



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

Between

122TACD2025

[REDACTED]

**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the “Commission”) as an appeal against 20 Notices of Assessment raised by the Revenue Commissioners (hereinafter the “Respondent”) on 25 January 2024 pursuant to section 28B(13) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (hereinafter the “EMPI Act 2020”) in respect of the Employment Wage Subsidy Scheme (hereinafter the “EWSS”) for the period 1 September 2020 to 30 April 2022 (hereinafter the “relevant period”) as follows:

	Period of Assessment	Assessment Amount €
1.	1 September 2020 to 30 September 2020	2,942.00
2.	1 October 2020 to 31 October 2020	3,890.50
3.	1 November 2020 to 30 November 2020	4,877.00
4.	1 December 2020 to 31 December 2020	2,061.00
5.	1 January 2021 to 31 January 2021	3,409.00
6.	1 February 2021 to 28 February 2021	3,612.00
7.	1 March 2021 to 31 March 2021	4,753.00
8.	1 April 2021 to 30 April 2021	4,200.00
9.	1 May 2021 to 31 May 2021	4,150.00
10.	1 June 2021 to 30 June 2021	2,800.00
11.	1 July 2021 to 31 July 2021	2,800.00
12.	1 August 2021 to 31 August 2021	3,850.00
13.	1 September 2021 to 30 September 2021	4,400.00
14.	1 October 2021 to 31 October 2021	4,500.00

15.	1 November 2021 to 30 November 2021	5,600.00
16.	1 December 2021 to 31 December 2021	4,400.00
17.	1 January 2022 to 31 January 2022	5,450.00
18.	1 February 2022 to 28 February 2022	4,008.50
19.	1 March 2022 to 31 March 2022	1,900.00
20.	1 April 2022 to 30 April 2022	1,600.00

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, 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 amount of tax in dispute is €75,203.00.

### **Background**

4. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020. The EWSS replaced the Temporary Wage Subsidy Scheme and came into effect from 1 September 2020.
5. 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.
6. The EWSS also provided for the charging of a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the payment under the EWSS.
7. The Appellant was incorporated on [REDACTED] December 2019 pursuant to the provisions of the Companies Acts and registered with the Companies Registration Office with a registered address and trading premises of [REDACTED]. The Appellant operates the trade of a newsagent / corner shop.
8. Ms. [REDACTED] (hereinafter the "Director") is the owner of 100% of the issued shares in the Appellant and is the sole director of the Appellant company.

9. In December 2019, the Appellant acquired its business from Mr. [REDACTED], the Director's husband, who, as a sole trader, had owned and operated a newsagent business from the same location as the Appellant (hereinafter the "sole trade business") up to 31 December 2019.
10. It is agreed between the parties that the premises from which both the sole trade business and the Appellant traded was the subject of a lease with the Appellant's husband as tenant. It is also agreed between the parties that the Appellant was not party to a lease in relation to the business premises during the relevant period.
11. On 11 September 2020, the Appellant registered for the EWSS. 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 EWSS and would undertake to retain all documents concerning eligibility for review by the Respondent, if so deemed necessary. The Appellant, through its Tax Agent, 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."*
12. Between September 2020 and April 2022 the Appellant claimed and received €75,203.00 of EWSS payments.
13. In June 2021, the Respondent introduced an Eligibility Review Form (hereinafter the "ERF") requirement in relation to the EWSS for periods from July 2021 onwards. All claimant employers availing of EWSS were required to complete an ERF detailing their 2019 monthly turnover and 2021 monthly actual and projected turnover to establish that claimants were eligible for EWSS payments based on their own assessment. The due date for the filing of an ERF was stipulated as being by 15 July 2021 and every subsequent month thereafter.
14. On 14 September 2021, the Appellant selected the "New Business" indicator on the initial ERF which it submitted to the Respondent indicating that its trade had commenced after 1 November 2019. As a result, the Respondent sent a notification via its Revenue Online Service (hereinafter "ROS") platform to the Appellant outlining the EWSS eligibility criteria and obligations.

15. Having filed a return of the initial ERF, there was no requirement for a “New Business” to return completed monthly ERFs (hereinafter “monthly rolling reviews”) to the Respondent.
16. On 13 October 2021, the Respondent wrote to the Appellant’s Tax Agent advising that the Appellant had been selected for a compliance check in relation to the EWSS and requesting it to provide the following information:
  - 16.1. An outline of the nature of its business and principal activities.
  - 16.2. A summary of the impact of the COVID-19 restrictions on the turnover of its business to include details such as:
    - 16.2.1. whether the business had closed including the date of closure;
    - 16.2.2. any service disruption due to restrictions;
    - 16.2.3. capacity limits imposed.
  - 16.3. Details of the monthly rolling reviews completed to verify the projected minimum 30% reduction in projected turnover or customer orders for the period 1 January 2021 to 31 December 2021 as if the pandemic had not occurred relative to actual turnover or customer orders and projected turnover or customer orders, looking at the period as a whole rather than on a monthly basis.
  - 16.4. The basis for projections / estimates and explanation of any assumptions made in arriving at the projected turnover had COVID-19 not occurred.
  - 16.5. Copies of bank statements for relevant periods of 1 September 2020 to 31 December 2020 and 1 April 2021 to 30 June 2021 in which EWSS was claimed.
  - 16.6. Copies of payslips for six of the Appellant’s named EWSS employees.
  - 16.7. Details of who runs the Appellant’s payroll.
17. On 28 March 2022, the Appellant provided the following response to the Respondent’s questions of 13 October 2021:

*“Our business is a high street Newsagent shop. We are selling Newspapers, Tobacco, Cold Drinks, Hot Drinks, Snacks, Confectionery, and small everyday household use items.”*

*“We started our business from the first week of January 2020 and then suddenly Covid-19 started and everything went to lock down from the last week of March 2020. Due to the Covid-19. All the staff stopped working, and the director herself was working at her own. A business analysis and projections were prepared before the shop was*

*overtaken. On the basis of business plan, the first year sales in 2020 were projected €666,423. 2nd year sales in 2021 were projected €719,737. These projections were based on the past history of the business.”*

*“The Review worksheet calculations are attached for your review.”*

*“The projections were prepared on the basis of the previous records of the business from the previous owner for 2019. A 7-8 % increase every year was projected. The company was incorporated in January 2020 and started business in the month of January 2021.”*

*“Bank statements are attached.”*

*“Payslips are attached for the relevant period.”*

*“Our payroll agent runs the payroll.”*

18. In its correspondence of 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in July 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
March	2021	59,978.08	Actual	35,761.00	24,217.08	40%
April	2021	59,978.08	Actual	34,433.00	25,545.08	43%
May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Projected	35,000.00	24,978.08	42%
August	2021	59,978.08	Projected	35,000.00	24,978.08	42%

September	2021	59,978.08	Projected	35,000.00	24,978.08	42%
October	2021	59,978.08	Projected	35,000.00	24,978.08	42%
November	2021	59,978.08	Projected	35,000.00	24,978.08	42%
December	2021	59,978.08	Projected	35,000.00	24,978.08	42%
Yearly Totals		719,737.00		427,179.00	292,558.00	41%

19. In its correspondence of 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in August 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
March	2021	59,978.08	Actual	35,761.00	24,217.08	40%
April	2021	59,978.08	Actual	34,433.00	25,545.08	43%
May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Actual	38,541.00	21,437.08	36%
August	2021	59,978.08	Projected	39,000.00	20,978.08	35%
September	2021	59,978.08	Projected	39,000.00	20,978.08	35%



October	2021	59,978.08	Projected	39,000.00	20,978.08	35%
November	2021	59,978.08	Projected	39,000.00	20,978.08	35%
December	2021	59,978.08	Projected	39,000.00	20,978.08	35%
Yearly Totals		719,737.00		450,720.00	269,017	37%

20. No further monthly rolling reviews for 2021 were submitted by the Appellant.
21. On 11 July 2022, the Respondent wrote to the Appellant advising that, as the business / trade of a newsagent from the relevant premises predated 1 November 2019, the methodology used to determine the Appellant's eligibility appeared to be incorrect. The Respondent requested additional information from the Appellant including monthly rolling reviews for 2020.
22. On 18 August 2022, the Appellant responded but did not provide the requested rolling reviews for 2020.
23. On 23 August 2022, the Respondent requested the Appellant to furnish information in support of its claim that it constituted a "New Business". In addition the Respondent advised the Appellant as follows:

*"As advised in my previous correspondences, a review of Revenue records and all documents received from you to date appear to confirm that a business/trade which was substantially the same and operated within the same commercial environment existed at the point where your company began to operate it. It also appears that the previous business was controlled and operated by a person connected to the existing business. In order to determine if this is a 'New Business' or a continuation/acquisition of an existing business as per the EWSS guidelines, Revenue examine the business/trade and not the trading entity. I would therefore be obliged if you would provide a comprehensive reply to the following queries in relation to this business/trade and the previous connected business/trade;*

*(a) Are the activities substantially the same?*

*(b) Is the management/control substantially the same?*

*(c) Are the employees substantially the same?*

*(d) Has the location(s) where the trade is carried on changed?*

*(e) Does the “new business” have the same customers/suppliers?*

*(f) Are the accounting/pay roll systems used the same?”*

24. On 4 October 2022, the Appellant replied stating:

*“(a) Are the activities substantially the same? My answer will be No. As the main activity is to run as a Newsagent shop, but I added an Ice cream machine, Slush machine, Coffee machine, many more Cigarettes and Tobacco, Disposable Vape, Helium Balloons, party stuff, gift baskets and many more lines.*

*(b) Is the management / control substantially the same? No. I open new company 2020 (sic) and I am managing the business and have full control on the business.*

*(c) Are the employees substantially the same? No, employees have changed.*

*(d) Has the location(s) where the trade is carried on changed? No, the company operates from the same location.*

*(e) Does the new business have the same customers/suppliers? Some suppliers and customers are same but as a result of changes in the product mix, the customers and suppliers has changes (sic). For example, new products were added including Slush Machines, Ice Cream Machines, non-Alcoholic drinks and Confectionary , Halal based candies and products, household items Coffee machine , Disposable Vape, many more cigarettes and tobacco Helium Balloons .*

*(f) Are the accounting / payroll systems used the same? No, the accounting and payroll systems were changed.”*

25. The Appellant also enclosed a document entitled “EWSS Review Month on Month Basis” for 2020 as follows:

Month	Year	Projection Sales for 2020	Actual / Projected	Actual Sales 2020	Difference	Decrease
September	2020	55,535.25	Actual	35,436.15	20,099.10	36%
October	2020	55,535.25	Actual	36,141.02	19,394.23	35%

November	2020	55,535.25	Actual	46,298.54	9,236.71	17%
December	2020	55,535.25	Actual	32,159.02	23,376.23	42%

26. On 8 November 2022, the Respondent wrote to the Appellant and advised that, from the documentation and information furnished, it appeared that the Appellant had acquired a business and it therefore was not a “New Business” for the purposes of EWSS. Therefore, the Appellant was advised that it should have used the 2019 actual figures from the acquired business to determine its eligibility for the Scheme. The Respondent stated that when the actual 2019 figures were compared against the actual 2021 figures for January to December 2021, the reduction in turnover was 26.7%.
27. On 29 November 2022 the Appellant reiterated its position to the effect that it was a “New Business” and also complained that the health and wellbeing of the Director was being negatively impacted by the Respondent’s compliance check.
28. On 9 January 2023, a Level 1 Review pursuant to the Respondent’s Complaint and Review Procedures took place and concluded that the Appellant should have utilised the actual 2019 turnover data in assessing its eligibility for the EWSS and in relation to the submission of monthly rolling reviews. Additional information was also requested from the Appellant.
29. By correspondence dated 6 February 2023, the Appellant contended that the Director was feeling unwell, had long COVID and suffered from severe depression and anxiety. Therefore, it was contended that the information requested would be provided once she felt better.
30. On 27 April 2023, the following information in relation to the 2019 monthly actual sales of the sole trade business was submitted to the Respondent:

2019	Monthly Sales €
January	59,334.69
February	61,764.51
March	59,116.35

April	61,040.16
May	45,793.99
June	52,980.56
July	65,870.99
August	70,669.52
September	59,222.64
October	61,708.15
November	"Can't find it"
December	"Can't find it"

31. On 2 May 2023 the Appellant submitted the following "Actual Net Sales" figures in relation to the sole trade business for 2019:

2019	Actual Net Sales €
January	54,278.37
February	51,383.96
March	54,453.13
April	56,359.37
May	52,362.05
June	54,093.40
July	55,679.15

August	65,473.74
September	54,734.36
October	57,077.60
November	59,622.40
December	62,540.28

32. On 19 May 2023, the Appellant submitted the following figures in relation to the sole trade business' Value Added Tax (hereinafter "VAT") position for 2019:

2019	Monthly VAT €
January	4,432.03
February	4,113.96
March	4,663.22
April	4,680.79
May	4,431.14
June	3,887.16
January – June 2019	26,208.30
July	5,191.84
August	5,184.78
September	4,488.28
October	4,630.55

November	3,570.28
December	5,958.13
July - December 2019	29,023.86

33. In addition, the Appellant submitted the following information for July and August 2020:

Month	Gross	VAT	Net
July 2020	59,814.87	5,314.19	54,500.68
August 2020	59,524.74	5,460.89	54,063.85
	119,339.61	10,775.08	108,564.53

34. On 23 May 2023, the Respondent issued correspondence to the Appellant stating that the Respondent considered that the Appellant's business had not met the 30% reduction in turnover requirement for all pay dates from 1 July 2020 to 31 December 2020, from 1 January 2021 to 30 June 2021 and from 1 July 2021 to 30 April 2022. As a result, the Respondent informed the Appellant that it had not been eligible to receive EWSS payments in those periods.
35. On 30 May 2023, the Appellant indicated to the Respondent that it was unhappy with the Respondent's finding that the Appellant was ineligible for EWSS and wished to lodge a Level 2 appeal internally with the Respondent.
36. On 18 August 2023, the Respondent issued correspondence to the Appellant requesting additional information in relation to the acquisition and transfer of the business from the sole trade to a limited company how and where the business was advertised for sale/copies of advertisements, full particulars of the sale, including copies of any sales agreement/contracts and bank accounts showing payment and source of finance, how the acquisition of the business was treated in the company accounts, copy of the lease agreement for the business premises.
37. On 1 September 2023 the Appellant stated as follows:

*“1. The business was advertised locally by talking to the local business and by putting a Business for Sale sign outside the shop. No third party agent was involved.*

*2. The particulars of the sale were that new company will take over the existing assets and will only pay once the company is in a position to pay.*

*3. Acquisition of the business was treated in the accounts as Assets purchased and a liability was created.”*

38. The Appellant also submitted a copy of a lease agreement in relation to the business premises from which the Appellant trades which was between the Director’s spouse as the tenant and the landlord.

39. By letter dated 23 October 2023, the Appellant was advised that it had not been successful with respect to its Level 2 complaint.

40. On 25 January 2024, the Respondent issued the contested Notices of Assessment.

41. Prior to the oral hearing of this appeal, the Respondent vacated the Notice of Assessment for the period 1 July 2021 to 31 July 2021.

42. Therefore, the amount under appeal is €72,403.00.

### **Legislation and Guidelines**

43. The legislation relevant to this appeal is as follows:

#### *Section 28B of the EMPI Act 2020, as in force from 1 July 2020:*

*“(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, ...*

*and*

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



*(2A) Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 January 2021 to 30 June 2021 (in this subsection referred to as 'the second specified period') 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 second 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 January 2019 to 30 June 2019 (in this subsection referred to as 'the second corresponding period'),*

*(II) in the case where the business of the employer has not operated for the whole of the second corresponding period but the commencement of that business's operation occurred no later than 1 May 2019, there will occur in the part of the second specified period, which corresponds to the part of the second 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 second corresponding period, or*

*(III) in the case where the commencement of the operation of the employer's business occurred after 1 May 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 second 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).*

*(2B) Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 July 2021 to the date on which the qualifying period expires in respect of the 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 January 2021 to 31 December 2021 (in this subsection referred to as 'the third 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 January 2019 to 31 December 2019 (in this subsection referred to as 'the third corresponding period'),*

*(II) in the case where the business of the employer has not operated for the whole of the third 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 third specified period, which corresponds to the part of the third 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 third 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 third 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).*

*(2C)Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 January 2022 to the date on which the qualifying period expires in respect of the employer where -*

*(a)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, there will occur in the period from 1 December 2021 to 31 January 2022 -*

*(i)in the case where the commencement of the operation of the employer's business occurred before 1 May 2019, 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 December 2019 to 31 January 2020, and*

*(ii) in the case where the commencement of the operation of the employer's business occurred on or after 1 May 2019, 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 average monthly turnover of the employer's business or in the average monthly customer orders being received by the employer by reference to the average monthly turnover of the employer's business or the average monthly customer orders being received by the employer -*

*(I) in the period from 1 August 2021 to 30 November 2021 (in this subparagraph referred to as 'the reference period'), or*

*(II) in the case where the business of the employer has not operated for the whole of the reference period, in the part of the reference period in which the business has operated,*

*and*

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

*(2D)(a) This subsection shall apply to an employer where -*

*(i) public health restrictions applied to the business of the employer in the relevant period, and*

*(ii) the conduct of that business was directly impacted by reason of the terms in which those public health restrictions stood in the relevant period being different from how they stood immediately before that period by virtue of the relevant amendments.*

*(b) In this subsection -*

*'public health restrictions' means restrictions for the purpose of preventing, or reducing the risk of, the transmission of Covid-19 provided for in the Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 2) Regulations 2021 (S.I. No. 217 of 2021);*

*'relevant amendments' means Regulations 5 to 8 of the Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (No. 2) (Amendment) (No. 22) Regulations 2021 (S.I. No. 736 of 2021);*

*'relevant period' means the period from 20 December 2021 to 22 January 2022.*

*(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.*

*[...]*

*(19) The administration of this section shall be under the care and management of the Revenue Commissioners and section 849 of the Act shall apply for this purpose with any necessary modifications as it applies in relation to tax within the meaning of that section.*

*(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).*

*[...]*

*(23) (a) In so far as it relates to income tax, this section shall be construed together with the Income Tax Acts..."*

44. 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:

44.1. 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 as set out in section 28B(2A) of the EMPI Act 2020.

44.2. 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 as set out in section 28B(2B) of the EMPI Act 2020.

44.3. From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020 as set out in section 28B(2C) of the EMPI Act 2020.

Otherwise in respect of these time periods, and insofar as is relevant for this appeal, section 28B of the EMPI Act 2020 remained as set out above.

45. Additionally, from 1 August 2020, subsection 14A was inserted into section 28B of the EMPI Act 2020:

*"A person aggrieved by an assessment or an amended assessment to relevant tax made on that person may appeal the assessment or amended assessment, as the case may be, to the Appeal Commissioners, in accordance with section 949I of the Act, within the period of 30 days after the date of the notice of assessment or the amended assessment, as may be appropriate."*

46. As required by section 28B(20) of the EMPI Act 2020, the Respondent published Main Guidelines on the operation of the EWSS (hereinafter the "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.”*

47. In respect of the monthly 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...”*

48. 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. It is reasonably expected that the assumptions which underpin the projections will be reliable, will reflect the operating conditions of the business, and will remain materially unchanged. However, Revenue appreciates that in exceptional circumstances, certain unforeseen events may occur which require the employer to revise the original budget estimate e.g. imposition of further Government restrictions (post the review date) impacting trade, receipt of an unexpected donation, entering into a significant new sales contract etc. Where Revenue determines that an employer, at any time over the term of the scheme, claimed and received payment by applying accounting practices that are clearly not appropriate, or by deliberately misrepresenting the true financial position of the business, it will be excluded from the EWSS in its entirety. No further claims will be accepted, and all subsidy paid and PRSI credit issued will be immediately repayable together with interest and penalties. The business may also face possible criminal prosecution.”*

## **Submissions**

### *Appellant’s Submissions*

49. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination. No direct oral evidence was adduced on behalf of the Appellant, with the Representative making oral submissions in the place of evidence. The Representative was cross-examined under affirmation by the Respondent.

50. The Appellant is a limited company and, at the oral hearing, was represented by Mr. ■■■■■, the Director's husband (hereinafter the "Representative"). The Representative was assisted at the oral hearing by his daughter, Ms ■■■■■ who provided some interpretation assistance to the Representative and who also made oral submissions at the hearing.
51. It was submitted that the Appellant was incorporated as a new business on ■■■ December 2019, following the acquisition by the Appellant of a pre-existing business which had been run as a sole trader business by the Representative. The Respondent subsequently issued a new VAT registration number and a new business licence / registration certificate to the Appellant.
52. It was submitted that the sole trade business had been run as a newsagent. It was further submitted that, whilst the Appellant traded as a newsagents and retail store, it did so with a different product range, new makeover, different opening hours and new director with a fresh vision. It was submitted that the new retail product range included, but was not limited to, a "slush machine", ice cream, non-alcoholic drinks, confectionary, Halal-based candies and products, household items, coffee, disposable vapes, antiseptics, hand sanitisers, soap / toiletries, cleaning products, helium balloons and party products. It was submitted that this changed the whole product line and product mix as compared to the previous business. As a result, it was submitted, a wider and different customer base was targeted.
53. It was submitted that the lease for the premises from which the Appellant's business had operated remained in the name of the owner of the previous sole trade business, which had been run by the Director's husband and which the Appellant had acquired.
54. It was submitted that, as the Appellant's business had suffered as a result of the COVID-19 pandemic, it was decided to apply for the EWSS. This decision was made on the basis that the Appellant had suffered a 30% reduction in turnover over a period of consecutive months. The Appellant had, it was submitted, projected a monthly increase in turnover of 8% when compared to the sole trade business when it had commenced its business, which said projection was based on the change in, and expansion of, products which the Appellant stocked in comparison to the previous sole trade business.

#### *Respondent's Submissions*

55. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of

the submissions whether written, oral or documentary received when considering this determination.

56. The Respondent submitted that this appeal centres on whether the Appellant can demonstrate that it was eligible to receive the EWSS payments which are the subject of the Assessments.
57. It is the Respondent's position that the Appellant has not demonstrated that it is a "New Business" pursuant to the provisions of the EMPI Act 2020. The Respondent submitted that:
- 57.1. The business of the Appellant is the trade of the sole trade, that is to say a newsagent that long predates the formation of the Appellant company.
- 57.2. The business has continued to trade from the same location as the sole trade, with similar - if not the same - stock and assets.
- 57.3. The Appellant has failed to distinguish the goods which it sells from those sold by the sole trade business.
58. The Respondent submitted that, as the Appellant was not a "New Business", it was required to perform its rolling reviews utilising the relevant 2019 turnover data pursuant to the provisions of section 28B(5) of the EMPI Act 2020.
59. It is the Respondent's position that the Appellant did not carry out the required rolling reviews and is therefore ineligible to receive payments under the EWSS.
60. In addition, it is the Respondent's position that, even if the Appellant had carried out the required rolling reviews, it has not demonstrated that it suffered a 30% reduction in turnover.

### **Material Facts**

#### *Uncontested Material Facts*

61. The following facts are not contested by the parties and the Commissioner finds same as material facts:
- 61.1. The Appellant was incorporated on [REDACTED] December 2019 pursuant to the provisions of the Companies Acts and registered with the Companies Registration Office with a registered address and trading premises of [REDACTED].
- 61.2. The Appellant operates the trade of a newsagent / corner shop.

- 61.3. The Director is the owner of 100% of the issued shares in the Appellant and is the sole director of the Appellant Company.
- 61.4. In December 2019, the Appellant acquired its business from the Director's husband, who, as a sole trader, had owned and operated a newsagent business from the same location as the Appellant up to 31 December 2019.
- 61.5. The premises from which both the sole trade business and the Appellant traded was the subject of a lease which had the Appellant's husband as tenant.
- 61.6. The Appellant was not party to a lease in relation to the business premises between 2020 and 2022.
- 61.7. On 11 September 2020, the Appellant registered for the EWSS.
- 61.8. Between September 2020 and April 2022 the Appellant claimed and received €75,203.00 of EWSS payments.
- 61.9. On 14 September 2021, the Appellant selected the "New Business" indicator on the initial ERF which it submitted to the Respondent indicating that its trade had commenced after 1 November 2019.
- 61.10. There was no requirement for a "New Business" to return completed monthly rolling reviews to the Respondent.
- 61.11. On 13 October 2021, the Respondent wrote to the Appellant and sought, *inter alia*, details of the monthly rolling reviews completed by the Appellant to verify the projected minimum 30% reduction in projected turnover or customer orders for the period 1 January 2021 to 31 December 2021 as if the pandemic had not occurred relative to actual turnover or customer orders and projected turnover or customer orders, looking at the period as a whole rather than on a monthly basis.
- 61.12. On 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in July 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
March	2021	59,978.08	Actual	35,761.00	24,217.08	40%
April	2021	59,978.08	Actual	34,433.00	25,545.08	43%
May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Projected	35,000.00	24,978.08	42%
August	2021	59,978.08	Projected	35,000.00	24,978.08	42%
September	2021	59,978.08	Projected	35,000.00	24,978.08	42%
October	2021	59,978.08	Projected	35,000.00	24,978.08	42%
November	2021	59,978.08	Projected	35,000.00	24,978.08	42%
December	2021	59,978.08	Projected	35,000.00	24,978.08	42%
Yearly Totals		719,737.00		427,179.00	292,558.00	41%

62. On 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in August 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
March	2021	59,978.08	Actual	35,761.00	24,217.08	40%
April	2021	59,978.08	Actual	34,433.00	25,545.08	43%
May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Actual	38,541.00	21,437.08	36%
August	2021	59,978.08	Projected	39,000.00	20,978.08	35%
September	2021	59,978.08	Projected	39,000.00	20,978.08	35%
October	2021	59,978.08	Projected	39,000.00	20,978.08	35%
November	2021	59,978.08	Projected	39,000.00	20,978.08	35%
December	2021	59,978.08	Projected	39,000.00	20,978.08	35%
Yearly Totals		719,737.00		450,720.00	269,017	37%

- 62.1. No further monthly rolling reviews for 2021 were submitted by the Appellant.
- 62.2. On 11 July 2022, the Respondent wrote to the Appellant and requested, *inter alia*, rolling reviews from the Appellant for 2020.
- 62.3. On 4 October 2022 the Appellant submitted the following in relation to a rolling review for 2020:

Month	Year	Projection Sales for 2020	Actual / Projected	Actual Sales 2020	Difference	Decrease
September	2020	55,535.25	Actual	35,436.15	20,099.10	36%
October	2020	55,535.25	Actual	36,141.02	19,394.23	35%
November	2020	55,535.25	Actual	46,298.54	9,236.71	17%
December	2020	55,535.25	Actual	32,159.02	23,376.23	42%

63. On 2 May 2023, the Appellant submitted the following “Actual Net Sales” figures in relation to the sole trade business for 2019:

2019	Actual Net Sales €
January	54,278.37
February	51,383.96
March	54,453.13
April	56,359.37
May	52,362.05
June	54,093.40
July	55,679.15
August	65,473.74
September	54,734.36

October	57,077.60
November	59,622.40
December	62,540.28

### *Contested Material Facts*

64. The following material fact is contested by the parties in this appeal:

64.1. Whether the Appellant was a “New Business”;

65. 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.”*

66. The standard of proof is the balance of probabilities.

67. When considering this material fact, the Commissioner has had regard to all of the evidence, whether oral or documentary, and all of the submissions, whether oral or documentary, submitted by the parties.

68. On the one hand, it is the Appellant’s position that it was a “New Business”, having commenced its business in December 2019 / January 2020.

69. On the other hand, it is the Respondent’s position that the Appellant acquired an existing sole trade business from the Director’s husband. It is the Respondent’s position that the Appellant’s business was a continuation of the previously existing sole trade business and was not a “New Business” for the purposes of the EMPI Act 2020.

70. The Commissioner has already found as a material fact, and it is not in dispute between the parties, that the Appellant was incorporated on ■ December 2019.

71. On 28 March 2022, the Appellant wrote to the Respondent stating, *inter alia*:

*“Our business is a high street Newsagent shop. We are selling Newspapers, Tobacco, Cold Drinks, Hot Drinks, Snack, Confectionary, and small everyday household use items.”*



72. On 4 October 2022, the Appellant wrote to the Respondent and stated the following:

*“(a) Are the activities substantially the same? My answer will be No. As the main activity is to run as a Newsagent shop, but I added an Ice cream machine, Slush machine, Coffee machine, many more Cigarettes and Tobacco, Disposable Vape, Helium Balloons, party stuff, gift baskets and many more lines.*

*(b) Is the management / control substantially the same? No. I open new company 2020 (sic) and I am managing the business and have full control on the business.*

*(c) Are the employees substantially the same? No, employees have changed.*

*(d) Has the location(s) where the trade is carried on changed? No, the company operates from the same location.*

*(e) Does the new business have the same customers/suppliers? Some suppliers and customers are same but as a result of changes in the product mix, the customers and suppliers has changes (sic). For example, new products were added including Slush Machines, Ice Cream Machines, non-Alcoholic drinks and Confectionary , Halal based candies and products, household items Coffee machine , Disposable Vape, many more cigarettes and tobacco Helium Balloons .*

*(f) Are the accounting / payroll systems used the same? No, the accounting and payroll systems were changed.”*

73. In support of its position that it was a “New Business”, the Appellant submitted the following in its Outline of Arguments:

*“The business would not continue just as a newsagent but as a retail store with a materially different product range, new makeover, different opening hours and new director with a fresh vision. The new retail product range included but was not limited to slush machine, ice cream, non-alcoholic drinks, confectionery, Halal-based candies and products, household items, coffee, disposable vapes, dettol, hand sanitisers, antiseptic, soap/ toiletries, cleaning products, helium balloons, party gear. This changed the whole product line and product mix as compared to the previous business carried out from the premises as a sole trader. Due to this, a wider and different customer base was targeted.”*

74. At the oral hearing it was submitted on behalf of the Appellant that the sole trade business was involved in the sale of top-ups, lottery tickets, limited confectionary and newspapers. It was further submitted that, as the Appellant’s business had expanded its product range from that which the sole trade business had offered, it was a “New Business”.

75. It is not in dispute between the parties, and the Commissioner has already found as material facts, that the Appellant operated out of the same premises as the sole trade business and that the premises was the subject of a lease personal to the Director's husband as tenant.
76. On cross examination by the Respondent, the Representative confirmed that the stock and the employees from the sole trade business transferred to the Appellant's business when the Appellant commenced trading.
77. When asked by the Commissioner, the Representative confirmed that the same suppliers which had supplied the sole trade business in December 2019 continued to supply the Appellant in January 2020.<sup>1</sup> In addition, the Representative confirmed that, in January 2020, the Appellant continued to sell the same product range as the sole trade business had sold in December 2019. He stated that, over time, the Appellant had expanded and changed the product range which it sold and that, as a result, its customer base had changed. No evidence relating to the timing of the introduction of new products by the Appellant was adduced.
78. Based on the foregoing, the Commissioner finds that the Appellant's business was a continuation of the sole trade business. This is based on the following:
- 78.1. The Appellant continued to trade from same business premises under a lease held by the Director's husband;
  - 78.2. The sole trade's employees transferred to the Appellant;
  - 78.3. The sole trade's stock transferred to the Appellant;
  - 78.4. The Appellant commenced trading using the same suppliers as the sole trade business;
  - 78.5. The Appellant commenced trading selling the same product range as the sole trade business.
79. The Commissioner is strengthened in her finding that the Appellant was not a "New Business" by the fact that the Appellant has, in the rolling reviews for July 2021 and August 2021, based its projected turnover figures on the 2019 turnover of the sole trade business. The Commissioner does not find it credible that on the one hand the Appellant seeks to rely on the sole trade business as a benchmark for its projected turnover figures but that on the other hand the Appellant seeks to distance itself from the sole trade

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<sup>1</sup> Transcript pages 73 and 74

business and to contend that the Appellant's business was not a continuation of the sole trade business.

80. As a result of the above, the Commissioner finds as a material fact that the Appellant's business was not a "New Business" but, rather, was a continuation of the sole trade business.

*Findings of Material Facts:*

81. For the avoidance of confusion, the Commissioner has made the following findings of material fact:

- 81.1. The Appellant was incorporated on [REDACTED] December 2019 pursuant to the provisions of the Companies Acts and registered with the Companies Registration Office with a registered address and trading premises of [REDACTED].
- 81.2. The Appellant operates the trade of a newsagent / corner shop.
- 81.3. The Director is the owner of 100% of the issued shares in the Appellant and is the sole director of the Appellant Company.
- 81.4. In December 2019, the Appellant acquired its business from the Director's husband, who, as a sole trader, had owned and operated a newsagent business from the same location as the Appellant up to 31 December 2019.
- 81.5. The premises from which both the sole trade business and the Appellant traded was the subject of a lease which had the Appellant's husband as tenant.
- 81.6. The Appellant was not party to a lease in relation to the business premises between 2020 and 2022.
- 81.7. On 11 September 2020, the Appellant registered for the EWSS.
- 81.8. Between September 2020 and April 2022 the Appellant claimed and received €75,203.00 of EWSS payments.
- 81.9. On 14 September 2021, the Appellant selected the "New Business" indicator on the initial ERF which it submitted to the Respondent indicating that its trade had commenced after 1 November 2019.
- 81.10. There was no requirement for a "New Business" to return completed monthly ERFs to the Respondent.

81.11. On 13 October 2021, the Respondent wrote to the Appellant and sought, *inter alia*, details of the monthly rolling reviews completed by the Appellant to verify the projected minimum 30% reduction in projected turnover or customer orders for the period 1 January 2021 to 31 December 2021 as if the pandemic had not occurred relative to actual turnover or customer orders and projected turnover or customer orders, looking at the period as a whole rather than on a monthly basis.

81.12. On 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in July 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
March	2021	59,978.08	Actual	35,761.00	24,217.08	40%
April	2021	59,978.08	Actual	34,433.00	25,545.08	43%
May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Projected	35,000.00	24,978.08	42%
August	2021	59,978.08	Projected	35,000.00	24,978.08	42%
September	2021	59,978.08	Projected	35,000.00	24,978.08	42%
October	2021	59,978.08	Projected	35,000.00	24,978.08	42%
November	2021	59,978.08	Projected	35,000.00	24,978.08	42%
December	2021	59,978.08	Projected	35,000.00	24,978.08	42%

Yearly Totals		719,737.00		427,179.00	292,558.00	41%
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81.13. On 28 March 2022, the Appellant submitted the following monthly rolling review which, it was claimed, was completed in August 2021 to verify the projected minimum 30% reduction in projected turnover or customer orders for 1 January 2021 to 31 December 2021 to the Respondent:

Month	Year	Projection Sales for 2021	Actual / Projected	Turnover	Difference	Decrease
January	2021	59,978.08	Actual	40,570.00	19,408.08	32%
February	2021	59,978.08	Actual	36,757.00	23,221.08	39%
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May	2021	59,978.08	Actual	34,848.00	25,130.08	42%
June	2021	59,978.08	Actual	34,810.00	25,168.08	42%
July	2021	59,978.08	Actual	38,541.00	21,437.08	36%
August	2021	59,978.08	Projected	39,000.00	20,978.08	35%
September	2021	59,978.08	Projected	39,000.00	20,978.08	35%
October	2021	59,978.08	Projected	39,000.00	20,978.08	35%
November	2021	59,978.08	Projected	39,000.00	20,978.08	35%
December	2021	59,978.08	Projected	39,000.00	20,978.08	35%
Yearly Totals		719,737.00		450,720.00	269,017	37%

81.14. No further monthly rolling reviews for 2021 were submitted by the Appellant.

81.15. On 11 July 2022, the Respondent wrote to the Appellant and requested, *inter alia*, rolling reviews from the Appellant for 2020.

81.16. On 4 October 2022 the Appellant submitted the following in relation to a rolling review for 2020:

Month	Year	Projection Sales for 2020	Actual / Projected	Actual Sales 2020	Difference	Decrease
September	2020	55,535.25	Actual	35,436.15	20,099.10	36%
October	2020	55,535.25	Actual	36,141.02	19,394.23	35%
November	2020	55,535.25	Actual	46,298.54	9,236.71	17%
December	2020	55,535.25	Actual	32,159.02	23,376.23	42%

81.17. On 2 May 2023, the Appellant submitted the following “Actual Net Sales” figures in relation to the sole trade business for 2019:

2019	Actual Net Sales €
January	54,278.37
February	51,383.96
March	54,453.13
April	56,359.37
May	52,362.05

June	54,093.40
July	55,679.15
August	65,473.74
September	54,734.36
October	57,077.60
November	59,622.40
December	62,540.28

81.18. The Appellant's business was not a "New Business" but, rather, was a continuation of the sole trade business.

### **Analysis**

82. 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.

83. Amendments to the EMPI Act 2020 were subsequently enacted such that:

83.1. 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 as set out in section 28B(2A) of the EMPI Act 2020.

83.2. 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 as set out in section 28B(2B) of the EMPI Act 2020,

83.3. From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020 as set out in section 28B(2C) of the EMPI Act 2020.

84. 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.
85. No evidence has been submitted by the Appellant in this appeal to show that it carried out monthly rolling reviews throughout the time it was registered on the EWSS. The monthly rolling review documentation submitted to the Respondent and to the Commission all appeared to post-date the Appellant’s participation in the scheme.
86. The Commissioner notes that the Guidelines provided that *“employers should retain their evidence/basis for entering and remaining in the scheme”*. The Commissioner is satisfied that the Appellant has failed to provide evidence of carrying out monthly rolling reviews during the course of its participation in the EWSS. The Commissioner notes that the Appellant submitted information in relation to July 2021 and August 2021 to the Respondent on 28 March 2022 having been requested to submit evidence of rolling returns on 13 October 2021.
87. The Commissioner considers that the plain meaning of section 28B of the EMPI Act 2020 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 28B(5) of the EMPI Act 2020 requires the carrying out of monthly rolling reviews by participants in the scheme. Therefore, it is clear that if an employer failed to carry out monthly rolling reviews, it was not entitled to participate in the EWSS.
88. Under cross-examination, the Representative was asked whether monthly rolling reviews had been carried out for any months other than July 2021 and August 2021. In response it was stated that the Appellant’s account knew about this. The Appellant’s accountant was not present at the oral hearing and no formal accounting evidence was adduced to the Commissioner, with the only oral evidence being that of the Representative.
89. The Appellant has failed to submit documentary evidence that monthly rolling reviews were carried out in relation to its business and its participation in the EWSS.



90. The Commissioner considers that the information provided by the Appellant does not establish that the Appellant carried out monthly rolling reviews and no evidence to that effect has been adduced or presented to the Commissioner.
91. The Commissioner notes that the Appellant claims that it had given all of its supporting documentation in relation to its participation in the EWSS to its accountant, but that this documentation was lost by its accountant and is no longer available. No evidence, whether documentary or oral, was adduced to the Commissioner which tends to support this claim.
92. The Commissioner finds that the evidence adduced, documentation submitted and submissions received in this appeal, have failed to establish on the balance of probabilities that the Appellant carried out monthly rolling reviews of its business circumstances immediately upon the end of each month as required under section 28B(5) of the EMPI Act 2020.
93. The Commissioner notes that section 28B(11) of the EMPI Act 2020 provides that:
- “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.”*
94. In addition, the Commissioner notes that section 28B(12) of the EMPI Act 2020 provides that:
- “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.”*
95. The requirement for participants in the EWSS to have carried out monthly rolling reviews was confirmed by the High Court in *Fire Safety Advantage Limited (formerly Superior Group Irl Limited) v Revenue Commissioners* [2025] IEHC 78.
96. As a result, the Commissioner finds that the Respondent was correct in its decision to disentitle the Appellant to the EWSS payments received by the Appellant and to issue the contested Notices of Assessment. As set out above, the Commissioner considers that

there is no evidence to suggest that a monthly rolling review that accorded with the requirements of section 28B of the EMPI Act 2020 and the Guidelines was carried out by the Appellant at any stage during the claim periods.

97. The Commissioner has also considered the Respondent's submission that even if the Appellant had carried out the required rolling reviews, it has not demonstrated that it suffered a 30% reduction in turnover as required by section 28B of the EMPI Act 2020.
98. The Appellant has submitted a number of figures in relation to the years 2020 and 2021 in support of this appeal:

	2019 "Actual Net Sales" for sole trade business submitted on 2 May 2023	2020 "EWSS Review Month on Month Basis" for Appellant submitted on 4 October 2022	€ Difference between 2019 Actual Sales for sole trade and 2020 Actual figures submitted by Appellant	% Difference between 2019 Actual Sales for sole trade and 2020 Actual figures submitted by Appellant	2021 "EWSS Review Month on Month Basis" for Appellant submitted on 28 March 2022	€ Difference between 2019 Actual Sales for sole trade and 2021 Actual figures submitted by Appellant	% Difference between 2019 Actual Sales for sole trade and 2021 Actual figures submitted by Appellant
Jan	54,278.37				40,570.00	-13,708.37	-25.26%
Feb	51,383.96				36,757.00	-14,626.96	-28.70%
Mar	54,453.13				35,761.00	-18,692.13	-34.33%
Apr	56,359.37				34,433.00	-21,926.37	-38.90%
May	52,362.05				34,848.00	-17,514.05	-33.45%
Jun	54,093.40				34,810.00	-19,283.40	-35.65%
Jul	55,679.15	54,500.68	-1,178.47	-2.12%	38,541.00	-17,138.15	-30.78%
Aug	65,473.74	54,063.85	-11,409.89	-17.43%			

Sep	54,734.36	35,436.15	-19,298.21	-35.26%			
Oct	57,077.60	36,141.02	-20,936.58	-36.68%			
Nov	59,622.40	46,298.54	-13,323.86	-22.35%			
Dec	62,540.28	32,159.02	-30,381.26	-48.58%			
Total	678,057.81						

99. As part of its documentation, the Appellant has submitted a copy of a Formatted Trial Balance for the sole trade business for 2019 which records sales of stock of €622,826. This is at odds with the amount of €678,057.81 in total sales for the sole trade business in 2019 submitted by the Appellant in its correspondence to the Respondent on 2 May 2023. No explanation for this discrepancy has been given to the Commissioner.
100. In addition, the Appellant submitted a copy of its unaudited financial statements for the financial year ended 31 December 2021 to the Commissioner as part of this appeal. This records the Appellant's turnover in 2020 as being €578,060 and its turnover in 2021 as being €508,133. This is the only place where the Appellant's total turnover figures for the years 2020 and 2021 have been revealed to the Commissioner.
101. Even if the Commissioner accepts the figures submitted by the Appellant, when comparing the submitted 2019 total sales for the sole trade business at their height of €678,057.81 and the Appellant's recorded sales for 2020 in its unaudited financial statements for 2020 of €578,060, this reveals a 14.75% reduction in sales between 2019 and 2020.
102. In a similar fashion, when comparing the submitted 2019 total sales for the sole trade business at their height of €678,057.81 and the Appellant's recorded sales for 2021 in its unaudited financial statements for 2021 of €508,133, this reveals a 25.06% reduction in sales between 2019 and 2020.
103. As a result, the Commissioner finds that the Appellant has not discharged the burden of proof to establish that it had, or was expected, to experience a 30% reduction in turnover or customer orders during the relevant period, in accordance with section 28B of the EMPI Act 2020.

## Conclusion

104. In summary, the Commissioner finds that:

- 104.1. the Respondent was correct in its decision to disentitle the Appellant to the EWSS payments received by the Appellant and to issue the contested Notices of Assessment.
- 104.2. there is no evidence to suggest that a monthly rolling review that accorded with the requirements of section 28B of the EMPI Act 2020 and the Guidelines was carried out by the Appellant at any stage during the claim periods.
- 104.3. the Appellant has not discharged the burden of proof to establish that it had, or was expected, to experience a 30% reduction in turnover or customer orders during the relevant period, in accordance with section 28B of the EMPI Act 2020.

## Determination

105. As a result of the above, the Commissioner determines that the Appellant has not been successful in this appeal and determines that the following Notices of Assessment shall stand:

	Period of Assessment	Assessment Amount €
1.	1 September 2020 to 30 September 2020	2,942.00
2.	1 October 2020 to 31 October 2020	3,890.50
3.	1 November 2020 to 30 November 2020	4,877.00
4.	1 December 2020 to 31 December 2020	2,061.00
5.	1 January 2021 to 31 January 2021	3,409.00
6.	1 February 2021 to 28 February 2021	3,612.00
7.	1 March 2021 to 31 March 2021	4,753.00
8.	1 April 2021 to 30 April 2021	4,200.00
9.	1 May 2021 to 31 May 2021	4,150.00

10.	1 June 2021 to 31 June 2021	2,800.00
11.	1 August 2021 to 31 August 2021	3,850.00
12.	1 September 2021 to 30 September 2021	4,400.00
13.	1 October 2021 to 1 October 2021	4,500.00
14.	1 November 2021 to 30 November 2021	5,600.00
15.	1 December 2021 to 31 December 2021	4,400.00
16.	1 January 2022 to 31 January 2022	5,450.00
17	1 February 2022 to 28 February 2022	4,008.50
18	1 March 2022 to 31 March 2022	1,900.00
19	1 April 2022 to 30 April 2022	1,600.00

106. The Commissioner notes that the Notice of Assessment for the period July 2021 was vacated by the Respondent prior to the hearing of this appeal. For completeness however, the Commissioner determines that the Notice of Assessment for the period July 2021 issued by the Respondent on 25 January 2024 shall be varied to nil.

107. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 (hereinafter the "TCA 1997") and in particular section 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

108. 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**

109. 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.



Clare O'Driscoll  
Appeal Commissioner  
14 March 2025

**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.**