AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

203TACD2025

Between

[redacted]

Appellant

and

Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This Determination concerns the appeal of [redacted] Limited ("the Appellant") to the Tax Appeals Commission ("the Commission") of a value-added tax ("VAT") assessment of the Revenue Commissioners ("the Respondent), brought under section 119 of the Value-Added Tax Consolidation Act 2010 ("the VATCA 2010"). The assessment in question covers the periods 1 January 2018 – 31 March 2018 and 1 April 2018 – 31 March 2019 (referred to together as "the period in issue"). The VAT assessed as owing was €16,189.05 for the period 1 January 2018 – 31 March 2018 and €96,320.61 for the period 1 April 2018 – 31 March 2019

2. In summary, the question that arises is whether the Appellant, in permitting self-employed taxi drivers to acquire its licensed taxis for a set period in return for an up-front fee, was engaged in the provision of a service constituting the "*transport of passengers".* Such a service is exempt from the charging of VAT pursuant to Schedule 1, Part 2 of the VATCA 2010.

3. In making this Determination, the Commissioner had the benefit of receiving written documentation provided by the parties in advance of the appeal hearing, oral evidence given by witnesses called by the Appellant, and written and oral legal argument made by junior counsel appearing for both parties.

Background

4. The Appellant is a company that was incorporated on [redacted] 2016. Upon its incorporation it registered both for corporation tax and as an employer for the purposes of PAYE. It did not register for VAT.

5. Over the period in issue, the Appellant owned a fleet of taxis. The Appellant permitted persons possessing a small public service vehicle licence ("a SPSV licence") and an insurance policy complete with a no-claims bonus to use these taxis for a set period in return for the payment of a pre-determined amount. This amount was payable prior to the person taking possession of the vehicle in question.

6. Most, though not all, of the Appellant's fleet of taxis were wheelchair accessible vehicles ("WAVs"), licensed as such by the National Transport Authority ("the NTA").

7. Over the period in issue, the Appellant treated the supplies it made as exempt from VAT on the grounds that it considered it was engaged in the activity of the "*transport of passengers and their luggage".*

8. On 5 February 2020, the Respondent commenced an audit of the Appellant's affairs, the scope of which covered VAT due for the years 2018 and 2019.

9. On 21 December 2022, the Respondent raised an assessment to VAT covering the period in issue.

10. The Respondent raised this assessment on the grounds that, in its view, the Appellant was providing taxable services that were subject to the charging of VAT at the standard rate prescribed under section 46(1)(a) of the VATCA 2010. In so deciding, the Respondent formed the view that the Appellant was not, as it maintained, providing services constituting the provision of passenger transport, exempt from the charging of VAT under paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010.

11. This assessment of the Respondent was appealed by the Appellant by way of Notice of Appeal delivered to the Commission on 5 January 2023. In this Notice, the Appellant stated its grounds of appeal in the following terms:-

> "*We disagree that our business is a VAT applicable business* […]"

Legislation

12. Article 371 of Directive 2006/112/EC ("the VAT Directive") provides:-

> "*Member States which, at 1 January 1978, exempted the transactions listed in Annex X, Part B, may continue to exempt those transactions, in accordance with the conditions applying in the Member State concerned on that date*."

13. Annex X, Part B to the VAT Directive is headed "*Transactions which Member States may continue to exempt".* One of these is:-

> *"the transport of passengers and, in so far as the transport of the passengers is exempt, the transport of goods accompanying them, such as luggage or motor vehicles, or the supply of services relating to the transport of passengers"*

14. The first schedule to the VAT Act 1972 sets out "*Exempted activities".* Point (xvi) therein enumerated as one such activity the:-

> "*transport in the State of passengers and their accompanying baggage* […]*"*

15. Also enumerated in the first schedule to the VAT Act 1972 at (xii) was:-

> "*agency services in regard to –*
>
> *(a) The arrangement of passenger transport or accommodation for persons"*

16. The parties were agreed in this hearing that this provision was not relevant to the issues arising.

17. Section 3 of the VATCA 2010 is headed "*Charge of value-added tax"* and provides:-

> "*Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions:*
>
> […]
>
> *(c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is in the State*
>
> […]"

18. Under section 37 of the VATCA 2010, headed *"General rules on taxable amount"*:-

> "*(i) The amount on which tax is chargeable by virtue of section 3(a) or (c) shall, subject to this Chapter, be the total consideration which the person supplying goods or services becomes entitled to receive in respect of or in relation to such supply of goods or services, including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of that supply*."

19. Schedule 1, Part 2 to the VATCA 2010 is entitled "*Other Exempted Activities"*. Paragraph 14 therein, which is headed "*Exemptions by derogation in accordance with Article 371 of the VAT Directive"*, lists as exempted, inter alia, the service of:-

> "*(3) Transporting passengers and their accompanying baggage."*

Evidence

Appellant

Appellant Witness 1

20. The first witness called by the Appellant was [redacted] ("Appellant Witness 1"), a director of the Appellant since its incorporation in 2016. Appellant Witness 1 was likewise a director of another company, [redacted] Motors Limited, which was involved in the motor trade. Prior to becoming a director of these companies, the Appellant worked as a taxi driver for approximately 20 years. He said that he considered himself to be an expert in the taxi industry.

21. Appellant Witness 1 gave evidence that at a certain point in time he was "*selling taxis as well as wheelchair accessible vehicles".* It would appear that this was done through his

aforementioned company, [redacted] Motors Limited. He then said that he decided to establish a business which would purchase WAV taxis, which would then be "*taken"* by taxi drivers for a fee in an arrangement that he described as being a "*joint venture"* between the Appellant and those drivers. This was, he said, the essence of a longstanding business arrangement prevalent in the taxi industry, referred to as "*cosying".*

22. Appellant Witness 1 said that in order to take one of the Appellant's vehicles, one had to have an EU driving licence, a tax clearance certificate, a no-claims bonus and a SPSV licence.

23. Appellant Witness 1 gave evidence that the NTA prescribed rules in order for a vehicle to be licenced as a WAV taxi. In particular, he said:-

> "*The car* [has] *to meet certain regulations set up with the NTA. So if it is a* [WAV] *it must have a conversion to accept a wheelchair but the conversion has to be licenced and done by a recognised conversion company; it can't just be done like I will put two ramps in the back."*

24. Appellant Witness 1 also said in relation to the vehicle that:-

> *"*[It] *then has to be passed out by the NTA; it also needs an NCT; it also needs a meter printer fitted; it also has decals put on it; it also has to have a roof sign. So, it is not just a simple we are giving you a car and letting you out on the road."*

25. Appellant Witness 1 was asked whether the Appellant's business included doing "*corporate work for organisations*". In answer to this, Appellant Witness 1 said that during the Covid-19 pandemic it had entered into an agreement with the HSE pursuant to which its vehicles would be used for the transportation of Covid-19 patients.

26. Returning to the cosy system as operated by the Appellant, Appellant Witness 1 explained that there was a problem in the taxi industry with drivers being unable to obtain finance to purchase vehicles. He also said that in relation to the years in issue:-

> "*There was no licence being offered* [by the NTA] *except the wheelchair accessible ones. We saw a gap in the market again where vehicles in the UK came compliant…the wheelchair ramp already put in, which was a big saving for us and a big saving for the drivers."*

27. Appellant Witness 1 then gave evidence that were an accident involving one of the Appellant's vehicles to occur, it was both the Appellant, as owner of the vehicle, and the driver of the vehicle who assumed potential liability.

28. Counsel for the Appellant asked Appellant Witness 1 whether, in so far as it was the source of work for the drivers of its taxis, those drivers were obligated to take on the work offered. To this, Appellant Witness 1 stated:-

> "[The driver] *is a self-employed guy. It is up to him to decide the hours he wants to work. Some guys work long hours, some guys work shorter hours. It is your needs you work to. I can't direct the driver to do anything as in work wise. I can offer him the work, he doesn't have to take it. The same as if he sees you on the street and you put your hand up, he doesn't have to stop for you."*

29. Counsel for the Appellant asked Appellant Witness 1 about the changing nature of the taxi industry as a consequence of the development of app platforms such as "FreeNow". Appellant Witness 1 said that the development of such platforms had, in effect, put most radio operating businesses, at least in urban areas, out of business. Appellant Witness 1 said that the Appellant had explored the possibility of developing its own app for the drivers of its vehicles, but pointed to issues of scale and the vast challenge of competing with FreeNow. It was, he said, necessary to have at least 2,000 drivers on an app to make it a reliable source of transport for the consumer and, therefore, a viable commercial proposition.

30. Appellant Witness 1 was cross-examined by counsel for the Respondent. Counsel for the Respondent began by putting it to Appellant Witness 1 that much of the evidence he had given in examination-in-chief did not relate to the period concerning the assessment under appeal, namely 1 January 2018 to 31 March 2019. In reply, he said that the nature of the Appellant's business was always the same.

31. Counsel for the Respondent put it to Appellant Witness 1 that the purpose of the business of the Appellant upon its incorporation in March 2016 was the leasing or renting out of taxis. Appellant Witness 1 did not agree. He said that the Appellant was involved in "cosying". Asked to explain what he meant by this term, Appellant Witness 1 said:-

> "*Cosying is a joint venture between me and the driver. I supply the vehicle, I supply the meter, I supply the printer, I supply work, I supply everything."*

32. Counsel for the Respondent asked Appellant Witness 1 how it was that the Appellant supplied work to those who used its vehicles. He said that he "*offered them work in the* [redacted] *Hotel*", where his wife was the general manager. He said that this would occur in the following manner:-

> "*I would ring the driver and offer him the work. I would send a WhatsApp to him asking would he like a job from* [redacted] *at 12.00 going to the airport"*

33. Asked by counsel for the Respondent whether the driver could say no to this offer of work, Appellant Witness 1 said:-

> "*A lot of times he would, depending on how far he was from…unless he was in the vicinity, he would not take the work."*

34. Counsel for the Respondent asked Appellant Witness 1 if the Appellant had any documentary evidence to support the assertion that it offered drivers work. Was there, for example, any written agreement with the [redacted] Hotel regarding the Appellant's provision of taxi services to it? Appellant Witness 1 said that there was not.

35. Counsel for the Respondent returned to the evidence of Appellant Witness 1, given in examination-in-chief, that the establishment of the Appellant was driven, at least in part, by the difficulty drivers had in finding the finance necessary to acquire a taxi. Counsel for the Respondent put it to Appellant Witness 1 that the Appellant was seeking to address this by "hiring" taxis to drivers. Appellant Witness 1 did not accept that it was correct to say that he was hiring taxis to drivers. He said, rather, that he was solving the problem in the market by entering into a joint venture with drivers. This led to the following exchange in cross-examination:-

> Q: "*So you repeatedly use the word 'joint venture' but I don't understand what that means."*
>
> A: "*Well, I've invested a sufficient amount of money into the taxi industry to buy this vehicle. I then say to the driver I can provide some work for you, you will have to get some work as well, the vehicle costs me €25,000, the maintenance of the vehicle costs this, this and this. So I will say initially I decided that it should be a 50/50 split but then I realised the driver could come back to me in the morning and say well, I only made €100 last night or I made no money, so that didn't work for me for the investment that I'd initially made. So we decided then it would be just a flat fee, depending on what vehicle the driver decided to take. Because then I decided, like, instead of having a small public service vehicle, we would buy eight eight-seaters, which would make more money for the driver because there weren't…there wasn't enough of them on the market for people to buy."*

36. Counsel for the Respondent asked Appellant Witness 1 whether he had any written evidence showing that the Appellant and taxi drivers had entered into a joint venture as described. In answer to this he stated:-

> "*Yes. The evidence is of a successful business. I have 100 taxis on the road, where I started out with two. So obviously the joint venture is working out quite well."*

37. Counsel for the Respondent then put it to Appellant Witness 1 that the reason that the Appellant ensured that its vehicles complied with regulatory requirements for taxis imposed by the NTA was because, otherwise, no taxi driver would hire them from the Appellant. Appellant Witness 1 did not express agreement with this proposition.

38. Counsel for the Respondent asked Appellant Witness 1 about a "*Terms of Use"* document given to drivers upon their taking a vehicle from the Appellant, which the Appellant had proffered to the Respondent in the course of its inquiry in the Appellant's affairs. Appellant Witness 1 said that counsel for the Respondent would have to ask the person in charge of the day-to-day management of the Appellant's business, [redacted], about this document. [redacted] was himself called to give evidence, the details of which are set out hereunder in this Determination.

39. Counsel for the Respondent put it to Appellant Witness 1 that the Appellant did not provide a radio service. He agreed that it did not and said that this was so because radio dispatch services were outdated.

40. Counsel for the Respondent asked Appellant Witness 1 whether the Appellant issued invoices for the service that it provided. Appellant Witness 1 said that it did not. The cosy agreement was, he said, "*a gentleman's agreement".* Counsel for the Respondent then asked whether, if a passenger in one the Appellant's vehicles sought an invoice, they would receive one from the Appellant. Appellant Witness 1 said "*they would get a receipt from the taxi driver."*

41. Counsel for the Respondent then cross-examined Appellant Witness 1 on the content of a number of posts constituting advertisements of the Appellant's business [redacted]. The first of these was dated [redacted] December 2017. Under the Appellant's logo, which included the words "*Taxi Rental & Sales",* was the following passage:-

> "*At* [the Appellant] *we are a* [redacted] *based rental company. Our aim is to provide our drivers with quality rental vehicles and a professional, no-hassle service. We pride ourselves on our service because our service matters."*

42. Counsel for the Respondent put it to Appellant Witness 1 that the Appellant's own description of its business was that of a company providing the service of taxi rental to drivers. In respect of this, Appellant Witness 1 said that the advertisement was "*purely for illustration purposes for people that don't understand cosy".* He then said that the illustration of "*taxi hire or rental"* was for the benefit of "*people coming into the industry"* (i.e. new taxi drivers). These were, he also said, "*the people that we needed to speak to."*

43. Counsel for the Respondent put it to Appellant Witness 1 that he was accepting by this evidence that the Appellant's customers were the taxi drivers using its vehicles, not the passengers carried in them. Appellant Witness 1 did not agree with this, stating that the advertisement also had the effect of encouraging members of the public seeking to get a taxi to contact the Appellant.

44. Counsel for the Respondent also made the point that elsewhere in the same [redacted] advertisement [redacted], the Appellant stated "*We also offer short-term rentals to owner drivers if your car is off the road.*" Appellant Witness 1 said that this constituted an offer to such drivers to enter into a short-term, joint venture, 'cosy' arrangement with the Appellant.

45. Counsel for the Respondent also cross-examined Appellant Witness 1 on the content of a second advertisement [redacted] dated [redacted] April 2019. This stated:-

> "*New vehicles available for rent. Rental starting at €180 plus insurance. We pride ourselves on our professional dedicated service we provide. We look after all maintenance in our own workshop.*
>
> *New and existing taxi drivers welcome, call us on* […] *and we can arrange insurance quotation.*
>
> *Quote today and be on the road tomorrow (T&C's apply).*"

46. In relation to this advertisement, Appellant Witness 1 repeated that reference to vehicles to rent and rental was for illustration purposes only. Counsel for the Respondent stated that it was unclear to her what exactly he meant by "*for illustration purposes*". Appellant Witness 1 said:-

> "*Obviously, as I said, you can't understand the arrangement of cosy or joint venture; you're not accepting that. So this is for illustration purposes and when you ring my base* […] *we will explain to you how it works. So it is an invitation to ring my phone.*"

47. Appellant Witness 1 then highlighted the statement in the advertisement of [redacted] April 2019 that "T&C's" apply. Asked by counsel for the Respondent what these terms and conditions were, he said:-

> "*That you must qualify certain criteria; you must meet a lot of criteria and then we would come to a cosy agreement which is part of the terms and conditions.*"

48. Appellant Witness 1 said that these criteria included that the person looking to take one of the Appellant's vehicles hold a SPSV licence and have a no-claims bonus.

49. When counsel for the Respondent made the point that the wording of the advertisement meant that the renting of a vehicle was for a fixed fee, Appellant Witness 1 said that "[…] *if the wording is wrong, I apologise."*

50. Appellant Witness 1 then said that any prospective driver who contacted him on foot of one of these advertisements would have to agree to terms and conditions expressed orally, which were "*you must follow my guidance and I'm telling you if you want to be in a joint venture with me* […]". Asked by the Commissioner whether a prospective driver, having contacted the Appellant as a consequence of reading one of its advertisements and having been told about the nature of the agreement orally, would think that these oral terms differed from the terms as expressed in the advertisement, Appellant Witness 1 said:-

> "*Well, he wouldn't really think there* [was] *any change in the terms but the understanding is the new understanding coming to market, you wouldn't understand what cosying means. So I am saying to him this is how I set up my business, as a joint venture. You earn; whatever you earn is your business but I need to receive €180 on this particular vehicle. If you want to get involved in the venture with me and you have the right criteria, we will get into business. If you don't, there is no hard feelings."*

51. Counsel for the Respondent put three further advertisements to Appellant Witness 1. One of these, dated [redacted] April 2019, had the headline, "*New rental gone out today*". Thereunder, the advertisement stated:-

> "*New rental guide today!! All our cars are supplied with leather seats, mirror, meter, LED roof sign, safety kits and all wheelchair accessible requirements and all fully maintained in own dedicated workshop so if you are currently renting a taxi or looking to start contact us."*

52. Another of these advertisements, dated [redacted] April 2019, stated:-

> "*Two new taxis passed out today and ready for first time rental. All our cars are provided with mirror, meter, LED roof sign, leather seats and WAV requirements. We also provide our drivers with onside wheelchair training before they go on the road and we send our drivers for official Irish Wheelchair Association. We also provide insurance in your name so you the driver earns the no claims bonus. If interested contact us and we can arrange a price for a complete package. <u>Quote today and begin working for yourself tomorrow</u>."* [Emphasis added]

53. And another, dated [redacted] May 2019, stated:-

> "*New cars going for suitability soon and will be ready for first time rental if you are currently renting a taxi or have recently passed your PSV test or looking to get on the road, contact us for a competitive price."*

54. Counsel for the Respondent put it to Appellant Witness 1 that it was self-evident that these advertisements were directed to persons working for themselves, looking to rent a taxi for work purposes. Nowhere was there any mention of the Appellant providing work to the drivers. In reply, Appellant Witness 1 said:-

> *"I don't create the ads. I can't answer why it doesn't state in it we will give you work, you know, what we are basically trying to get is people to come into the industry which the industry requires."*
>
> […]
>
> *Like most* [redacted] *ads, because you see an ad* [redacted] *doesn't mean it is actually factual. It is your interpretation of that ad and my interpretation of that ad."*

55. Counsel for the Respondent finished by asking Appellant Witness 1 when it was that the Appellant started to do work for the HSE providing taxi services directly to patients. Appellant Witness 1 said that this commenced in or around March 2020, after the period in issue.

Appellant Witness 2

56. The second witness called by the Appellant to give evidence was [redacted] ("Appellant Witness 2"), the employee of the Appellant in charge of its day-to-day operations. Prior to being employed in that capacity, he had managed car showrooms and, earlier still, had been a taxi driver for about ten to fifteen years.

57. Appellant Witness 2 said that his function in the business involved liaising not only with drivers of the Appellant's vehicles but also the NTA and insurance companies. He had, he said, an overall managerial role.

58. Appellant Witness 2 was asked about cosying, which had been discussed at length in the evidence of Appellant Witness 1. He gave the following description:-

> "*Cosying goes back* [..] *a long, long time. The basis of it is the sharing of the fare between the owner of the vehicle and the driver of the vehicle. It can be broken down in different ways. They can go on percentages, they can go on agreed amounts. It depends how they want to do it* […] *If you go to the back page of The Evening Herald*

in the early '90s, you'll just see a full back page of cosy, cosy, cosy, cosy. Cosying is a word I recognise from a long time in the industry, new guys won't. It's a different word that is used for it altogether."

59. Appellant Witness 2 gave evidence that technology had changed the profile of those involved in the taxi business. The advent of apps meant that those who traditionally worked for operators using radio channels had been replaced by a "younger generation" unfamiliar with term "cosy". [redacted]

60. Appellant Witness 2 gave evidence that from the outset the Appellant had focused on acquiring WAV taxis. He said that it had done so for several interrelated reasons. Firstly, it was not possible around the time of the incorporation of the Appellant to acquire taxi licenses for anything other than WAV taxis. It appears from the evidence of Appellant Witness 2 that the reason for this was because there was a shortage of such vehicles on the roads and because EU law mandated that a minimum percentage of taxis be WAVs. The shortage of WAV taxis on the road meant that there was unmet consumer demand for such vehicles. This, coupled with the NTA grant available for the purchase of WAV taxis, meant that the Appellant believed building a fleet of such vehicles represented a commercial opportunity.

61. Appellant Witness 2 was asked by counsel for the Respondent about a proposed app, that at one stage was to be developed by the NTA and was to cater specifically for those seeking to call a WAV taxi. Appellant Witness 2 said that the Appellant initially had hoped that it would be able to make this app a cornerstone of its business. However, the NTA app never came to fruition. Appellant Witness 2 said that instead the Appellant had, in the period in issue, a "*small bit of business",* that it would on occasion refer to drivers. In particular, he said:-

"*Myself and* [Appellant Witness 1] *had taxis before so we would have had a bit of work on the phone. We gave that to the guys who are taking…who had agreed to cosy in the cars with ourselves. Our office was just across from* [redacted]*; you'd get people walking in, "taxis"; you'd ring one of the drivers to come down and get this."*

62. Appellant Witness 2 was asked to comment on the Appellant's abridged financial statements for 2023. At note 3 therein, tangible fixed assets as of 11 March 2022 were stated to be in the value of €1,244,730. Appellant Witness 3 said that this figure represented "*Everything involved in what would be the purchasing of vehicles to be put on the road as a taxi."*

63. Appellant Witness 2 also commented in examination-in-chief on a certificate of motor insurance relating to one of its taxis, which covered the period 6 October 2023 to 5 October 2024. He stated that the name of the policy holder was the Appellant and the name of the insured on the policy was a taxi driver named [redacted]. He said that this was:-

> *"*[…] *part and parcel here with the driver in a cosy arrangement, the licence is in our name, the vehicle is in our name, the taxi, everything, is in our name, and he is the operating driver of the vehicle."*

64. Counsel for the Appellant also asked Appellant Witness 2 to comment on an unsigned document entitled *"Contractual Joint Venture Agreement".* Appellant Witness 2 gave evidence that this document put into writing what had, over the period relevant to this appeal, been the agreement reached orally between the Appellant and the drivers of its taxis. Paragraph 2 of this document provided that: *"This Joint Venture will be formed for the purpose of transporting passengers and their luggage."*

65. Appellant Witness 2 was asked by counsel for the Appellant what happened to the taxis when drivers went on holidays. To this Appellant Witness 2 answered that the drivers would drop the taxi back to the Appellant's yard. Another driver would have access to the vehicle during the period of the holidaying driver's absence.

66. Counsel for the Appellant asked Appellant Witness 2 to comment on the document dated 1 April 2019 entitled "*Terms of Use Agreement".* In particular, he drew the attention of Appellant Witness 2 to term 9 therein, namely "*WAV (wheelchair accessible vehicle) journey records must be completed and submitted to us bi-monthly starting from the date of this agreement."*

67. Appellant Witness 2 said that the reason for this record keeping requirement was that it was a condition of the grant aid that it had received from the NTA in relation to the purchase of WAV vehicles that they be used for "wheelchair work". If on an inspection by the NTA the Appellant was not complying with record keeping obligations, then "*At any stage the NTA can pull a licence or pull a vehicle. If you are doing something wrong or are not compliant."*

68. Appellant Witness 2 gave evidence that the Appellant was the owner of the largest single fleet of WAV taxis in the country. It had, over the period in issue, approximately 40 such vehicles. The Appellant was, he said, important to the industry as many individual drivers could not afford to purchase them alone out of their own resources.

69. Counsel for the Appellant then referred Appellant Witness 2 to a document included in the Appellant's book of core documents. This document appeared to record an exchange on the Respondent's '*My Enquiries'* system between a person identified only as Miriam and somebody in the Respondent's Business Taxes Division. The message from the person called Miriam stated:-

    "*Hi*

    I cannot find the answer to my query directly in the database,

    Is the hire of a taxi vatable. My client is hiring out car & Taxi plate and meter to someone who is going to operate as a taxi. Does he have to charge VAT on this supply or is it covered under Article 371.

70. The message in reply stated:-

    "*Hi Miriam,*

    As long as the car, taxi plate and meter have not given rise to a VAT deductibility, the hiring of the taxi would be covered under Article 371 and VAT would not have to be charged on the supply."

71. Arising from this, counsel for the Appellant asked Appellant Witness 2 whether the Appellant had sought to deduct the VAT paid as a consequence of the purchase of its WAV taxis. Appellant Witness 2 said that it had not done so.

72. Appellant Witness 2 said that when it became clear that the Respondent was of the view that the Appellant was engaged in an activity that did not involve VAT exempt transactions, he asked other Irish operators of similar businesses whether they too were being told that they should be charging VAT on their transactions. He said that nobody else was in a situation comparable to their own.

73. Counsel for the Appellant asked Appellant Witness 2 what the effect would be of the Appellant being required to charge VAT. Appellant Witness 2 said that it would increase the price that it charged to drivers for the use of its taxis.

74. Counsel for the Appellant then sought to return to the '*My Enquiries'* correspondence referred to at paragraph 70 of this Determination. In particular, he asked Appellant Witness 2 whether the statement concerning the non-charging of VAT, set out in the replying email contained in the document, was in line with how, in general terms, people "*in the* [taxi] *industry operate"* with respect to VAT. Appellant Witness 2 said, in effect, that his experience was that it was in line with industry practice.

75. It is necessary to observe at this point that counsel for the Respondent objected to the *My Enquiries* correspondence being introduced at hearing by means of it being put to Appellant Witness 2. It was, counsel for the Respondent noted, completely unclear who was the "Miriam" referred to in the first email. Appellant Witness 2 was not someone who was in a position to prove that this correspondence was genuine.

76. Appellant Witness 2 was cross-examined by counsel for the Respondent. Counsel for the Respondent began by asking Appellant Witness 2 about the terms of use agreement of 1 April 2019. In response, he said that it was:-

> "[…] *how we expect a driver to treat a vehicle when he is out in it; cleanliness, tolls, maintenance, whatever you want for the upkeep of the car.*

77. Counsel for the Respondent then put it to Appellant Witness 2 that his earlier evidence given in examination-in-chief had been that there was no written agreement entered into between the Appellant and the drivers of the taxis. In relation to this, Appellant Witness 2 said:-

> "[…] *that's not the agreement for cosying, that's the terms of using the vehicle, as in, the upkeep of the vehicle, how we expect the vehicle to be treated, it is not an agreement, as in, a work agreement."*

78. Appellant Witness 2 accepted in cross-examination that the terms of use agreement that had been produced as part of the appeal and upon which he had commented in evidence was dated 1 April 2019, which post-dated the beginning of the period under appeal by one day.

79. Counsel for the Respondent asked Appellant Witness 2 to comment on some of the terms set out in the terms of use agreement. In relation to the aforementioned term 9, "*WAV journey records must be completed and submitted to us bi-monthly, starting from the date of this agreement",* counsel put it to Appellant Witness 2 that the Appellant had availed of a NTA grant in its purchase of WAV vehicles. As a condition for receipt of this grant, the NTA required the Appellant to retain records demonstrating that the vehicles purchased actually were in use as WAV taxis. Appellant Witness 2 agreed that the NTA required that such records be kept as a condition of grant aid.

80. Counsel for the Respondent also addressed term 11, "*Your agreement is for 50 weeks over a 52 week period with 2 weeks allowed for annual leave. These 2 weeks cannot be taken consecutively and a minimum of 2 weeks notice must be given before any holidays are taken."* Counsel for the Respondent put it to Appellant Witness 2 that, in contradiction of this term, the oral evidence given in the appeal was that the drivers of the Appellant's

taxis were self-employed persons. Appellant Witness 2 accepted that this was so. It did not reflect the reality of the relationship between the two parties.

81. Also in relation to term 11 of the terms of use agreement, counsel for the Respondent pointed out to Appellant Witness 2 that his evidence given in examination-in-chief was that when a driver returned a vehicle to the Appellant's yard to go on holiday, the Appellant was free to give that vehicle to another driver. Appellant Witness 2 accepted that this was his evidence. He also accepted that it was not a term of the terms of use agreement that the vehicle in question be used by a driver only as a taxi. It could also be used during 'time off' as personal transport. Appellant Witness 2 said, however, that this was no different to how any taxi driver made use of their taxi.

82. Counsel for the Respondent opened the certificate of motor insurance that the Appellant had included in its appeal document booklet, and on which Appellant Witness 2 had commented in examination-in-chief. She put it to Appellant Witness 2 that the fact that the Appellant was the policy holder and the insured was comparable to how any car hire company would operate. In other words, the company hiring out a vehicle would be the holder of a policy of insurance and the person renting it would be insured under that policy, not their own. Appellant Witness 2 was not prepared to accept this as an appropriate analogy, stating in relation to this that the difference in relation to car hire companies was that:-

> "*they are on an open policy so you just have to be over 25 with a full licence, you don't get an insurance cert on a hire car."*

83. Counsel for the Respondent agreed that a customer seeking to hire a car would not receive an insurance certificate on which they were named, however that customer would nonetheless be "*a part of their policy when* [they] *hire the car."* Appellant Witness 2 did not agree with this proposition.

84. Counsel for the Respondent next put it to Appellant Witness 2 that as a matter of fact the Appellant did not share the fare obtained by the drivers of its vehicles. What it obtained was a fixed fee. Appellant Witness 2 did not accept this, stating in evidence that the charging of a fixed fee for the use of the Appellant's vehicles came from, firstly, the fear that those persons driving their taxis would under-declaring the fares received and, secondly, administrative convenience as the Appellant would not be required to "*keep chasing guys around"* for money owed. This, Appellant Witness 2 said, was why its agreement with drivers was not structured in a manner that involved it taking a percentage of fares paid by passengers.

85. Counsel for the Respondent suggested to Appellant Witness 2 that there was no risk assumed by the Appellant in entering into the agreement with the drivers:-

> Q. "*There is no risk here for your company. You receive a fixed fee if the taxi sits in a driveway or if the taxi is out 24/7. So if you have a very successful taxi you are not sharing in that fare either because you are still getting the fixed fee?"*

86. Appellant Witness 2 repeated that the nature of the arrangement with drivers was brought about by "*the admin of things, you don't have to keep chasing around and seeing which way it is worked out."*

87. Counsel for the Respondent also cross-examined Appellant Witness 2 about the claim of Appellant Witness 1 that, during the years in issue, the Appellant distributed work to drivers. In this regard, Appellant Witness 2 echoed the evidence given Appellant Witness 1 that the Appellant had a certain amount of work of its own derived from walk-in customers and calls to is physical premises, as well as work sourced by himself and Appellant Witness1, including that from the [redacted] Hotel. Appellant Witness 2 did not contradict the proposition put to him by counsel for the Respondent that no documentary evidence had been produced to corroborate this claim that the Appellant referred work over the period in issue to the drivers of its vehicles.

88. Counsel for the Respondent put it to Appellant Witness 2 that, in any event, it had been accepted by Appellant Witness 1 that the persons driving the Appellant's vehicles were free to accept or reject the work offered to them by the Appellant. Appellant Witness 2 agreed that this was so, but added that such a situation was regular industry practice.

Appellant Witness 3

89. The third and final witness called by the Appellant was [redacted] ("Appellant Witness 3"), an SPSV licence-holding taxi driver who has driven vehicles belonging to the Appellant.

90. In examination-in-chief, Appellant Witness 3 was asked why he had entered into an arrangement with the Appellant for the use of its vehicles. He said that finance was the biggest factor. Having obtained his licence, purchasing a taxi would, he said, have constituted a "massive outlay" on his part, which he estimated to be €50,000. He said that having made inquiries with taxi drivers already operating in the industry, he had been told about the alternative option of a 'cosy' arrangement and was given the name of the Appellant as a potential partner. He said that he then met representatives of the Appellant, who he said made the following proposition to him:-

"[…] *they will get* [me] *in a vehicle but it will still be* [the Appellant's] *but we will work together so what you earn you will give us a share of, albeit it is set." So they will say a max for me of whatever the fee was at that time and we will stay working together, we will get work going, we can show you where these apps are."*

91. After this meeting with the Appellant's representatives, Appellant Witness 3 began using vehicles belonging to the Appellant when operating as a taxi driver.

92. Appellant Witness 3 was asked in examination-in-chief whether his agreement with the Appellant was in his view to his advantage. He said that it was from his perspective a "beneficial partnership". In addition to avoiding the need to have funds necessary to purchase a taxi, he did not have to worry about ensuring that it was in compliance with regulations then in force regarding the equipment and maintenance of taxis.

93. In cross-examination, counsel for the Respondent asked Appellant Witness 3 when it was that he obtained his SPSV licence. Appellant Witness 3 said that he did so at the start of 2019. He was then asked by counsel for the Respondent when he first took one of the Appellant's vehicles for use as a taxi. He said that he did so in the middle of June 2019.

94. Counsel for the Respondent finished by asking Appellant Witness 3 whether he had any written contract evidencing the terms of his agreement with the Appellant. Appellant Witness 3 said that he did not, having entered into what he understood to be an industry standard "gentleman's agreement".

Submissions

Appellant

95. Before proceeding further, it is appropriate to observe at this point of the Determination that counsel for the Appellant sought in the early part of his oral argument to advance for the first time a submission that the Appellant may, during the periods in issue, have been making a "mixed supply" involving, in part, a VAT-exempt supply of insurance to the drivers of its vehicles. In support of this, he pointed, inter alia, to evidence given by Appellant Witnesses 1 and 2 that the Appellant had arranged insurance for the drivers who took its vehicles.

96. The Commissioner presumes this submission to have been made by the Appellant in the alternative to its primary argument, advanced in writing prior to the appeal hearing and orally during it, that it was engaged at the relevant time in the VAT-exempt supply of the service of the transport of passengers and their luggage. Whether this presumption is correct or not, counsel for the Appellant contended that if the Commissioner agreed with

his submission that the Appellant had made supplies of insurance as part of a mixed supply, he should, as part of his ultimate Determination, give a direction that the parties "*go away and work out*" the portion of the mixed supplies constituting supplies of insurance, such that the VAT assessed under the assessment could be reduced accordingly.

97. Counsel for the Respondent raised objection to the Appellant advancing this argument in circumstances, she said, where it represented an entirely new ground of appeal. This question is addressed in the Analysis part of this Determination.

98. Returning to the Appellant's primary contention regarding the nature of its supplies made, counsel for the Appellant began by stating that, in his view, the key issue to be decided was whether the Appellant operated a cosy system or, as the Respondent asserted, was hiring out vehicles. He said that it was the Appellant's contention that it operated a cosy system, which he described as being "*an all-encompassing joint venture agreement with the driver and ultimately with the passenger."*

99. Counsel for the Appellant then referred to Schedule 1, Part 2 to the VATCA 2010, which enumerates "*Other Exempted Activities".* He pointed out that paragraph 14(3) therein lists as a VAT exempted activity "*Transporting passengers and their accompanying baggage."* He then pointed out that the VATCA 2010 provided no further definition as to the meaning of "*transporting passengers".* However, counsel for the Appellant saw as relevant to the interpretation of the meaning of this term in the context of the VATCA 2010 that the heading to paragraph 14 of Schedule 1, Part 2 is "*Exemptions by derogation in accordance with Article 371 of the VAT Directive"* [emphasis added]. Counsel for the Appellant argued that by referring in express terms to Article 371 of the VAT Directive, the Oireachtas intended that, in interpreting the scope of what was to constitute the activity of "*transporting passengers*" under the VATCA 2010, "[…] *one is invited by the heading on the section to look to the* [VAT Directive]".

100. Counsel for the Appellant therefore referred to the wording of Annex X, Part B to the VAT Directive. He emphasised that at point 10 therein, it was stated that a Member State could exempt from the charging of VAT:-

> "*the transport of passengers and, in so far, as the transport of passengers is exempt, the transport of goods accompanying them, such as luggage or motor vehicles, or the supply of services relating to the transport of passengers"* [Emphasis added]

101. Counsel for the Appellant submitted that when one read paragraph 14 of Schedule 1, Part 2 of the VATCA 2010 in light of Article 371 of the VAT Directive, as he said one should

on the grounds that it mentioned that Article in express terms in its heading, it was clear that the definition of "*Transporting passengers and their accompanying baggage"* had to be interpreted to include "*the supply of services relating to the transport of passengers."* Counsel for the Appellant then submitted, in the first instance, that the services supplied by the Appellant clearly constituted supplies "*relating to the transport of passengers*" and, thus, were correctly treated as exempt from VAT by the Appellant.

102. Next, counsel for the Appellant, citing the principle of the supremacy of EU law, submitted that when interpreting the VATCA 2010, one had to consider the context, aim and objectives of the VAT Directive. What had to be done, he said, in reading the provisions of the VATCA 2010, in particular in this instance paragraph 14 of Schedule 1 therein, was to look to its purpose. Counsel for the Appellant then stated:-

> *"It is the Appellant's submission that the terms of the Directive provides for a wider definition of passenger transport service that that contained in the VATCA 2010. It must be superimposed on the definition in the VATCA 2010 on the principle that Irish VAT law, having adopted a derogation, must implement its purposes contained in the Directive. In other words, the definition contained in the VAT Act 2010 which seeks to implement the Directive must be read in the context of the Directive.*
>
> […]
>
> *The Appellant further submits that in passing the VATCA 2010 the Oireachtas had the benefit of the VAT Directive and intended to implement its purpose and effect in the context, aim and objectives of the VAT system as a whole, which is to exempt the wider services provided to the taxi industry* […]*"*

103. Counsel for the Appellant then cited judgments of the Irish Courts concerning the interpretation of taxing legislation, in particular *Dunnes Stores v Revenue Commissioners* [2019] IESC 50*, Bookfinders v Revenue Commissioners* [2020] IESC 60 and *Perrigo Pharma International DAC v McNamara & Ors* [2020] IEHC 152. He also quoted from *McGrath v McDermott,* [1998] IR 258 in which, at page 276, the Supreme Court held:-

> "*The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."*

104. In relation to this, counsel for the Appellant submitted:-

"*And I say this reinforces the point I made earlier which is that in looking at the VATCA 2010 one is invited to look at the Directive for the broad and true definition of what transporting passengers means.*"

105. Later, counsel for the Appellant submitted in relation to the appropriate steps of statutory interpretation:-

"*In the Appellant's submission* […] *the steps which arise involve first looking to the literal approach which does not in the Appellant's submission give vent to the terms of the Directive and then one is required to look to interpreting the words in the VATCA 2010* […] *in the context of the Directive and then looking to the purposive approach.*"

106. Counsel for the Appellant then submitted:-

"*The clear purpose and intention of the Oireachtas in the VATCA 2010 must in the Appellant's submission include implementing the terms of the Directive on the principle that Irish law be presumed to intend to be consistent with EU law. Therefore, the intention of the VATCA 2010 is to provide exemption for taxi services and the supply of services relating to the transport of passengers being the additional leg contained in the Directive which I have raised.*"

107. Counsel for the Appellant also submitted on the question of the purpose of the VATCA 2010 that:-

"*And I say that the purpose and scheme of the VATCA 2010 and in particular the exemption under the Schedule is to encourage and create an environment where a public service utility can flourish and, in particular, small public service vehicles can be allowed to function in a competitive and cost effective manner.*

And indeed in my respectful submission if [the Respondent] *succeeds in their argument that what my client is doing is hire then it would defeat the scheme and purpose of the exemption in the VATCA 2010* […]"

108. Counsel for the Appellant then pointed to the evidence of the Appellant witnesses to the effect that the Appellant had invested heavily in building a taxi fleet comprised of wheelchair accessible vehicles that met with the regulatory requirements of the NTA. Counsel submitted that the activity of the Appellant was:-

"[…] *clearly for the benefit of the passenger(s), and not the driver who is merely a conduit for the delivery of the taxi service to the passenger(s). If it were otherwise, the efforts of the Appellant in investing heavily in a regulated taxi fleet (and indeed oversight by the NTA in regulating the services), would become an absurdity.*"

109. Lastly, counsel for the Appellant addressed in legal submission "*the taxpayer's right of legitimate expectation."*

110. Counsel for the Appellant opened the judgment of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18. He stated that in this case the Court held that the Appeal Commissioners did not have jurisdiction to determine matters before them on the basis of arguments concerning legitimate expectation and estoppel. Counsel for the Appellant submitted, however, that this finding was subject to an important qualification at paragraph 74 of the Court of Appeal's judgment, which was relevant to the instant appeal. In this paragraph, Murray J, giving judgment on behalf of the other members of the Court, held:-

> "*Finally, in the course of his submissions counsel for the plaintiff submitted that since the decision of the CJEU in C-378/17 Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission [ECLI:EU:C:2018:979], the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be incompatible with European law. The principle is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise. It was suggested that this in some sense implied a broadening of their jurisdiction as a matter of national law. This does not at all follow. The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seised with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. <u>If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law.</u> These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law*." [Emphasis added]

111. Counsel for the Appellant submitted that the clear import of this passage was that if a matter of EU law arose in a tax appeal, the Commissioner hearing that appeal was possessed of "*inherent jurisdiction to deal with that dispute in order to uphold the legal right under EU law."*

112. Counsel said that, in this instance, the Respondent's decision to treat the Appellant's supplies made over the period in issue as subject to the charging of VAT breached its right to legal certainty, this right being a general principle under EU law.

113. Counsel for the Appellant then referred to the judgment of Clarke J (as he then was) in *Glenkerrin Homes v Dun Laoghaire Rathdown County Council,* [2011] 1 IR 417. In this case, it was held that the county council had engaged in a long-standing practice of issuing "*letters of compliance"* to developers relating to their payment of financial contributions required under planning permission. These letters, the Court held, had developed the status of "*quasi documents of title"* on foot of the council's practice and, as such, the council could not without reasonable notice terminate its practice of issuing them.

114. Counsel for the Appellant submitted that, in this instance, the Respondent had "*changed"* its policy in relation to the treatment of the Appellant's business activity. He said that:-

> "*It is a fundamental tenet of the Appellant's right under EU law under the principle of legal certainty that they should be allowed to organise their business affairs with certainty, reasonable certainty. And what has happened in this case is that it appears to me and my clients that* [the Respondent's] *policy has changed on this matter. And because* [the Respondent's] *policy has changed without notice, my clients have not been in a position to alter their set up, if I can put it like that, or their business model to enable them to deal with the issue at stake. And I say that that is a matter that is covered by paragraph 74 of Lee and I say it is within your jurisdiction to consider that point* […]"

Respondent

115. Counsel for the Respondent began her oral legal argument by submitting in overall terms that the core issue to determine was whether Appellant was in the period in issue engaged in supplying the service of "*transporting passengers and their baggage*". It fell, she said, to the Appellant to prove the facts that might allow the Commissioner to find that it was engaged in the transport of passengers over the period on issue.

116. This term, she said, should be given its plain meaning based on the wording used in the legislation. In support of this, counsel for the Respondent quoted from the judgment of the Supreme Court in *Heather Hill v Revenue Commissioners* [2022] IESC 43, in which it held at paragraph 115:-

"*[…] the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it*."

117. Counsel for the Respondent submitted that the evidence presented clearly indicated that the Appellant was involved in providing the service of hiring out of vehicles in the form of taxis to drivers and that this did not equate to providing a transport service for passengers.

118. Counsel for the Respondent then turned to the relevant legislation. In the first place, she submitted that Article 371 of the VAT Directive constitutes a 'standstill' provision that allows Member States to continue to treat as VAT-exempt certain transactions enumerated in Annex X, Part B, thereto. Counsel for the Respondent described Annex X, Part B to the VAT Directive, as a 'menu' of the types of transaction that Member States could opt to continue to treat as VAT exempt. It was, however, crucial to note that in order for a Member State to treat a transaction enumerated in Annex X, Part B as exempt, it had to have been already treating that transaction as exempt under its own domestic law as of 1 January 1978.

119. Counsel for the Respondent did not dispute that the service supplied by the Appellant fell within the list of transactions that could, in principle, be treated as VAT exempt under Article 371. This was so because, as already noted in this Determination, Annex X, Part B to the VAT Directive envisaged the possible exemption not just of transactions involving the transport of passengers and their goods, but, more broadly, those involving *"the supply of services relating to the transport of passengers"* [Emphasis added]. Counsel for the Respondent appeared to accept that the Appellant's services supplied were such transactions.

120. However, counsel for the Respondent submitted that the position under Irish law as of 1 January 1978 was that, although the First Schedule to the VAT Act 1972 prescribed the "*transport in the State of passengers and their accompanying baggage"* as an "*exempted activity",* there was nothing equating to a broader exemption for supplies of services "*relating to travel".*

121. Counsel for the Respondent said that it was her understanding of the submissions of counsel for the Appellant that, as the derogation provision in Annex X, Part B to the VAT Directive allowed a broad exemption in respect of supplies of services relating to travel, Schedule 1, Part 2 of the VATCA 2010 should be read so as to exempt such supplies as well. This submission was in her view misconceived. In support of this, counsel for the Respondent submitted that in *Talacre Beach Caravan Sales Ltd v Commissioners of Customs & Excise* (ECLI:EU:C:2006:451) ("*Talacre Beach Caravans*"), the Court of Justice made clear that one could not make use of a 'standstill' provision under EU legislation to extend the scope of exemptions that theretofore existed under domestic legislation.

122. *Talacre Beach Caravans* concerned the question of whether a 'single supply' comprising static caravans and their fixtures could be treated as a zero-rated supply. Although a standstill provision in the EU legislation envisaged that both could be so treated, the Court held that, in circumstances where as a matter of UK national law at the relevant time, only the static caravans, and not their fixtures, were treated as subject to zero-rating, it followed that only the caravan element of the single supply could continue to be zero-rated.

123. Counsel for the Respondent also opened the judgment of the Court of Justice in *Norbury Developments v Commissioners of Customs & Excise* (ECLI:EU:C:1999:211) ("*Norbury")*, in which it stated at paragraph 20:-

> "*In the main proceedings, the United Kingdom is entitled, pursuant to Article 28(3)(b) of the Sixth Directive, read in conjunction with point 16 of Annex F thereto, to continue to exempt supplies of land, save as regards the various exceptions to the maintenance of the exemption listed in Group 1 of Schedule 5 to the Finance Act 1972, as supplemented by Group 1 of Schedule 6 to the 1983 Act, in the version thereof resulting from the Finance Act 1989. As the national court has found, those amendments have not widened the scope of the exemption; on the contrary, they have reduced it. Consequently, they were not adopted in disregard of the wording of Article 28(3)(b). <u>While the provision precludes the introduction of new exemptions or the extension of the scope of existing exemptions following the entry into force of the Sixth Directive, it does not prevent a reduction of those exemptions, since their abolition constitutes the objective pursued by Article 28(4) of the Sixth Directive."</u>* [Emphasis added].

124. Counsel for the Respondent submitted that the effect of the Appellant's submission was that the State should be taken to have, pursuant to Schedule 1, Part 2 to the VATCA

2010, expanded the types of transaction exempt from VAT under domestic law. Such an expansion was, she submitted, not allowed under EU law, as was apparent from the judgments of the Court of Justice in both *Talacre Beach Caravans* and *Norbury.* Counsel for the Respondent repeated her submission that the Appellant had to be providing the service of transporting passengers in order to have its transactions treated as VAT exempt.

125. Returning, to the question of whether the Appellant should be understood as having provided passengers transport services during the period in issue, counsel submitted that as what was being considered was an exemption, the provision in question had to be construed strictly. This was in accordance with both national and EU law (*Revenue Commissioners v Doorley,* [1933] I.R. 750 and *Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien* (ECLI:EU:C:1989:246) respectively).

126. Counsel for the Respondent laid emphasis on the fact that under section 3 of the VATCA 2010, it is supplies "*for consideration"* that are chargeable to tax. A supply is for consideration when there is a "*direct link*" between the purported consideration received (such as the receipt of a payment of money) and the service or good supplied (*Staatssecretaris van Financien v Aardappelenbewaarplaats (ECLI:EU:C:1981:38*)) Counsel further observed that under section 37 of the VATCA 2010 VAT is calculated on the basis of the amount of consideration received.

127. Counsel for the Respondent further pointed out that the question of what kind of supply the Appellant was making in the period in issue was an objective question (*Halifax plc v Commissioners of Customs & Excise* (*ECLI:EU:C:2006:121*)).

128. Reviewing the evidence given by the Appellant's witnesses, counsel for the Respondent submitted that it was clear that there was no direct link between the payment to the driver made by a passenger taking a journey in one of the Appellant's rented vehicles and the service it provided.

129. Counsel for the Respondent submitted that all of the objective indicators suggested that what the Appellant received from persons who opted to enter into an agreement to take one of its taxis was payment for the use of the taxis. The drivers paid money to the Appellant up front. This up-front amount was calculated by reference to, inter alia, the type of the taxi in question, maintenance costs and insurance. The fee was, however, the same irrespective of the amount of passenger fares received by the driver during their time in possession and control of the taxi.

130. Counsel for the Respondent said that the fact that the Appellant ensured that its vehicles were compliant with NTA regulations was a consequence of the fact that its market was taxi drivers. Such customers would be highly unlikely, as a matter of obvious logic, to rent a vehicle that could not be used by them as a taxi. As counsel put it, it was clearly "*in the interest"* of the Appellant that its vehicles be ready to use as taxis upon hire. With specific regard to WAV taxis, which made up a significant part of its fleet, the Appellant had received a grant from the NTA and it was a condition of this grant that records be kept demonstrating that the taxi in question was in fact in use transporting wheelchair users. Requiring those drivers who took these taxis to record the details of their journeys was a measure that was imposed by the Appellant to protect its grant aid from the NTA.

131. Counsel for the Respondent observed that the evidence was that there was no requirement that the persons who paid for the use of the Appellant's vehicles were required even to use them as taxis. From the evidence, it appeared that once paid for the vehicles could be used as the driver pleased, whether as a taxi or for personal use.

132. Counsel for the Respondent said that the evidence given in relation to the period in issue was that the Appellant did not give work to drivers that they were obliged to take. In fact, all that had been given was vague evidence, unsupported by corroborating documentation, that a small amount of work was offered from time to time to the persons who had paid to take the Appellant's taxis.

133. Counsel for the Respondent submitted that the [redacted] advertisements were clearly directed toward that Appellant's target market – taxi drivers. They were equally clear in stating that what was being offered was a service offering vehicle rental.

134. Counsel for the Respondent addressed the Appellant's references to 'cosying'. She said:-

> […] *the Appellant's* [witnesses] *themselves weren't necessarily consistent with their definition but, in any event,* [Appellant Witness 1] *defined cosying as two men buy a car and a plate* […]. [Appellant Witness 2] *said that cosying was the sharing of the fare between the owner of the vehicle and the driver of the vehicle. That is not what happened here. There is no sharing of the fare, none. You know, the fee must be paid irrespective of how little or how much you drive the vehicle, whether you use it for personal use or public service vehicle use or whether you have a great week with taxis because it is Valentine's day or you have a terrible week because it is the first week of January, it doesn't matter. So this is not cosying."*

135. Counsel then submitted:-

"[…] *one would imagine the typical cosying was two taxi drivers, both driving the vehicle sharing the cost of the one vehicle…. In those circumstances those two taxi drivers are presumably both providing a passenger transport service. They are sharing the cost of the vehicle and they are…sharing the fares because they are both getting their own."*

136. Counsel for the Respondent opened the Commission Determination 116TACD2021. This was a case in which an appellant company that operated a radio dispatch service, and charged self-employed taxi drivers a set fee, was held by the Appeal Commissioner to be engaged in the activity of transporting passengers and their luggage. Counsel for the Respondent said, however, that paragraphs 8 and 9 of 116TACD2021 left no doubt that the facts of that case were fundamentally different to those at hand. There it was stated:-

"*The Appellant is engaged in the business of supplying a taxi and hackney service in Co* [Redacted]. *The Appellant provides a 24-hour call centre with a computer dispatch system. The majority of the business is generated by phone calls from customers to the Appellant's call centre. The calls are allocated to drivers through a computerised radio system. The Appellant operates both taxi and hackney (private hire) vehicles. Hackneys cannot use bus lanes, pick up passengers on the street or at a taxi rank. All hackney work must come through the Appellant's office, while the taxi drivers can also pick up passengers at a rank or on the street without going through the Appellant's office.*

Drivers who supply their own vehicle remit an agreed amount per week to the Appellant for work they get from the Appellant. Typically, depending on the arrangement, these drivers pay €70-€160 per week, with most of the drivers paying €140 per week to the Appellant. Some 20 to 30 drivers who own their own vehicles are affiliated to the Appellant."

137. Counsel for the Respondent then quoted from paragraph 41, where the Appeal Commissioner set out the facts material to his determination:-

"*Having heard all the evidence adduced at hearing and carefully considered the documentation submitted and the submissions made for and on behalf of the parties herein, I am satisfied that, and find as material facts, the following:-*

(a) the contracts for taxi and hackney services arranged through the Appellant were made between the Appellant and the customer;

(b) if a driver picked up a customer off the street or from a taxi rank, that fare did not form part of the driver's arrangement with the Appellant;

(c) *if the customer had a complaint, it was made to the Appellant and it was resolved by the Appellant;*

(d) *the Appellant assumed full responsibility to customers for all services provided;*

(e) *the risks and rewards of the contracts remained with the Appellant;*

(f) *drivers had no control over the fares they charge – these were set by the Appellant;*

(g) *customers were issued receipts with the Appellant's details thereon;*

(h) *all drivers displayed the Appellant's sign and branding, irrespective of whether they were self-employed or salaried drivers;*

(i) *the Appellant supervised and oversaw the cleanliness and condition of the vehicles used by the drivers; and,*

(j) *the Appellant was responsible for and dealt with complaints made to the Commission for Taxi Regulation."*

138. It was in this very different context, submitted counsel for the Respondent, that the Appeal Commissioner in 116TACD2021 held that the weekly payments made by the drivers to the appellant company running the taxi and hackney radio service constituted an "*estimate of the Appellant's gross margin on the sale price to the customer; they were not simply payments made by the drivers in exchange for services provided to them by the Appellant."*

139. Counsel for the Respondent submitted that, in the instant matter, the payments made by the drivers who took the Appellant's vehicles were in fact payments made for the service provided to them by the Appellant. This service was the rental of taxis. Counsel for the Respondent emphasised, in particular, that the Determination in 116TACD2021 was premised on the drivers, notwithstanding their self-employed status, being agents of the appellant company and the appellant company having a "*relationship with the passenger"* transported. The evidence, counsel for the Respondent submitted, clearly pointed to the Appellant being in this instance neither the drivers' principal, nor having a relationship with the passengers those drivers transported.

140. Lastly, counsel for the Respondent addressed the Appellant's argument relating to a legitimate expectation that it be treated as an entity engaged in making supplies that were exempt from VAT. She referred to the statement of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18 and argued that, where the Oireachtas intended to confer "*additional functions"* on an Appeal Commissioner beyond determining the correct charge

to tax under an assessment, "*it is reasonable to expect that it would have been expressly noticed in the legislation, and lucidly identified and delineated."* No such identification and delineation was apparent in legislation governing the powers and functions of an Appeal Commissioner.

141. Counsel for the Respondent acknowledged that at paragraph 74 of *Lee v Revenue Commissioners* [2021] IECA 18*,* the Court of Appeal held that an Appeal Commissioner is empowered to consider whether domestic legislation is compatible with EU law and, if necessary, to disapply the domestic law where it is found to be incompatible. However, counsel for the Respondent then submitted:-

> "[Counsel for the Appellant] *didn't open any law in relation to what breach of EU law he relied upon. He referred to…legal certainty but didn't so much as open a case as to what or how the right to legal certainty was somehow enforceable by you, Commissioner, or how it usurped the* [TCA 1997] *or how it meant that the* [TCA 1997] *should be disapplied, which is really what the Workplace Relations Decision is about. And so he doesn't seem to raise any breach of EU law. The height of what the Appellant seems to be saying is that…the exemption is inconsistent with the* [VAT Directive] *but I hope I have satisfied you as to that, Commissioner, in relation to the Derogation itself."*

142. Even at that, counsel for the Respondent submitted that it was clear that the facts elicited in evidence did not meet the test prescribed for legitimate expectation under national law. In this respect, in its seminal judgment on the topic in *Glencar Explorations plc v Mayo County Council,* [2002] 1 IR 84, the Supreme Court made clear that for an expectation to be legitimately held, it was essential, firstly, that a public authority have made a promise or representation, express or implied, as to how it would act in relation to an identifiable area of its activity and, secondly, that:-

> "[…] *the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons affected actually or potentially in such a way that it forms part of a transaction definitely entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation."*

143. Counsel submitted that there was, at the most fundamental level, simply no evidence of any representation made by the Respondent on which the Appellant could be said to have relied. The height of what the Appellant had produced was a copy of an exchange, seemingly on *My Enquiries,* between an unidentified person unconnected to the Appellant

and a person employed by the Respondent, dating from long after the period in issue. Counsel for the Respondent thus concluded her legal submissions.

Material Facts

144. The facts material to the determination of this appeal that are not in dispute are as follows:-

- the Appellant is a limited liability company that was incorporated in 2016;
- over the period in issue, the Appellant owned a fleet of vehicles that were licenced as taxis;
- these vehicles were each fitted with a meter and printer, a roof sign and decals. Each vehicle had received its NCT;
- over the period in issue, the majority of the Appellant's vehicles were WAV taxis (i.e. were wheelchair accessible taxis);
- over the period in issue, the Appellant would provide its taxis to persons holding SPSV licences and an insurance policy with a valid no-claims bonus in return for a weekly fee;
- the amount of the fee charged to these persons was calculated by reference to the type of taxi taken, maintenance and repair costs;
- in its acquisition of WAV taxis, the Appellant received grant aid from the NTA. It was a condition for receipt of this grant aid that records be kept regarding the use of the WAV taxi;
- over the period in issue, the Appellant did not charge VAT in respect of its supplies;
- the persons to whom the Appellant provided its taxis were self-employed;
- when in possession of the Appellant's taxis, the persons to whom the Appellant provided its taxis were free to use the vehicles as they pleased, whether for personal use or as a taxi for the transportation of paying passengers;
- if the person to whom a taxi had been provided did not pay the fee required by the Appellant, that person would be required to return the taxi to the Appellant;

- the person to whom the Appellant provided one of its taxis was free to carry out work as a taxi driver as they pleased over the period that they possessed the taxi in question;
- the Appellant would, on occasion, offer work to the persons to whom it had provided its taxis, however there was no obligation on those persons to take the work offered;
- passengers transported in the Appellant's taxis would be issued a receipt by the person to whom the Appellant had provided its taxi. This receipt did not bear the Appellant's name;
- the Appellant used [redacted] to advertise to persons holding SPSV licences. The wording of these advertisements stated that taxis were available for "rent" and "hire";
- on or about [redacted] 2020, the Appellant entered into an agreement with the HSE, whereby it was to transport Covid-19 patients in its taxis;
- on 5 February 2020, the Respondent commenced an inquiry into the VAT affairs of the Appellant for the years 2018 and 2019;
- on 21 December 2022, the Respondent raised an assessment to VAT in which it assessed the Appellant as owing VAT for the period 1 January 2018 – 31 March 2018 in the amount of €16,189.05 and for the period 1 April 2018 – 31 March 2019 in the amount of €96,320.61;
- the Appellant appealed this assessment by way of Notice of Appeal delivered to the Commission on 5 January 2023.

Analysis

The "multiple supply" argument

145. The Commissioner will first address the argument that the Appellant sought to advance for the first time at the submission stage of the hearing of the appeal concerning whether part of the Appellant's supply, constituting the provision of insurance, is part of a "multiple supply" under section 47 of the VATCA 2010. There was no dispute that supplies of insurance are VAT exempt.

146. It is first of all necessary to observe that section 949I(6) of the Taxes Consolidation Act 1997 ("the TCA 1997") requires that an appellant specify in its Notice of Appeal the grounds on which they intend to rely, and provides that they shall not be permitted to rely

on a ground not included in their Notice unless the ground could not reasonably have been stated therein at the time of its delivery to the Commission.

147. In its Notice of Appeal the Appellant stated in general terms that the supplies giving rise to the assessments under appeal were exempt from VAT. This could perhaps be taken as a ground encompassing an argument that certain supplies were exempt on the basis that they were supplies of insurance. However, it is essential to note that at no stage in either its Statement of Case or its two separate Outlines of Argument did the Appellant advert to the fact that it was going to contend that there had been a multiple supply involving an exempt supply of the service of insurance. At hearing, the Commissioner decided in such circumstances the Appellant was not entitled to proceed with the making of this argument, on the basis that the Respondent was being subjected to the kind of procedural unfairness against which section 949I(6) of the TCA 1997 is intended to guard. This decision, made in the course of the hearing and delivered orally, is hereby given expression in writing.

148. The Commissioner does, however, make the following further observation regarding the Appellant's attempt to raise at legal submission stage a ground concerning the provision of a mixed supply, including a supply of insurance. In the evidence stage of the hearing, the Appellant adduced no evidence regarding what portion of the supplies at issue, purportedly constituting a multiple supply under section 47 of the VATCA 2010, constituted insurance. Due to this lack of fundamental information on which the base his submission, the Appellant's counsel asked that the Commissioner, as part of the Determination, direct that the parties "go away" after its delivery and establish between themselves the portion of the sums assessed under the appealed assessments that should be reduced on the grounds that it was attributable to a VAT exempt insurance supply.

149. The powers and functions of the Commissioner are prescribed by legislation as passed by the Oireachtas. The Commissioner does not possess any inherent powers, as would be the case of a judge of the Superior Courts. As was noted by the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18*,* which as has been seen was the subject of analysis in legal argument made by counsel for both parties, the statutory role of the Commissioner is to determine whether tax is owed and, if it is found to be owed, determine in what amount. In the context of an appeal of an assessment, nowhere in legislation is the Commissioner empowered to make a final determination on the level of principle only and, in the absence of any evidential basis upon which to proceed to fulfil the statutory function of assessing the amount of tax due, instead direct the parties to

enter into a separate, post-appeal, process of engagement between one another. The Commissioner is satisfied that to do as the Appellant suggested and make such a direction would be to step outside the jurisdiction that has been conferred on him under legislation by the Oireachtas.

Whether the Appellant was supplying the service of transporting passengers

150. The Commissioner thus moves to the question that was at the centre of the appeal hearing, namely whether the Appellant was, in the period in issue, supplying the service of transporting passengers, which under Schedule 1, Part 2 to the VATCA 2010 is a service that is exempt from the charging of VAT.

151. Both parties agreed that the Appellant was engaged over the period in issue in the provision of a service for consideration within the meaning of the VATCA 2010/the VAT Directive. What the parties could not agree on was what the nature of that service was, or how that service might be characterised.

152. The Commissioner observes that it falls to the Appellant to adduce factual evidence sufficient to prove on the balance of probabilities that the sum assessed pursuant to the assessment under appeal is not payable. That this is so as a matter of law was made clear by the High Court in *Menolly Homes v Revenue Commissioners* [2010] IEHC 49, where Charleton J held:-

> "*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*. *"*

153. The foregoing statement of the law regarding the burden of proof has been reaffirmed by the Courts in subsequent judgments (see for example *McNamara v Revenue Commissioners* [2023] IEHC 15 and *Quigley v Revenue Commissioners* [2023] IEHC 244).

154. However, it is important to emphasise in the context of this appeal that there is no burden falling on either party as regards questions of law as opposed to fact. As was held by the Court of Appeal in *Hanrahan v Revenue Commissioners* [2024] IECA 113, determining and applying the law to a particular set of facts found is an objective exercise, to be carried out by the Commissioner by reference to relevant legislation and case law.

155. A significant part of the dispute in this appeal centred on the question of whether the Appellant was sharing in the income in the form of fares received by the drivers of its

vehicles when transporting passengers. In the course of evidence, the Appellant's witnesses referred to the Appellant as receiving a "*commission*" from the drivers of its vehicles. The Commissioner considers the question of whether they were or were not so sharing to be one of fact.

156. The Commissioner notes there is little evidence on which to conclude that the Appellant was sharing in the income earned by the drivers of its vehicles. The facts, which were not in dispute, were that the Appellant would charge a sum to a driver for the use of a vehicle. This sum would be calculated by reference to the type of vehicle taken by the driver and other associated costs such as insurance and maintenance. The amount charged was entirely unrelated to what the driver opted to do with the vehicle and the number of fares thus received over the period of their possessing it. Having taken one of the Appellant's vehicles for a fee, a driver could, for whatever reason, have taken not a single fare and earned nothing.

157. In the course of legal argument regarding whether the fees charged by the Appellant to drivers should be viewed as being part of a "joint venture" sharing in the income or profits earned from the transportation of passengers, reference was made to the earlier decision of the Commission in 116TACD2021. In that appeal, the Appeal Commissioner in question found that the appellant company, which provided a 24-hour call centre with computer dispatch, was operating a taxi and hackney service that fell within the parameters of paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010. The Appeal Commissioner reached this conclusion notwithstanding that, in providing this service, the appellant's business model involved charging drivers, whether or not they provided their own vehicle, a flat fee to be referred taxi and hackney work over its dispatch system.

158. In relation to the determination of the instant matter, it is first necessary to underline that a previous Determination given in respect of a tax appeal is not binding on the Commissioner. However, it is the Commissioner's view that the facts in 116TACD2021 stand in marked contrast to those present in this appeal. It is clear that in 116TACD2021, an essential part of the relationship between the appellant company and the drivers of taxi and hackney vehicles on duty was that it would refer work to them that it had received directly from customers. It is also apparent that once referred, the drivers were obliged to carry out that work. Some, though a lesser part, of the work referred was for customers who held an account with the appellant company, in which case it would receive payment directly from those customers. At the end of a journey a customer would receive a receipt with the appellant company's name on it, and any complaints about the service received would as a matter of near inevitability land with that company rather than with the driver

in question. For these reasons, amongst others, the Appeal Commissioner concluded that the appellant company in 116TACD2021 was acting as principal of the taxi and hackney drivers, who were its agents. The Appeal Commissioner accepted the evidence given to him that though the drivers were charged a flat fee by the appellant company, doing so was driven by "*administrative convenience*" and the sum charged was an "*estimate on the gross margin on the sale price to the customer".*

159. None of these features are present in this appeal. The evidence of Appellant Witness 2, given in examination-in-chief, was that in the period in issue the Appellant had a "*small bit of business*" to refer to drivers of its vehicles, which was derived from 'walk-ins' to its physical premises, callers to its phone number and work that Appellant Witnesses 1 and 2 sourced themselves.[1] Later, under cross-examination, Appellant Witness 2 gave a somewhat different description of the level of work that the Appellant had to refer over the period in issue, stating "*we were right and busy, we weren't mental. We still had the offer of work if work needed to be done."*[2]

160. The Commissioner notes that there was no documentary evidence proffered to corroborate the existence of the Appellant's practice of referring work to persons driving its vehicles. The Commissioner finds it probable that the actual amount was in line with the "*small bit of business",* referred to by Appellant Witness 2 when giving evidence in the first instance under examination-in-chief. However, whatever the exact level, there was no dispute in the appeal that the drivers who received a referral were under no obligation to take that work. This is an important fact, as the principal/agent relationship between company and driver that was found to be present in 116TACD2021, and was central to the outcome in that case, is absent from the circumstances of this appeal.

161. Much reference was made in the course of the appeal to the terms 'cosying' and 'joint venture'. These, in the Commissioners view, were labels given by the Appellant to the transactions that it entered into with drivers and do not affect their fundamental and true nature. What the Appellant was doing was supplying a taxi rental service to drivers who could not, or would struggle to, afford to purchase their own taxi. Lest there be doubt in this respect, the advertisements carried on [redacted] are a clear indication of the persons with whom the Appellant was seeking to transact, namely the potential drivers of its vehicles, and the type of service being provided, namely a leasing or rental service. The Commissioner finds the foregoing as facts material to the determination of this appeal.

[1] Transcript of appeal hearing, day 1, page 92;the
[2] Transcript of appeal hearing, day 1, page 129

162. This leads to the question of whether such a service is exempt from the charging of VAT under the VATCA 2010. Before proceeding to answer this, the Commissioner notes, firstly, that the proper method of statutory interpretation has been set out in a variety of judgment of the Courts, most recently in cases such as *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152 and *Heather Hill DAC v Revenue Commissioners* [2022] IESC 43. For the purposes of this Determination, it is sufficient to observe that, as Murrary J made clear in his judgment for the Supreme Court in *Heather Hill v Revenue Commissioners* [2022] IESC 43, quoted above at paragraph 116 the primary tool for interpreting the meaning of legislation is the wording used, analysed by reference to its plain meaning taken in context. Secondly, as McDonald J observed at paragraph 74 of *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152*,* when approaching a claim for relief from tax, that claim must only be allowed where the relieving provision allows it "*expressly and in clear and unambiguous terms"*. This accords with the earlier judgment of the Supreme Court in *Revenue Commissioners v Doorley,* [1933] IR 750.

163. Paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010 lists as an activity exempt from the charging of VAT, "*Transporting passengers and their accompanying baggage".* This term is not defined in the VATCA 2010, however the meaning of the word "*transporting",* as defined by the Oxford English Dictionary, is "*the action of transport"* and "*transport"* is "*the action of conveying a person or thing from one place to another."*

164. It has already been held as a matter of fact that what the Appellant was doing over the period in issue was supplying to drivers of taxis the vehicles by which they could carry out their activity. To this extent, it could be said that the Appellant's service enabled those drivers to carry out the conveyance of passengers and their luggage from one place to another, if they wished to do so. The Appellant was not, however, performing this action itself.

165. The Commissioner finds that the consequence of this is that the Appellant's service cannot fall within the parameters of the exemption under paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010, by reference to its plain and ordinary meaning. Moreover, the Commissioner is mindful of the dictum of McDonald J in *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152 regarding the interpretation of provisions granting tax *relief,* as opposed to those imposing tax. The Commissioner finds that the plain and ordinary meaning of paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010 is that the service of supplying vehicles to taxi drivers in return for a fee, could not be said to constitute "*in clear and unambiguous terms"* the act of *"transporting*

passengers and their luggage". As it is not so clear and unambiguous, the Commissioner must avoid "*delimiting"* or "*extending"* the provision and find that the Appellant's service is not one exempt under paragraph 14(3) of Schedule 1, Part 2 to the VATCA 2010.

166. It is necessary also to observe that in the course of the hearing, counsel for the Appellant argued that the term "*transporting passengers"* had to be read in light of the fact that the heading to paragraph 14 of Schedule 1, Part 2 to the VATCA 2010 referred in express terms to the activities thereunder being exempted "*by derogation in accordance with Article 371 of the VAT Directive."* This, he submitted, meant that one was "*invited"* to look to the VAT Directive, in particular Annex X, Part B thereto, for the proper definition of the term. Upon doing this, one saw that the equivalent provision in the VAT Directive mentioned not just the transport of persons and their luggage, but also "*supplies of services relating to transport".*

167. The Commissioner considers this submission to be in error. In the first place, section 18(g) of the Interpretation Act 2005 provides that no heading to a part, chapter or section in legislation is to be taken into consideration in the construction of that legislation. However, even were this not the case, the submission is flawed on its own terms. What the heading to paragraph 14 of Schedule 1, Part 2 to the VATCA 2010 says is that the paragraph relates to exemptions "*in accordance"* with Article 371 of the VAT Directive. Article 371 of the VAT Directive sets out that transactions listed in Annex X, Part B thereto, that a Member State was exempting as of 1 January 1978 could ***continue*** to be the subject of an exemption by way of derogation. What is clear, is that types of transactions listed in Annex X, Part B to the VAT Directive, which a Member State was not as of 1 January 1978 already exempting could not thereafter be exempted. As counsel for the Respondent put it, Article 371 in other words constituted a 'standstill' provision. It was not an opportunity for a Member State to extend the types of activity exempt from VAT beyond those already exempted under domestic law as of 1 January 1978.

168. It was not in dispute that as of 1 January 1978, Ireland was, pursuant to the VAT Act 1972, exempting, as under the VATCA 2010, the "*transport in the State of passengers and their accompanying baggage".* What Ireland was not doing as of this date was exempting a broader category of transactions constituting supplies *"of services relating to the transport of passengers".*

169. In both *Talacre Beach Caravans* and *Norbury,* the Court of Justice considered standstill provisions comparable to Article 371 and concluded that while a Member State could seek to restrict an exemption previously allowed, it could not seek to expand the range of exempted activities. It is clear to the Commissioner that were the Oireachtas to have

sought under the VATCA 2010 to have included provision for the exemption of services "*relating to the transport of passengers",* it would have been doing so for the first time and would, therefore, have been seeking to expand its use of a derogation, which expansion is not permissible under EU law. In other words, what Ireland would have been doing is not "*continuing"* to exempt, which is what Article 371 allows, but creating a new exempted transaction.

170. The net effect of this, the Commissioner finds, is that the reference to Article 371 in the heading to paragraph 14 of the First Schedule, Part 2 to the VATCA 2010 does not mean that the wording thereunder exempting the activity of "*transporting passengers*" from the charging of VAT should be interpreted as encompassing activity "*relating to the transport of passengers."* The Commissioner so finds as a matter of law.

171. The final issue to address is the contention of the Appellant that the Respondent, by refusing to treat the Appellant's activity in the period in issue as exempt from the charging of VAT, was breaching an expectation legitimately held that it would do otherwise. In this regard, counsel for the Appellant argued that, as the right to legal certainty is a general principle of EU law, the Commissioner must be considered empowered to consider and make a determination on such a claim.

172. The Commissioner does not agree with this submission. It is quite clear from the judgment of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18 that a claim based on the violation of a legitimate expectation falls outside of the jurisdiction of the Commissioner to determine. Any such claim must be brought before the High Court and decided at first instance in that forum. It is true that in *Lee v Revenue Commissioners* [2021] IECA 18*,* Murray J indicated on behalf of the Court of Appeal that a Commissioner would be obliged in the fulfilment of their function to consider whether domestic legislation would need to be disapplied in a specific case where it was claimed that that legislation was incompatible with EU law. The Commissioner however agrees with the submission of counsel for the Respondent that no incompatibility between the relevant provisions of the VATCA 2010 and EU law, whether under legislation or enshrined in EU Charter rights, was identified by the Appellant, such that the question of the disapplication could arise. Accordingly, this ground of appeal must also fail.

173. For completeness only, even if the Commissioner had jurisdiction to determine matters of legitimate expectation there is no evidence upon which to conclude that the Appellant had cause for such an expectation. The height of what was produced in the course of the Appeal hearing was an extract from a '*My Enquiries*' message exchange between a person identified only as Miriam, who it was apparent was not associated with the

Appellant, and a person employed by the Respondent. On its face, it would appear that in this exchange the employee of the Respondent suggested that a business renting out taxis to taxi drivers would, provided certain conditions were met, be one that involved VAT exempt supplies. Based on the above analysis, such advice would seem to be in error. The Commissioner considers, however, that this exchange falls far short of constituting adequate evidence of an established 'practice' on the part of the Respondent, sufficient to amount to a promise made, on which the Appellant might be entitled to rely, such that it could hold a legitimate expectation that the alleged practice in question, namely the treatment of taxi hire services as VAT exempt, would be applied to the circumstances of the instant case. In any event, and to repeat, the Commissioner is not empowered to take into consideration any actions of the Respondent in his determination of the appeal.

Determination

174. The Commissioner finds that the activity of the Appellant over the course of the period in issue was one that was not exempt from the charging of VAT pursuant to paragraph 14(3) of the First Schedule, Part 2 to the VATCA 2010. In accordance with this finding, the Commissioner determines that the VAT assessment of the Respondent under appeal, whereby it assessed the Appellant as owing VAT in the amount of €16,189.05 for the period 1 January 2018 – 31 March 2018 and €96,320.61 for the period 1 April 2018 – 31 March 2019 is correct and stands affirmed.

175. 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

176. 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

177. 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.

Conor O'Higgins
Appeal Commissioner
30 May 2025