



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

123TACD2025

Between

[REDACTED]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of 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 (“the EWSS”).
2. The Respondent submits that the assessments were raised on the basis that the Appellant failed to demonstrate to the satisfaction of the Respondent that its business had experienced or was expected to experience a 30% (thirty percent) reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.
3. The appeal proceeded by way of a hearing on 2 December 2024. The Appellant did not have legal representation at the hearing. Representatives of the Appellant who attended were [REDACTED], Director of the Appellant and [REDACTED], who was described as a former employee of the Appellant (“the Witness”). The Respondent was represented by Senior Counsel. In addition to hearing oral submissions from the parties’ representatives, the Appeal Commissioner (“the Commissioner”) also heard sworn oral testimony from the Witness.

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, 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. The EWSS 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.
5. The Appellant registered for the EWSS with effect from 1 August 2020. The Appellant claimed payments under the EWSS for the periods July 2020 to July 2021 in the amount of €285,407.
6. On 7 November 2023 the Respondent raised assessments in respect of payments made under the EWSS and it is these assessments which are being appealed. These assessments sought the following amounts as illustrated by the table below:

Period of Assessment	Amount of Assessment Remitted amount		Balance Unpaid
01/07/2020 - 31/07/2020	€4,872.00	€0	€4,872.00
01/08/2020 - 31/08/2020	€4,060.00	€0	€4,060.00
01/09/2020 - 30/09/2020	€3,654.00	€0	€3,654.00
01/10/2020 - 31/10/2020	€24,521.00	€0	€24,521.00
01/11/2020 - 30/11/2020	€26,650.00	€0	€26,650.00
01/12/2020 - 31/12/2020	€25,600.00	€0	€25,600.00
01/01/2021 - 31/01/2021	€31,650.00	€0	€31,650.00
01/02/2021 - 28/02/2021	€26,700.00	€0	€26,700.00
01/03/2021 - 31/03/2021	€25,900.00	€0	€25,900.00
01/04/2021 - 30/04/2021	€31,600.00	€0	€31,600.00
01/05/2021 - 31/05/2021	€25,900.00	€0	€25,900.00
01/06/2021 - 30/06/2021	€26,750.00	€0	€26,750.00
Total	€257,857.00		257,857.00

7. On 6 July 2022 the Respondent wrote to the Appellant advising that an intervention had been commenced regarding the Appellant's entitlement to the EWSS.
8. The Respondent requested the Appellant to provide monthly rolling reviews to demonstrate that its business experienced or was expected to experience a 30% reduction in turnover. The Respondent notified the Appellant that employers must undertake a review of the six-month period on the last day of every month (other than July 2020) up to and including December 2021 to be satisfied whether they continue to meet the EWSS eligibility criteria and to take the necessary action of withdrawing from the EWSS where they do not. The Appellant was notified that this review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period (July to December 2020 for 2020 pay dates, January to June 2021 for January to June 2021 pay dates and January to December 2021 for pay dates in the period 1 July 2021 to 30 April 2022).

9. On 15 July 2022 the Appellant submitted an analysis of sales figures for January 2021 to July 2021 showing a year-to-date reduction of 30.88%.
10. On 18th July 2022 the Respondent requested that the Appellant submit monthly rolling reviews for the period July to December 2020.
11. The Appellant submitted sales figures for July to December 2020 and July to December 2019 with an analysis of these sales figures which showed a reduction of 30.74% for July to December 2020 compared to July to December 2019.
12. The Respondent after review of the information requested the Appellant to submit a schedule of sales for all periods in 2020 and 2021. The schedule of sales was provided by the Appellant to the Respondent.
13. On 11 November 2022 the Respondent requested the Appellant to amend the payroll submissions by removing the EWSS marker for all periods and repay the subsidies received.
14. On 24 November 2022 the Appellant advised the Respondent that there were additional sales in 2019 which would qualify the Appellant for the EWSS for 2020 and up until June 2021.
15. The Respondent requested that the Appellant submit sales listings for 2019 to include the additional sales. These figures were submitted to the Respondent by the Appellant.
16. The Respondent requested the Appellant to amend the payroll submissions for July to December 2020 and July 2021 to remove the EWSS marker and repay the subsidies received.
17. On 31 July 2023 the Appellant advised the Respondent that the 2019 and 2020 figures submitted did not take into account discounts allowed or taken by customers. The discounts allowed arose at various times when payment had not been received in full on the invoices that had issued. The Appellant submitted that taking the discounts into account would result in a percentage decrease for July to December 2020 of 30.01% when compared to July to December 2020.
18. On 11th September 2023 the Respondent issued a pre-assessment letter advising that the Respondent did not accept this latest change to the sales figures.
19. On 18th September 2023 the Appellant requested that its eligibility for the EWSS be reviewed on the full facts of the case.

20. On 6 December 2023 the Appellant completed its Notice of Appeal and submitted it to the Commission. An extract of the Appellant's grounds of appeal are set out below:

"We believe that we had achieved the requirement [sic] of 30% in order to claim for the EWSS for the periods July to Decmber [sic] 2020 and for the period January 2021 to June 2021.

Once we were aware that we did not qualify for July 21 we deregistered immedialtley [sic]

We submitted documentation which showed that we had meet the requirements as outline above, however the Revenue Commissioner said that we had not meet the requirements for July to December 20, as the reduction was 29.93% therefore would need to repay the amount we received. for this period.

We were also informed that we did not quality for July 2021 which we are in agreement with.

However, we then informed that we would have to repay all of the period July 2020 to July 2021 following a letter we received on the 6th November 2023."

The notice of assessments were raised on the 7th November 2023.

We received a letter on the 6th November 2023 from the EWSS complince [sic] unit to which we believe the figures used within the letter are incorrect."

Legislation and Guidelines

21. The legislation and guidelines relevant to this appeal are set out below.

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)."*

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."

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 1st of the month) and cease claiming the subsidy..."

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

Direct Examination of [REDACTED] (the Witness) by [REDACTED]

22. The Witness stated the Appellant received correspondence from the Respondent looking for bank statements and pay slips in relation to a number of employees and the Appellant

sent that information to the Respondent. The Witness further stated that a subsequent request was made by the Respondent to the Appellant seeking a *".....breakdown of sales figures and a copy of RTDs, which were provided, and we got some correspondence back. I don't have all the dates in front of me here. But there was questions in relation to was the company eligible for availing of the EWSS"*. The Witness further stated the Appellant submitted to the Respondent *".....amended figures to the Respondent which included figures that had previously been omitted from the VAT returns"*.

23. The Witness stated the Appellant received further correspondence from the Respondent which stated that for the period July to December 2020 the Appellant only had a reduction in its turnover of 29.93% and that accordingly the Appellant did not qualify for the EWSS. The Witness stated that the percentage shortfall was .07%. which equated in money terms to *"...about €457."*

24. The Witness further stated the Respondent advised the Appellant that for the period January to June 2021 the Appellant did have a 30% reduction and that the Appellant was eligible for the EWSS for that period. The Witness continued and stated the Appellant submitted correspondence to the Respondent stating that in the *".....figures we hadn't included the discount that would have been given to customers and that that hadn't been applied to the sales."*

25. The Witness further stated the Appellant *".....sent the letter with our correspondence through MyEnquiries saying that these are the discount figures and with those taken into account that we would come in at 30.01 for the period January to December 2020"*. The Witness further stated the Appellant received a letter on 11 September advising that following a meeting with a representative of the Respondent and the Appellant, that the Respondent was not accepting any more sales figures and that the Appellant was not eligible for the EWSS for the period.

Cross Examination - [REDACTED] – the Witness

26. Counsel for the Respondent asked the Witness to refer to the letter from the Respondent to the Appellant dated 6 July 2022 and the response from the Appellant dated 15 July 2022. Counsel for the Respondent asked the Witness to refer to further responses from the Appellant to the Respondent. Counsel asked the Witness to refer to information given regarding the background to the Appellant being established in 2016 and to the Appellant's claim that it had been forced to close for a period of time because of the Covid-19 pandemic and how the Appellant claimed it was in compliance or entitled to the EWSS. Counsel for the Respondent cited from the Appellant's letter *"[W]e looked at our net sales for each period from January to July 2021 and compared this to our net sales for each*

period for January to July 2019. We have attached a schedule of this comparison for your attention".

27. Counsel for the Respondent asked the Witness did the Appellant compare its actual sales in 2019 to the actual sales that were achieved in 2021. The Witness replied "*.....that was correct*".
28. Counsel for the Respondent submitted that there was no attempt by the Appellant to carry out a rolling review which is required under legislation, which would require that in January 2021 one looked forward for the next six months and the forward projections and compare those projections to the actual figures of 2019. Counsel submitted that instead what was done by the Appellant was it compared at the end of each month the actual sales to the actual sales in 2019. The Witness replied that was correct and that is what was done.
29. Counsel submitted that the Appellant did not attempt to carry out, as was required pursuant to the Guidelines, what is called a rolling review where one sets out for the next six months what each month's projected turnover will be and compare them to the actual records of 2019 in order to ascertain whether or not the Appellant is going to meet the 30% criteria of the EWSS for the calendar year 2021. The Witness in response stated that for the period from July 2020 to December 2020 it would have been six months and then for a longer period in respect of 2021.
30. Counsel submitted that the required exercise simply was not done. The Witness stated that the Appellant had de-registered for the EWSS and that enquiries were made and a decision was made that after July the Appellant would not qualify under the EWSS.
31. Counsel submitted that the Appellant did not know in January 2021 that the Appellant was going to exit the EWSS in August. The Witness agreed with Counsel's submission.
32. Counsel asked the Witness did he accept that the exercise prescribed under the Guidelines and legislation was not completed by the Appellant. The Witness replied "*not to the extent in which it was required at the time, no.*"
33. Counsel referred to the email dated 18 July 2022 from the Respondent to the Appellant, where the Respondent advised that there is a need for "*[R]olling monthly reviews for all months in 2020 in which EWSS was claimed.*" Counsel submitted the Respondent sent a further reminder to the Appellant of the need for "rolling reviews" in its letter dated 16 August 2022. Counsel submitted there was further correspondence between the parties and later the Appellant submitted further material and information to the Respondent, which Counsel submitted was "*...simply looking at the net sales for 2019 and the net sales for 2020*".

34. Counsel asked the Witness did he agree that what was done was not a rolling review. The Witness replied *"[I]f you deem it not to be a rolling review. You seem to be deeming it not a rolling review, but we would have probably deemed it to be a rolling review at the time."*
35. Counsel submitted he wanted to examine the Appellant's CT1 (Corporation Tax Return) forms which were before the Commission. Counsel asked the Witness had he been involved in the preparation of the corporation tax returns for the company. The Witness replied that they *"are prepared by the external accountant"* and that he had *"supplied the income and expenditure account, yes"*.
36. Counsel referred to a CT1 Form for the period 1 January 2019 to 31 December 2019. Counsel referred to the figure thereon for sales receipts/turnover of €1,222,888. The Witness replied *".....that was correct"*.
37. Counsel asked the Witness to look at the CT1 Form for 2020 and to the same heading of turnover and that in this return the turnover has reduced, it has reduced from €1.22 million to €1,013,977. Counsel asked the Witness if that was correct. The Witness replied that it was.
38. Counsel asked the Witness was there probably a 15% or maybe slightly greater reduction in turnover from 2019 to 2020. The Witness replied *"...that would be about right, yeah."*
39. Counsel submitted that the reduction from 2019 to 2020 was *".....certainly nowhere near 30%; isn't that right?"*. The Witness replied *"No, not for those figures, no."*
40. Counsel then asked the Witness to look at the CT1 Form for the Appellant for the year ended 31 December 2021 and thereon the figure for the turnover has increased up to €1,468,605. Counsel asked the Witness if it was correct. The Witness replied *"That's correct."*
41. Counsel submitted that according to the CT1 Forms for the Appellant, the Appellant had *"....a bit of a dip in its turnover in 2020, it made a very good recovery, in fact to an increase. I think what we saw in the last letter, in fact, was that the actual figures for the year '21 show an increase of 44.16%, I think was what the letter had said there earlier. But it's not far off what's reflected in the corporation tax return..."*. Counsel asked the Witness if it was correct. The Witness replied *"that would be correct, yeah."*
42. Counsel referred to a letter from the Appellant to the Respondent dated 24 November 2022, where the Appellant stated *".....have reviewed the workings that you supplied to us back on the 11th November 2022. Please note that there were additional sales during the*

year 2019 that were not included on the VAT Returns in 2019...". The Witness replied that he was familiar with the contents of the letter.

43. In reference to the previous letter from the Appellant to the Respondent, Counsel submitted the Appellant had stated therein *".....because it doesn't suit, you want to increase the 2019 figures so that it will make the turnover figures in 2020 and 2021 look worse, effectively, because your comparator was of a greater turnover level. So, obviously, if you increase 2019, it makes the figures in 2020 and 2021 look lesser, from a turnover perspective. Do you understand?"* Counsel further submitted that as per the 2019 VAT returns, these additional sales were not included on the 2019 VAT returns. The Witness replied that the additional sales were additional sales to the UK and they had not been included previously as *"...there was no VAT on those sales"*.
44. Counsel asked the Witness if these additional sales were notified to the Respondent prior to the letter in November 2022. The Witness replied *"....at the time probably not, no."*
45. Counsel submitted to the Appellant that his previous assertion was incredible as the Appellant was undergoing a full audit by the Respondent which included the tax year 2019. The Witness confirmed that the Appellant was undergoing an audit at that time.
46. Counsel further submitted that during the course of the audit by the Respondent, which dealt with the expenses that were claimed on the part of the Appellant, that *".....there was absolutely no issue in terms of the recorded turnover because it was accepted, as represented by the [company] during the course of the [Revenue] audit, the [company] declared its turnover for 2019 at a figure of €1,228,888, as per the CT1. And that was represented yet again during the course of the [Revenue] audit. And this Revenue audit was in or around the very time that you were having the EWSS in queries from Revenue"*. Counsel asked the Appellant if his account was correct. The Witness replied that it was correct.
47. Counsel asked the Witness did he accept that the Respondent's function was to ensure that the Appellant *".....pays the tax that is obliged to pay pursuant to the Taxes Consolidation Act 1997...."* The Witness agreed.
48. Counsel continued and asked the Witness was he *".....telling the [Appeal] Commissioner that in the full knowledge that the [company] had under-declared its earnings and in terms of your representations to [Revenue] during that [Revenue] audit that, in terms of the turnover figures, that you facilitated the non-disclosure of that information to the [Revenue] officers?"* The Witness replied that *"the scope of the audit did not include turnover."*

49. Counsel submitted the directors of the Appellant have a legal obligation under the Taxes Acts and also the Companies Acts, to represent to the public what the earnings of the company are and to represent to the Respondent, pursuant to their tax obligations, what the taxable profits of the company are and that in this instance the Appellant “...chose not to do so”. The Witness replied that Counsel was incorrect.
50. Counsel submitted that during the course of an audit, the Appellant chose not to disclose these details “...when it was clearly a material issue” and why the sales to the UK were not recorded. The Witness replied that “.....[I] have no idea. The invoices weren't submitted to me so how could I record them”.
51. Counsel submitted what had happened was the audit by the Respondent was underway to ascertain if the Appellant was in compliance with the terms of the EWSS and the Appellant was stating to the Respondent regarding the audit for 2019, that the figures then disclosed were the Appellant's sales, its turnover, but “.....when it comes to EWSS, when you see that the EWSS isn't going away you come up with this figure out of the blue in terms of unrecorded sales. I am just trying to understand how that could arise”. The Witness replied that the figures came about “because it did actually arise.”
52. Counsel submitted that the Witness's explanation was not credible as the Appellant had not explained how these additional sales came about and instead all that has been given by way of explanation/support is “.... all you've said is look, this happened, no more. We sold stoves to the UK.” The Witness replied “yeah”.
53. Counsel asked the Witness why did the Appellant not tell the Respondent about the additional sales much earlier, when the position of the Appellant in terms of turnover and qualifying for the EWSS was represented. The Witness replied that it “.....must have been an oversight, that's all I can say. I don't know.”
54. Counsel submitted that the explanation that it was an oversight was not credible when the “.....whole issue was whether you satisfied with 30%, I have to say to you, [REDACTED], there's no reality in that. A figure of €200,000 of sales in a small company like this would have been a very significant issue. And I'm putting it to you that this is a mere fabrication in the context of trying to overcome the EWSS?”. The Witness replied “and I disagree with you”.

Submissions

The Appellant's submissions

55. The Commissioner sets out an extract of the Appellant's Statement of Case as follows:

1. *On the 6th July 2022 we received an Employment Wages Subsidy Scheme Compliance check letter requesting information in relation to six employees together with copies of bank statements for May 2021 and copies of payslips for the six employees for May 2021.*
2. *The information requested on the 6th July 2022 was submitted to EWSS Compliance on the 15th July 2022 via ROS My Enquires. The information was sent in two parts which included in the following information:-*
 - 1 *Details of the company together with information on how Covid 19 had effected the company.*
 - 2 *Copies of bank statements and payslips as requested*
3. *On the 18th July 2022 we received correspondence via my enquiries requesting the following information*
 - 1 *VAT RTD 2020 and 2021 to be filed*
 - 2 *Rolling monthly reviews for all months in 2020 in which EWSS was claimed*
4. *On the 31st August we submitted the following information*
 - 1 *Copy of the VAT RTD for 2020*
 - 2 *Analysis of the Rolling reviews for the months in 2020 in which EWSS was claimed - Oct, Nov and Dec*
5. *On the 1st September we submitted the following information :-*
 - 1 *Copy of the VAT RTD for 2021*
6. *On the 5th September we received correspondence requesting that we provide figures for July, August and September for 2019 and 2020*
7. *On the 9th September 2022 we submitted the figures for July to September as requested.*
8. *On the 23rd September 22 we received correspondence requesting that we submit the workings for the VAT Returns for 2020 AND 2021.*
9. *On the 14th October 22 we submitted the workings for*

Jan/Feb 21

Mar/Apr 21

10. *On the 19th October 22 we submitted the workings for*

Jan/Feb 20

Mar/Apr 20

May/Jun 20

Jul/Aug 20

Sep/Oct 20

Nov/DEC 20

11. *On the 11th November 2022 we received correspondence [sic] informing us that we did not qualify for the EWSS based on the information submitted.*

We believe that we had achieved the requirement [sic] of 30% in order to claim for the EWSS for the periods July to December [sic] 2020 and for the period January 2021 to June 2021.

We believe that we had achieved the requirement [sic] of 30% in order to claim for the EWSS for the periods July to December [sic] 2020 and for the period January 2021 to June 2021.

We believe that we had achieved the requirement [sic] of 30% in order to claim for the EWSS for the periods July to December [sic] 2020 and for the period January 2021 to June 2021.

12. *On the 24th November 2022 we sent a correspondence with the following:*

that we had reviewed the working that had been [sic] supplied to us on the 11th November 2022.

We informed the EWSS Compliance section that there were additional sales during 2019 that were not included on the VAT Returns for 2019 and were reflected in the financial accounts and this would explain the difference in the figures used in the monthly review and the figures on the VAT workings. Taking those additional figures into account we would qualify for the EWSS for 2020.

In relation to 2021 we deregistered for the EWSS in July once we were aware that we had gone below the 30% reduction figure for June 2021 and that we would be

under the 30% reduction for the remaining months of August, September, October, November and December 2021.

13. On the 8th December 2022 we received correspondence requesting details of the additional sales for 2019

14. On the 15th December we submitted the additional sales details for 2019

15. On the 26th July 2023 we received correspondence informing us of the following

- 1 July to December 2020 July to December 2020 compared to the same period for 2019 shows a reduction of 29.93%*
- 2 Jan to June 2021 eligible per the sales listing submitted*
- 3 Jul 21 Not eligible*
- 4 That we were liable to repay the monies for July to Dec 20 and for July 21*

16. On the 26th July 2023 we sent a reply to the correspondence received on the same date, stating that we were not in agreement with evaluation for the period for July to December 2020 in that it does not meet the criteria of 30%, in fact 29.93% equals 30% [when rounded to the nearest decimal place]. There is only 0.07% of a difference which equals a difference of €457 based on the figures.

Surely we can come to an agreement on €457.

17. On the 27th July 2023 we received a correspondence stating that the criteria is 30% and therefore is strictly adhered to.

18. On the 31st July 2023 we sent a correspondence stating that we had looked over the workings for 2019 and 2020 and [sic] noted that figures used did not take into account discount allowed that would have arose at various times when a customer would not paid the amount owed on a invoice in full even do [sic] the VAT would have ben [sic] paid over on the invoice.

We demonstrated that taking into account the discount allowed to customers that we would qualify for the July to December 2020 EWSS.

19. On the 11th September 2023 we received a pre assessment [sic] letter which stated that we did not qualify for he [sic] EWSS for the following periods July to December 2020 and for July 2021 and that we were to adjust our payroll to reflect same. Also that assessments would be issued in the next 7 days.

20. On the 18th September 2023 we submitted a letter to the Compliance section in relation to the correspondence received on the 11th September 2023 which we outlined the following:

As stated in your correspondence dated the 11th September 2023, in order to qualify for the EWSS payment we must demonstrate and prove that there was a 30% reduction in our turnover for July to December 2020 as compared to 2019. We are satisfied that we have complied with this obligation and have clearly provide [sic] your office with the relevant details to support this assertion and that based on the recent information provided, that we did indeed qualify as we have showed a reduction to the value of 30.01%. Therefore, we cannot accept that you are refusing our eligibility for EWSS based on a discussion rather than the facts have been presented to you. We are an employer of a highly skilled and specialist workforce whose particular skill set is not easily transferable to another employment. This further stenghtens [sic] our resolve to ensure that our claim is determined on the full facts and is not subject to an arbitrary decision. The decision to refuse the EWSS payment would seriously impact the future viability of the company going forward and jeopardise these jobs.

Whilst we fully accept that it was from ideal that previously provided information to our [sic] was incomplete and therefore did not provide sufficient support to our EWSS claim there were a number of extenuating factors that impacted on our ability to provide comprehensive and robust date [sic] in support of our claim. For the we appogise [sic] but new that you are in posseession [sic] of the full facts, we are confident that our claim to the EWSS will be duded [sic] on its merits and that as we meet the qualifying criteria the [sic] our claim for the period in question be granted.

21 on the 6th November 2023 we received a correspondence in relation to our letter dated the 18th September 2023 which stated that the we did not meet the criteria for the periods July 2020 to July 2021 and that assessment would be issued. At this point I would like to point out that there is some discrepancies in the letter received on the 6th November under the analysis section

22 On the 7th November 2023 we received a findings letter which stated that the pre assessment letter findings have now been withdrawn and that we were now liable for the periods July 2020 to July 2021.

23 On receipt of this letter we reviewed the situation and proceeded to lodge an appeal”

Oral submissions on behalf of the Appellant.

56. In oral submissions [REDACTED], Director of the Appellant submitted “.....none of us foresaw the way the pandemic went down. We were working hard, we were working remotely and we couldn't tell when we were going to manufacture and that's basically the cusp of it. We were all dealing with something completely new, we were doing our absolute best just to keep the because the one thing that didn't stop was the banks and we worked hard to try and keep and save everything.....There was no bad intentions or ill intentions or anything like that.”

The Respondent's submissions

57. The Commissioner sets out an extract of the Respondent's Statement of Case as follows:

“SECTION 3: OUTLINE OF RELEVANT FACTS

3.1 Eligibility for the Employment Wage Subsidy Scheme (EWSS) is governed by Section 28B of the Emergency Measures in the Public Interest (Covid-19) Act, 2020, which states, inter alia, that several things must take place in order for Section 28B to apply to the employer. The employer must:

i. In accordance with the Guidelines,

ii. Demonstrate to the satisfaction of the Revenue Commissioners,

iii. That by reason of COVID,

iv. There will occur in the relevant time period,

v. A 30% reduction in either turnover or orders being received by reference to a particular corresponding period.

3.2 EWSS is a self-assessment scheme, where the onus is on the employer to demonstrate to the satisfaction of the Revenue that they fall within the terms of the scheme and are an employer to which section 28B applies.

3.3 Subsection (2/2A/2B) in the use of the words ‘will occur’ requires the employer to look forward and demonstrate that such an event ‘will’ happen. This is relevant for the operation of subsection (5).

3.4 Subsection (5) imposes an obligation where the employer is an employer to which Section 28B applies by virtue of subsection (2/2A/2B). The employer must review his or her business circumstances immediately upon the end of each income tax month. If, based on the results of that review it is manifest to the employer that the turnover reduction that

had previously been envisaged under subsection (2/2A/2B) would not now occur, then the employer must deregister.

3.5 By reviewing his or her business circumstances at the end of each month, the employer must conclude by reference to those circumstances that the reduction required under subsection (2/2A/2B) either 'will occur' or 'will not, in fact, now occur'. Subsidies correctly claimed in accordance with the terms and conditions of the scheme prior to deregistration are not repayable.

3.6 The Revenue EWSS Guidelines, referred to in subsection (2/2A/2B), which outline in detail how the monthly reviews should operate, are given statutory footing under subsection 20(a).

3.7 The Guidelines state: 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.

3.8 In this case, the Appellant registered for the Employment Wage Subsidy Scheme (EWSS) w.e.f. 1st August 2020 and claimed EWSS payments for the periods July 2020 to July 2021 in the amount of €285,407.

3.9 An intervention was opened to verify the taxpayer's eligibility for EWSS. A notification letter issued on 6th July 2022. Various communications took place between the Appellant and Revenue over the following months.

3.10 The Appellant was requested to provide monthly rolling reviews as evidence to support their claim "to demonstrate that their business experienced or was expected to experience a 30% reduction in turnover - Employers must undertake a review of the six-month period on the last day of every month (other than July 2020) up to and including December 2021 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 (July to December 2020 for 2020 pay dates, January to June 2021 for January to June 2021 pay dates and January to December 2021 for pay dates in the period 1 July 2021 to 30 April 2022.

3.11 An analysis of sales figures for January 2021 to July 2021 was provided by the Appellant on 15th July 2022 showing a year-to-date reduction of 30.88%. The figures submitted differed from the figures previously submitted on the Eligibility Review Form

(ERF) for June 2021. The 2019 figures also differed from sales figures previously submitted as part of an ongoing audit for 2019. Monthly rolling reviews were not submitted.

3.12 On 18th July 2022, monthly rolling reviews were requested for July to December 2020.

3.13 Sales figures for July to December 2020 and July to December 2019 were provided and an analysis of these sales figures showed a reduction of 30.74% for July to December 2020 compared to July to December 2019. The July – December 2020 versus July – December 2019 monthly rolling reviews were not provided.

3.14 Following a review of the information received to date, a schedule of sales for all periods in 2020 and 2021 was requested.

3.15 The schedule of sales was provided. Using the sales figures per the sales listings received for 2020 and 2021 and comparing them to the sales figures previously received for 2019 resulted in the following – July to December 2020 had a 27.74% reduction in sales compared to the same period in 2019; January to June 2021 had a 75.25% increase in sales compared to the same period in 2019. Assessing the Appellant's eligibility for July 2021 showed a projected increase of 1.36% using the actual sales for January to June 2021 and the projected sales for July to December 2021 submitted on the Appellants ERF versus the actual sales for January to December 2019.

3.16 On 11 November 2022, the Appellant was requested to amend the payroll submissions by removing the EWSS marker for all periods and repay the subsidies received.

3.17 On 24th November 2022, the Appellant advised that there were additional sales in 2019 which would qualify them for EWSS for 2020 and up until June 2021. Sales listings for 2019 to include the additional sales were requested and subsequently received. Based on these revised figures, the taxpayer was advised that they did not qualify for EWSS for July to December 2020 (only a 29.93% reduction in turnover). Based on these revised sales listings for 2019, the taxpayer did qualify for EWSS for Jan – June 2021 and did not qualify for July 2021. Note that monthly rolling reviews had still not been provided and caseworker analysis has been conducted based on sales listings only. The Appellant was requested to amend the payroll submissions for July to December 2020 and July 2021 to remove the EWSS marker and repay the subsidies received.

3.18 On 31st July 2023, the Appellant replied stating that the 2019 and 2020 figures submitted did not take into account discounts allowed or taken by customers. The discounts allowed arose at various times when payment had not been received in full on

the invoices that had issued. Taking the discounts into account would result in a percentage decrease for July to December 2020 of 30.01% when compared to July to December 2020.

3.19 On 11th September 2023, a pre-assessment letter issued advising that Revenue were not going to accept this latest change to the sales figures.

3.20 On 18th September 2023, a letter received from the Appellant asked that their eligibility be reviewed on the full fact of the case. No additional information was submitted.

3.21 The case was reviewed by the caseworker's manager, and the taxpayer was found ineligible for all periods on the following points: -

- Monthly rolling reviews in accordance with guidance issued by Revenue were not provided.*
- As per the guidelines published by Revenue, in order to demonstrate eligibility for the Employment Wage Subsidy Scheme the taxpayer must show a 30% reduction in turnover. If discounts were provided to customers, the discounts should have been included in the invoices provided to those customers. As the discounts were not included in the invoices, the amounts detailed as discounts are uncollected debt and EWSS eligibility criteria does not allow for monthly turnover to be reduced by expenses or debt incurred in the month.*
- As monthly rolling reviews prepared in the format set out in Revenue guidance were not provided, the taxpayer failed to demonstrate that the business had reasonable grounds to meet the reduction in turnover/customer orders criteria for July 2020 to July 2021 pay dates.*

3.22 TWSE assessments were issued on 7th November 2023, which were subsequently appealed.

SECTION 4: STATUTORY PROVISIONS

Section 28B of the Emergency Measures in the Public Interest (COVID-19) Act 2020 provided for the introduction of the Employment Wage Subsidy Scheme (EWSS)."

Oral submissions on behalf of the Respondent.

- 58. In oral submissions Counsel for the Respondent requested that the submissions as outlined within the Outline of Arguments be adopted.*
- 59. Further Counsel submitted that with respect to the Appellant, there was a failure by it to carry out a rolling review as required under the legislation and the Guidelines. Counsel further submitted that the failure to carry out a rolling review has been considered*

previously by the Commission and the consistent view of the Commission in the context of section 28(5) of the TCA 1997 and also in the context of the Guidelines that derive from the legislation, is that there were certain conditions on the part of an employer to remain eligible as an employer within the EWSS. One of those conditions was the obligation to carry out a monthly rolling review. Counsel submitted that the Guidelines set out the strict manner in which such a review was to be carried out. Counsel submitted that the evidence before the Commission supports that no such review was carried out by the Appellant in compliance with the legislation and, more particularly, the Guidelines. Counsel submitted that at paragraph 2.5 of the Outline of Arguments the Respondent submits that:

"What is also abundantly clear from the inter parte correspondence is that the Appellant did not carry out monthly rolling reviews at the material time, as was required of the Appellant as a condition of participating in the scheme."

Counsel submitted that the Appellant was repeatedly asked to furnish the rolling reviews to the Respondent and none were submitted. Counsel further submitted that he did examine with the Witness what was actually done by the Appellant and Counsel submitted that what was actually done by the Respondent did not constitute a rolling review as required under the legislation and the Guidelines.

60. Counsel submitted another issue which is highlighted at paragraph 2.7 of the Respondent's Outline of Arguments is the discrepancies in terms of the figures submitted by the Appellant to the Respondent. Counsel referred to the examination of the evidence and in particular of the CT1 Forms for the Appellant and in particular the three years that are before the Commission and the comparator figures of 2019 which are germane to the issues to be considered.

61. Counsel submitted that it is apparent throughout the course of the interactions with the Appellant that there were some five different iterations or changes in figures made by the Appellant. Counsel submitted that each iteration was made *"...in a reactionary manner, to seek to overcome the fact that they did not meet the 30% criteria"*. Counsel submitted that if the figures at page 3 of the Outline of Arguments are examined, in 2019 the turnover figure per the CT1 Form is €1,222,888. Counsel submitted that the sales listing provided by the Appellant was *".....ultimately, to try and overcome the issues that they had to reach the 30% brought the figure up to €1,407,471"*. Counsel submitted that the explanation from the Appellant for that change has never been set out in writing. Counsel submitted that the Witness stated that there are zero rated sales to the UK that the Appellant never

declared to the Respondent. Counsel submitted that there was no disclosure of this to the Respondent in the context of an audit by the Respondent at that same time.

62. Counsel submitted that there are very significant issues in terms of credibility and what reliability one can place upon that evidence. Counsel submitted that it has to be viewed in the context of what the Appellant has formally declared publicly through its financial statements, but also in terms of its corporation tax return and the financial statements that would have been audited. Counsel submitted that the Witness has accepted that the CT1 Forms were prepared by external accountants. Counsel submitted that it is only later on in the context of trying to overcome the 30% threshold that the Appellant submits this reason. Counsel submitted *"what was submitted on behalf of the Appellant at hearing is the greatest element of some form of explanation"*. Counsel submitted *"what is done is an adjustment upwards of the 2019 figures and an adjustment, as you would anticipate, downwards of 2020 and 2021"*. Counsel submitted *"the 2020 figures there we see the CT1 turnover is €1,013,977, yet the sales listing is significantly less than that, at only €886,608"*. Counsel submitted that this is *".....a massaging of figures, without substance, without explanation, and so cannot be given any form of credence."*

63. Counsel referred to the Booklet of Authorities. Counsel referred to *inter alia* Commission Determination reference 83TACD2023. This was a determination of Commissioner Noone with a heading therein of *"Requirement to carry out rolling reviews"*. It was found that:

"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.'"

Counsel submitted that this is something that did not happen in this case.

64. Counsel referred to another decision of Commissioner Noone, reference 91TACD2024, and to the section entitled: *"Requirement to carry out rolling reviews"* where it states:

"When entering the EWSS, the Appellant undertook to abide by its terms and conditions, and it was a clear condition of participation in the EWSS that monthly rolling reviews utilising projected turnover be carried out."

65. Counsel submitted that, referring to the submissions made in the Respondent's Outline of Arguments, they highlight that a declaration was signed by the Appellant in terms of being bound by the conditions of the EWSS scheme. Counsel submitted that as Commissioner Noone had found the *".....EWSS was an optional scheme for employers that was based on self-assessment, and therefore the Commissioner does not consider it unreasonable or unduly onerous that each employer had to assess on an ongoing monthly basis whether it continued to be entitled to participate in the scheme."*
66. Counsel submitted that no reliability can be placed upon the figures that are submitted by the Appellant as being correct figures regarding additional sales. Counsel submitted that the *".....only figures that you can reliably look at, with respect, are the figures that were declared in the CT1"* and that *"...nothing to substantiate the other figures has been furnished"* to the Respondent.
67. Counsel in conclusion submitted that having regard to the evidence before the Commission and the reliability of same, *"...all of that aside, there really ought be no need for you to even get into any issues as to whether and what level of reliability you can place upon figures because, ultimately, whatever your findings might be there, they don't get over the hurdle that is a barrier, an impediment for them. It was an integral part of the condition of participation within the scheme that [they] carry out a monthly rolling review and [they] simply failed to do so, so that should be the end of the matter"*.
68. Counsel requested that the EWSS assessments before the Commission be affirmed.

Material Facts

69. Having considered and assessed all the documentation submitted, all the submissions made both written and oral and all the evidence given by the parties in this appeal, the Commissioner makes the following findings of material fact:
- 69.1 The Appellant registered for the EWSS with effect from 1 August 2020. The Appellant claimed payments under the EWSS for the periods July 2020 to July 2021 in the amount of €285,407;
- 69.2 On 7 November 2023 the Respondent raised assessments in respect of payments made under the EWSS and it is these assessments which are being appealed. These assessments sought the following amounts as illustrated by the below table:

Period of Assessment	Amount of Assessment	Remitted Amount	Balance Unpaid
01/07/2020 - 31/07/2020	€4,872.00	€0	€4,872.00
01/08/2020 - 31/08/2020	€4,060.00	€0	€4,060.00
01/09/2020 - 30/09/2020	€3,654.00	€0	€3,654.00
01/10/2020 - 31/10/2020	€24,521.00	€0	€24,521.00
01/11/2020 - 30/11/2020	€26,650.00	€0	€26,650.00
01/12/2020 - 31/12/2020	€25,600.00	€0	€25,600.00
01/01/2021 - 31/01/2021	€31,650.00	€0	€31,650.00
01/02/2021 - 28/02/2021	€26,700.00	€0	€26,700.00
01/03/2021 - 31/03/2021	€25,900.00	€0	€25,900.00
01/04/2021 - 30/04/2021	€31,600.00	€0	€31,600.00
01/05/2021 - 31/05/2021	€25,900.00	€0	€25,900.00
01/06/2021 - 30/06/2021	€26,750.00	€0	€26,750.00
Total		€257,857.00	€257,857.00

- 69.3 On 24 November 2022 the Appellant advised the Respondent that there were additional sales in 2019 which would qualify the Appellant for the EWSS for 2020 and up until June 2021;
- 69.4 The Respondent requested that the Appellant submit sales listings for 2019 to include the additional sales. These figures were submitted to the Respondent by the Appellant;
- 69.5 The Respondent requested the Appellant to amend the payroll submissions for July to December 2020 and July 2021 to remove the EWSS marker and repay the subsidies received;
- 69.6 On 31 July 2023 the Appellant advised the Respondent that the 2019 and 2020 figures submitted did not take into account discounts allowed or taken by customers. The discounts allowed arose at various times when payment had not been received in full on the invoices that had issued. The Appellant submitted that

taking the discounts into account would result in a percentage decrease for July to December 2020 of 30.01% when compared with July to December 2020;

69.7 On 11th September 2023 the Respondent issued a pre-assessment letter advising that the Respondent did not accept this latest change to the sales figures;

69.8 On 18th September 2023 the Appellant requested that its eligibility for the EWSS be reviewed on the full facts of the case.;

69.9 On 6 December 2023 the Appellant completed its Notice of Appeal.

Analysis

70. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015. As a statutory body, the Commission only has the powers that have been granted to it by the Oireachtas. The powers of the Commission to hear and determine tax appeals are set out in Part 40A of the TCA 1997.

71. In this regard, the jurisdiction of a Commissioner is well established and was considered by the Court of Appeal in *Lee v the Revenue Commissioners* [2021] IECA 18 (“Lee”) wherein Murray J. stated at paragraph 20:

“The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation”.

72. The Commissioner also refers to the judgment of *Fahy v the Revenue Commissioners* [2023] IEHC 710; wherein Quinn, J. stated at paragraph 47:

“ Applying the rationale of the jurisprudence summarise and analysed in Lee, the function of the TAC is limited to what is provided in the legislation and factual and legal questions arising therefrom. There is no inherent jurisdiction to consider broader questions ...”.

73. The Commissioner is bound by the prevailing legislation and guiding case law from the Superior Courts which has found, that in any appeal before the Commission, the burden of proof rests on the Appellant and that it is the Appellant who must satisfy the Commission at the threshold of the balance of probabilities, that an assessment to tax made against them is incorrect. This binding legal principle was stated in the High Court case of *Menolly*

Homes Ltd v Appeal Commissioners and Anor. [2010] IEHC 49, (“Menolly”) wherein at paragraph 22, Charleton, J. stated:

“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”.

74. The Commissioner also refers to paragraph 12 of the case of Menolly, wherein Charleton, J, stated:

“Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute...”.

75. The Commission is a statutory entity and it can only lawfully operate within the confines of empowering and enabling legislation. The Commissioner refers to *Lee*, wherein Murray, J. stated at paragraph 76:

“The jurisdiction of the Appeal Commissioners is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid.”

76. The Commissioner has had regard to the Supreme Court judgment of *Revenue Commissioners v Doorley* [1933] IR 750, [“Doorley”], in which Kennedy CJ stated:

“.....As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.”

77. Further the Commissioner has had regard *Doorley* at page 765 in which Kennedy CJ stated:

“The duty of the Court, as it appears to me, is to reject any a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms on the alleged subject of taxation”.

78. Further the Commissioner has had regard *Doorley* in which Kennedy CJ stated:

“For no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to acts of parliament so far as they can be applied without violated the proper character of taxing acts to which I have referred.”

79. All material submitted to the Commission has been assessed by the Commissioner before making this determination.

80. Firstly, the Commissioner refers to an issue which arose at the start of cross examination of the Witness by Counsel for the Respondent. Counsel asked the Witness was he a member of an accountancy body and the Witness stated that he was not. After further questioning by Counsel the Witness advised that he was a book keeper and that he had worked in that role for the Appellant from circa March 2019 to circa February 2024. Counsel asked the Witness to state where he was currently employed and the Witness replied that he did not wish to disclose that information. Counsel repeated the question to the Witness. The Commissioner asked Counsel if his question to the Witness relevant? Counsel replied that yes it was as *“.....there are issues of credibility that will be at play, as we will see as we go through the cross examination.”* Counsel further submitted that *“...in terms of any, in particular where you have a witness who is no longer an employee, it is of most importance that there is credibility in terms of the evidence. I'm at a loss as to why he would be hesitant to say where he's now employed.* The Commissioner stated that she did not know why the Appellant was hesitant to say where he worked but that Counsel was *“.....asking him questions in respect of his work for the Appellant when he was there...”* and she asked Counsel to move on with his questions and noted his submissions.

81. As to the main issue between the parties and before the Commission, the Commissioner will now proceed to assess and make a determination on same.
82. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise assessments in the total amount of €257,857.00 in respect of payments made to the Appellant under the EWSS. In the High Court case of *Menolly*, 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.*”
83. It is noted that 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. 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.
84. Counsel for the Respondent stated that its primary argument was that the Appellant had failed to carry out rolling reviews as required by the EMPI Act 2020 and the Guidelines. Additionally, the Respondent did not accept the basis for the revised set of turnover figures provided by the Appellant. The Respondent submits that:
- 84.1 monthly rolling reviews must show a 30% reduction in turnover in accordance with the Respondent’s Guidelines and these were not provided; and
 - 84.2 if discounts were provided to customers, the discounts should have been included in the invoices provided to those customers. As the discounts were not included in the invoices, the amounts detailed as discounts are uncollected debt and the EWSS eligibility criteria does not allow for monthly turnover to be reduced by expenses or debt incurred in the month; and
 - 84.3 as monthly rolling reviews prepared in the format set out in the Respondent’s Guidelines were not provided, the taxpayer failed to demonstrate that the

business had reasonable grounds to meet the reduction in turnover/customer orders criteria for July 2020 to July 2021 pay dates.

85. It is noted that the requirement to carry out rolling reviews is provided for at section 28B(5) of the EMPI Act 2020 which mandates participants in the EWSS to carry out a review of their business circumstances immediately upon the end of each month. The statutory provisions mandate that 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/ her/ itself from the EWSS. These mandatory requirements under the act were confirmed by the Guidelines, which also confirmed that “[T]his 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”.
86. It is noted that in accepting the terms and conditions of the EWSS, the Appellant undertook to abide by the terms and conditions of the EWSS and it was a clear condition of participation in the EWSS that monthly rolling reviews utilising projected turnover be carried out. As stated earlier the EWSS was an optional scheme for employers that was based on self-assessment.
87. It is noted that the Guidelines state 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.”
88. The Commissioner having assessed all the material and information before the Commission is satisfied that the Appellant did not provide copies of any rolling reviews carried out in compliance with the legislation and the Guidelines to the Respondent for the periods specified in the appealed assessments.
89. The Commissioner has assessed all the material and evidence before her and 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 the period specified in the assessments under appeal to the Commission. The requirements for rolling review were confirmed by the High Court in *Fire Safety Advantage Limited (formerly Superior Group Irl Limited) v Revenue Commissioners* [2025] IEHC 78.

90. The Commissioner will now address the issue of the revised figures which were submitted by the Appellant to the Respondent. This matter was examined in detail by Counsel when cross examining the Witness. In summary of that examination and the evidence given by the Witness, it is noted that in November 2022 the Appellant advised the Respondent that there were additional sales of products to customers in the UK to the value of €200,000 which had not previously been disclosed to the Respondent. Additionally, that there was no disclosure of these additional sales by the Appellant to the Respondent despite the Respondent carrying out an audit to examine if the Appellant was eligible for the EWSS.
91. The Commissioner having assessed all the material and evidence before her finds that it is not credible that the Appellant did not disclose to the Respondent the existence of additional sales to the value of €200,000 at the time the Respondent was conducting an audit of the Appellant to examine and establish if it qualified for the EWSS. The Commissioner finds that the Appellant's submissions in that regard are not credible and are rejected.
92. To return to the matter of the Appellant not carrying out rolling reviews and not complying with the statutory terms and obligations under the EWSS (as was established in earlier paragraphs) the Commissioner finds that as a consequence of the Appellant's own non-compliance with the conditions of the EWSS, the Appellant was not entitled to receive payments under the EWSS for the periods specified in the assessments under appeal to the Commission. Accordingly, the Commissioner determines that the Respondent was entitled to seek repayment of the subsidies provided to the Appellant in the total amount of €257,857.00.

Determination

93. Accordingly, the Commissioner finds that the Appellant has not discharged the burden of proof as the Commissioner does not accept that the Appellant was in compliance with the terms and conditions of the EWSS and was not in adherence and in compliance with the provisions of the EMPI Act 2020.
94. Accordingly, for the reasons set out above the Commissioner finds that the Appellant's appeal in this matter is unsuccessful and further to the provisions of section 949AK (1)(c) of the TCA 1997 which provides inter alia as follows:

(1) In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—.....or

(c) neither paragraph (a) nor (b) applies, determine that the assessment stand;

the Commissioner finds that the assessments raised against the Appellant in respect of the EWSS shall stand.

95. 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

96. 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

97. 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.



Leonora B. Doyle
Appeal Commissioner
14 March 2025