



Between

44TACD2023



**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal against a Value Added Tax (“VAT”) assessment of the Revenue Commissioners (“the Respondent”) dated 1 September 2021 requiring the Appellant to repay VAT in the amount of €3,268.
2. This appeal is determined under section 949U of the Taxes Consolidation Act 1997 (“the TCA 1997”), both parties having consented to its determination without a hearing.

**Background**

3. The Appellant is a limited liability company established for the purpose of providing online services. On or about March 2017 the Appellant, which was then a start-up that had not made any taxable supplies of services, elected by way of TR2 form to register for VAT and become an “accountable person”. On the evidence of one of its two Directors, [REDACTED], this was done because at that point they “*planned on exceeding the €37,500 threshold*”. Notwithstanding this contention, it would appear that at section 25 of the TR2 form the Appellant calculated its expected annual turnover from supplies of taxable goods or services within the State to be €5,000.

4. On or about January 2021, after a little under four years of being an accountable person, the Appellant sought to cancel its registration for VAT so as to “*start the process of putting the company into voluntary liquidation.*” During the period of its registration the Appellant made no taxable supplies and thus returned no VAT to the Respondent.
5. During the same period, however, the Appellant claimed the refunding of VAT incurred on goods and/or services supplied to it in accordance with its right under section 59 of the VATCA 2010. In the period spanning the 18 taxable periods preceding the Appellant’s application to cancel its election, the following refunds were made:-

MONTH		AMOUNT
January – February 2018		€1,802
May – April 2018		€29
May – June 2018		€29
July – August 2018		€433
September – October 2018		€165
November – December 2018		€25
January – February 2019		€32
March – April 2019		€40
May – June 2019		€18
September – October 2019		€376
November – December 2019		€37
November – December 2020		€282
<b>TOTAL</b>		<b>€3,268</b>

6. As a consequence of the cancellation of registration, the Respondent sought the repayment of refunds of VAT that it had made to the Appellant over the 18 taxable periods preceding the application for cancellation.
7. On or about 1 September 2021 the Respondent issued a VAT assessment assessing the Appellant as having a liability of €3,268. This sum amounted to excess of VAT refunded to it over VAT paid to the Respondent in the 3 years prior to the cancellation of election.

### **Legislation and Guidelines**

8. A “taxable person” under the VATCA 2010 is defined as one who independently carries on a business in the community or elsewhere.
9. Section 5 of the VATCA 2010 provides:

“(1)

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

*(i) an accountable person, and*

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

10. A “taxable good” or “taxable service” is a service or good the supply of which is not an “exempted activity”.
11. Section 6 of the VATCA 2010 is entitled “*Persons not accountable unless they so elect*”. Subsection 1(c)(i) therein defines such a person as being:-

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

12. Section 6(1)(d) of the VATCA 2010 likewise defines a person not accountable unless they so elect as one:-

*“[...] whose supply of taxable goods and services the total consideration has not exceeded, and is not likely to exceed, the services threshold in any continuous period of 12 months.”*

13. The threshold relevant to the supply of services at the time material to this appeal was €37,500.

14. Section 8 of the VATCA 2010 is entitled "*Cancellation of Election*" and provides:-

"(1)

*(a) Provision may be made by regulations for the cancellation, at the request of a person, of an election made by the person under this Part and for the payment by him or her to the Revenue Commissioners, as a condition of such cancellation, of such a sum as is calculated in accordance with paragraph (b).*

*(b) The sum referred to in paragraph (a) is calculated by the formula—*

$$(A + B) - C$$

*where—*

*A is the amount of tax repaid to the person referred to in paragraph (a) for the period for which the election has effect in respect of tax borne or paid in relation to the supply of goods or services, other than services of the kind referred to in paragraph 11 of schedule 3,*

*B is the tax deductible in accordance with Chapter 1 of Part 8 in respect of intra-Community acquisitions made by that person during that period, and*

*C is the net total amount of tax (if any) paid by such person in accordance with Chapter 3 of Part 9 in relation to the supply of goods or services (other than services of the kind referred to in paragraph 11 of 40 Schedule 3) by that person in that same period."*

15. Regulation 3 of S.I. 639 of 2010 ("the VAT Regulations 2010") is entitled "*Election to be an accountable person and cancellation of such election*". Therein it is provided:-

*(1) In this Regulation –*

*[...]*

*"relevant taxable periods" means the taxable periods comprised in whichever of the periods referred to in paragraph (5)(b)(i) is appropriate;*

*[...]*

*(2) A person who, in accordance with section 6(1) of the Act, is not an accountable person but who wishes to elect to be such a person is required to register for tax by completing the application form.*

*(3) The submission of the application form referred to in paragraph (2) constitutes an election to be an accountable person. Such election is effective from the start-date until the date the election is cancelled in accordance with paragraph (7).*

*(4)*

*(a) A person who is an accountable person by reason only of an election made in accordance with paragraphs (2) and (3) is entitled to have such election cancelled, subject to fulfilling the requirements of paragraph (5).*

*(b) An accountable person who satisfies the Commissioners that, in accordance with section 7 of the Act, he or she may be treated as a person who is not an accountable person is entitled to have his or her registration as an accountable person cancelled, subject to fulfilling the requirements of paragraph (5).*

*(5) A person who wishes to have his or her election cancelled is required to—*

*(a) apply to the Commissioners in writing to have his or her election cancelled,*

*(b) furnish particulars to the Commissioners of—*

*(i) the total amount of tax paid by him or her in accordance with sections 76 and 77 of the Act on the supply by him or her of goods or services, other than services consisting of the letting of immovable goods referred to in paragraph 11 of Schedule 3 to the Act, in respect of whichever of the following periods is the shorter:*

*(I) all the taxable periods comprised in the period commencing with the start-date and ending with the end-date, or*

*(II) the 18 consecutive taxable periods up to the end-date,*

*(ii) the total amount of tax refunded to him or her in accordance with section 99(1) of the Act in respect of tax borne or paid in relation to the supply by him or her of goods or services, other than services consisting of the letting of immovable goods referred to in paragraph 11 of Schedule 3 to the Act, in respect of the relevant taxable periods, and*

*(iii) the tax deductible under Chapter 1 of Part 8 of the Act in respect of the intra-Community acquisition of goods, if any, made by him or her in the same relevant taxable periods,*

*and*

*(c) furnish a return in accordance with sections 76 and 77 of the Act for the request period, and at the same time pay to the Collector-General—*

*(i) any tax payable in respect of goods and services supplied by him or her during the request period, and*

*(ii) an amount equal to the excess (if any) of the sum of the tax referred to in clauses (ii) and (iii) of subparagraph (b) over the tax referred to in clause (i) of that subparagraph;*

*but, if that person supplied qualifying goods and services in accordance with section 56 of the Act during the relevant taxable periods, he or she may include in the amount referred to in subparagraph (b)(i) the tax that would have been chargeable had the supplies not been zero-rated under that section.*

*[...]*

*(7) Where the Commissioners are satisfied that the requirements of paragraph (5) and, where appropriate, paragraph (6) are fulfilled by the person concerned, they shall—*

*(a) notify that person in writing accordingly, and*

*(b) cancel that person's election to be an accountable person with effect from the end of the taxable period during which those requirements have been fulfilled."*

## **Submissions**

### *Appellant*

16. In its Statement of Case the Appellant argued that it should not be required to repay VAT on the grounds that it was mistaken in its expectation when registering that it was likely to exceed the €37,500 threshold. Summarising the position, the Appellant's Director, ■■■■■, stated:-

*“This was a genuine start up, backed by various state agencies which unfortunately didn’t succeed – I feel extremely grieved by the fact that I have to pay money back in relation to invoices genuinely incurred in the course of business.”*

*Respondent*

17. The Respondent submitted that the VAT Act 2010 and the VAT Regulations make provision for the clawback of VAT repayments made that exceed the VAT returned on sales and supplies of goods and services. It is obliged by legislation to seek this repayment from accountable persons who cancel their registration. Thus, the assessment under appeal should stand.

**Material Facts**

18. The facts material to this appeal are as follows:-

- the Appellant elected by way of the submission of a TR2 form to register for VAT on or about March 2017. The Appellant thus became an accountable person;
- over the course of being an accountable person registered for VAT, the Appellant claimed the refunding of VAT on goods and services supplied to it;
- the Appellant applied to cancel its election on or about January 2021;
- in the 18 taxable periods prior to the application for cancellation, the Appellant had received refunds in the amount of €3,268. During this same period the Appellant made no taxable supplies;
- on 1 September 2021 the Respondent assessed the Appellant as having a liability to repay the sum of €3,268.

**Analysis**

19. Under section 5 of the VATCA 2010, the definition of an accountable person obliged to account for and pay VAT to the Respondent is a person engaged in the supply of taxable goods or services. “Person” in this context includes a non-natural person such as the Appellant.

20. This definition of an accountable person is, however, qualified by section 6 of the same legislation. This provides that a person who supplies quantities of taxable goods or services falling below prescribed thresholds is not required to become an accountable person. Such a person becomes accountable for VAT only if they so elect. In respect of a person engaged in the supply of services, the applicable threshold is €37,500.

21. Under the VAT system, an accountable person may reclaim the VAT charged to them on goods or services they acquire for the purpose of making their own taxable supplies. This ensures that the price paid by consumers on finished goods or services does not include the VAT incurred by the suppliers themselves in making available the good or service.
22. In the instant case, the Appellant elected to become an accountable person. It did so despite indicating in its TR2 form that its expected annual turnover of suppliers of taxable goods or services was only €5,000.
23. During its registration the Appellant applied for and received repayments of VAT that it incurred on various goods and/or services that it acquired. It did so despite making no supplies itself.
24. Section 8 of the VATCA 2010 states that provision may be made by way of Statutory Instrument for the cancellation of an election to be an accountable person and, as a condition for cancellation, for the repayment of a sum constituting the excess of VAT refunds previously made to the accountable person over the VAT charged on its own supplies and paid over to the Respondent.
25. Pursuant to the power granted to it by the Oireachtas under section 120 of the VATCA 2010, the Respondent made the 2010 Regulations. Under Regulation 3(5) therein, it is a mandatory requirement that the cancelling person pay to the Collector General the aforementioned excess arising over the course of “*relevant taxable periods*”. These periods are defined as comprising the 18 taxable periods preceding the application to withdraw (overall equalling 3 years).
26. The premise of the Appellant’s appeal is that it made a mistake in registering in March 2017 and that, consequently, no repayment should be sought by the Respondent. This argument appears, in the first instance, to be misconceived. If the Appellant had not registered for VAT and remained a person that was not accountable, it would not have been entitled to seek the refunding of VAT incurred in its own acquisition of taxable supplies.
27. In any event, and crucially for the purpose of this determination, the function of the Commissioner as expressed by the Court of Appeal in *Lee v Revenue Commissioners [2018] IECA 18* is limited to establishing whether or not tax is owed by reference to the legislation that applies. This includes secondary legislation in the form of Statutory Instrument made by the Respondent pursuant to powers vested in it by the Oireachtas.
28. Regulation 3(5) of the VAT Regulations 2010 is clear in requiring the Appellant, as a condition for the cancellation of election, to make repayment in respect of the excess

arising from the “*relevant taxable periods*”. In the Appellant’s case this amounts to €3,268. While the Commissioner understands the disappointment of the Directors of the Appellant, who indicated through [REDACTED] that it was a start-up company that, despite initial expectations, did not prosper and make taxable supplies, there is no provision made for treatment of the kind sought by the Appellant and the Commissioner has no power to disregard the legislation that has been enacted and made. Consequently, the Commissioner finds that the Respondent’s assessment of 1 September 2021 must stand.

### **Determination**

29. The VAT assessment of 1 September 2021 raised by the Appellant in the amount of €3,268 stands affirmed.
30. This appeal is determined under section 949AK 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 only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Conor O'Higgins  
Appeal Commissioner  
9 January 2023