



Between

71TACD2024

████████████████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by ██████████ (“the Appellant”) pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for September 2020 to September 2021 in the total amount of €222,534.87.
2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business had expected or was expected to experience a 30% reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.
3. The appeal proceeded by way of an oral hearing on 11 April 2024.

Background

4. The Appellant operates a number of franchises of ██████████. Since ██████████ it has operated a franchise in ██████████. In ██████████ 2020 it

opened a second premises in [REDACTED]. In [REDACTED] 2020¹ it opened a third premises in [REDACTED].

5. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020, and replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic, and provided for a flat-rate subsidy to qualifying employers based on the numbers of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.
6. On 15 December 2022, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

Period of Assessment	Amount €
September 2020	6360.67
October 2020	16679.17
November 2020	9419.67
December 2020	18619.67
January 2021	15866.67
February 2021	16216.67
March 2021	13450.00
April 2021	18666.67
May 2021	18375.67
June 2021	25875.67

¹ In its written submissions, the Respondent stated that the third premises was opened in 2021; however, based on the evidence heard at the hearing the Commissioner finds that it was opened in 2020. In any event, for the reasons set out in this determination, the Commissioner is satisfied that nothing material turns on this.

July 2021	32134.67
August 2021	24719.67
September 2021	6150.00
Total	222,534.87

7. On 14 January 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held on 11 April 2024.

Legislation and Guidelines

8. Section 28B of the EMPI Act 2020, as in force from 1 July 2020, provided *inter alia* that:

“(1)... 'qualifying period' means the period commencing on 1 July 2020 and expiring on 31 March 2021 or on such later day than 31 March 2021 as the Minister may specify...”

(2) Subject to subsections (4) and (5), this section shall apply to an employer where –

(a) (i) in accordance with guidelines published by the Revenue Commissioners under subsection (20)(a), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce –

(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period'),

(II) in the case where the business of the employer has not operated for the whole of the corresponding period but the commencement of that business's operation occurred no later than 1 November 2019, there will occur in the part of the specified period, which corresponds to the part of the corresponding period in which the business has operated, at least a 30 per cent reduction, or such other percentage reduction as the

Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to that part of the corresponding period, or

(III) in the case where the commencement of the operation of the employer's business occurred after 1 November 2019, the nature of the business is such that the turnover of the employer's business or the customer orders being received by the employer in the specified period will be at least –

(A) 30 per cent, or

(B) such other percentage as the Minister may specify in an order made by him or her under subsection (21)(b),

less than what that turnover or those customer orders, as the case may be, would otherwise have been had there been no disruption caused to the business by reason of Covid-19,

or

(ii) the employer's name is entered in the register established and maintained under section 58C of the Child Care Act 1991,

and

(b) the employer satisfies the conditions specified in subsection (3).

(3) The conditions referred to in subsection (2)(b) are –

(a) the employer has logged on to the online system of the Revenue Commissioners (in this section referred to as 'ROS') and applied on ROS to be registered as an employer to which this section applies,

(b) having read the declaration referred to in ROS as the 'Covid-19: Employment Wage Subsidy Scheme' declaration, the employer has submitted that declaration to the Revenue Commissioners through ROS,

(c) the employer has provided details of the employer's bank account on ROS in the 'Manage bank accounts' and 'Manage EFT' fields, and

(d) the employer is throughout the qualifying period eligible for a tax clearance certificate, within the meaning of section 1095 of the Act, to be issued to him or her.

(4) Where on any date in the qualifying period the employer ceases to satisfy the condition specified in subsection (3)(d), the employer shall cease to be an employer to which this section applies as on and from that date.

(5) Where, by virtue of subsection (2) (apart from paragraph (a)(ii) thereof), and subsection (3), an employer is an employer to which this section applies –

(a) immediately upon the end of each income tax month (in this subsection referred to as 'the relevant income tax month') in the qualifying period, apart from July 2020 and the last such month, the employer shall review his or her business circumstances, and

(b) if, based on the result of that review, it is manifest to the employer that the outcome referred to in clause (I), (II) or (III), as the case may be, of subsection (2)(a)(i) that had previously been envisaged would occur will not, in fact, now occur, then –

(i) the employer shall immediately log on to ROS and declare that, from the first day of the income tax month following the relevant income tax month (in subparagraph (ii) referred to as 'the relevant day'), the employer is no longer an employer to which this section applies, and

(ii) on and from the relevant day, the employer shall not be an employer to which this section applies and shall not represent that his or her status is otherwise than as referred to in this subparagraph nor cause the Revenue Commissioners to believe it to be so otherwise.

[...]

(11) Where the Revenue Commissioners have paid to an employer a wage subsidy payment in relation to an employee in accordance with subsection (7)(a) and it transpires that the employer was not entitled to receive such payment in relation to the employee, the wage subsidy payment so paid to the employer shall be refunded by the employer to the Revenue Commissioners.

(12) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (11) (in this section referred to as 'relevant tax') shall be treated as if it were income tax due and payable by the employer from the date the wage subsidy payment referred to in that subsection had been paid by the Revenue Commissioners to the employer and shall be so due and payable without the making of an assessment.

(13) Notwithstanding subsection (12), where an officer of the Revenue Commissioners is satisfied there is an amount of relevant tax due to be paid by an employer which has

not been paid, that officer may make an assessment on the employer to the best of the officer's judgment, and any amount of relevant tax due under an assessment so made shall be due and payable from the date the wage subsidy payment referred to in subsection (11) had been paid by the Revenue Commissioners to the employer.

[...]

(20) The Revenue Commissioners shall prepare and publish guidelines with respect to –

(a) the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (2), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce, and

(b) the matters to which an employer shall have regard in determining the appropriate class of Pay-Related Social Insurance to be operated by an employer in relation to a qualifying employee for the purposes of compliance by the employer with subsection (7) (e).”

9. Section 28B of the EMPI Act 2020 was amended from time to time to *inter alia* account for changes to the qualifying periods as the EWSS continued into 2021 and 2022. From 1 January 2021, the relevant specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019, and the relevant commencement date for a business was 1 May 2019 (section 28B(2A)). From 1 July 2021, the relevant specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019, and the relevant commencement date for a business reverted to 1 November 2019 (section 28B(2B))
10. As required by section 28B(20), the Respondent published Main Guidelines on the operation of the EWSS (“Guidelines”). The Guidelines stated that:

“The scheme is administered by Revenue on a “self-assessment” basis. Revenue will not be looking for proof of eligibility at the registration stage. We will in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering and remaining in the scheme.”

11. In respect of the “rolling reviews” mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (1 November 2021 version) stated that

“Employers must undertake a review of the six month period on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether

they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.

This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period...as illustrated below:

Paydates in January to June 2021			
Date review is undertaken	Total of Column A & B equals 2021 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 December 2020	N/A	January to June 2021	Actual results for period January to June 2019
31 January 2021	January 2021	February to June 2021	
28 February 2021	January & February 2021	March to June 2021	
31 March 2021	January to March 2021	April to June 2021	
30 April 2021	January to April 2021	May and June 2021	
31 May 2021	January to May 2021	June 2021	

Paydates in 2020			
Date review is undertaken	Total of Column A & B equals 2020 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
31 August 2020	July & August 2020	September to December 2020	Actual results for the period July to December 2019
30 September 2020	July, August & September 2020	October, November & December 2020	
31 October 2020	July to October 2020	November & December 2020	
30 November 2020	July to November 2020	December 2020	

If an employer no longer qualifies, they must deregister for EWSS through “Manage Tax Registration” on ROS with effect from the following day (that being the 1st of the month) and cease claiming the subsidy...

If an employer becomes aware prior to the end of the month that they will no longer meet the eligibility criteria (e.g. unexpected donation or grant received at the start of a month), they should deregister immediately and cease to claim subsidies.

Subsidies correctly claimed in accordance with the terms and conditions of the scheme prior to deregistration will not be repayable...”

Evidence

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12. ██████████ (“the witness”) was the joint owner and director of the Appellant. He stated that the Appellant entered negotiations with ██████████ in 2019 regarding setting up two new locations. He referred to a letter from the Managing Director of ██████████

██████████ which confirmed this, and which stated that the two new premises in ██████████ ██████████ operate under individual franchise agreements. He stated that the ██████████ premises opened in ██████████ 2020 and the ██████████ premises opened in ██████████ 2020. He stated that separate records were kept for the three premises but that staff from one could be sent to another if the need arose.

13. On cross examination, he agreed that the expansion of the Appellant's business had been successful. He stated that he believed the Appellant was entitled to participate in the EWSS because "in 2020, it was necessary." He stated that the Appellant did not fund the expansion of its business through the EWSS payments. He agreed that no monthly rolling reviews were performed by the Appellant.
14. He was brought through the Appellant's bank statements for July 2021, and stated that he did not know what a debit of €6,000 for ██████████ referred to. He stated that the expansion of the Appellant's business to the two new premises was not a new business but was "the same". He agreed that the Appellant's figures showed that its turnover increased while it participated in the EWSS. He also agreed that its profitability increased and that it had expanded very successfully. He agreed that the Appellant did not satisfy the criteria for participation in the EWSS.
15. On re-examination, he stated that the Appellant entered negotiations with ██████████ in early 2019. The Appellant took out a loan to finance its expansion in 2019.

Submissions

Appellant

16. In written submissions, the Appellant's agent stated that:

"[The Appellant runs] a franchise of ██████████, with one location in ██████████ (meant to be opened in ██████████ 2020 but delayed by 1st lockdown) and ██████████ (planned to open in ██████████ 2020, also delayed by 2nd lockdown). Revenue refused to treat 2 new locations opened by the Company before the Covid, as new business...

On several months the business was on the loss position even if they have operated on 2 or 3 trading units, compared with 2019 when they had only one unit. Once the restrictions have been lifted, and slowly the normal trading patterns returned, the business start have increased sales/turnover. Back in August 2021, Revenue requested real figures for first 7 months in the year and an estimative forecast for the months August to December. Calculating turnover for 3 trading locations, somewhere

in April 2021 the company did not qualify any longer for TWSS [sic]. Please note the turnover for 2019 which was the basis (100%) was in this situation [at] one location - [REDACTED] and the 2020 and 2021 figures of turnover [were] based on 3 locations. Despite [...] all of our attempts to discuss the matter with the Revenue Case workers, we could not obtain any flexibility on considering any other factors on calculating the wealth of the business rather than the turnover. [The Appellant] had 3 times more employees, 3 rents and overheads, 2 bank loans (investment in the set-up of the new units), several periods of lockdowns when even not able to operate they had to pay rent and other associated costs.

We appeal on the decision made by Revenue on the 15th of December 2022 for client to pay back ALL amounts received as TWSS [sic] on 13 months of support even for the months when the business was on more than 30% loss the legal criteria of qualifying for support. The amount owed to Revenue now is in excess of 120K Euro. Also, on the decision of not accepting the 2 new units to be considered New Business and to be treated separately from the one existed unit from before the COVID. [The r]eason given by Revenue was that was not independently run and managed by the owners. The owners could do this if they knew that will be a requirement for TWSS [sic] New business. All purchases and payroll was made on a single record as it was easier to manage and control. The only separate operation was the sales/ till records and bank accounts, which was not sufficient or acceptable for Revenue to treat the 2 new units as New Business.

[The Appellant is] willing to pay back all of the un-qualified payments and to remove all of the financial support from the [REDACTED] as it was the only one viable on some periods of 2020 and most of [...] 2021."

17. In oral submissions at the hearing, the Appellant's agent stated that it seemed to him that the final liability claimed by the Respondent was €121,000 (in response, counsel for the Respondent confirmed that the Respondent was seeking repayments of the entirety of the EWSS payments made to the Appellant). He stated that the figures showed that the Appellant suffered a decrease in turnover in November 2020 and January 2022. He stated that the Appellant was now profitable because of the help received by it during the pandemic.

Respondent

18. In written submissions, the Respondent stated that:

“The primary focus of the within appeal is the Appellant’s contention that it set up two new businesses or individual Business Divisions for the purposes of EWSS and as such contends that it was entitled to compare its actual turnover to projected turnover for the relevant period for these alleged new businesses / individual Business Divisions, rather than against the Appellant’s actual turnover of the comparable period in 2019. The Respondent is firmly of the view that there is no basis either in fact or in law for the Appellant’s said contentions. Any expansion of the Appellant’s business which occurred was an expansion of the existing business, rather than a new business. Furthermore, the Appellant does not meet the requisite conditions to avail of the ‘individual Business Divisions’ concession as set out in the EWSS Guidelines.

[...]

The turnover of the Appellant in the six months to 31 December 2019 was €296,446. In the equivalent period of six months prior to 31 December 2020, the Appellant’s turnover increased by €108,529, to €404,975. Despite this increase in turnover, the Appellant claimed EWSS.

[...]

The Appellant makes the case that the negotiations for the leases for the new franchise premises started in 2019 and suggests that they are separate businesses. However, it is clear from a careful perusal of the facts that the two additional franchise premises reflect an expansion of the pre-existing business. The following facts are noteworthy in the context of whether there was a new business or individual Business Divisions:

- (a) The Appellant has admitted that it was the same business, expanded into two further locations;*
- (b) The exact same trade or business is carried on at each location, under the same name;*
- (c) The Appellant is the leasee and guarantor of the two new leases entered into;*
- (d) Management was centralised;*
- (e) All stock purchases were centralised;*
- (f) Payroll was centralised;*
- (g) Personnel were transferable as between different locations;*
- (h) There was no clearly defined, formalised and separate distinct management structure in place for each premises either prior to or post COVID.*

[...]

It is the Respondent's view that the Appellant was never eligible for EWSS and this should have become obvious had it carried out any appropriate rolling review. The Respondent shall rely on the Determination issued by the TAC on 14/04/23 (83TACD2023) in an EWSS appeal and in particular Commissioner Noone's findings in relation to the obligation to carry out rolling reviews and the Appellant's evidential burden to satisfy the Appeal Commissioner that same were carried out, which the Commissioner considered at paragraph 52 to be a necessary condition for participating in the EWSS, a condition which it is respectfully submitted the Appellant fails herein."

19. In oral submissions, Conor Bourke SC for the Respondent stated that the Appellant had accepted it did not meet the turnover test. The Appellant seemed to think special circumstances should apply to it, but such factors were not relevant. The exact same trade or business was carried out in each of the Appellant's three locations. Management was centralised, stock purchased was centralised, payroll was centralised, and the personnel were transferrable between the locations. There was no clearly defined, formalised and separate management structure in place either before or after the pandemic.
20. The witness and the Appellant's agent had stated that the Appellant's business had expanded, but the EWSS was not created to fund business expansions. It was there to ensure that an existing business could survive and retain staff. The witness also confirmed that the Appellant had not carried out rolling reviews, and the Commissioner had previously determined that it was a prerequisite of participation in the EWSS that contemporaneous rolling reviews be performed.

Material Facts

21. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:
 - 21.1. The Appellant is a company that operates a number of franchises of [REDACTED] in Ireland. The Appellant has operated a franchise in the [REDACTED]. In [REDACTED] 2020 it opened a second premises in [REDACTED]. In [REDACTED] 2020 it opened a third premises in [REDACTED].
 - 21.2. The opening of the second and third franchises in [REDACTED] respectively, constituted an expansion of the Appellant's business rather than a new business or trade.

- 21.3. The Appellant ran the three franchises under centralised operations. Consequently, the second and third franchises were not separate, individual business divisions, but were an integrated part of the Appellant's operation. Both the second and third franchises opened after the commencement of the Covid-19 pandemic.
- 21.4. On the basis of the turnover figures provided by the Appellant, it experienced: a 37% increase in turnover for July to December 2020 compared to the corresponding period of July to December 2019; a 38% increase in turnover for January to June 2021 compared to the corresponding period of January to June 2019; and an 87% increase in turnover for January to December 2021 compared to the corresponding period of January to December 2019.
- 21.5. According to its corporation tax returns, the Appellant's turnover in 2019 was €539,954; in 2020 was €531,589; in 2021 was €1,009,519; and in 2022 was €1,502,765.
- 21.6. The Appellant participated in the EWSS, and between September 2020 and September 2021 it received payments totalling €222,534.87. On 15 December 2022, the Respondent issued notices of assessment seeking repayment of the EWSS payments made to the Appellant.
- 21.7. The Appellant did not perform rolling reviews during its participation in the EWSS.

Analysis

22. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise assessments in the total amount of €222,534.87 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*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. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders being received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. From 1

July 2021, the specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019.

24. However, where the business did not commence operating until after 1 November 2019, for claims during 2020 and from July 2021 onwards, or until after 1 May 2019, for claims from January to June 2021, the business was entitled to compare its actual turnover against its projected turnover as if there had been no disruption as a result of the pandemic. If the comparison showed a reduction of at least 30%, the business was entitled to EWSS payments.
25. The Respondent contended that the Appellant had failed to carry out rolling reviews, and furthermore that, even on the figures provided by it, it was not entitled to participate in the EWSS. The Commissioner will consider the question of the rolling reviews first, before going on to address the Appellant's eligibility to participate in the EWSS more generally. However, before doing so, it is necessary to briefly consider and confirm the scope of this appeal.

Scope of the appeal

26. In the Notice of Appeal submitted on behalf of the Appellant on 14 January 2023, under "Section 4: Details of Appealable Matter", it was stated that the assessment appealed against related to the year 2020, and that the amount being appealed was €121. However, in "Section 5: Grounds for appeal", the Appellant's agent went on to argue against the assessments raised by the Respondent more generally². In its Outline of Arguments, the Respondent addressed its arguments to the total amount of EWSS payments made to the Appellant.
27. At the outset of the hearing, the Commissioner asked the Appellant's agent to confirm whether the Appellant sought to appeal against the entirety of the EWSS assessments against it. The agent stated that he did not know how much the Appellant was appealing against, because it accepted that it was not entitled to some of the payments received, but wished to discuss the matter further. The Commissioner explained that the burden of proof rested on the Appellant, and that the hearing was not a negotiation between the parties but was an opportunity for the Appellant to explain and set out in what aspects it believed the assessments raised by the Respondent to be incorrect. In response, Mr Bourke SC for the Respondent stated that it had proceeded on the understanding that the

² In passing, it is noted that repeated reference was made in the Notice of Appeal, and again in the Appellant's Statement of Case of 13 April 2023, to the TWSS rather than EWSS, but the Commissioner is satisfied that this was obviously a simple error.

entirety of the assessments were under appeal, and was happy to proceed on that basis at the hearing.

28. The Commissioner stated that he was obliged under section 949H of the Taxes Consolidation Act 1997 as amended ("TCA 1997") to take a flexible approach to proceedings. He stated that he was satisfied that neither party would be prejudiced by proceeding on the basis that all of the assessments raised by the Respondent were under appeal, and he told the Appellant's agent that it was open to him after the evidence had been heard to state if the Appellant wished to concede that a certain portion of the repayments sought by the Respondent was owed by the Appellant. Both the Appellant's agent and counsel for the Respondent stated that they were happy to proceed on such basis.

29. No formal concession was made by the Appellant in respect of any portion of the total sought by the Respondent during the hearing. Therefore, the Commissioner is satisfied that this determination is concerned with all of the assessments raised by the Respondent against the Appellant, i.e. from September 2020 to September 2021 in the total amount of €222,534.87.

Requirement to carry out rolling reviews

30. Section 28B(5) of the EMPI Act 2020 required participants in the EWSS to carry out a review of their business circumstances immediately upon the end of each month. If, on foot of this review, it was manifest that the anticipated decrease of at least 30% in either turnover or customer orders would not occur, the employer was obliged to immediately remove him or herself from the scheme. This was confirmed by the Guidelines, which also confirmed that "*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period*" and set out tables providing further details. The Guidelines also stated that "*employers should retain their evidence/basis for entering and remaining in the scheme*".

31. There was no evidence submitted to show that the Appellant carried out any rolling reviews while it participated in the EWSS. Indeed, it was fairly admitted by the Appellant's witness that no rolling reviews were carried out by it. Therefore, the Commissioner finds as a matter of fact that no rolling reviews were carried out by the Appellant during its participation in the EWSS.

32. The necessity of carrying out rolling reviews has been considered by the Commission in a number of previous decisions concerning EWSS, including 83TACD2023 and 28TACD2024. In 83TACD2023, the Commissioner stated that:

“the plain meaning of section 28B is that the carrying out of monthly rolling reviews was a necessary condition for participating in the EWSS. Subsection (2) states that section 28B shall apply to an employer, but that this is subject to subsections (4) and (5). As discussed herein, subsection (5) requires the carrying out of monthly rolling reviews. Therefore, it is clear that if an employer failed to carry out monthly rolling reviews, it was not entitled to participate in the EWSS.”

33. As it is found that the Appellant did not carry out rolling reviews, and as it was a requirement for participation in the scheme that rolling reviews be carried out on a monthly basis, it follows that the Appellant was not entitled to receive payments and it is determined that the Respondent was correct to require repayment of the EWSS payments made to the Appellant.

34. While this is determinative of the appeal, the Commissioner will now consider the eligibility of the Appellant to participate in the EWSS more generally.

Eligibility of the Appellant to participate in the EWSS

35. In truth, the Commissioner found it difficult to decipher the precise basis on which the Appellant claimed that it was entitled to participate in the EWSS. In written submissions, it contended that the two premises in [REDACTED] should be treated as new businesses. However, in correspondence dated 13 September 2021, the Appellant’s agent stated that the Appellant decided to open the two new premises “*due to expansion plans*”, and in his evidence at the hearing, the Appellant’s witness agreed that the new premises were an expansion of the existing business rather than new businesses. The Commissioner is satisfied that the two new branches established by the Appellant in [REDACTED] constituted an expansion of the Appellant’s existing business of carrying on the running of a franchise of [REDACTED], and did not constitute a new business.

36. In the Guidelines (version dated 14 August 2020), it was explained that a participant in the EWSS would have to demonstrate an expected reduction of at least 30% in turnover or customer orders compared to the relevant period in 2019 unless the “*business commenced*” on a date after July/November 2019. The Commissioner accepts that the Appellant’s two new premises opened in 2020. However, based on the evidence provided, and indeed the admissions of the Appellant’s witness, the Commissioner is satisfied that these new premises did not constitute the commencement of a new business, but were opened as part of the expansion of the Appellant’s existing business. Therefore, the Commissioner finds that the Appellant was not entitled to rely on the exceptions provided for by sections 28B(2/2A/2B)(a)(i)(II) or 28B(2/2A/2B)(a)(i)(III) of the EMPI Act 2020. In

any event, it seemed to the Commissioner that no projections had been provided by the Appellant on the basis of those sections, so that, even if it was entitled to rely on one of the exceptions to the general rule *in principle*, it had still failed to demonstrate its entitlement to participate in the EWSS.

37. The Appellant also sought to argue that the two new premises should be treated as individual business divisions, and therefore the turnover of the three premises should be treated separately. The Guidelines stated that:

“Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic.”

38. It was clear from the evidence that the Appellant did not satisfy these requirements. There was no distinct management structure for the two new premises, which continued to be managed on a centralised basis by the Appellant. In any event, the new premises were not opened until after the pandemic had commenced. The Appellant’s agent had accepted in its submissions that it did not have a distinct management structure:

“Reason given by Revenue was that was not independently run and managed by the owners. The owners could do this if they knew that will be a requirement for TWSS [sic] New business. All purchases and payroll was made on a single record as it was easier to manage and control. The only separate operation was the sales/ till records and bank accounts, which was not sufficient or acceptable for Revenue to treat the 2 new units as New Business.”

39. Additionally, in correspondence with the Respondent, the agent stated that *“I would [not] call [REDACTED] as [a] Business Division.”* However, this is what was required in order for the Appellant to be entitled to treat each of its premises separately. In the circumstances, the Commissioner is satisfied that the Appellant’s three premises did not constitute individual business divisions, and therefore the Appellant was obliged to calculate its turnover based on the combined turnover of the three premises.

40. Ultimately, it seemed to the Commissioner that the Appellant’s case was based on an argument that it should be treated as a special or exceptional case because it had incurred additional costs due to its expansion. In an email of 16 October 2022, the Appellant’s agent stated that, *“We do agree that based on the figures the company [does] not qualify for the full period on the scheme but this is one particular / non-standard situation and we consider that [the Respondent] cannot base the decisions strictly on turnover figures*

ignoring the increased rent, increased insurances, electricity bills, increased workforce, bank interest and all other expenses incurred in the lockdown period and the reduced activity after that.”

41. The introductory text to the EMPI Act 2020 stated *inter alia* that it was:

“An Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of that disease and to mitigate the adverse economic consequences resulting, or likely to result from the spread of that disease and to mitigate its impact on the administration of vital public service functions...”

42. The Commissioner considers that the purpose of the EWSS was to subsidise employers in order to encourage them to retain eligible employees while experiencing adverse trading conditions as a result of the pandemic. The purpose was not to provide a subsidy to employers to assist in the expansion of their businesses. There is no special or all-purpose exception in section 28B of the EMPI Act 2020 to allow the Respondent, or the Commissioner on appeal, to disapply the normal turnover test because an employer had incurred additional expenses as a result of a business expansion. In this appeal, the Appellant had to demonstrate that its new premises constituted new business, and/or that they should be treated as individual business divisions. As it has failed to do so, it follows that it should be applied the standard turnover test to ascertain whether it was entitled to participate in the EWSS.

43. While the Commissioner has already found that the Appellant did not carry out any rolling reviews during its participation in the EWSS, its agent did subsequently provide turnover figures to the Respondent. The Respondent used these figures to calculate whether or not the Appellant was entitled to receive subsidies. It calculated that the Appellant experienced: a 37% increase in turnover for July to December 2020 compared to the corresponding period of July to December 2019; a 38% increase in turnover for January to June 2021 compared to the corresponding period of January to June 2019; and an 87% increase in turnover for January to December 2021 compared to the corresponding period of January to December 2019.

44. The Commissioner is satisfied that the Appellant did not meaningfully challenge the Respondent’s calculations. Its agent did point to two months (November 2020 and January 2022, albeit it did not receive an EWSS payment for the latter month) when the Appellant experienced a decrease in turnover compared to the corresponding month in 2019. However, the Commissioner is satisfied that the turnover test prescribed by section

28B does not provide for a straight month-to-month comparison. Rather, it was necessary to compare the relevant 'specified period' (for example, July – December 2020) with the relevant 'corresponding period' (e.g. July – December 2019), and calculate on the basis of those periods whether a 30% reduction in turnover was anticipated.

45. Consequently, as the turnover test shows that the Appellant actually experienced an increase in turnover throughout its participation in the EWSS, it follows that it was not entitled to receive subsidies. This is confirmed by the Appellant's own corporation tax returns, which show that in 2019 its turnover was €539,954; in 2020 it was €531,589; in 2021 was €1,009,519; and in 2022 was €1,502,765. After a very small decrease in turnover in 2020, it experienced very strong growth in the subsequent years.
46. In conclusion, for the reasons set out herein, the Commissioner is satisfied that the Appellant was not entitled to participate in the EWSS, because (1) it failed to carry out rolling reviews during its participation in the scheme, and (2) it experienced an increase in turnover during its participation in the scheme. Therefore, the appeal is unsuccessful.

Determination

47. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments against the Appellant in the total amount of €222,534.87 for September 2020 until September 2021. Therefore, those assessments stand.
48. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

49. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

50. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Simon Noone
Appeal Commissioner
18th April 2024