82TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] [redacted] ("the Appellant") pursuant to section 111 of the Value Added Tax Consolidation Act 2010 ("VATCA 2010") against an assessment raised by the Revenue Commissioners ("the Respondent") to Value-Added Tax ("VAT") in the total amount of €89,520 for ten bi-monthly VAT periods from 1 January 2011 to 31 August 2012.

2. The appeal proceeded by way of a hearing on 14 February 2022.

Background

3. The Appellant is a pharmacy. Its agent, on its behalf, submitted VAT3 returns for the ten VAT periods in question on various dates in 2013 and 2014, for a total amount of €114,547 payable by it. It subsequently submitted amended VAT3 returns for the relevant periods on various dates between 28 February 2015 and 13 January 2016, for a total amount of €25,027 payable by it.

4. On 2 December 2020, the Respondent issued a notice of assessment to VAT against the Appellant in the amount of €89,520. This amount was the total difference between the original VAT3 returns and the subsequent amended returns.

5. On 30 December 2020, the Appellant appealed the assessment to the Commission.

Legislation and Guidelines

6. Section 76(1) of the VATCA 2010 states *inter alia* that

   "…an accountable person shall, within 9 days immediately after the 10th day of the month immediately following a taxable period

   (a) furnish to the Collector-General a true and correct return, prepared in accordance with regulations, of—

   (i) the amount of tax which became due by the person during that taxable period (other than tax already paid by him or her in relation to goods imported by him or her),

   (ii) the amount (if any) which may be deducted in accordance with Chapter 1 of Part 8 in computing the amount of tax payable by the person in respect of that taxable period, and

   (iii) such other particulars as may be specified in regulations,

   and

   (b) remit to the Collector-General, at the same time as so furnishing such return, the amount of tax (if any) payable by the person in respect of that taxable period."

7. Section 113 of the VATCA 2010 states *inter alia* that

   "(1) An estimation or assessment of tax under section 110 or 111 may be made at any time not later than 4 years—

   (a) after the end of the taxable period to which the estimate or assessment relates, or

   (b) if the period for which the estimate or assessment is made consists of 2 or more taxable periods, after the end of the earlier or earliest taxable period within that period.

   (2) (a) Subject to paragraphs (b) and (c), in this subsection "neglect" means negligence or a failure to give any notice, to furnish particulars, to make any return or

to produce or furnish any invoice, credit note, debit note, receipt, account, voucher, bank statement, estimate or assessment, statement, information, book, document, record or declaration required to be given, furnished, made or produced by or under this Act or regulations.

(b) 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 may have allowed.

(c) Where a person had a reasonable excuse for not doing anything required to be done, he or she shall be deemed not to have failed to do it if he or she did it without unreasonable delay after the excuse had ceased.

(d) Notwithstanding subsection (1), in a case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to tax, an estimate or assessment as referred to in that subsection may be made at any time for any period for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer."

Submissions

Appellant

8. The Appellant's agent submitted that the original VAT returns had been calculated on the basis of the old "Chemist Scheme" template ("the old scheme"). This template was deficient and produced demonstrably incorrect results. Consequently, it was replaced by a new calculation template agreed between the Irish Pharmaceutical Union ("IPU") and the Respondent ("the revised scheme"). The amended returns were calculated using the revised scheme.

9. The Appellant claimed that the Respondent had provided different reasons for rejecting the amended returns, but that the reasons seemed to be that (1) the revised scheme only applied from 1 September 2012, (2) the revised scheme only applied to pharmacies with a turnover of less than €1.5 million, and/or (3) that the calculations used by the Appellant in calculating the amended returns were incorrect because a substantial VAT adjustment charge would have arisen on adopting the revised scheme.

10. The Appellant rejected these arguments. In respect of the first and second, it stated that there was no legal basis for the Respondent's contentions, and that it correctly used the revised scheme in circumstances where it was widely accepted that the old scheme was

not fit for purpose. Regarding the third argument, the Appellant contended that there was no logical basis for the calculation of the adjustment that the Respondent sought to make.

11. Furthermore, the Appellant contended that the Respondent had raised the assessment out of time, being later than four years since the submission of the amended returns, and it strenuously rejected that it had committed "neglect" in its submission of the amended VAT returns.

12. In oral submissions, the Appellant's agent stated that it became clear to him over time that applying the old scheme and the revised scheme gave noticeably different results, and that it could not be the case that both were right. He studied the old scheme and concluded that every VAT return prepared using that scheme contained incorrect VAT on sales figures. This was because the 'less GMS ingredients' figure was based on list or reference prices, and took no account of discounts which would be allowed by drug companies. This had the result of overstating the zero rate of purchases that were sold to the HSE, and which therefore understated zero rated shop purchases.

13. The agent stated that the Respondent subsequently reviewed the Appellant's VAT returns for January to August 2017 and did not require any adjustments to be made. However these returns were calculated on precisely the same basis as those that were the subject of this appeal. He rejected the Respondent's contention that the amended returns were incorrect because they failed to include a stock adjustment. He stated that the assessment raised by the Respondent was not for a stock adjustment, but simply sought to reinstate the original returns. He contended that the Respondent's argument about stock adjustments had been "*dreamt up*" as a "*vacuous attempt to prevent – regardless of the law – prevent people from using the correct…basis for calculating VAT on sales…"*

14. The Appellant's agent reiterated his objection to the Respondent's contention that the Appellant had been negligent in the manner in which it submitted the amended returns. He stated that at all times the Appellant had taken proper and appropriate professional advice from his firm, which was within their area of professional expertise.

Respondent

15. In its written submissions, the Respondent stated that the amended returns had been calculated by the Appellant using a methodology that it should never have applied. The revised scheme was stated by the Respondent in E-Brief 41/12 as applying prospectively for periods post-dating 1 September 2012; however, the Appellant had applied it retrospectively. Furthermore, the revised scheme only applied to pharmacies with an

annual turnover of less than €1.5 million, which the Appellant exceeded for each relevant year: its aggregate turnover for 2011 was €2,441,308, and for 2012 was €2,474,121.

16. The Respondent stated that the result of the Appellant using the revised scheme was that it accounted for stock subject to the 23% rate at 0%, and accounted for 0% stock at 0% for a second time. Consequently, it failed to properly account for VAT as required by section 76 of the VATCA 2010.

17. The Respondent contended that the Appellant had acted negligently in submitting its amended returns and therefore the assessments raised were not out of time. The Respondent noted that the IPU's guidance on the revised scheme provided that "*The reworking of historic figures using the revised scheme of itself would not be sufficient to evidence incorrect payment of tax*." The Appellant's returns were skewed and inaccurate, as they did not accurately reflect sales on which 23% VAT was chargeable.

18. In oral submissions, counsel for the Respondent stated that the Appellant originally submitted returns using an application of the zero rate to input purchases with the balance falling into the 23% rate. When it submitted amended returns, it essentially did a mirror image of the original returns, with 23% as the starting point and the balance falling into the zero rate. But it had already submitted and gotten the benefit of the zero rating once. It then got the zero rating twice, when the balance of sales were zero rated under the new scheme. Consequently, what was at issue in this appeal was the Appellant's failure to submit returns that complied with section 76 of the VATCA 2010. What mattered was not whether the returns were calculated on the basis of a scheme or otherwise, but whether the returns were correct.

19. Counsel submitted that the Appellant, via its agent, had failed to acknowledge the figures that had been put before it in the Respondent's letter of 16 May 2018. There had been a "*determined resistance*" on the part of the Appellant's agent to engage with the detail contained in that letter. The Appellant had to show that its original returns were incorrect but it had failed to do so; there was no reference to any data, documents or records to demonstrate how they were incorrect.

20. In response to a question from the Commissioner, counsel stated that the Appellant was not precluded in law from using the revised scheme prior to 2012. The scheme was non-statutory, and therefore a pharmacy was neither obliged to use it nor precluded from doing so.

Material Facts

21. Having read the documentation submitted, and having listened to the submissions at the hearing, the Commissioner makes the following findings of material fact:

21.1. The Appellant is a pharmacy. In each of 2011 and 2012, it had a turnover in excess of €2 million.

21.2. The Respondent and the IPU agreed the revised scheme for calculation of VAT by pharmacies. The Respondent's E-Brief 41/12 stated that the revised scheme had its approval for use from 1 September 2012, and that it was for use by pharmacies whose annual Vatable turnover was less than €1.5 million. The IPU VAT Scheme FAQs stated that "*The [revised] scheme should not be used by pharmacies with turnover exceeding €2m…The reworking of historic figures using the revised scheme of itself would not be sufficient to evidence incorrect payment of tax*"

21.3. The Appellant submitted VAT3 returns for ten bi-monthly VAT periods, from 1 January 2011 to 31 August 2012, on various dates in 2013 and 2014, for a total amount of €114,547 payable by it. These were calculated on the basis of the old scheme for calculation of VAT.

21.4. The Appellant subsequently submitted amended VAT3 returns for the relevant periods on various dates between 28 February 2015 and 13 January 2016, for a total amount of €25,027 payable by it. These were calculated on the basis of the revised scheme for calculation of VAT.

21.5. On 27 March 2015, the Respondent wrote to the agent and stated *inter alia* that "*It should be noted that the Revised Pharmacists Scheme for Vat has Revenue approval for use from 1st September 2012 and cannot be used to review your client's Vat returns retrospectively*."

21.6. On 2 December 2020, the Respondent raised an assessment to VAT in the amount of €89,520. This was the difference between the original VAT3 returns submitted by the Appellant as calculated using the old scheme, and the amended VAT3 returns as calculated using the revised scheme.

Analysis

22. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J. stated at para. 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 Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."

23. Notwithstanding the position as set out in *Menolly Homes*, the Appellant's agent at the hearing of the appeal argued that the Respondent was obliged to prove that the Appellant had acted negligently in the submission of the amended returns, and that the hearing should consider the question of whether the Respondent was out of time to raise assessments before the substantive matter of the appeal was heard. The Commissioner did not agree to this request; he considered that the question of alleged negligence was inherently connected to the substantive issue under appeal and that it would be artificial to seek to split them in such a manner. Additionally, he noted that no request had previously been made for a preliminary hearing or decision. Furthermore, in its Notice of Appeal, the Appellant had stated, regarding the contention that the Respondent was out of time, that "*We are not currently including this as part of our grounds of appeal – we are entirely satisfied that the VAT returns submitted by [the Appellant] for the periods at issue were accurate, and that is the basis for our appeal – but we nevertheless reserve the right to refer to this statutory time limit issue at Appeal should we wish to do so*." In all the circumstances, the Commissioner was satisfied that the more appropriate way to proceed was for the Appellant to present its case first, on both the time limit point and, on a without prejudice basis, the substantive ground of appeal, before hearing from the Respondent.

24. Section 76 of the VATCA 2010 obliges an accountable person to furnish "*a true and correct return*" the amount of VAT due by him or her. In this instance, the Appellant had submitted VAT returns for 1 January 2011 to 31 August 2012 on the basis of the old scheme. It subsequently submitted amended returns on the basis of the revised scheme. The Respondent had raised an assessment to VAT in the amount of the difference between the original and amended returns.

25. On 16 May 2018, the Respondent wrote to the Appellant's agent regarding the audit of the Appellant. In that letter, the Respondent explained its objections to the amended returns as follows:

> "*Where a review of Vat 3 returns takes place, in the context of revised returns showing a refund, the purpose of the review is to demonstrate that the original returns overpaid the vat liability.*
>
> *The original workings are therefore a necessary part of the records to be examined.*
>
> *The new IPU Vat Scheme came into operation from 1st September 2012.*

The scheme did not exist prior to that date.

Any review of returns for periods prior to this date should be sufficient to indicate incorrect payment of tax. The reworking of historic figures using the revised scheme would not be sufficient in this regard.

A complete review of the operation of Vat by reference to purchases, sales, mark ups used and stock adjustments for changing schemes would be required to demonstrate any overpayment.

I can assure you that Revenue does not seek to impose incorrect figures on any taxpayer. Revenue's policy is to ensure that the correct amount of tax is paid.

Where pharmacies change to the new scheme the agreement between Revenue and the IPU I referred to in our earlier telephone conversation was that Revenue would not seek an adjustment of the Vat arising on the stock issue where the pharmacy did not seek to reopen earlier periods.

This does not prevent or seek to prevent any pharmacy from reviewing earlier periods.

It is of course open to any pharmacy to review any periods they wish to do so within the time limits specified in legislation.

Revenue acknowledges that this position applies to all taxpayers.

An examination of the workings for the periods Jan /Feb 2011-July/ Aug 2012 showed that these periods were recomputed using the new scheme. In relation to same, please note:

As previously advised the reworking of the historic figures with the new scheme is not sufficient to demonstrate an overpayment of tax.

The new IPU Vat scheme only came into effect from 1st September 2012 and did not exist prior to that date.

The new scheme is intended for use by pharmacies with a turnover up to €1.5m.

There is no agreement for the scheme to be used where pharmacies have a turnover in excess of €2m.

The original Vat pharmacy scheme used by your client allowed for 0% rated purchases to be marked up by 40% to get a deemed selling price and the balance of shop sales fell into the 23% rate.

This meant that, at a point in time, all zero stock had been marked up to a notional selling price and the pharmacy had the benefit of the notional zero rated sales in their Vat 3 returns.

On changing to the new scheme the 23% shop purchases were to be marked up to a notional selling price and the balance of shop sales were to fall into the zero rate category. Therefore stock on hands as the date of changeover would not have been sold.

This has a twofold effect:

Firstly the zero rated stock at the time of changeover, when sold, will be returned at zero Vat rate under the new scheme. This will result in the taxpayer getting the benefit of returning it twice at zero rate (both under the new scheme and old scheme).

Similarly the 23% vat rated shop stock at the date of change over will not be included in the new scheme as only 23% shop purchases from the date of change over will be marked up to notional selling price.

This will result in the existing 23% stock at date of change over being returned at zero vat rate when sold."

26. The Respondent went on to provide detailed calculations underpinning its assessment.

27. In its response of 12 July 2018, the Appellant's agent stated, in response to the Respondent's contention that the Appellant had double-counted zero rated sales, *inter alia* that:

"*In relation to your extraordinary remarks in relation to the nature of pharmacy VAT schemes, old and new, and your even more extraordinary use of calculations that are vacuous both as regards the logic (or, more appropriately, illogic) underpinning them and integrity of the figures and assumptions used therein and that look worryingly like an attempt to deny our client the substantial VAT refund due, my comments are as follows:*

(1) Reference must be had to the fundamental properties of pharmacy VAT schemes.

(2) The necessity for the very existence of a scheme, be it old or new, has its genesis in the fact that the nature of pharmacy business is such that VAT on sales cannot be calculated on the normal basis e.g. where individual supplies, each carrying a single distinct VAT rate, can be recorded, accumulated and returned each period, and with

stock tracked accordingly (i.e. item by item, with each item falling within a single distinct VAT rate).

(3) That being the case (i.e. as set out at (2) above), it is necessary to have a scheme in place which allows for VAT on sales to be calculated on a reasonable basis per VAT period. Neither the old scheme nor the new scheme can, could nor were ever designed to allow for tracking of closing stock by VAT rate, VAT period by VAT period, as you are now suggesting and it is incredible to now attempt to introduce this concept as a mechanism to deny our clients refund rightfully due to them when the concept never formed part of any pharmacy VAT scheme.

(4) The purpose of both the old and new pharmacy VAT schemes was single fold, being to allow the calculation of VAT on sales, per VAT period, each period in isolation, on a reasonable and agreed basis.

(5) It is completely misrepresentative, and factually incorrect, to state that moving to the new scheme "will result in the taxpayer getting the benefit of returning" stock "twice at zero rate", and equally wrong to state that a further result of changing to the new scheme is "existing 23% stock at the date of change over being returned at zero vat rate when sold". These statements utterly misunderstand the working of pharmacy VAT schemes which, as outlined, are merely a period by period calculation tool, with no stock tracking functionality whatsoever inherent in them, and seem to simply aim to make it as difficult as possible for pharmacies to reclaim what amounts to a small portion of overpayments made over many years.

(6) The implication in your statement that "Where pharmacies change to the new scheme the agreement between Revenue and the IPU" ... "was that Revenue would not seek an adjustment of the Vat arising on the stock issue where the pharmacy did not seek to reopen earlier periods" is not credible. You may be aware -that many pharmacies, -including [the Appellant], will tend to keep a relatively even amount of stock throughout the year. In that light, it is reasonable to estimate that the incorrect calculation made by you of VAT due to Revenue of €107,373.44 on changing to the new scheme at 1 January 2011 would, if the same illogic and incorrectness was applied at 1 September 2012, have resulted in a broadly similar figure. Let us call it €100,000 for even numbers. This is a ████ ████ pharmacy █████ ███████ ███████ ███. The notion that Revenue made an agreement with any representative body which resulted in a business such as [the Appellant] simply being given a concessional free pass on a VAT bill of that size, and by extension that Revenue simply

overlooked the collection of hundreds of millions of euro in VAT from the pharmacy sector in a sweetheart deal with that representative body, is nakedly nonsensical. Is this the same Revenue that seeks to collect every last cent it considers owed to it by every taxpayer in the country? Is this the same Revenue that will refer unpaid tax bills of mere hundreds to the Sheriff? I would thank you to reflect carefully on this. While some of the fallacies, both logical and numerical, particularly pertaining to the phantom you refer to as "the stock issue", put forward by you have a chance of appearing reasonable to the untrained eye, the implication that Revenue would have been entitled to collect very substantial VAT adjustments from pharmacies on the changeover to the new IPU scheme and that it simply didn't exercise that entitlement is utterly lacking in credibility and is, for the avoidance of doubt, now rejected by me as being patently inaccurate. If such adjustments were collectable, Revenue would have collected them as it always seeks to collect everything possible from every taxpayer. The fact of the matter is that there is no reasoned basis for such adjustments, hence there were no adjustments to collect on the change to the new scheme and hence no such adjustments were collected, just as no such adjustment will be collected by you in this case."

28. It can be seen from the above extract of the Appellant's agent's letter that it strenuously refuted the Respondent's contention that the amended returns were incorrect. However, the Commissioner considers that the Appellant has failed to directly engage with the relatively straightforward contention that it had double-counted zero rated sales. Its agent did argue that the Respondent had misunderstood "*the working of pharmacy VAT schemes*" but the Commissioner considers that it has not demonstrated that the Respondent's calculations were incorrect. Indeed, at the hearing of the appeal, the Appellant's agent stated that "*I'm not engaging with the detail of those multiple pages of spreadsheets because the principle behind them doesn't apply*." However, the Commissioner considers that, as the burden of proof rests on the Appellant, it was incumbent on it to challenge the calculations provided by the Respondent and demonstrate that they were incorrect.

29. It was accepted by counsel for the Respondent at the hearing that there was no legal impediment to the Appellant using the revised scheme for periods before 1 September 2012. However, it is clear from the guidance provided by the Respondent and the IPU that it was intended that the scheme would apply from 1 September 2012. The Respondent's E-Brief 41/12 stated that the revised scheme "*has Revenue approval for use from 1*

September 2012." The IPU guidelines stated that "*The scheme came into effect on 1 September 2012.*"

30. In its letter to the Appellant's agent, the Respondent stated that "*On changing to the new scheme the 23% shop purchases were to be marked up to a notional selling price and the balance of shop sales were to fall into the zero rate category. Therefore stock on hands as the date of changeover would not have been sold*." The Appellant argued in effect that this was unduly onerous and seemed "*to simply aim to make it as difficult as possible for pharmacies to reclaim what amounts to a small portion of overpayments made over many years*." However, the Commissioner is satisfied that the Appellant has not demonstrated that the Respondent was wrong.

31. The Respondent further stated that "*Where pharmacies change to the new scheme the agreement between Revenue and the IPU I referred to in our earlier telephone conversation was that Revenue would not seek an adjustment of the Vat arising on the stock issue where the pharmacy did not seek to reopen earlier periods*." Therefore, it seems to the Commissioner that the Respondent's position was that the amendments required on the changeover to the revised scheme which the Appellant considered unduly onerous were only required if a taxpayer wished to apply the revised scheme to a period before 1 September 2012. The Appellant's agent rejected this as "*utterly lacking in credibility and is…patently inaccurate*." However, the Commissioner considers that the Appellant has failed to demonstrate that what the Respondent said was untrue. Indeed, it seems to the Commissioner that the consequence of the Appellant's arguments was that it implicitly accepted that there would be a tax loss arising from the application of the revised scheme without appropriate amendments.

32. Consequently, the Commissioner is satisfied that the Appellant has failed to prove, on the balance of probabilities, that the Respondent's notice of assessment was incorrect. The Respondent provided reasons why it believed the Appellant's amended returns were incorrect. The Commissioner finds that the Appellant has not directly refuted the Respondent's contention that it double-counted zero rated sales, and therefore is satisfied that it has failed to demonstrate that its amended returns were correct.

33. Additionally, the Commissioner considers that it was necessary for the Appellant to demonstrate that its original returns were wrong, in order to justify the submission of the amended returns seeking a repayment of VAT. However, the Commissioner does not consider that the Appellant has demonstrated that the original returns were incorrect; it simply replaced the original returns calculated on the basis of the old scheme with the

amended returns calculated on the basis of the revised scheme. The Appellant's justification for this approach appeared to the Commissioner to be that the revised scheme had replaced the old scheme, and that therefore, *ipso facto*, the old scheme was wrong and the new scheme was right. However the Commissioner does not consider that this was sufficient to demonstrate that the original returns did not satisfy section 76 of the VATCA 2010, but that the amended returns did.

34. Consequently, the Commissioner is satisfied that the Appellant has failed to show that its amended returns were accurate and that as a result the assessment raised by the Respondent was incorrect. Therefore, he now must consider whether or not the assessment was raised out of time.

35. Section 113 of the VATCA 2010 provides that the Respondent can raise an assessment within four years of the relevant tax period. It was not disputed by the Respondent that the assessment in this appeal was raised more than four years after the amended returns were submitted by the Appellant. However, the Respondent seeks to rely on section 113(2)(d), which disapplies the four year rule where there has been "neglect" on the part of a taxpayer. Section 113(2)(a) provides that "neglect" means *inter alia* negligence.

36. The Appellant has strongly refuted the Respondent's contention that it was negligent in the manner it submitted its amended returns. In particular, its agent took exception to the Respondent's contention in its written submissions that there had been a "*want of probity*" in the manner in which it had engaged with the Respondent with regards to the submission of the amended returns.

37. The Commissioner has no doubt that the Appellant's agent fully believed that the amended returns were correctly calculated by it, and therefore he understands the agent's unhappiness with the Respondent's contention that there had been a want of probity on the agent's part in the manner in which it engaged with the Respondent. No finding is made by the Commissioner that there was a want of probity on the part of the Appellant or its agent in their dealings with the Respondent.

38. However, the Commissioner has found that the Appellant has failed to demonstrate that its amended returns were correct. Therefore, he must consider the circumstances in which the amended returns were submitted. It was clearly stated by the Respondent and the IPU that the revised scheme was intended (i) to commence from 1 September 2012, and (ii) to apply to pharmacies with an annual turnover of less than €1.5 million. The Appellant had a turnover of greater than €1.5 million and applied the revised scheme retrospectively from 1 January 2011 to 31 August 2012. While the Respondent has confirmed that the Appellant

was not legally precluded from applying the revised scheme in the manner it did, the Commissioner is satisfied that the Appellant was on notice from both the IPU and the Respondent that the revised scheme was not considered appropriate for the purpose to which the Appellant sought to put it to use; i.e. the amended returns. Indeed, the IPU FAQs on the revised scheme stated that, while reviews of previous years could be carried out, "*The reworking of historic figures using the revised scheme of itself would not be sufficient to evidence incorrect payment of tax*." However, this is what the Appellant did.

39. Furthermore, E-Brief 41/12 stated that "*Pharmacies must be able to demonstrate that their calculations of the VAT liability include all sales and purchases.*" On 10 March 2015, the Appellant's agent wrote to the Respondent in response to queries in respect of the amended January/February 2011 return. The agent stated "*The Revenue Commissioners are requested by this office on behalf of the above named not to raise specific queries in relation to the amended Form VAT3 for the taxable period January/February 2011, and rather to allow the ongoing review mentioned to be completed, with any further amended Forms VAT3 to be submitted, before raising specific queries.*"

40. In response, on 27 March 2015, the Respondent wrote to the agent and stated "*It should be noted that the Revised Pharmacists Scheme for Vat has Revenue approval for use from 1st September 2012 and cannot be used to review your client's Vat returns retrospectively. In a review of your client's Vat returns for periods prior to the new scheme your client would be required to satisfy Revenue that the position reflected is a true and correct return for the taxable period(s) involved.*" Notwithstanding this advice, the Appellant proceeded to submit additional amended returns.

41. Consequently, the Commissioner is satisfied that the Appellant was on notice that the revised scheme was not appropriate for a pharmacy of its turnover, and was not intended to apply retrospectively. Furthermore, the Appellant's agent was directly advised by the Respondent that the revised scheme could not be used to review the Appellant's returns retrospectively. Nevertheless, in spite of these circumstances, the Appellant proceeded to submit amended returns based purely on calculations using the revised scheme.

42. In *Tobin v Foley* [2011] IEHC 432, the High Court (Peart J) stated that "*Negligence is a term which implies more culpability than mere carelessness or oversight.*" In this case, the Commissioner is satisfied that the Appellant's conduct could not properly be classified as mere carelessness or oversight. In the face of guidance from the Respondent and the IPU, and particularly in the face of advice received directly from the Respondent to its agent, it submitted incorrect returns based on a methodology that it had been advised was

unsuitable. The Commissioner is satisfied that this behaviour constituted negligence on the part of the Appellant. Therefore, he finds that the Respondent was entitled to raise the assessments against the Appellant pursuant to section 113(2) of the VATCA 2010.

43. Finally, the Commissioner notes that, prior to the hearing of the appeal, the Appellant's agent sought to have called two former officers of the Respondent as witnesses. The Commissioner understood from the Appellant's agents that these former officers *inter alia* were engaged in the audit of the Appellant and also represented the Respondent in its dealings with the IPU. However, both of the former officers had retired and the Appellant did not have contact details for them, and therefore was unable to seek to have them summonsed.

44. The Commissioner is satisfied, as already stated, that the burden of proof in tax appeal cases rests on the appellant, and therefore considers that it was for the Appellant to arrange for the attendance of any witnesses whom it wishes to give evidence on its behalf. In any event, the Commissioner does not consider it likely that any evidence of the two former officers could have been relevant to the matters he had to consider. The appeal is not a judicial review of the Respondent's actions in auditing the Appellant, much less a consideration of the discussions between the Respondent and the IPU. The appeal is against the assessment raised by the Respondent against the Appellant, and for the reasons set out herein, the Commissioner is satisfied that the Appellant has not demonstrated that the assessment was incorrect.

Determination

45. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by the parties, the Commissioner is satisfied that the Respondent was correct in raising an assessment to VAT against the Appellant in the amount of €89,520 for 1 January 2011 to 31 August 2012. Therefore, the assessment stands.

46. The appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
14th April 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