/ AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

76TACD2023

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against assessments to Value Added Taxation ("VAT") and Corporation Tax ("CT") raised by the Revenue Commissioners ("the Respondent") on various dates in 2018 and 2019. The amount of tax at issue, including surcharges is €112,075.

2. The assessments were appealed under reference numbers 1279/18, 882/19, 883/19 and 899/19. Following a direction of the Commission on 2nd January 2020, in accordance with the provisions of section 949E (2) (b) Taxes Consolidation Act 1997 ("TCA 1997"), the appeals were heard at the same time under the merged reference number 1279/18 as similar facts are in issue.

Background

3. The Appellant trades as a restaurant with a sit-down and take away service. It commenced operations on [redacted] and registered for PAYE/PRSI/USC ("PREM"), VAT and CT on [redacted].

4. Following a series of "unannounced compliance visits" by the Respondent to the Appellant's business during 2017, the Appellant was selected for a Revenue Audit ("audit") by the Respondent. Whilst generally taxpayers are notified of a compliance intervention, the Respondent may call to a taxpayer's business without a prior appointment. This is referred to as an "unannounced compliance visit" and may consist of a "spot-check" of the taxpayer's records or other various compliance checks in operation by the Respondent.

5. In the Appellant's case, the unannounced compliance visits consisted of a number of sample purchases made by the Respondent on a variety of dates. At a later stage, the Respondent sought to verify that its test purchases were properly recorded in the Appellant's business records and more particularly that the associated tax liabilities on those transactions had been accurately recorded and discharged by the Appellant.

6. Subsequent to the initial test purchases, the Respondent conducted a final test purchase with the Appellant on 15th September 2017. At the conclusion of that test purchase, the Appellant hand delivered a Notification of Audit letter to the Appellant.

7. The scope of the audit was a review of CT for the period 1st November 2014 to 31st October 2016, VAT for the period 1st November 2014 to July/August 2017 and PREM for the period 1st January 2014 to 31st December 2016. The audit was scheduled to take place on 10th to 12th October 2017 but following communication from the Appellant's agent the audit was re-scheduled for 21st to 23rd November 2017. Subsequently, owing to one of the Appellant director's travel plans, the audit was further rescheduled to 12th December 2017.

8. The audit commenced on that date and owing to certain records not being available and discrepancies being noted in the available records, the audit continued throughout 2018. Additionally, owing to the noted discrepancies the Respondent notified the Appellant that it was extending the period of the audit in respect of CT to cover the additional year end 31st October 2017.

9. In January 2018, the Respondent received the Appellant's Merchant Acquirer ("MA") line level data and attempted to reconcile that data to the information contained on the Appellant's Electronic Point of Sale System ("EPOS"). A MA is a financial institution that processes credit and debit card transactions for a company or merchant and thus the information obtained by the Respondent provided details of all the Appellant's sales which had been paid by debit or credit card over a period of time.

10. The results of that reconciliation were not consistent as substantial sums shown in the MA line level data were not matched to the Appellant's EPOS readings. The Respondent noted that the "ORDNUM" (the "ORDNUM" is the number which runs in sequence to identify

individual sales) sequences had significant gaps within them which indicated that a number of sales were removed from the EPOS. The effect of sales being removed from the EPOS would be an under-declaration of sales and an associated under-declaration of CT and VAT on those "missing" sales.

11. In addition to the above, the Respondent conducted an analysis of the differential VAT rates being used by the Appellant and following completion of this exercise, it formed the view that the Appellant was under-returning VAT at the higher rate (23%) and over-returning VAT at the reduced rate (9%).

12. For the purpose of comprehension, hot food (whether consumed on or off the premises) is generally liable to VAT at the reduced rate whereas minerals and alcohol sales are generally liable at the standard rate. The result of under-declaring sales at the higher rate and over-declaring sales at the reduced rate is that less VAT would be payable by a taxpayer than would otherwise be due had the taxpayer adapted the correct method.

13. On the basis of the incomplete information available to the Respondent, the Respondent prepared estimates to tax all of which form the figures under appeal. Notices of assessment were issued to the Appellant for the periods under appeal on 2nd December 2018, 12th December 2018, 2nd August 2019 and 7th August 2019 seeking the combined sum of €112,075. A breakdown of those figures is as follows:

Period	Tax Type	Amount
1/11/2015 - 31/10/2016	CT*	8,210
1/11/2016-31/10/2017	CT*	21,739
Nov/Dec 14 - Nov/Dec 15	VAT	35,369
Jan/Feb 16 - Nov/Dec 16	VAT	31,274
Jan/Feb 17 - May/June 17	VAT	15,483
		112,075
*These figures include a 10% surcharge		

14. The Appellant who was not in agreement with the Notice of Assessments, lodged appeals with the Commission. The consolidated appeal hearing was held on 29th November 2022 and the Appellant was represented by its agent. The Respondent was represented by Counsel.

Legislation and Guidelines

15. The following legislation is relevant to this appeal.

Section 886 TCA 1997

Obligation to keep certain records.

(1)In this section—s886 tca 1997

"linking documents" means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;

"records" includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to—

(a) all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,

(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,

(c) the assets and liabilities of the trade, profession or other activity referred to in paragraph (a) or (b), and

(d) all transactions which constitute an acquisition or disposal of an asset for capital gains tax purposes.

(2)(a)Every person who—

(i) on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,

(ii) is chargeable to tax under Schedule D or F in respect of any other source of income, or

(iii) is chargeable to capital gains tax in respect of chargeable gains,

shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.

(b)The records shall be kept on a continuous and consistent basis, that is, the entries in the records shall be made in a timely manner and be consistent from one year to the next.

(c) Where accounts are made up to show the profits or gains from any such trade, profession or activity, or in relation to a source of income, of any person, that person shall retain, or cause to be retained on that person's behalf, linking documents.

…

(3) Records required to be kept or retained by virtue of this section shall be kept—

(a) in written form in an official language of the State, or

(b) subject to section 887(2), by means of any electronic, photographic or other process.

(4) (a) Notwithstanding any other law, linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records-

(i) for a period of 6 years after the completion of the transactions, acts or operations to which they relate, or

(ii) in the case of a person who fails to comply with Chapter 3 of Part 41A requiring the preparation and delivery of a return on or before the specified return date for a year of assessment or an accounting period, as the case may be, until the expiry of a period of 6 years from the end of the year of assessment or accounting period, as the case may be, in which a return has been delivered showing the profits or gains or chargeable gains derived from those transactions, acts or operations, or

(iii) where the transaction, act or operation is the subject of—

(I) an inquiry or investigation started by the Revenue Commissioners or by a Revenue officer into any matters to which this Act relates.

(II) a claim under a provision of this Act,

(III) proceedings relating to any matter to which this Act relates,

linking documents and records shall be retained by the person required to keep the records for the 6 year period and until such time as—

(A) the enquiry or investigation has been completed or the claim has been determined, and

(B) any appeal to Appeal Commissioners in relation to that enquiry or the determination of that claim or to any other matter to which the Act relates, has become final and conclusive, and

(C) any proceedings in relation to the outcome of the inquiry or investigation or the determination of that claim or that appeal, or to any other matter to which the Act relates, has been finally determined, and

(D) the time limit for instituting any appeal or proceedings or any further appeal or proceedings has expired.

(aa) Where a person to whom this section applies ceases to be a person to whom subparagraph (i), (ii) or (iii), as appropriate, of subsection (2) (a) applies, that person (or such other person on that person's behalf) required to keep the linking documents and records shall keep or retain the linking documents and records notwithstanding that a period of 5 years has elapsed from the date of such cessation.

…

(5) Any person who fails to comply with subsection (2), (3), (4), (4A) or (4B) in respect of any records or linking documents in relation to a return for any year of assessment or accounting period shall be liable to a penalty of €3,000; but a penalty shall not be imposed under this subsection if it is proved that no person is chargeable to tax in respect of the profits or gains for that year of assessment or accounting period, as the case may be.

Section 1084 TCA 1997 - Surcharge for late returns.

(1)(a)In this section—

"chargeable person", in relation to a year of assessment or an accounting period, means a person who is a chargeable person for the purposes of Part 41A;

"return of income" means a return, statement, declaration or list which a person is required to deliver to the inspector by reason of a notice given by the inspector under any one or more of the specified provisions, and includes a return which a chargeable person is required to deliver under Chapter 3 of Part 41A;

"specified return date for the chargeable period" has the same meaning as in section 959A;

"specified provisions" means sections 877 to 881 and 884, paragraphs (a) and (d) of section 888(2), and section 1023;

"tax" means income tax, corporation tax or capital gains tax, as may be appropriate.

(b)For the purposes of this section—

(i)(I)subject to clause (II), where a person deliberately delivers an incorrect return of income as set out in section 1077E(2) or carelessly delivers an incorrect return of income as set out in section 1077E(5) or deliberately or carelessly delivers an incorrect return of income as set out in section 1077F(2), as appropriate, on or before the specified return date for the chargeable period, the person shall be deemed to have failed to deliver the return of income on or before that date unless the error in the return of income is remedied on or before that date,

(II) clause (I) shall not apply where a person—

(A) deliberately delivers an incorrect return of income as set out in section 1077E(2) or carelessly delivers an incorrect return of income as set out in on or before the specified return date for the chargeable period, and

(B) pays the full amount of any penalty referred to in either of the provisions referred to in subclause (A) to which the person is liable,

(ia) where a person who is a specified person in relation to the delivery of a specified return for the purposes of any regulations made under section 917EA delivers a return of income on or before the specified return date for the chargeable period but does so in a form other than that required by any such regulations the person shall be deemed to have delivered an incorrect return on or before the specified return date for the chargeable period and subparagraph (ii) shall apply accordingly,

(ib) where a person delivers a return of income for a chargeable period (within the meaning of section 321(2)) and fails to include on the prescribed form the details required by the form in relation to any exemption, allowance, deduction, credit or other relief the person is claiming (in this subparagraph referred to as

the "specified details") and the specified details are stated on the form to be details to which this subparagraph refers, then, without prejudice to any other basis on which a person may be liable to the surcharge referred to in subsection (2), the person shall be deemed to have failed to deliver the return of income on or before the specified return date for the chargeable period and to have delivered the return of income before the expiry of 2 months from that specified return date; but this subparagraph shall not apply unless, after the return has been delivered, it had come to the person's notice or had been brought to the person's attention that specified details had not been included on the form and the person failed to remedy matters without unreasonable delay,

(ii) where a person delivers an incorrect return of income on or before the specified return date for the chargeable period but does so neither deliberately nor carelessly and it comes to the person's notice (or, if he or she has died, to the notice of his or her personal representatives) that it is incorrect, the person shall be deemed to have failed to deliver the return of income on or before the specified return date for the chargeable period unless the error in the return of income is remedied without unreasonable delay,

(iii) where a person delivers a return of income on or before the specified return date for the chargeable period but the inspector, by reason of being dissatisfied with any statement of profits or gains arising to the person from any trade or profession which is contained in the return of income, requires the person, by notice in writing served on the person under section 900, to do anything, the person shall be deemed not to have delivered the return of income on or before the specified return date for the chargeable period unless the person does that thing within the time specified in the notice, and

(iv) references to such of the specified provisions as are applied, subject to any necessary modifications, in relation to capital gains tax by section 913 shall be construed as including references to those provisions as so applied.

(2)(a) Subject to paragraph (b), where in relation to a year of assessment or accounting period a chargeable person fails to deliver a return of income on or before the specified return date for the chargeable period, any amount of tax for that year of assessment or accounting period which apart from this section is or would be contained in an assessment to tax made or to be made on the chargeable person shall be increased by an amount (in this subsection referred to as "the surcharge") equal to—

(i) 5 per cent of that amount of tax, subject to a maximum increased amount of €12,695, where the return of income is delivered before the expiry of 2 months from the specified return date for the chargeable period, and

(ii) 10 per cent of that amount of tax, subject to a maximum increased amount of €63,485, where the return of income is not delivered before the expiry of 2 months from the specified return date for the chargeable period,

and, except where the surcharge arises by virtue of subparagraph (ib) of subsection (1)(b), if the tax contained in the assessment is not the amount of tax as so increased, then, the provisions of the Tax Acts and the Capital Gains Tax Acts (apart from this section), including in particular those provisions relating to the collection and recovery of tax and the payment of interest on unpaid tax, shall apply as if the tax contained in the assessment to tax were the amount of tax as so increased.

(b) In determining the amount of the surcharge, the tax contained in the assessment to tax shall be deemed to be reduced by the aggregate of—

(i) any tax deducted by virtue of any of the provisions of the Tax Acts or the Capital Gains Tax Acts from any income, profits or chargeable gains charged in the assessment to tax in so far as that tax has not been repaid or is not repayable to the chargeable person and in so far as the tax so deducted may be set off against the tax and contained in the assessment to tax,

(iii) any other amounts which are set off in the assessment to tax against the tax contained in that assessment.

(3) In the case of a person—

(a) who is a director within the meaning of section 116, or

(b) to whom section 1017 or 1031C applies and whose spouse or civil partner is a director within the meaning of section 116,

subsection (2) (b) (i) shall not apply in respect of any tax deducted under Chapter 4 of Part 42 in determining the amount of a surcharge under this section.

(4) (a) Notwithstanding subsections (1) to (3), the specified return date for the chargeable period, being a year of assessment (in paragraph (b) referred to as "the first-mentioned year of assessment") to which section 66(1) applies, shall be the date which is the specified return date for the year of assessment following that year.

(b) Paragraph (a) shall only apply if throughout the first-mentioned year of assessment the chargeable person or that person's spouse or civil partner, not being a spouse in relation to whom section 1016 applies, or a civil partner in relation to whom section 1031B applies, for that year of assessment, was not carrying on a trade or profession set up and commenced in a previous year of assessment.

(5) This section shall apply in relation to an amount of preliminary tax (within the meaning of Part 41A) paid under Chapter 7 of that Part as it applies to an amount of tax specified in an assessment.

Section 949E TCA 1997

Directions

(1) The Appeal Commissioners may, on their own initiative or on the application of a party, give a direction at any time to a party in relation to the conduct or disposal of an appeal, including a direction amending an earlier direction or suspending or setting aside its operation.

(2) Without prejudice to the generality of subsection (1), the matters in relation to which the Appeal Commissioners may give a direction include—

(a)requiring a party to provide, to the Appeal Commissioners or to another party, documents, statements, accounts, returns, computations, explanations, particulars, records, certificates, declarations, schedules and such other items or information as they consider relevant to the adjudication of the matter under appeal,

(b) consolidating or hearing together 2 or more appeals raising common or related issues,

….

Section 959AD TCA 1997

Chargeable persons and other persons: Revenue assessment and amendment of assessments where there is fraud or neglect.

(1) In this section 'neglect' means negligence or a failure to give any notice, to make any return, statement or declaration, or to produce or furnish any list, document or other information required by or under the Acts.

(2) For the purposes of subsection (1), a person shall be deemed not to have failed to do anything required to be done within a limited time if the person did it within such further time, if any, as the Revenue Commissioners or Revenue officer concerned may have allowed and, where a person had a reasonable excuse for not doing anything required to be done, the person shall be deemed not to have failed to do it if the person did it without unreasonable delay after the excuse had ceased.

(3) Notwithstanding sections 959AA and 959AB, where a Revenue officer has reasonable grounds for believing that any form of fraud or neglect has been committed by or on behalf of a person in connection with or in relation to tax due for a chargeable period, a Revenue officer may, at any time, make a Revenue assessment on that person for the chargeable period.

(4) An assessment to which this section applies shall be made by a Revenue officer in such sum as, according to the best of the officer's judgment, ought to be charged on the person involved.

(5) In the circumstances referred to in subsection (3), a Revenue officer may, at any time, amend a Revenue assessment on, or a self assessment in relation to, a person for a chargeable period in such manner as the officer considers necessary.

Section 84 Value-Added Tax Consolidation Act 2010 ("VATCA 2010")

Duty to keep records.

(1) Every accountable person shall, in accordance with regulations, keep full and true records of all transactions which affect or may affect his or her liability to tax and entitlement to deductibility.

(2) Every person (other than an accountable person) who supplies goods or services in the course or furtherance of business shall keep all invoices issued to him or her in connection with the supply of goods or services to him or her for the purpose of such business.

(3) The following:

(a) records kept by a person pursuant to this Chapter or section 124 (7) and that are in the power, possession or procurement of the person;

(b) any books, invoices, copies of customs entries, credit notes, debit notes, receipts, accounts, vouchers, bank statements or other documents whatsoever which relate to the supply of goods or services, the intra-Community acquisition of goods, or the importation of goods by the person and that are in the power, possession or procurement of the person; and

(c) in the case of any such book, invoice, credit note, debit note, receipt, account, voucher, or other document, which has been issued by the person to another person, any copy thereof which is in the power, possession or procurement of the person,

shall, subject to subsection (4), be retained in that person's power, possession or procurement for a period of 6 years from the date of the latest transaction to which the records, invoices, or any of the other documents, relate.

(4) Notwithstanding the retention period specified in subsection (3), the following retention periods shall apply:

(a) where a person acquired or developed immovable goods to which section 4 of the repealed enactment applied, the period for which the person shall retain records pursuant to this Chapter in relation to that person's acquisition or development of those immovable goods shall be the duration that such person holds a taxable interest in such goods plus a further period of 6 years;

(b) where a person exercised a waiver of exemption from tax in accordance with section 7 of the repealed enactment, the period for which the person shall retain records pursuant to this Chapter shall be the duration of the waiver plus a further period of 6 years.

(5) This Chapter—

(a) shall not require the retention of records or invoices or any of the other documents in respect of which the Revenue Commissioners notify the person concerned that retention is not required, and

(b) shall not apply to the books and papers of a company which have been disposed of in accordance with section 305 (1) of the Companies Act 1963.

Section 111 VATCA 2010

(1) Where, in relation to any period, the inspector of taxes, or such other officer as the Revenue Commissioners may authorise to exercise the powers conferred by this section (in this section referred to as "other officer"), has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person in any of the following circumstances:

(a) the total amount of tax payable by the person was greater than the total amount of tax (if any) paid by that person;

(b) the total amount of tax refunded to the person in accordance with section 99 (1) was greater than the amount (if any) properly refundable to that person;

(c) an amount of tax is payable by the person and a refund under section 99 (1) has been made to the person,

then, without prejudice to any other action which may be taken, the inspector or other officer—

(i) may, in accordance with regulations but subject to section 113, make an assessment in one sum of the total amount of tax which in his or her opinion should have been paid or the total amount of tax (including a nil amount) which in accordance with section 99 (1) should have been refunded, as the case may be, in respect of such period, and

(ii) may serve a notice on the person specifying—

(I) the total amount of tax so assessed,

(II) the total amount of tax (if any) paid by the person or refunded to the person in relation to such period, and

(III) the total amount so due and payable (referred to subsequently in this section as "the amount due").

Documentation Presented to the Commission

Appellant

16. The Appellant provided an excel spreadsheet entitled "2015 – 2017". Included within this spreadsheet was the following information:

- The gross sales figures returned by the Appellant for the periods November/December 2014 to May/June 2017. The total of these sales was €1,091,698.75 and they showed VAT included within them of €110,986.41.

- In a separate column on that spreadsheet, the Appellant recorded a narrative of "gross sales per Revenue" in the sum of €1,209,050.38 and showed the VAT included within that figure as €117,081.63.

- Thirdly, the spreadsheet contained a revised calculation of VAT on sales originally returned by the Appellant. These sales were split for VAT purposes on a revised percentage split of 76% at the 13.5% rate of VAT, 26% at the 21% rate of VAT and 1% at the O% rate of VAT. This split was conducted on the basis of the workings the Respondent had undertaken on the EPOS analysis and represented what the Respondent believed was the correct re-classification of sales of hot food, minerals and alcohol and gift vouchers respectively [See below at paragraph 18 for further].

- An additional spreadsheet entitled "voluntary disclosure workings". This spreadsheet recorded additional VAT payable by the Appellant on the rec-classification of sales in the sum of €8,979.60 and additional VAT on unrecorded sales in the sum of €14,095. The total of these sums was €23,075 and the Appellant provided a copy of a bank draft payable to the Respondent in that sum together with an additional amount of €5,000 in respect of interest. Finally, within that spreadsheet the Appellant provided a tab entitled additional purchases which showed a total amount of €40,994 excluding VAT and a separate VAT component of €1,494.20.

- Financial Statements for the year ended [redacted] These financial statements disclosed the following figures:

Sales	€[redacted]
Cost of Sales	€[redacted]
Gross Profit	€[redacted]
Gross Profit percentage	61%

- Financial Statements for the year ended [redacted]. These financial statements disclosed the following figures:

Sales	€[redacted]
Cost of Sales	€1[redacted]
Gross Profit	€[redacted]
Gross Profit percentage	63%

- A copy of the Appellant's Corporation Tax Return for the accounting period 1st [redacted]. Included within this return was corporation tax losses carried forward to future accounting periods in the sum of €[redacted]

Respondent

17. The Respondent furnished three lever arch folders of documentation to the Commission. These booklets contained workings which explained how the Respondent calculated the figures for the additional VAT and CT sought on the assessments under appeal.

18. The front of each folder contained a document entitled "synopsis of case". Within this 26 page document, it included:

    - A brief outline of the Appellant's audit which summarised the trading history of the Appellant's business, details of the test purchase visits, a summary of the initial interview with the Appellant's representatives and an overview of the methodology used in computing the liabilities under appeal.
    - A summary of the test purchases and the trace of those transactions through the Appellant's EPOS.
    - Details of the ORDNUM gaps on the Appellant's EPOS.
    - A reconciliation of the Appellant's EPOS sales data against the MA line level data.
    - Gap detection on the EPOS sales data order number.
    - A review of a reconciliation completed by the Appellant's agent for the period 18th June 2017 until 27th June 2017.
    - A summary of a meeting with the Appellant regarding "cash back transactions". This refers to a process whereby a customer of the Appellant pays for a meal by credit or debit card and requests an amount of cash back in addition to the cost of the meal. This summary confirms that the Appellant does not offer cash

back transactions to its customers which contradicts previous information provided by the Appellant.

- A review of the Appellant's procedures in relation to manual books and records. This review focuses solely on the Appellant's sales and sales receipts.
- An overview of the Appellant's bank account. This overview focuses on whether the amounts received from the MA were lodged into the Appellant's bank account and confirms that they were.
- An overview of how the Appellant's "vat-split" of sales were computed. The Respondent subsequently produced workings which confirmed that the splits the Appellant was using [82% Food/18% Drink] were inconsistent with the information produced from the EPOS system. That system recorded the split as 73% Food/26% Drink/1% voucher.
- For the purpose of comprehension, VAT on gift vouchers is treated differently and this differential treatment is dependent upon whether the voucher may be used to acquire goods or services at one specific rate or a variety of rates. In the case of the vouchers sold by the Appellant, as the beneficiary could redeem the voucher against food (liable to VAT at the reduced rate) or against minerals and alcohol (liable at the standard rate) in order to ensure the correct VAT treatment is applied, the vouchers are initially sold at the 0% rate of VAT and the appropriate VAT is then calculated on redemption of the voucher[1].
- A computation of the Appellant's additional VAT liability arising in respect of the reclassification of the VAT split. For the period under appeal this amounted to €20,671.
- The additional VAT liability arising from the EPOS data reconciliation. This was broken into two periods, November 2014 – June 2016 (€38,395) and July 2016 to June 2017 (€23,247). The split between the VAT rates was computed on these additional sales using the re-calculated split derived from the Respondent's earlier workings.
- Details workings and exhibits for all periods under appeal.

[1] The Respondent has produced a comprehensive guide to the VAT treatment of gift vouchers. See https://www.revenue.ie/en/tax-professionals/tdm/value-added-tax/part05-taxable-amount/single-purpose-vouchers-and-multi-purpose-vouchers/single-purpose-vouchers-and-multi-purpose-vouchers.pdf

Submissions

Appellant

19. The Appellant's agent submitted that the Appellant's restaurant was a small business and that there were a number of competitors in the locality. As a result of these factors, the Appellant's agent submitted that the Appellant was required to offer a number of promotional offers and this resulted in the Appellant's business having a lower than average profit margin. The Appellant's agent submitted that the additional figures utilised by the Respondent were not reasonable for the restaurant sector and could not have been achieved even if the restaurant was working at full capacity.

20. Agent for the Appellant submitted that there was a change of EPOS in 2014 to a more modern system and as a result of the changeover some discrepancies arose. The Appellant's agent submitted that these discrepancies were not apparent until the Respondent commenced its audit.

21. The Appellant's agent submitted that the EPOS system in use was not an integrated card and cash system and that a number of discrepancies noted by the Respondent arose as a result of customers "splitting bills", paying in cash or customers not being charged for food as a result of complaints such as take-away orders not arriving on time. The Appellants agent submitted that these discrepancies caused inaccurate "z reads" ("z reads" are the daily totals produced by an EPOS) being produced.

22. The Appellant's agent submitted that as the Appellant did not calculate its weekly turnover and associated liabilities by reference to the reports produced by the EPOS system but rather by regard to weekly cash sheets, then the Respondent had erred in calculating the alleged additional sales by reference to the EPOS.

23. The Appellant's agent produced one such weekly cash sheet (completed in excel format with handwritten/typed entries) and submitted that as this showed the "missing" test purchase conducted by the Respondent was included within it, then this was evidence that the Appellant had correctly recorded that transaction in its accounting records, contrary to the Appellant's belief (see below at paragraph 32). The Appellant's agent further submitted that as the Respondent had conducted an exercise which confirmed that all the MA sums received by the Appellant were lodged into its bank account then this was further testament to the integrity of the Appellant's accounting system.

24. The Appellant's agent submitted as soon as the Respondent notified the Appellant of the discrepancies within its EPOS, the Appellant undertook a comprehensive review of its system in an attempt to rectify any noted errors. The Appellant's agent stated that this

review did result in under-returns and that these errors arose as a result of the change of its EPOS system in 2014. The Appellant's agent summarised those under-returns of VAT as follows:

2014	€1,926
2015	€11,485
2016	€6,567
2017	€3,097
Total	€23,075

25. The Appellant's agent advised as soon as the Appellant had finalised these under-returns on 11th December 2020, it paid the Respondent the sum of €23,075 by bank draft and a further €5,000 in interest on a "without prejudice" basis since it had at that stage lodged its appeal. The Appellant's agent submitted that the liability computed by the Appellant was the true figure due and owing by the Appellant and as such there was no basis for the Commission to find that there was any further sums due by the Appellant.

26. The Appellant's agent submitted that there was no capacity for the Appellant's directors to raise any further sums as the amount of the "without prejudice" payment paid to the Respondent, €28,075 was obtained from a re-mortgage of the Appellant director's residences. The Appellant's agent stated that as there was no prospect of any additional funds being raised by the Appellant or its directors to discharge any further liabilities then a finding by the Commission that further sums were payable would result in undue hardship and a loss of livelihoods. The Appellant's agent submitted that the correct liability had been paid by the Appellant and given that it had implemented appropriate controls within its business, then there was no risk of further tax loss to the exchequer.

27. The Appellant's agent opened the case of *Hanrahan v Merck Sharp Dohme (Ireland) Ltd* 1987 WJSC-HC 88 ("*Hanrahan*"), *where* it was held at paragraph 20:

> "*The rationalise behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof*".

28. The Appellant's agent submitted that as it was the Respondent who alleged that the Appellant had under-returned its liabilities, then in applying the principles promulgated in *Hanrahan*, it was incumbent on the Respondent to provide it with detailed workings

explaining how it arrived at the figures forming the amounts under appeal. The Appellant's agent submitted that despite this position, the Respondent did not properly explain how it arrived at the quantum of its assessments and as such the Appellant had to operate "in the dark" in its attempts to make adequate disclosures to settle its liabilities.

29. In conclusion, the Appellant's agent submitted that the Respondent's assessments were flawed, exaggerated and incorrect and as it had paid the amount properly due to the Respondent, the Commission should allow the Appellant's appeal.

Respondent

30. The Respondent's Counsel advised at the opening of the audit the Appellant made a voluntary disclosure in the sum of €1,884.77 in respect of an amount of VAT over claimed on renovations to its restaurant premises. A voluntary disclosure is information given to the Respondent in advance of it examining the taxpayer's records if the taxpayer has not reported all of their income or gains or if the taxpayer has made an error in completing its tax returns.

31. The Respondent's Counsel advised following the commencement of the audit, the Respondent having extracted digital information and examined some manual records, was required to defer the audit as it discovered that key information was not available.

32. Subsequently when that information was made available, the Respondent's Counsel stated that the Respondent conducted an extensive review of the Appellant's records for the period under review. The Respondent's Counsel submitted that this review revealed the following anomalies:

    - Substantial sums shown in the MA line level data were not matched to the Appellant's EPOS.
    - The ORDNUM sequences contained numerous transactional gaps.
    - The numerical sales per the EPOS did not match the number of MA transactions and there was a significant variance in those values i.e. the MA statements showed a specific number of card transactions and the EPOS displayed a lesser number of transactions.
    - In some instances the MA transactional value did not agree to the sales per the EPOS i.e. some MA transactions showed values of €400 while the sale system did not record any sales in that amount on the same day.

- The euro monthly sales total of the MA transactional report was significantly higher than the sales recorded on the Appellant's EPOS.
- One of the Appellant's test purchases was not recorded on the Appellant's EPOS system.
- The "departmental analysis" shown on the Appellant's EPOS did not agree to the VAT split of sales returned by the Appellant. A "departmental analysis" is a report produced by an EPOS which splits the VAT across the various different VAT rates. The departmental analysis produced by the EPOS showed that the correct VAT split was 73% food, 26% drink, 1% gift vouchers whereas the split operated by the Appellant in computing its returns was 82% food and 18% drink.
- An analysis of the MA line level data and the Appellant's bank account showed that while the Appellant's bank account showed the MA transactions being lodged, lesser sums were returned on the Appellant's VAT returns.

33. Following the review, the Respondent's Counsel stated the Respondent requested that the Appellant provide a reconciliation of sales for a specific period to assist the Respondent with its workings. The Respondent's Counsel submitted that the Appellant's subsequently provided reconciliation similarly contained discrepancies which it attempted to explain as arising from:
    - One customer paying for a number of tables which would result in a mismatch between customer orders and payments;
    - The various meal courses being entered into the EPOS at different stages of the meal progression which would result in there being more entries in the EPOS system than the transaction occurring (for example, the starter being rang into the EPOS, then the main course, then the dessert, and the customer paying for those transactions by one payment).
    - Customers not paying for meals following complaints such as take-away deliveries arriving late or cold or such like.
34. The Respondent's Counsel submitted that the onus of proof in the appeal was on the Appellant and that those explanations were not supported by any or sufficient evidence and as such were "simply not credible". In addition, the Respondent's Counsel submitted that this lack of credibility was supported by the Appellant being uncooperative or selective in providing information to the Respondent. The Respondent's Counsel cited examples of

the Appellant providing photographs of periods where there were no gaps in handwritten sales records but being unable to do so for periods in which the Respondent noticed gaps in the EPOS and a refusal to make a laptop situated at the Appellant's premises available on the first day of the audit on the grounds that it was a personal computer belonging to one of the Appellant's staff only to be provided with the same laptop at a later stage in the audit process.

35. The Respondent's Counsel advised following the investigation into the Appellant's affairs the Respondent concluded that the Appellant had under-declared its tax liabilities and as the Appellant was providing unreliable information, the Respondent was required to conduct its own calculations of what it believed was the Appellant's under-declared tax liabilities.

36. In order to do this, Counsel for the Respondent advised that the Respondent identified the number of gaps in the ORNUM documentation for a given VAT period, identified the number of MA transactions not included in the EPOS, calculated an average value of MA transactions not so included, and from there, calculated an amount in respect of suppressed sales. These suppressed sales formed the basis for both the CT and VAT assessments for the period under appeal and the Commission was provided with the copy of the three lever arch folders which contained the workings that the Respondent undertook.

37. In addition, to those workings, utilising the information gleamed from the audit, the Respondent's Counsel stated that the Respondent split the Appellant's sales for the period under review (both those recorded on its EPOS and those identified by the Respondent's workings) across the different VAT rates. The Respondent's Counsel advised that these workings indicated that the Appellant had under-returned sales at the higher rate of VAT and over-returned VAT on sales at the lower rate.

38. The Respondents' Counsel submitted that as the Respondent's assessable figures for the period under appeal were obtained from a careful examination of the Appellant's own books and records, then the liabilities calculated by the Respondent as evidenced in the supplied folders of source documentation ought to be upheld by the Commission.

Material Facts

39. The Commissioner finds the following material facts:-

    39.1. The Appellant was registered for VAT and CT on [redacted].

39.2. The Appellant was selected for an audit by the Respondent on 15th November 2017.

39.3. At the commencement of the audit, the Appellant made a voluntary disclosure of €1,884.77 in respect of VAT reclaimed on renovations to its premises. The Appellant made no submissions to the Commission regarding this disclosure.

39.4. The scope of this audit included VAT for the period 1st November 2014 to 31st August 2017 and CT for the period 1st November 2014 to 31st October 2016.

39.5. The Respondent subsequently extended the period of the audit to include CT for the period 1st November 2016 to 31st October 2017.

39.6. The Appellant's MA data did not properly reconcile with its EPOS. The "gaps" in the EPOS indicated that a number of sales were missing or removed from that system. In addition, reports obtained from the EPOS indicated that the Appellant was not applying the produced "VAT percentage splits" accurately.

39.7. The Appellant in computing its tax liabilities ignored the information provided by its EPOS system and sought instead to use computerised spreadsheets which were manually completed.

39.8. Those spreadsheets are capable of manipulation by virtue of how they are computed and as such an unreliable source for ascertaining the Appellant's sales.

39.9. The Respondent issued additional assessments to VAT in the sum of €35,369 for the period November/December 2014 to November/December 2015, €31,274 for the period January/February 2016 to November/December 2016 and €15,483 for the period January/February 2017 to May/June 2017. These assessments represented VAT chargeable of €20,671 arising from the Appellant being deemed to have utilised the incorrect "VAT split" and €61,455 in respect of VAT on under-returned sales.

39.10. The Respondent further issued assessments to corporation tax for the financial year ending [redacted] in the sum of €8,210 and €21,739 for the financial year ending [redacted]. Those liabilities included a 10% surcharge arising from the Appellant being deemed to have filed negligent CT returns.

39.11. As the rate of corporation tax was 12.5% for the periods under appeal, the Respondent assessed the Appellant on additional sales of €59,712 for the financial year ended 31st October 2016 and €158,104 for the financial period ended 31st October 2017.

39.12. The Respondent produced three folders of information which contained detailed calculations on how it derived its figures forming the figures for the assessments under appeal. These folders were primarily limited to analysis of the Appellant's EPOS and transactional reports provided by the Appellant's MA.

39.13. The Commission was not provided with any substantive workings in respect of the Appellant's purchases or bank transactions by either the Appellant or the Respondent.

39.14. The Appellant provided its own analysis of its unrecorded sales and revised VAT calculations from using the sales split advocated by the Respondent. These figures of €8,980 in respect of the incorrect sales split and €14,095 in respect of unrecorded sales totalled €23,075 were paid to the Respondent with an amount of €5,000 in respect of interest in advance of the appeal hearing.

39.15. The Appellant provided limited information on how it derived its additional sales forming the above analysis. In addition the Appellant claimed that it had incurred additional purchases of €40,994 (ex VAT) for the period under appeal.

39.16. No invoices were produced by the Appellant to support the above purchases claim.

39.17. The Appellant made a gross margin of 61% in 2016 and 63% in 2017.

39.18. At [redacted], the Appellant had the sum of [redacted] in unutilised CT losses.

Analysis

40. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49 ("*Menolly*"), at paragraph 22 Charleton J. stated:

> '*The burden of proof in this appeals 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*'

41. The decision in *Menolly* is consistent with authorities in England and Wales, such as *Hurley v Taylor (inspector of Taxes)* ChD, 10th February 1998 which is persuasive authority that on appeal of an "in-time" assessment the burden of proof rests with the taxpayer. In *Eagerpath Limited v Edwards (Inspector of Taxes)* CA 14th December 2000, the UK Court of Appeal held:

"*On appeal to the commissioners the burden of proof is on the appellant taxpayer because the taxpayer can be expected to know all about his own financial affairs, whereas the inspector may have little or no knowledge about them apart from the taxpayer's return*."

42. The provisions of section 886 TCA 1997 and section 84 VATCA 2010 further require taxpayers such as the Appellant to maintain proper records which correctly record and explain the transactions of its business.

43. It follows that the Appellant being the entity with access to all of the facts and documents relating to its own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions but also to produce such documentation as may be required in support of its appeal so as to meet the burden of proof.

44. As the Appellant did not keep the records required under section 886 TCA 1997 or section 84 VATCA 2010, it follows that the assessments issued by the Respondent should not be vacated by the Commission subject to the quantum of the assessments being determined in accordance with the provisions of the TCA 1997 and the VATCA 2010.

45. The Appellant's agent submitted in line with *Hanrahan,* that it was for the Respondent to prove that the basis of its, the Respondents, calculations were correct. The Commissioner rejects this submission as the Respondent was not only required to prepare its own workings to ascertain the Appellant's correct liability to tax given the lack of cooperation afforded to it and the numerous discrepancies noted in its review of the Appellant's records but also provided the Appellant with the complete workings of its computations. Furthermore, the Commissioner not only adjourned the appeal hearing from its intended date of hearing to allow the Appellant review and digest the contents of the Respondent's workings but also enquired at the commencement of the hearing if the Appellant had enough time to review same.

46. Having agreed that it had enough time, it was incumbent for the Appellant to succeed in its appeal to have submitted its own workings which either reduced or vacated the sums sought by the Respondent. Rather than adopt this course of action, the Appellant's agent made a submission which disclosed revised liabilities to VAT without any reference to the Respondent's workings or providing any substantive narrative or documentation on how it arrived at its figures. In these circumstances, it is difficult for the Commissioner to attach any weight to those submissions.

47. In relation to quantum, the Commissioner examined the detailed workings and analysis prepared by the Respondent in calculating those assessments. The Commissioner notes

that the Respondent's calculations were derived solely from its analysis of the Appellant's EPOS and MA statements and during the course of the audit the Respondent omitted to substantively review the Appellant's purchases and bank transactions.

48. The result of the Respondent limiting its audit to one aspect of the Appellant's records is that it has the potential to produce inaccurate results. As noted in paragraph 39.11, the result of the Respondent's workings is to assess the Appellant to additional sales in the sum of €59,712 for the financial year ended 31st October 2016 and €158,104 for the financial year ended 31st October 2017 without regard to any additional purchases for those generated sales. The effect of this, if implemented would be to assess the Appellant on unrealistic profit margins.

49. Furthermore such a viewpoint ignores the Appellant's submissions that some of the gaps identified on its EPOS system were caused by one individual paying for several tables or non-charges to customers owing to complaints. Evidence in support of the former is the Respondent's submissions that it was unable to vouch some MA large transactions to the Appellant's EPOS (which indicates to the Commissioner that such transactions could be linked to one individual paying for several tables) and in respect of the latter, it appears inconceivable to the Commissioner that a business of a type conducted by the Appellant would be paid 100% for its customers' orders.

50. Regarding the submission made by the Appellant that some of the ORDNUM sequences were displaced arising from meal courses being entered into the EPOS at various times throughout the meal, the Appellant in response to a question posed by the Commissioner stated that the meal courses were entered onto a written docket before being entered into the EPOS and gave an incomplete account of how the procedure would account for the missing sequences. For those reasons, the Commissioner dismisses those submissions.

51. As section 959AD TCA 1997 and Section 111 VATCA 2010 require the Respondent's estimates to be made using its "best judgment" or using "reasonable opinion", the Commissioner in noting the methodology used by the Respondent in calculating its figures directs that the assessments raised by the Respondent are discounted down by 20% in respect of its over calculation of VAT from its failure to allow for "multiple table payments" and a further 10% in respect of customer non-payments. These figures while estimated are derived from a review of the Respondent's workings and are in the Commissioner's opinion derived using "best judgment" and therefore "reasonable".

52. The effect of applying the above reductions to the Appellant's VAT assessments is to reduce the VAT payable by the Appellant from the sum of €82,126 to the reduced sum of €57,488 which represents 70% of the sum originally sought by the Respondent. As the

Appellant did not provide any invoices in respect of its purported additional purchases, the Commissioner is unable to reduce this figure any further.

53. In addition to the above liability, the Commissioner directs that the additional sum of €1,885 disclosed by the Appellant at the commencement of the audit, in respect of an over-claim of VAT on refurbishment of the Appellant's premises be added to the VAT assessable on the Appellant to give a total figure of €59,373.

54. Turning to the corporation tax assessments, the 30% reduction reduces the figure assessable on the Appellant from €59,712 to €41,798 in the financial year ended [redacted] and from €158,104 to €110,673 in the financial year ended [redacted]. In addition to those reductions, the Commissioner directs that the figures are further discounted by 39% in the financial year ended [redacted] and 37% in the financial year ended [redacted]. Those reductions are in respect of the Appellant's cost of sales using the figures provided from its financial statements and therefore represent the likely costs incurred by the Appellant in relation to its unrecorded sales.

55. The revised assessable figures for CT are therefore €25,497 for the financial year ended [redacted] and €69,724 in respect of the financial year ended [redacted]. As the cost of sales were most likely incurred at the 0% rate of VAT and as no invoices were provided to the Commission in respect of them, the Commissioner is unable to allow the Appellant any further reduction in the calculated VAT liability in respect of these purchases.

56. The Commissioner notes that the Appellant had allowable CT losses of €[redacted] as at [redacted]. As the Appellant is entitled to offset those losses against any future profits of its business under section 382 TCA 1997, it follows that the additional CT assessments for the accounting period [redacted] in the sum of €25,497 and for the accounting period ended [redacted] in the sum of €69,724 may be offset against these losses carried forward thereby reducing the corporation tax liability to nil. This offset is subject to the Appellant's losses being reduced by the amount of such offsets.

57. As section 1084 TCA 1997 permits the Respondent to apply a surcharge to the Appellant's liability, it follows that as the Appellant's CT liability for the period under appeal is nil, the surcharges for those periods should also be reduced to nil.

58. Accordingly, the Commissioner determines that the Appellant has partly succeeded in its appeal and directs that the amount of VAT sought by the Respondent be reduced from €82,126 to €59,373 with credit to be given for any amounts paid by the Appellant since the inception of the audit. Furthermore, the Commissioner directs that the Respondent's

assessments to CT be reduced to nil by virtue of the foregoing adjustments and the availability of losses carried forward by the Appellant from earlier accounting periods.

59. The Commissioner notes the Appellant's submission that there is no prospect of any additional funds being raised by the Appellant's directors and the imposition of additional liabilities on the Appellant would result in undue hardship and a loss of livelihoods. However as confirmed in *Lee v The Revenue Commissioners* [2021] IECA 18, the Commission are not conferred with any form of equitable relief and as such are unable to consider the Appellant's submissions.

Determination

60. The Commissioner determines that the assessments to VAT be reduced to reflect the following figures payable by the Appellant:

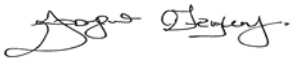
Nov/Dec 2014 – Nov/Dec 2015*	€26,643
Jan/Feb 2016 – Nov/Dec 2016	€21,891
Jan/Feb 2017 – May/June 2017	€10,839
Total	€59,373

*This sum includes the payable amount of €1,885 disclosed by the Appellant at the commencement of the audit.

61. From the above payable figure, the Respondent is directed to give credit for any sums paid by the Appellant in respect of the audit liabilities.

62. In addition, the Commissioner determines that the Respondent's assessments to CT be reduced from €8,210 to nil for the financial year ended [redacted] and from €21,739 to nil for the financial year ended [redacted].

63. The appeal is determined in accordance with section 949AK 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.



Andrew Feighery
Appeal Commissioner
22nd March 2023

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