



**AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH**  
**TAX APPEALS COMMISSION**

09TACD2025

Between

██

**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 August 2021 in the total amount of €348,496.50.
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 experienced 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.

**Background**

3. 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.

4. On 20 September 2023, 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:

<b>Period of Assessment</b>	<b>Amount €</b>
September 2020	25,881.00
October 2020	37,203.50
November 2020	38,700.00
December 2020	36,200.00
January 2021	30,306.00
February 2021	29,250.00
March 2021	28,900.00
April 2021	35,253.00
May 2021	26,550.00
June 2021	24,953.00
July 2021	29,400.00
August 2021	5,900.00
<b>Total</b>	<b>348,496.50</b>

5. On 17 October 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held in private on 4 September 2024.

### **Legislation and Guidelines**

6. 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')...*

*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)."*

7. 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 (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 (section 28B(2B)). Otherwise in respect of these time periods, and insofar as is relevant for this appeal, section 28B remained as set out herein.

8. 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."*

9. In respect of the "rolling reviews" mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (September 2020 version) stated that

*"Employers must undertake a review 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...*

*If an employer no longer qualifies, they must deregister for EWSS through ROS with effect from the following day (that being the 1<sup>st</sup> of the month) and cease claiming the subsidy..."*

10. The Guidelines further stated:

*"Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period."*

## **Evidence**

- ██████████
11. The witness was the managing director of the Appellant company. The nature of the Appellant's business was ██████████ ██████████ ██████████, and the company was established in ██████████. The witness stated that the Appellant was involved in a wide range of different projects, some of which could take up to 24 months to complete. Other projects might last 12 to 18 months. He stated that the Appellant had up to 15 – 20 clients but it would not be working for all of them at the same time. He stated that the Appellant had about 10 – 12 transactions a month but that it varied.
  12. Prior to the onset of the pandemic in 2020 the Appellant's business was strong. It had up to 30 employees. When the pandemic started, some of the Appellant's work continued because it was for essential contractors, but other work ceased. But due to the rules to try and prevent the spread of Covid, the work with even the essential contractors slowed down. In particular the two metre distancing rule had a big impact.
  13. The witness became aware of the EWSS through an item on the news. He decided to apply for it because he believed the Appellant qualified. Because the Appellant's capacity to complete jobs had decreased, he believed it would meet the relevant turnover test. He stated that he did an analysis of what he believed his turnover would be, which was conservative. He estimated that his turnover would be €250,000 per month from September 2020. He stated that he performed monthly rolling reviews. From January 2021 he estimated turnover of €300,000 per month. He continued to review turnover monthly and was happy that the figure of €300,000 was appropriate. He accepted that the Appellant was not entitled to EWSS payments in July and August 2021, and stated that the appeal was limited to September 2020 – June 2021. He stated that there was no

documentary evidence of the monthly rolling reviews, which were done “*through the programme and through the bill of quantities.*”

14. On cross examination, the witness confirmed that he declared he would comply with the terms and conditions of the EWSS when he applied to join the scheme. He confirmed that the Appellant’s corporation tax (“CT”) returns are filed for the year ending 28 February. He accepted that the Appellant’s CT returns showed only a 20% reduction in turnover for February 2020 – February 2021 compared to the previous year (March 2019 – Feb 2020: €6,073,621; March 2020 – Feb 2021: €4,863,558).
15. He stated that there was no accountant or bookkeeper in the Appellant company. The witness gathered information and passed it to his external accountant, [REDACTED]. He accepted that he had no written evidence of having carried out rolling reviews, but stated that he knew the figures he used because “*I did the figures myself.*” He agreed that increasing the turnover for 2019 would have a material impact on whether or not the Appellant qualified for EWSS.
16. He stated that some of the work that the Appellant carried out did not require the raising of invoices. He stated that in some instances he did not account for income until he received payment. It was put to him that this was not in accordance with accounting convention, as the Appellant operated an accruals basis. He stated that the company did not have the facility to operate fully on an accruals basis, but accepted that this was not the correct way to operate. He stated that his accountant had previously notified him that the Appellant’s accounts were not managed in a fully compliant way.
17. He was asked why he projected turnover of €250,000 for the relevant months in 2020, and stated that this was what work he thought the Appellant would do. It was put to him that turnover of €250,000 a month equated to €3m per year, but that the Appellant’s actual turnover was €4.863m for the period of time. The witness stated that the €250,000 was a projection and he did revise it, but “*that could be old money in that turnover because we’ll say when I get paid for jobs.*” He could not explain why the Appellant projected turnover of €346,000 per month on its eligibility review form (“ERF”) for June and July 2021.
18. It was put to him that the actual turnover for September 2020 was recorded as €953,417, when it had been projected at €250,000, and he replied that this was not for work actually done in September. He accepted that he chose to be assessed by reference to turnover when he applied for the EWSS.
19. He agreed that from January 2021 the projected turnover was €300,000, but that for the majority of the relevant months the actual turnover was greater (e.g. January 2021 -

€357,000; March 2021 - €594,375). He was asked why the figures provided on behalf of the Appellant in its ERFs differed from the figures subsequently provided to the Respondent: *"I suppose it comes back again to when work was done but I'd have to review it all and revert on it."* He could not explain why figures on the ERFs were different to those on the Appellant's CT returns. He was asked about a reference in correspondence with the Respondent regarding a bad debt in the amount of €350,000, and it was put to him that a bad debt had no effect on turnover. He stated that the Appellant had a ruling from an adjudicator and had done the work. He stated that he understood that turnover was supposed to be a recording of invoices raised by the Appellant.

20. He confirmed that the Appellant did not have a sales or debtors' ledger. He accepted that the Appellant did not have an accounting system. It was put to him that he was obliged under company law and section 886 of the Taxes Consolidation Act 1997 as amended ("TCA 1997") to keep proper books and records, including primary books. He agreed with counsel that the absence of proper books meant that the Appellant's records were unreliable.
21. He was asked about the Appellant's revised submission to the Respondent, which showed an increase in turnover for 2019 from €5,837,522 to €7,385,045. He stated that this was done to account for work done in 2019. He was asked about invoices from 2020 that were reassigned to 2019: *"Because that's when the work was done like."* It was put to him that the submission was manipulated. He was asked why an invoice dated 24 March 2021 for €310,000 was attributed to 2019, and he stated it was when the work was done on site.
22. The Respondent had reviewed the Appellant's relevant contracts tax ("RCT") records for 2019 to 2021. Counsel put it to the witness that the RCT records further illustrated the lack of reliability of the figures presented by the Appellant for EWSS, as they did not tally with the contended turnover. He was asked about an invoice dated 28 December 2018 that was included in 2019 turnover, and stated that it was because the work had not been finished. When counsel stated that the work was obviously finished because an invoice issued, the witness replied *"Yeah"*. It was put to him that there appeared to be a large number of missing invoices in those submitted to the Respondent, and he stated that he could not explain why. He accepted that it was fair to say that the information submitted to the Respondent and the Commission was unreliable.
23. On re-examination, he was asked if he had generated any records relating to the EWSS that he had not retained, and he stated that *"I would have had to do calculations like, like*



*with a biro and a bit of paper I'd be working."* The Commissioner asked the witness whether he had reallocated any invoices raised in 2019 to 2018, on the basis that that was when the work was carried out. He stated that *"There was a few that were part of '18 that we didn't submit"* but could not identify them.

24. [REDACTED] was the accountant of the Appellant. He stated that he advised the company in September 2020 about the EWSS and the conditions for qualifying, but he did not have any particular involvement in the Appellant's application. He had some discussions with the Appellant's managing director but he did not look in detail at the figures for September to December 2020.
25. He had more discussions for the period January to June 2021, as he prepared the VAT returns for the company on a bi-monthly basis. However, he did not specifically review the Appellant's figures for EWSS eligibility until June 2021, when it became necessary for participants in the EWSS to upload ERFs. He stated that his review indicated that the Appellant was not eligible for July 2021 payments.
26. He stated that the figures submitted to the Respondent in December 2022 were primarily based on VAT returns. Subsequently, the Appellant submitted amended figures in March 2023, as *"we went back to [the managing director] and asked him to look at the three years in total and allocate as best as possible what months the work – the turnover related to."*
27. He believed that the Appellant's projections, as submitted to the Respondent in December 2022, were reasonable. He stated that the actual turnover for July to December 2020 was €1,725,205, which approximated to €275,000 per month compared to the projection of €250,000. He believed that the projections were fairly consistent with the Appellant's turnover. The actual turnover for January to June 2021 was approximately €350,000 per month.
28. He stated that he prepared a breakdown of invoices month by month. Where there were no invoices he worked from bank statements. He stated that some invoices were reallocated on the basis of when the work was carried out. He stated that the invoices should have been raised when the work was completed, but that this did not occur in some instances. Regarding the bad debt that the managing director had discussed, the witness stated that he believed it constituted turnover, as it was based on a contract, albeit an invoice had not been issued.

29. Regarding materials received by the Appellant from [REDACTED] that had been included as turnover in its 2021 CT return but not in the revised submission in March 2023, the witness stated that he believed it could be argued they did not constitute turnover because they did not generate a profit. He accepted that the Appellant's EWSS claims for December 2020 and June 2021 had not been done on the basis of the correct corresponding period.
30. On cross examination, the witness agreed that a receipt gave rise to turnover, and that the raising of an invoice gave rise to a receipt. He accepted that the question of when income was earned was determined by FRS 102. However, in the Appellant's case, invoices had been reallocated on the basis that they had been raised late, which was a failure of its accounting system.
31. He agreed that if no invoice was raised, there were no earnings from an accountancy point of view. He disputed whether it was the date that an invoice issued that determined the matter. However he accepted that when monies were paid was of no consequence. Following further question, he accepted that there was no legal basis for the manner in which the Appellant reallocated invoices. He did not agree that figures were manipulated, but accepted that if one increased turnover for 2019 and reduced turnover for 2020, it would help to satisfy the 30% reduction test.
32. It was put to him that there had been three separate submissions of figures to the Respondent (December 2022, March 2023 and June 2023). He stated that he believed the third submission "*was just clarifying some of the points raised earlier.*" He agreed that it included additional rolling reviews. He did not accept that none of the figures provided to the Respondent were reliable. However, he accepted that the Appellant had no bookkeeper, that invoices were not always issued, that the Appellant did not keep primary books, and that he had previously informed the Respondent that he had advised the Appellant to improve its accounting system. He accepted that, in the absence of a robust accounting system, it was not possible to have fully reliable figures.
33. He was brought through some invoices that had been reallocated, and stated that it had been done on the basis of when monies were received. He accepted that the company was not on a cash receipts basis. He accepted that reallocation of invoices massaged the figures. He did not dispute counsel's contention that the figures submitted on behalf of the Appellant were a misrepresentation.

## **Submissions**

### *Appellant*

34. In written submissions, the Appellant contended that it experienced a substantial reduction in turnover resulting from the imposition of restrictions on foot of the Covid-19 pandemic. The levels of turnover during the first six months of 2020 indicated that turnover would reduce by 30% in comparison to 2019. The Appellant carried out monthly reviews to ascertain its eligibility and took a reasonable approach to its projections of turnover.
35. From January 2021 onwards, monthly reviews were carried out by the Appellant's agent, which established that the company was still eligible to participate in the scheme. Following the issuance of the Respondent's compliance request in October 2022, the Appellant's agent provided revised submissions to accurately reflect the Appellant's turnover for some of the periods in question.
36. In oral submissions, counsel for the Appellant stated that participants in the EWSS were not required to upload their basis for eligibility until July 2021. So there was no mechanism for demonstrating eligibility until then. The Guidelines required people to retain documentation but prior to July 2021 the Appellant did not have any such documentation. The Appellant's managing director had given evidence of carrying out monthly projections, which did not in fact greatly differ from the actual turnover achieved by the company.
37. The Appellant had done the best it could in the circumstances. The EWSS was a one-size-fits-all regime, and the Appellant's managing director had to confirm to a regime which was thrust upon him. The Appellant had a small number of clients over a large amount of time, and thus did not have much data to go on. It was accepted that the Appellant had participated in the EWSS on the basis of turnover, but the potential availability of the "other reasonable basis" in the Guidelines showed the difficulties that arose from trying to shoehorn everything into one structure.
38. In response to a question from the Commissioner, counsel confirmed that the Appellant accepted that it was not entitled to payments for July and August 2021, and that the amounts set out on notices of assessment for those months were repayable.

### *Respondent*

39. In written submissions, the Respondent stated that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business experienced or was

expected to experience a 30% reduction in turnover or customer orders during the claims periods, and that the Appellant had failed to prepare rolling reviews contemporaneously.

40. The Appellant registered for EWSS from 2 September 2020 via Revenue Online Services. As part of the registration process, the Appellant was required to make a declaration which acknowledged that the Appellant would abide by the terms and conditions of the scheme and would undertake to retain all documents concerning eligibility for review by the Respondent if so deemed necessary. The Appellant was on notice that a failure to adhere to such terms could result in the recoupment of EWSS payments. The Appellant made the following declaration:

*“I declare that I have read the eligibility criteria for the Employment Wage Subsidy Scheme and that the business qualifies for the scheme. I undertake that the business will abide by the terms and conditions of the scheme. I understand and accept that failure by the business to adhere to the terms of the scheme could result in recoupment of monies together with interest, penalties and prosecution. I undertake that the business will retain all records relating to the scheme, including the basis of eligibility, for review by Revenue.”*

41. The Appellant was selected for a compliance check. During the course of the compliance check, the Appellant's agent furnished the Respondent with three different sets of purported rolling reviews and turnover figures by way of correspondence dated 8 December 2022, 28 March 2023 and 6 June 2023. On foot of this correspondence, the Respondent sought, on several occasions, supporting documentation to verify the veracity of the turnover figures furnished. No raw data was forthcoming during the course of the compliance check apart from a sales listing by correspondence dated 28 March 2023.
42. The Appellant failed to demonstrate to the Respondent that it suffered a 30% reduction in turnover in circumstances where the Appellant supplied EWSS turnover figures which were inconsistent and could not be reconciled with the filed CT1 return for the years ending 28 February 2019, 2020 and 2021. For example, when the actual turnover figures for the period 1 March 2019 to 28 February 2020, as furnished by correspondence dated 28 March and 6 June 2023, were compared with the filed CT1 for the same year ending, there was a significant discrepancy of €787,159 between the EWSS turnover and the filed CT1 return. Each EWSS turnover submission was different from the last submission and the Appellant had failed and or refused to supply any supporting documentation which verified the accuracy of any of these turnover figures provided to the Respondent or furnish adequate explanations as to these discrepancies in turnover. The figures as

supplied by the aforementioned correspondence did not correspond with the filed ERFs for July 2021.

43. In oral submissions, senior counsel for the Respondent stated that there was nothing particularly unusual about the Appellant's business, and it had never been suggested that its eligibility for EWSS was not capable of being dealt with in the context of turnover. The issue was with how the Appellant had calculated its turnover.
44. The Appellant had undertaken, when entering the EWSS, to retain proof of continued eligibility. The obligation to file an ERF commenced in June 2021, but there was an obligation prior to that to perform monthly rolling reviews and to keep a copy of the methodology employed in carrying out those reviews.
45. The Appellant's managing director and its accountant had acknowledged that there was a lack of reliability in the figures presented. It was clear that there was no proper system of accounting for the turnover within the company. Counsel referred to previous determinations of the Commission in respect of EWSS, including 28TACD2024, 68TACD2024, 83TACD2024 and 91TACD2024.
46. In this appeal, the most reliable evidence that the Respondent had to go on was the Appellant's CT returns, which showed that the dip in turnover as between the year ending February 2020 compared to 2021 was 20%, which was well below the threshold on an annual basis. The figures subsequently provided to the Respondent had been manipulated in an effort to satisfy the 30% test.

### **Material Facts**

47. 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:
  - 47.1. The Appellant was a company involved in the business of [REDACTED]. The Appellant was established in [REDACTED].
  - 47.2. The Appellant participated in the EWSS from September 2020 to August 2021 and received subsidy payments in the total amount of €348,496.50. It participated on the basis that it expected to experience a reduction in turnover of at least 30%.
  - 47.3. The Appellant had not retained contemporaneous documentation to demonstrate its eligibility to participate in the EWSS. It did not perform rolling reviews from September 2020 to June 2021 inclusive. It submitted online ERFs for July and August 2021.

- 47.4. The Appellant's CT returns showed turnover to the year end 28 February 2019 of €4,041,041, to the year end 28 February 2020 of €6,073,621, to the year end 28 February 2021 of €4,863,558, and to the year end 28 February 2022 of €4,680,620. Therefore, the reduction in turnover for the year end 28 February 2021 compared to 28 February 2020 was 20%, and the reduction in turnover for the year end 28 February 2022 compared to 28 February 2020 was 23%.
- 47.5. The Appellant did not keep primary books of account, including a sales ledger or debtors' ledger. It did not have an in-house bookkeeper. Consequently, its purported turnover figures were unreliable.
- 47.6. On 8 December 2022, following a compliance check by the Respondent, the Appellant submitted figures which it stated showed it was entitled to EWSS payments. It stated that its actual turnover for 2019 was €5,837,522. It utilised projections of €250,000 per month for September to December 2020 and projections of €300,000 per month for January to June 2021. There was no evidence that these projections were altered on an ongoing monthly basis by the Appellant in light of actual turnover. The figures utilised did not reconcile with the Appellant's CT returns.
- 47.7. On 28 March 2023 and subsequently on 6 June 2023, the Appellant submitted revised figures to the Respondent. It now stated that its actual turnover for 2019 was €7,385,045. These figures showed a difference of €787,159 in the Appellant's actual turnover for March 2019 to February 2020 as between the CT return (€6,073,621) and the figures submitted for the EWSS claim (€6,860,780). This difference was as a result of the Appellant artificially inflating its turnover for the period March 2019 – February 2020, and artificially deflating its turnover for March 2020 – February 2021, by way of reallocating invoices to March 2019 – February 2020 in order to attempt to satisfy the requirement of a reduction of at least 30% in turnover.
- 47.8. The Appellant had not amended its CT returns for the years 2019 – 2022. The Appellant's CT returns stated that they were prepared in accordance with FRS 102. The Appellant operated on the accrual basis of accounting, and the reallocation of invoices by the Appellant, as per the submissions to the Respondent on 28 March 2023 and 6 June 2023, was not done in accordance with FRS 102 or ordinary accounting principles.
- 47.9. On 20 September 2023, the Respondent raised assessments against the Appellant, seeking the repayment of the EWSS payments made to the Appellant.

On 17 October 2023, the Appellant appealed against the assessments to the Commission. The Appellant subsequently confirmed that it accepted it was not entitled to EWSS payments for July and August 2021. As of the date of the hearing of the appeal, the Appellant had not repaid the EWSS payments received by it for July and August 2021.

### **Analysis**

48. The burden of proof in this appeal rests on the Appellant, which must show that the Respondent was incorrect to raise assessments in the total amount of €348,496.50 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.*”
49. 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.
50. The Respondent contended that the Appellant had not carried out monthly rolling reviews, and also did not accept that the figures provided by the Appellant demonstrated its eligibility to participate in the EWSS. Both of these matters will be considered in turn.

#### *Requirement to carry out rolling reviews*

51. 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*”.

52. In his evidence, the Appellant’s managing director stated that he carried out monthly reviews of projected turnover, but there was no documentary evidence of this before the Commissioner. Counsel for the Appellant stated that there was no requirement to provide documentary evidence of rolling reviews until the introduction of the ERF in July 2021.
53. In considering the Appellant’s evidence, the Commissioner notes that its managing director stated that “*I would have had to do calculations like, like with a biro and a bit of paper I’d be working*”, so it appeared that some documentation had been generated by the Appellant which was not submitted to the Respondent or the Commission. In any event, the Commissioner is satisfied that the Guidelines made clear that monthly rolling reviews had to be written/paper-based, and that a mere mental check in the mind of the employer was not sufficient. In this regard, the Guidelines stated “*Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period.*” The Commissioner is satisfied that the Appellant did not provide copies of any rolling reviews allegedly carried out by it from September 2020 to June 2021. Consequently the Commissioner finds as a matter of fact that no rolling reviews, as required by section 28B of the EMPI Act 2020 and the Guidelines, were performed by the Appellant for those months.
54. The necessity of carrying out rolling reviews has been considered by the Commissioner in previous determinations concerning EWSS. As stated in 83TACD2023:
- “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.”*
55. As it is found that the Appellant did not carry out rolling reviews between September 2020 and June 2021, 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 EWSS payments between September 2020 and June 2021. Furthermore, as the Appellant has accepted that it was not entitled to receive EWSS payments for July and August 2021, this finding in respect of the requirement to carry out monthly rolling reviews is determinative of the appeal. However, the Commissioner will now proceed to consider



the figures submitted by the Appellant to attempt to demonstrate its eligibility to participate in the EWSS.

*Whether the Appellant's figures demonstrate entitlement to EWSS payments*

56. Following a compliance check by the Respondent, the Appellant submitted figures in December 2022, and amended figures in March 2023 (which were supplemented by a further submission in June 2023). While both sets of figures purported to show that the Appellant had suffered a reduction in turnover of at least 30%, they were rejected by the Respondent as unreliable.
57. The Respondent contended that the projections contained in the December 2022 submissions were unrealistic, as they did not accurately reflect the actual turnover of the company. From September to December 2020, the Appellant projected monthly turnover of €250,000, which over a twelve month timeframe would result in turnover of €3m. However, the Appellant's actual turnover for the year ended 28 February 2021 was €4,863,000. Furthermore, the Commissioner notes that the Appellant did not change the €250,000 per month figure, despite actual turnover being in excess of this, which strengthens the finding above that monthly rolling reviews were not actually carried out by the Appellant. If such rolling reviews had been performed, the Commissioner would expect that the monthly projections would have been increased as time went on to reflect the higher than anticipated actual turnover.
58. For January to June 2021, the Appellant increased projected turnover to €300,000 per month, but again did not amend this figure to account for fluctuations in actual turnover. The Respondent also noted that the projected turnover as stated in the December 2022 figures was different to that included in the Appellant's ERFs filed for July and August 2021. The Appellant's managing director was unable to account for this discrepancy.
59. Following queries from the Respondent on the Appellant's figures, the Appellant's agent submitted revised figures for 2019 in March 2023. The Appellant had previously claimed that its turnover for 2019 was €5,837,522, but now stated that it was €7,385,045. At the hearing, the witnesses for the Appellant stated that this revised turnover was arrived at by reallocating invoices raised after 2019 to that year on the basis that they related to work carried out in 2019.
60. The Commissioner is satisfied that the Appellant was not entitled to proceed on this basis. It was accepted at the hearing by the Appellant's accountant that the Appellant's accounts were compiled on an accruals rather than cash receipts basis, and consequently the Commissioner finds that the Appellant was obliged to record turnover on the basis of

when invoices were raised by it, and not on a later, subjective assessment of when work was actually carried out.

61. Regrettably, the Commissioner considers that the inflation of the 2019 turnover was an attempt by the Appellant to manipulate its turnover figures in order to try to prove its eligibility for EWSS. During cross examination, the Appellant's accountant ultimately did not dispute counsel's contention that the Appellant misrepresented its figures.

62. In any event, the Commissioner does not consider that it was open to the Appellant to submit different sets of figures on an *ex post facto* basis to attempt to justify its participation in the EWSS. In 28TACD2024, the Commissioner stated that

*"The Commissioner considers that there is nothing in section 28B of the EMPI Act 2020 which allows for such retrospective calculations to be carried out to justify receipt of subsidy payments. Rather, the wording is clearly prospective in nature: "there will occur in the specified period at least a 30 per cent reduction..." Hence the need for projections to be carried out for the specified period, which were then to be compared against the corresponding period to assess eligibility."*

63. The Commissioner has already concluded that there were no proper monthly rolling reviews carried out by the Appellant in this instance; rather, it was paid subsidies and then subsequently submitted different sets of figures in an attempt to justify receipt of those subsidies. The Commissioner is satisfied that there is nothing in the EMPI Act 2020 which permits such an approach.

64. Finally, the most fundamental difficulty that the Appellant faced in trying to justify its eligibility for EWSS is the lack of proper books of account kept by the company, which both its managing director and accountant accepted rendered its figures unreliable. Given that the burden of proof rests on the Appellant in this appeal, the Commissioner considers that the unreliability of its figures, in itself, means that the appeal could not succeed. The Commissioner considers it apposite to draw the Appellant's attention to the provisions of section 886 of the TCA 1997, which obliges the Appellant to keep "*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.*" This obligation is, of course, in addition to the duties of directors under company law.

65. Given this lack of reliability, the Commissioner considers that it was wholly reasonable of the Respondent to proceed on the basis that the most reliable turnover figures available were those contained in the Appellant's CT returns (which, it is noted, were stated to have been prepared in accordance with FRS 102 and which had not been amended). While

the Appellant's accounting periods do not match directly onto the relevant specified and corresponding periods under the EMPI Act 2020, the Commissioner notes that the turnover contained in the CT returns showed a reduction in turnover for the year end 28 February 2021 compared to 28 February 2020 of 20%, and a reduction in turnover for the year end 28 February 2022 compared to 28 February 2020 of 23%. Therefore, while it seems that the Appellant did indeed suffer a reduction in turnover following the onset of the pandemic, there is no reliable evidence before the Commissioner to show that it suffered a reduction of at least 30%, such that it would have been eligible to receive subsidy payments under the EWSS.

66. Consequently, for all the reasons set out herein, the Commissioner concludes that the Appellant's appeal is unsuccessful, and the assessments raised by the Respondent are upheld.

### **Determination**

67. 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 in the total amount of €348,496.50 for September 2020 to August 2021. Therefore, the assessments stand.
68. 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**

69. 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**

70. 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  
24 October 2024

**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**