom to the territory of a Member State, and vice versa, provided that the dispatch or transport started before the end of the transition period and ended thereafter.*
- 2. Directive 2006/112/EC shall continue to apply until 5 years after the end of the transition period with regard to the taxable person's rights and obligations in relation to transactions with a cross-border element between the United Kingdom and a Member State that took place before the end of the transition period and with regard to transactions covered by paragraph 1.*
- 3. By way of derogation from paragraph 2 and from Article 15 of Council Directive 2008/9/EC (30), refund applications that relate to VAT which was paid in a Member State by a taxable person established in the United Kingdom, or which was paid in the United Kingdom by a taxable person established in a Member State, shall be submitted under the conditions of that Directive at the latest on 31 March 2021.*
- 4. By way of derogation from paragraph 2 and from Article 61(2) of Council Implementing Regulation (EU) No 282/2011 (31), amendments to VAT returns that were submitted in accordance with Article 364 or Article 369f of Directive 2006/112/EC either in the United Kingdom with regard to services supplied in Member States of*

consumption before the end of the transition period, or in a Member State with regard to services supplied in the United Kingdom before the end of the transition period, shall be submitted at the latest on 31 December 2021”

The Protocol on Ireland/Northern Ireland included in the Withdrawal Agreement and the consequential technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. (hereinafter the “Northern Ireland Protocol”)

“Article 8

VAT and excise

The provisions of Union law listed in Annex 3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland. In respect of Northern Ireland, the authorities of the United Kingdom shall be responsible for the application and the implementation of the provisions listed in Annex 3 to this Protocol, including the collection of VAT and excise duties. Under the conditions set out in those provisions, revenues resulting from transactions taxable in Northern Ireland shall not be remitted to the Union. By way of derogation from the first paragraph, the United Kingdom may apply to supplies of goods taxable in Northern Ireland VAT exemptions and reduced rates that are applicable in Ireland in accordance with provisions listed in Annex 3 to this Protocol. The Joint Committee shall regularly discuss the implementation of this Article, including as concerns the reductions and exemptions provided for in the provisions referred to in the first paragraph, and shall, where appropriate, adopt measures for its proper application, as necessary. The Joint Committee may review the application of this Article, taking into account Northern Ireland’s integral place in the United Kingdom’s internal market, and may adopt appropriate measures as necessary.

...

ANNEX 3

PROVISIONS OF UNION LAW REFERRED TO IN ARTICLE 8

1. Value Added Tax

- *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*
- *Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State*
- *Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax*
- *Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures*
- *Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in Community territory*
- *Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries*
- *Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods*
- *Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries*
- *Obligations stemming from the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax”*

Submissions

Appellant Submissions and Witness Evidence

15. The Appellant was represented by Junior Counsel at the oral hearing.

16. The Appellant submitted that it had many years of filing and submitting claims to the Respondent and of receiving refunds on foot of same and that this should be accepted as supporting the Appellant's claim that it attempted to make a VAT refund claim for 2020 in April 2021. In addition the evidence of Mr [REDACTED] was that he himself accessed the United Kingdom's HM Revenue and Customs (hereinafter the "HMRC") system in July 2021 and was unable to submit a 2020 VAT refund claim whilst at the same time he was able to submit a January to June 2021 VAT refund claim.
17. The Appellant submitted that the only method by which it could make a VAT refund claim was through the HMRC system and that the Respondent does not interact with claimants until a claim is submitted through the HMRC system. The Appellant submitted that there was confusion in relation to what the deadline date of the submission of VAT refund claims for VAT registered entities in Northern Ireland was. The Appellant submitted that on the one hand the correct deadline date for the submission of VAT refund claims for 2020 for Northern Ireland VAT registered entities was 30 September 2021 and on the other hand that the deadline date of 31 March 2021 was the date to which the Withdrawal Agreement referred. The Appellant submitted that this was a time of uncertainty for the Appellant as regards the correct dates for the submission of VAT refund claims pursuant to the 2008 Directive.
18. The Appellant submitted that the Respondent's reply to the query which it submitted on 10 May 2022 entitled "[REDACTED]" and asking for confirmation of the deadline for submitting a claim for an EU VAT refund, was confusing as the Respondent replied that the deadline was 30 June 2022. The Appellant submitted that this response tends to demonstrate that there was confusion as to what the deadline was for VAT refund claims for 2020 within the Respondent.
19. The Appellant submitted that HMRC were acting as agent for the Respondent in relation to EU Vat refund claims. No detailed argument was made to the Commissioner in relation to this submission.

Witness – [REDACTED]

20. The Commissioner heard evidence from Mr [REDACTED] who has worked for the Appellant for [REDACTED] and is the manager of the Appellant.
21. Mr [REDACTED] stated that the Appellant purchases the majority of its diesel in the State and thereafter submits claims for VAT refunds to the UK's HM Revenue and Customs (hereinafter referred to as "HMRC") online portal which are in turn forwarded to the Respondent for processing.

22. Mr [REDACTED] stated that in early 2021 a former employee of the Appellant attempted to access the HMRC online portal which was at that time unavailable. He stated that no official reason for this was known to the Appellant but that they thought it might have been in connection with the UK leaving the EU at the end of 2020 (hereinafter referred to as "Brexit"). Mr [REDACTED] stated that the Appellant had unsuccessfully tried to access the HMRC portal on several occasions.
23. Mr [REDACTED] stated that he had accessed the HMRC portal in early July 2021 but that the system would not allow him to input details of a refund claim for 2020. He stated that as far as he was aware the deadline in previous years for claiming refunds had been June. He stated that on the same occasion he successfully submitted a VAT refund claim for January to June 2021 claim on the HMRC system which was paid by the Respondent on 7 September 2021.
24. Mr [REDACTED] stated that he then contacted the person in accounts by text, who was at that point on maternity leave, and asked her the details in relation to her previous experience in submitting a VAT refund claim to HMRC for 2020. She stated that she had been unable to access the system and that she thought that this might have been related to Brexit but she was not sure. The employee also stated in the Whatsapp message that she had taken a screenshot of the failed attempt to submit a claim and this was left in her desk drawer at work.
25. Mr [REDACTED] stated that since that time he had received confirmation from the Respondent that the deadline for the submission of VAT refund claims for 2020 was 30 September 2021 but that he had been unable to submit a claim to the HMRC website in July 2021. He stated that neither he nor the Appellant were made aware of the reason why a refund claim could not be submitted to the HMRC website.
26. The witness stated that a new accountant started with the Appellant and he then attempted to progress the VAT refund claim and that he contacted the Respondent in relation to same. He stated that the amount claimed is a significant sum for the business and it is not the Appellant's fault that they were unable to access the HMRC system to make the claim. He stated that the Appellant has always made claims on time and has received refunds in the past.

Respondent Submissions

27. The Respondent submitted that Article 15 of the 2008 Directive provides that:

“The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.”

28. The Respondent submitted that section 101(6)(b) of the VATCA2010 adopts the 2008 Directive into Irish VAT legislation and states *“a refund application may be lodged only on or before 30 September in the calendar year following the refund period.”*
29. The Respondent submitted that Title Withdrawal Agreement is entitled “ONGOING VALUE ADDED TAX AND EXCISE DUTY MATTERS”. Article 51 of the Withdrawal Agreement is entitled Value added tax (VAT) and paragraph 3 provides for a deadline for the submission of applications for VAT refunds that relate to VAT which was paid in a Member State by a taxable person established in the United Kingdom, or which was paid in the United Kingdom by a taxable person established in a Member State of 31 March 2021.
30. The Respondent submitted that paragraph 2 provides for the application of COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of VAT continuing to apply until 5 years after the end of the transition period.
31. The Respondent submitted that Article 8 and Annex 3 of the Northern Ireland Protocol established a derogation from the provisions of Article 51 of the Withdrawal Agreement for Northern Ireland taxpayers in respect of VAT refunds under the 2008 Directive.
32. The Respondent accepted that the response which it sent to the Appellant on 10 May 2022 in relation to the deadline for submission of EU Vat refund claims for 2021 in which it stated that the deadline was 30 June 2022 was incorrect. The Respondent stated that the date of 30 June 2022 related to third countries which the United Kingdom was in May 2022 but that it did not relate to taxable persons in Northern Ireland.
33. The Respondent did not accept the Appellant’s claim that HMRC was acting as agent for the Respondent in relation to EU VAT refund applications and stated that the operation of the VAT refund system was a matter of International Treaty and that the law of agency does not apply to same.

Material Facts

34. The following material facts are not at issue in the within appeal and the Commissioner accepts same:

- i. The Appellant did not submit a claim for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021;
- ii. The Appellant is a company registered in Northern Ireland and trading from Northern Ireland. The Appellant is registered for VAT under the UK number [REDACTED].
- iii. On 17th May 2022 the Appellant corresponded with the Respondent by email requesting contact details of the correct person to speak to in relation to submitting a claim for an EU VAT refund for 2020.
- iv. On 18 May 2022 the Respondent replied asking the Appellant to forward a detailed account of the circumstances pertaining to their query along with the necessary documentation and an explanation as to the Appellant's delay in addressing the issue.
- v. On 23 June 2022 the Respondent refused the Appellant's application for a refund of VAT on the basis that the application had not been in time.

35. The following material facts are at issue in the within appeal:

- i. The deadline for the submission of claims for VAT refunds pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 was 30 September 2021;
- ii. The Appellant attempted to submit an application for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021 through the HMRC portal.

36. The Commissioner has examined the material facts at issue, the evidence received both oral and documentary and the submissions made on behalf of the Parties.

- i. The deadline for the submission of claims for VAT refunds pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 was 30 September 2021;

37. The Appellant submitted at the oral hearing that there was some confusion as to the deadline for the submission of claims for VAT refunds under the 2008 Directive.

38. Article 15(1) of the 2008 Directive provides that a refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year

following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.

39. Section 101 of the VATCA2010 adopts the 2008 Directive into Irish law.
40. Article 51 of the Withdrawal Agreement provides that “*By way of derogation from paragraph 2 and from Article 15 of Council Directive 2008/9/EC (30), refund applications that relate to VAT which was paid in a Member State by a taxable person established in the United Kingdom, or which was paid in the United Kingdom by a taxable person established in a Member State, shall be submitted under the conditions of that Directive at the latest on 31 March 2021.*”
41. The effect of this provision of the Withdrawal Agreement is that a taxable person in the United Kingdom was obliged to submit a claim for a VAT refund under the 2008 Directive on or before 31 March 2021.
42. However, it is important to note the provisions of the Northern Ireland Protocol applied to taxable persons in Northern Ireland and that Article 8 of the Northern Ireland Protocol states that “*The provisions of Union law listed in Annex 3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland.*” Annex 3 of the Northern Ireland Protocol lists, *inter alia*, the 2008 Directive. This means that the 2008 Directive remained operative for taxable persons in Northern Ireland seeking to submit VAT refund claims. As previously noted Article 15(1) at Article provides that a refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period.
43. Therefore the Commissioner finds as a material fact that the deadline for the submission of claims for VAT refunds pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 was **30 September 2021**.
44. The Commissioner notes the contents of the Respondent’s email to the Appellant dated 10 May 2022 wherein it stated that the deadline for the submission of VAT refunds for 2021 was 30 June 2022. The Commissioner notes that the email from the Appellant querying the deadline date contained a GB tax registration number and, although the Appellant’s Northern Ireland address was contained at the very bottom of the email, the Respondent provided the date of 30 June 2022 for the submission of 2021 Vat refund claims. The Commissioner accepts the Respondent’s explanation in relation to the error which was contained in this email and notes that the Respondent accepts that the correct deadline date for the submission of 2021 VAT refund claims was 30 September 2022. However, the Commissioner can see no cause for confusion which this email may have created on the

Appellant's part in relation to a VAT refund claim for 2020. The Respondent was answering a query made on 10 May 2022 in relation to the tax year 2021. This appeal relates to the tax year 2020.

- i. The Appellant attempted to submit an application for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021 through the HMRC portal.

45. The Appellant claims that in April 2021 and again in July 2021 it attempted to submit a claim for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 through the HMRC portal and that it was prevented from doing so as the relevant section in the HMRC portal for claiming the VAT refunds for 2020 was not available.

46. The Commissioner asked Mr [REDACTED], on behalf of the Appellant, what dates the accounts person tried to access the HMRC system and he replied:

"I don't have dates but she would have been on several times. Now I was obviously managing the business, she would have made me aware that - and we didn't make much of a fuss of it because we were just awaiting the outcome and we assumed that everything would come back online and everything would be okay. You know I didn't think that we would need to be taking notes of every time we tried to access the system."

47. Mr [REDACTED] has given evidence that he himself accessed the HMRC portal in early July 2021 and successfully submitted an application for a VAT refund for January – June 2021 but he stated that on that same date he was unable to submit a claim for a refund for 2020. In support of this the Appellant has submitted a screenshot of a Whatsapp conversation which he had with the accounts person on 8 July 2021 wherein she stated:

"The EU vat submission was paused with HMRC for a good while, if you log onto the vat account you'll see if it's still not accepting submissions. It never gave an explanation why but I think its was to do with brexit???. Could be wrong tho. I've printed out a copy of the hmrc screen showing it's been paused by them, could be in my 2nd drawer along with the normal vat submission printouts?"

48. Mr [REDACTED] confirmed in evidence that a copy of the printout referred to in the Whatsapp message could not be found.

49. The Commissioner notes that no documentary evidence has been submitted by the Appellant which supports the claim that it attempted to submit an application for a VAT

refund through the HMRC portal prior to 20 September 2021. The Commissioner considers it reasonable to expect that the Appellant, in circumstances where as is claimed it was unable to submit a claim for a VAT refund for 2020 to HMRC on a number of occasions that it would have kept some record of its attempts to submit the claim. It did not. The Commissioner notes that under cross examination Mr ██████ stated that:

“Well, we did contact HMRC UK to ask them if they could provide us evidence that we tried to access the system and make a submission in early 2021, but they could not provide that information because a claim wasn't actually submitted. I wanted to provide you today with the evidence that we were on that system and we couldn't physically input the data but they could not provide that.”

50. The Commissioner notes that the Appellant did not submit evidence of them contacting HMRC seeking information as to their attempts to submit the claim such as an email.
51. The Commissioner does not accept as credible that no documentary evidence of an inability to submit the VAT refund claim through the HMRC portal was retained following Mr ██████'s accessing the HMRC in July 2021.
52. The Commissioner also notes that no evidence, whether oral or documentary, of contact between the Appellant and HMRC in relation to the claimed inability to submit a VAT refund claim for 2020 has been submitted. The Commissioner does not find Mr ██████'s statement that *“...we didn't make much of a fuss of it because we were just awaiting the outcome and we assumed that everything would come back online and everything would be okay”* credible. It is not credible that a business with a claim for a VAT refund of €63,845.36 would simply assume that everything would be “okay” in circumstances where it was unable to submit a claim for same.
53. The Commissioner further notes that the first contact the Appellant made with the Respondent in relation to the VAT refund claim for 2020 was on 17 May 2022 which was almost 8 months after the deadline of 20 September 2021.
54. In appeals before an Appeal Commissioner the burden of proof rests on the Appellant who must prove on the balance of probabilities that the contested tax is not payable. This is confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49 by Charleton J at paragraph 22:-

“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 Commissioner as to whether the taxpayer has shown that the relevant tax is not payable.”

55. The Commissioner does not accept that the Appellant has discharged the burden of proof in relation to its' claim that it attempted to submit an application for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021 through the HMRC portal.

56. Therefore this material fact is not accepted.

57. For clarity the Commissioner restates that the following material facts are accepted in this appeal:

- i. The deadline for the submission of claims for VAT refunds pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 was 30 September 2021;
- ii. The Appellant did not submit a claim for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021;
- iii. The Appellant is a company registered in Northern Ireland and trading from Northern Ireland. The Appellant is registered for VAT under the UK number [REDACTED].
- iv. On 17th May 2022 the Appellant corresponded with the Respondent by email requesting contact details of the correct person to speak to in relation to submitting a claim for an EU VAT refund for 2020.
- v. On 18 May 2022 the Respondent replied asking the Appellant to forward a detailed account of the circumstances pertaining to their query along with the necessary documentation and an explanation as to the Appellant's delay in addressing the issue.
- vi. On 23 June 2022 the Respondent refused the Appellant's application for a refund of VAT on the basis that the application had not been in time.

Analysis

58. The Commissioner has already accepted as a material fact that the Appellant did not submit a claim for a refund of VAT pursuant to the provisions of the 2008 Directive and / or the provisions of section 101 of the VATCA2010 for 2020 prior to 30 September 2021. There is no dispute about this and the Appellant accepts that it did not submit the claim prior to 30 September 2021.

59. Article 15(1) of the 2008 Directive provides that a refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11.
60. Section 101 of the VATCA2010 adopts the 2008 Directive into Irish law.
61. Article 51 of the Withdrawal Agreement provides that “*By way of derogation from paragraph 2 and from Article 15 of Council Directive 2008/9/EC (30), refund applications that relate to VAT which was paid in a Member State by a taxable person established in the United Kingdom, or which was paid in the United Kingdom by a taxable person established in a Member State, shall be submitted under the conditions of that Directive at the latest on 31 March 2021.*”
62. The effect of this provision of the Withdrawal Agreement was that a taxable person in the United Kingdom was obliged to submit a claim for a VAT refund under the 2008 Directive on or before 31 March 2021.
63. However, it is important to note the provisions of the Northern Ireland Protocol applied to taxable persons in Northern Ireland and that Article 8 of the Northern Ireland Protocol states that “*The provisions of Union law listed in Annex 3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland.*” Annex 3 of the Northern Ireland Protocol lists, *inter alia*, the 2008 Directive. This means that the 2008 Directive remained operative for taxable persons in Northern Ireland seeking to submit VAT refund claims. As previously noted Article 15(1) provides that a refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period.
64. Section 101(6)(b) of the VATCA2010 entitled “*Intra-Community refunds of tax*” provides that “*where the State is the Member State of refund, a refund application may be lodged only on or before September in the calendar year following the refund period*”.
65. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter “*Perrigo*”), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

“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: "... 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”.

66. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner finds that the words contained in section 101(6)(b) of the VATCA2010 are plain and their meaning is self-evident. The Commissioner finds that the words contained in section 101(6)(b) of the VATCA2010 mean that applications for refunds of VAT where the State is the Member State of refund may be lodged only on or before September in the calendar year following the refund period. Therefore for the year 2020 a refund application may only have been lodged or submitted on or before the 30 September 2021. The Commissioner finds that the wording of the provision does not provide for extenuating circumstances in which the deadline might be extended past the 30 September in the year following the year of refund, in this case 30 September 2021.

67. The Commissioner notes the submissions made on behalf of the Appellant which suggested that the HMRC were acting as agent for the Respondent. No detailed submissions in respect of the law in relation to this claim were made to the Commissioner despite her asking for same, save and except Counsel for the Applicant, when asked for same by the Commissioner, stated that he was relying on the “*cannons of general commercial law and agency*”. The argument in respect of agency was not developed any further than that. However, for completeness the Commissioner notes that Article 8 of the Northern Ireland Protocol provided that:

“In respect of Northern Ireland, the authorities of the United Kingdom shall be responsible for the application and the implementation of the provisions listed in Annex 3 to this Protocol, including the collection of VAT and excise duties.”

As the 2008 Directive is contained in Annex 3 of the Northern Ireland Protocol, it is clear that responsibility for the operation of the system of VAT refund claims by taxable persons

in Northern Ireland to Member States lies with the United Kingdom authorities and there is no basis for the Appellant's claim that HMRC act as an agent for the Respondent.

68. As a result of the above, the Commissioner finds that the burden of proof has not been discharged to satisfy the Commissioner that the decision of the Respondent dated 22 June 2022 to refuse the Appellant's claim for a refund of VAT under the provisions of the 2008 Directive was incorrect.

Determination

69. The Commissioner determines that the Appellant has failed to discharge the burden of proof in this appeal and that she has not succeeded in showing that the Respondent's decision of 22 June 2022 to refuse the Appellant's claim for a refund of VAT under the provisions of the 2008 Directive was incorrect.

70. The Commissioner therefore determines that that the Respondent's decision of 22 June 2022 to refuse the Appellant's claim for a refund of VAT under the provisions of the 2008 Directive shall stand.

71. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997") and in particular, section 949AL thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA1997.



Clare O'Driscoll
Appeal Commissioner
23 December 2022