



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

89TACD2025



Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) brought by [REDACTED] (“the Appellant”) under section 28B(14) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against four assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for the period of May to August 2021 (“the relevant period”) and were in the total amount of €75,700.00. The assessments were raised on the basis that the Appellant had failed to abide by the terms of the EWSS.
2. The appeal proceeded by way of an oral hearing on 15 November 2024. The Appellant’s Company Director appeared with a Financial Consultant and the Respondent was represented by Counsel.

Background

3. The EWSS was introduced by the Financial Provisions (Covid-19) (No. 2) Act 2020, which inserted section 28B into the EMPI Act 2020 and replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic and provided for a flat rate subsidy to qualifying employers based on the number of paid and eligible employees on the employer’s payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.
4. The Appellant is a [REDACTED] company which was incorporated on [REDACTED] and participated in the EWSS from [REDACTED] 2020. On 5 August 2022, the Respondent informed the Appellant that it had been selected for an EWSS compliance check and requested copies of monthly rolling reviews to verify the projected minimum 30% reduction in turnover or customer orders for all periods in which EWSS was claimed. The Appellant and the Respondent subsequently entered into correspondence, which was followed by a Stage 1 Local Review on 20 April 2023 and a Stage 2 Local Review on 24 November 2023, under the Respondent’s complaint procedure.
5. On 7 December 2023, the Respondent raised four assessments against the Appellant on the basis that it had failed to abide by the terms of the EWSS. The assessments were raised in the amounts of: €14,850.00 for May 2021; €16,200.00 for June 2021; €24,350.00 for July 2021; and €20,300.00 for August 2021. On 20 December 2023, the Appellant submitted a Notice of Appeal to the Commission in respect of those amounts.

6. The Appellant and the Respondent subsequently submitted Statements of Case under section 949Q of the Taxes Consolidation Act 1997 ("TCA 1997") and pre-hearing documentation under section 949S of the TCA 1997, as well as additional documentation at the hearing. The Commissioner has considered all of the documentation submitted by the parties in this appeal.
7. On 14 November 2024, the Appellant requested the Commissioner to treat the books submitted by the Respondent as inadmissible due to late delivery. The Commissioner was not satisfied that it was appropriate to exclude the books as requested, having regard to the following. The books were due to be submitted by 18 October 2024. The Respondent sent the books electronically on 29 and 30 October 2024. The Respondent sent hard copies on 7 November 2024. The Appellant's office received the hard copy books on that date, although it stated that the Company Director did not receive them until 11 November 2024. The books included a significant number of documents of which the parties would have had sight; for example, correspondence between the parties, notices of assessments, appeal documentation and tax returns. On 14 November 2024, the Commissioner refused the Appellant's request.
8. An oral hearing was held in private on 15 November 2024.

Legislation and Guidelines

9. Section 28B of the EMPI Act 2020, as in force from 1 April 2021, provided (among other things) that:

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

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

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

June 2019 (in this subsection referred to as 'the second corresponding period'),

(II) in the case where the business of the employer has not operated for the whole of the second corresponding period but the commencement of that business's operation occurred no later than 1 May 2019, there will occur in the part of the second specified period, which corresponds to the part of the second corresponding period in which the business has operated, at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to that part of the second corresponding period, or

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

(A) 30 per cent, or

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

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

or

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

and

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

(2B) Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 July 2021 to the date on which the qualifying period expires in respect of the employer where-

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

(I) there will occur in the period from 1 January 2021 to 31 December 2021 (in this subsection referred to as 'the third specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 January 2019 to 31 December 2019 (in this subsection referred to as 'the third corresponding period'),

(II) in the case where the business of the employer has not operated for the whole of the third corresponding period but the commencement of that business's operation occurred no later than 1 November 2019, there will occur in the part of the third specified period, which corresponds to the part of the third corresponding period in which the business has operated, at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to that part of the third corresponding period, or

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

(A) 30 per cent, or

(B) such other percentage as the Minister may specify in an order made by him or her under subsection (21)(b), less than what that turnover or those customer orders, as the case may be, would otherwise have been

had there been no disruption caused to the business by reason of Covid-19,

or

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

and

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

(3) The conditions referred to in subsection (2)(b), (2A)(b) or (2B)(b) are -

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

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

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

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

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

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

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

(b) if, based on the result of that review, it is manifest to the employer that the outcome referred to in clause (I), (II) or (III), as the case may be, of

subsection (2)(a)(i), (2A)(a)(i) or (2B)(a)(i) that had previously been envisaged would occur will not, in fact, now occur, then -

- (i) the employer shall immediately log on to ROS and declare that, from the first day of the income tax month following the relevant income tax month (in subparagraph (ii) referred to as 'the relevant day'), the employer is no longer an employer to which this section applies, and*
- (ii) on and from the relevant day, the employer shall not be an employer to which this section applies and shall not represent that his or her status is otherwise than as referred to in this subparagraph nor cause the Revenue Commissioners to believe it to be so otherwise.*

[...]

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

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

[...]

(13) Notwithstanding subsection (12), where an officer of the Revenue Commissioners is satisfied there is an amount of relevant tax due to be paid by an employer which has not been paid, that officer may make an assessment on the employer to the best of the officer's judgment, and any amount of relevant tax due under an assessment so made shall be due and payable from the date the wage subsidy payment referred to in subsection (11) had been paid by the Revenue Commissioners to the employer.

[...]

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

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

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

10. Section 28B of the EMPI Act 2020 was amended from time to time to (among other things) account for changes to qualifying periods as EWSS continued into 2021. From 1 January 2021, the second specified period was 1 January 2021 to 30 June 2021 and the second corresponding period was 1 January 2019 to 30 June 2019 (section 28B(2A)). From 1 July 2021, the third specified period was 1 January 2021 to 31 December 2021 and the third corresponding period was 1 January 2019 to 31 December 2019 (section 28B(2B)). Otherwise in respect of these time periods, and insofar as is relevant to this appeal, section 28B remained as set out above.

11. As required by section 28B(20) of the EMPI Act 2020, the Respondent published guidelines on the operation of the EWSS ("the Guidelines"). The Guidelines stated that: *"this scheme is administered by Revenue on a self-assessment basis. Revenue will not be looking for proof of eligibility at the registration stage. We will in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering and remaining in the scheme."*

12. In respect of the rolling review requirement mandated by section 28B(5) of the EMPI Act 2020, the Guidelines stated that:

"Employers must undertake a review of the six month period on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.

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

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

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

13. The Guidelines (dated 18 December 2020) stated under the heading “*other reasonable basis*” that:

*“In Revenue’s administration of this scheme, the key focus will be on disruption to commerce as a result of COVID-19. In instances where application of the “turnover” and “customer orders” tests do not adequately demonstrate this, an alternative “reasonable basis” should be applied. It is not possible to be prescriptive in guidance as to what might or might not constitute such a reasonable basis. However, **the starting position is that neither the turnover test nor the reduction in customer orders test is capable of being applied to the business in question**. It is not sufficient that the business does not meet either of these tests. It must be the case that neither of these tests are capable of being applied to the business in question before*

an alternative basis for assessing eligibility is used. In all such cases, guidance from Revenue should be sought through the relevant Revenue Division/Branch responsible for the tax affairs of the employer concerned.

An example may be where the majority of a company's contracts take 6 months or longer to complete and that the business otherwise is eligible for the subsidy, then such a business will be treated as meeting the criteria where no substantive work has taken place on any order since the business stopped working due to COVID-19."
(emphasis in original)

14. The Guidelines were revised on 31 March 2021, but the section on "*other reasonable basis*" remained unchanged.

Evidence

Appellant's Evidence

██████████ Company Director

15. ██████████ ("the witness") was the director of the Appellant. He stated that the Appellant's business commenced commercial activity in 2019 and that was their start-up period. He said that the Appellant was not permitted to trade in 2021 until April, ██████████
██████████
██████████
██████████ Turnover was down when the Appellant came back to work in 2021 because the Appellant was physically closed. He stated that in the first six months of 2021, the Appellant did very little business. In 2022, the Appellant achieved a turnover of €3.7 million. Had the Appellant not been shut down in 2021, the Appellant's activity level in that year would not have been €3.7 million, but it would have achieved very close to its target of €2.5 million. The Appellant achieved below 69% of what the turnover would have been if the Appellant had been left open for that period. The Appellant's projection was €2.5 million and 30% of that would have been €800,000. ██████████
██████████
██████████
16. During cross-examination, the witness agreed that the Appellant was incorporated on ██████████
██████████, registered for VAT ██████████ ██████████, and registered for employer PRSI ██████████
██████████. He agreed that the Appellant was trading in the period ██████████
██████████ 2019. The witness agreed that the Appellant registered for EWSS on ██████████

████ and that he or an accountant would have declared that they had read the EWSS eligibility criteria and agreed to participate with the terms of the scheme.

17. Counsel for the Respondent referred the witness to documentation regarding the Appellant's turnover, as listed below:

- The EWSS eligibility review form ("ERF") filed by the Appellant in September 2021 comprised a combination of actual and projected turnover: €8,194.00 in █████ 2019, €8,590.00 in █████ 2019, overall turnover of €368,548.00 for 2019 and overall turnover of €940,569.00 for 2021.
- Corporation tax return figures: turnover of €319,646.00 for 2019, €847,588.00 for 2020, €1,439,295.00 for 2021 and €3,709.196.00 for 2022.
- Figures provided by the Appellant to the Respondent in response to requests for rolling reviews: turnover of €368,548.00 for 2019 and €893,947.74 for 2021.

18. The witness did not dispute the turnover figures in the documents put to him. On being taken through the ERF, he stated that: "*our turnover in 2021 should have been €2.5 million*" and that the Appellant was in start-up mode to the end of 2019.

19. Counsel for the Respondent asked the witness whether the Appellant conducted rolling reviews and requested the witness to point him to those reviews. In response, the witness stated that the Appellant had carried out internal reviews and they had files on that, but that he did not have them there.

Submissions

Appellant's Submissions

20. The Commissioner sets out below a summary of the submissions made by the Appellant, both in the documentation submitted in support of this appeal and at the hearing:

20.1. The Appellant carried out internal rolling reviews and had invited the Respondent to inspect all of its records in an on-site inspection. The Appellant had also attempted to engage with the Respondent but the Respondent did not take telephone calls. The Appellant did not produce the rolling review documentation as the witness was out of the country in the weeks preceding the hearing and the Appellant received the Respondent's books in the week before the hearing.

20.2. The Appellant commenced trading in █████ 2019. The criteria that the reference period should be from when the business commenced to 31 December 2019 is clearly unfair to a rapidly expanding company. Due to lockdown restrictions, the

Appellant was closed from January 2021 to late April 2021 [REDACTED] and until June 2021 [REDACTED]. The EWSS required the business to experience a drop in turnover of 30% between 1 January 2021 to 30 June 2021. This was the case as the Appellant was closed from January 2021 until April 2021 and lost three months total trading. [REDACTED], the Appellant achieved 57% of projected revenue for the period.

20.3. The Guidelines refer to an “other reasonable basis” and give examples of service companies and contracts taking six months or longer. The Appellant has a lead time of three months [REDACTED] and six months [REDACTED] and therefore the “other reasonable basis” should also have been considered by the Respondent. The 2019 turnover is irrelevant because the Appellant’s business was in establishment mode. It discriminates against the Appellant as a start-up business which was increasing turnover by multiples of 100% every year. Projections should be taken account of. The Appellant qualified on an “other reasonable basis” primarily because they were closed for the first three months of 2021 and for the next three months they were recovering their business.

20.4. The Appellant’s Finance Consultant made the following oral submissions. The Appellant suffered massively due to closing in the pandemic. Maybe the Appellant should have chosen the “order” or “other reasonable basis” box but ticking the “turnover” box is easy, because every month the accountant does accounts and has a turnover. Turnover in 2021 should have been €2.3 million, but in 2021 there was very little activity. The Appellant was incorporated in [REDACTED] but sales prior to 2019 were irrelevant. The Appellant was effectively a start-up company in 2019; how would a start-up company have a drop of 30% in turnover? The total turnover for the first six months of 2019 was €28,000 and a year or two years later the turnover was €3.7 million, which shows that it was a start-up. An example of why the turnover test does not apply is that the turnover on 20 June 2019 was zero and one cannot have a reduction of 30% on zero.

Respondent’s Submissions

21. The Commissioner sets out below a summary of the submissions made by the Respondent, both in the documentation and at the hearing:

21.1. The Appellant failed to demonstrate to the satisfaction of the Respondent that its business satisfied the statutory criteria provided for in section 28B of the EMPI Act. In particular, the Appellant did not demonstrate that its business experienced,

or was expected to experience, a 30% reduction in turnover or customer orders for the period. The Appellant was required to make a declaration which acknowledged that the Appellant would abide by the terms and conditions of the EWSS and would undertake to retain all documents concerning eligibility for review by the Respondent. The Appellant was therefore on notice that a failure to adhere to such terms could result in the recoupment of EWSS payments. The Appellant, through its agent, made the following declaration:

"I declare that I read the eligibility criteria for the employment wage subsidy scheme and that the business qualifies for the scheme. I undertake that the business will abide by the terms and conditions of the scheme. I understand and accept that failure by the business to adhere to the terms of the scheme could result in recoupment of monies together with interest, penalties, prosecution. I undertake the business will retain all records relating to the scheme, including the base of eligibility, for review by Revenue."

- 21.2. The Appellant commenced trade in or about [REDACTED] 2019, which is consistent with the fact that the first VAT returns were returned for the period [REDACTED] 2019. Section 28B(2A) of the EMPI Act 2020 covers claims made in this appeal between 1 January and 30 June 2021 and section 28B(2B) of the EMPI Act 2020 covers claims made in this appeal for July and August 2021. The Respondent and the Commission may not deviate from the eligibility criteria. When the projected figures are compared to the required 2019 figures, the Appellant was manifestly not entitled to EWSS.
- 21.3. The Appellant's argument that it may rely on "any other reasonable basis" is misplaced. The Appellant cannot utilise a different corresponding period to that provided for in the legislation.
- 21.4. The Appellant did not provide rolling reviews that complied with section 28B(5) of the EMPI Act 2020 or the Guidelines. The carrying out of rolling reviews is a necessary precondition for participating in the EWSS. If rolling reviews had been performed month on month, the Commission would have been provided with that documentation.

Material Facts

22. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

- 22.1. The Appellant is a [REDACTED] which was incorporated on [REDACTED] and registered for VAT and employer PRSI in [REDACTED].
- 22.2. The Appellant's business commenced operations in [REDACTED] 2019.
- 22.3. The Appellant participated in the EWSS from [REDACTED] 2020.
- 22.4. On 7 December 2023, the Respondent raised four assessments against the Appellant for the relevant period in the total amount of €75,700.00.
- 22.5. The Appellant did not provide documentary evidence of having conducted rolling reviews during the relevant period.
- 22.6. Turnover figures for the Appellant (in the ERF, corporation tax returns, and figures provided by the Appellant to the Respondent in response to requests for rolling reviews) do not show decreases but instead show increases in turnover in 2021 when compared with turnover in 2019.

Analysis

23. This appeal relates to the raising of assessments by the Respondent for the relevant period. In an appeal before the Commission, the burden of proof rests on the Appellant, which in this appeal must show that the Respondent was incorrect to raise assessments in the total amount of €75,700 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, Charleton J. stated at paragraph 22 that:

"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".

Requirement to carry out rolling reviews

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

25. The Commissioner is not satisfied that the Appellant has demonstrated that it carried out the monthly rolling reviews as required. The Commissioner notes that the witness referred to internal documentation. However, no such supporting documentation was provided to the Commissioner.
26. At the hearing, in oral submissions, the Appellant's Company Director contended that the Appellant did not have sufficient time to provide the documents as he was out of the country in the weeks preceding the hearing and the Appellant received the Respondent's books in the week before the hearing. The Commissioner notes that on 5 August 2022, the Respondent asked the Appellant to provide evidence of rolling reviews and on 24 November 2023, the Respondent stated in its Stage 2 Review letter that rolling reviews had not been provided. The Appellant instigated this appeal on 20 December 2023 and was notified of the hearing date on 2 August 2024 (it was rescheduled at the Appellant's request). In that context, the Commissioner considers that it was open to the Appellant at any point to furnish documentary evidence of the rolling reviews. In addition, the Commissioner is cognisant of the fact that the burden of proof in this appeal lies on the Appellant and it is for the Appellant to present supporting documentation on which it wishes to rely. For the avoidance of doubt, the Commissioner is satisfied that at the hearing, the Appellant was afforded time and opportunity to put forward its case on all matters relevant to this appeal, including the rolling reviews and the requirement to demonstrate a 30% reduction.
27. On 22 August 2022 and 1 September 2022, the Appellant provided documents to the Respondent in response to the requests for rolling reviews. At the oral hearing, the Respondent stated that those documents did not meet the requirements of rolling reviews for the purposes of the legislation. Having examined the documents provided, the Commissioner notes that they do not present as contemporaneous reviews which had been conducted on a rolling monthly basis, but rather as total monthly figures for 2019 and 2021. The Commissioner considers that she is supported in this view by the fact that in oral submissions at the hearing, the Appellant's Company Director confirmed to the Commissioner that the Appellant had not produced rolling review documents. The Commissioner is therefore not satisfied that the documents provided evidence monthly rolling reviews for the relevant period.
28. Consequently, the Commissioner finds as a material fact that the Appellant provided no documentary evidence of having conducted rolling reviews during the relevant period, as required by section 28B(5) of the EMPI Act 2020 and the Guidelines.

29. The requirement to carry out rolling reviews has been considered by the Appeal Commissioners in previous determinations concerning EWSS. As stated in 83TACD 2023:

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

30. As noted above, the Appellant was required to retain all records relating to the EWSS and undertook to do so. As the Commissioner has found that the Appellant has provided no documentary evidence of having carried out rolling reviews in the relevant period and as it was a requirement for participation in the EWSS that rolling reviews be carried out on a monthly basis, it follows that the Appellant has not established in this appeal that it met that requirement for entitlement to EWSS. In those circumstances, the Commissioner is satisfied that the Respondent was correct to disentitle the Appellant from payments of EWSS for the relevant period.
31. Finally, in oral submissions, the Appellant’s Finance Consultant referred to the fact that ERFs were introduced in July 2021, while the assessments under appeal cover the period May – August 2021. The Commissioner notes that ERFs were online monthly forms which assisted individuals in ensuring continued eligibility for the EWSS. Insofar as the Appellant’s Finance Consultant was querying the requirement to conduct rolling reviews before the introduction of the ERF facility, the Commissioner is satisfied that the statutory requirement under section 28B(5) of the EMPI Act 2020 to conduct rolling reviews predated those forms and applied during the relevant period, as outlined above.

Requirement to demonstrate reduction

32. In addition to the matter of rolling reviews, the Commissioner must consider whether the Appellant has satisfied the requirement to demonstrate a reduction of at least 30% in turnover or customer orders.
33. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders during a specified period compared to the appropriate corresponding period.

Sections 28B(2A) and 28B(2B)

34. The Appellant's written submissions stated that the Appellant commenced trading in [REDACTED] 2019 and in oral evidence, the witness agreed that the Appellant was trading in the period [REDACTED] 2019. The Commissioner notes that this is consistent with VAT return documentation presented, which shows T1 (VAT on sales) figures for the period [REDACTED] 2019 onwards. Accordingly, the Commissioner has found it to be a material fact that the Appellant commenced operations in [REDACTED] 2019.
35. The relevant period is May to August 2021. The Commissioner therefore finds that under section 28B(2A)(a)(i)(II) of the EMPI Act 2020, as the Appellant's business did not operate for the whole of the second corresponding period (1 January 2019 to 30 June 2019) but commenced no later than May 2019, for May and June 2021 the applicable specified period was [REDACTED] 2021 to 30 June 2021 and the applicable corresponding period was [REDACTED] 2019 to 30 June 2019. Under section 28B(2B)(a)(i)(II), for July and August 2021 the applicable specified period was [REDACTED] 2021 to 31 December 2021 and the applicable corresponding period was [REDACTED] 2019 to 31 December 2019.
36. For completeness, the Commissioner notes that the Appellant accepts that it was incorporated and registered for taxes in [REDACTED] and the Commissioner has found this to be a material fact. If the Commissioner is incorrect in finding as a material fact that the Appellant's business commenced operation in [REDACTED] 2019 and in fact the Appellant's business operated for the whole of the period 1 January 2019 to 20 June 2019, then under section 28B(2A)(a)(i)(I) of the EMPI Act 2020, for May and June 2021 the applicable specified period was 1 January 2021 to 30 June 2021 and the applicable corresponding period was 1 January 2019 to 30 June 2019, while under section 28B(2B)(a)(i)(I) of the EMPI Act 2020, for July and August 2021 the applicable specified period was 1 January 2021 to 31 December 2021 and the applicable corresponding period was 1 January 2019 to 31 December 2019.
37. The Commissioner observes that in both oral evidence and written submissions, the Appellant referred to what turnover "*should have been*" in 2021. The Commissioner considers that this goes to the crux of the Appellant's case, which is that its turnover in 2021 was significantly impacted by the pandemic and should be compared to projections, rather than to its turnover in 2019, when it is said to have been in "start-up" mode.
38. However, the Commissioner is mindful of the fact that the question is not solely whether the Appellant's 2021 turnover was affected by the pandemic, but whether it was affected in the manner prescribed in legislation.

39. The Commissioner considers that the EMPI Act 2020 does not allow for an employer participating in the EWSS unilaterally to apply a different corresponding period when participating in the scheme. There was an exception where business commenced after 1 May 2019, whereby it could compare its turnover orders against projected turnover orders (section 28B(2A)(a)(i)(III)). However, as noted above, the Commissioner has found it to be a material fact that the Appellant commenced operations in [REDACTED] 2019. It therefore follows that the Commissioner is satisfied that the Appellant was not entitled to use the exception for businesses set up after 1 May 2019.

Other Reasonable Basis

40. Accordingly, the question for the Commissioner is whether the Appellant was entitled to disregard the statutorily prescribed corresponding period, and instead apply a corresponding period utilising an “other reasonable basis”, referred to in the Guidelines.
41. The first point to note is that the “other reasonable basis” is not included in section 28B of the EMPI Act 2020, which only provides for the payment of a wage subsidy where the employer demonstrated a 30% reduction in either turnover or customer orders compared to the relevant corresponding period. The reference to “other reasonable basis” is contained in the Guidelines.
42. Turning then to the Guidelines, the relevant section on “other reasonable basis” has been set out at paragraph 13 above. The following sentence is underlined and in bold in the Guidelines: ***“the starting point is that neither the turnover test nor the reduction in customer orders test is capable of being applied to the business in question”***.
43. The Commissioner is not satisfied that there is a ground on which to find that the turnover test was incapable of being applied in this case. In reaching this conclusion, the Commissioner has had regard to the following factors. The Appellant applied the turnover test in the ERF submitted in September 2021. Moreover, the Appellant submitted turnover figures for 2019 and 2021 to the Respondent in response to requests for rolling reviews. While the Appellant’s written submissions contended that to compare its 2021 turnover with its 2019 turnover was unfair and unsuitable, they did not state that the turnover test was incapable of being applied. Furthermore, the turnover figures, which were not disputed by the Appellant, show that the Appellant had turnover in 2019 and 2021.
44. In oral submissions, although the Appellant’s Finance Consultant stated that the Appellant had monthly turnover, he added that the turnover test could not be applied to June 2019, as one cannot have a reduction of 30% on zero. For clarity, the Commissioner does not accept that it follows from the fact the Appellant’s turnover for June 2019 was

zero that the turnover test was incapable of being applied to the whole of the specified and corresponding periods which were required to be compared under the legislation (in *Fire Safety Security Advantage Limited (formerly Superior Group Irl Limited) v Revenue Commissioners* [2025] IEHC 78, the High Court confirmed that it is the turnover in the entirety of each period which must be compared). As will be seen below, the Commissioner considers this to be a case in which the turnover test was not met, rather than one in which it was incapable of being applied.

45. Finally, the Guidelines state that in all cases of an “other reasonable basis”, guidance from the Respondent should be sought through the relevant Division/Branch responsible for the tax affairs of the employer concerned. In this appeal, the Appellant did not suggest that the Appellant had contacted the Respondent to seek guidance on this matter and no evidence has been presented to the Commissioner to indicate that it did.
46. In all the circumstances, the Commissioner finds no basis on which to conclude that an “other reasonable basis” should have applied instead of the statutorily prescribed corresponding period.

30% Reduction

47. Consequently, the Commissioner finds that the Appellant was required to satisfy the requirement to demonstrate a reduction or anticipated reduction in turnover of at least 30% in the specified periods by reference to the corresponding periods.
48. The Commissioner does not understand the Appellant to contend that there was a reduction or anticipated reduction in the Appellant’s 2021 turnover by reference to the 2019 turnover. Furthermore, the Commissioner notes that turnover figures for the Appellant (in the ERF, corporation tax returns, and figures submitted by the Appellant to the Respondent in response to requests for rolling reviews), which were put to the Appellant and not disputed, do not show decreases but instead show increases in the 2021 turnover when compared with the 2019 turnover. The Commissioner has found this to be a material fact. The Commissioner finds this to be the case whether the specified and corresponding periods commenced in [REDACTED] 2021 and [REDACTED] 2019, or in January 2021 and January 2019. Accordingly, the Commissioner finds that the Appellant did not demonstrate a reduction or anticipated reduction in turnover of at least 30% in the specified periods by reference to the corresponding periods.
49. Given this, the Commissioner finds that the Appellant was not entitled to the EWSS payments as it did not meet the statutory requirement to demonstrate a reduction or anticipated reduction in turnover of at least 30%.

50. It follows from the above that the Commissioner determines that the Appellant was not entitled to receive the payments for the relevant period under the EWSS.
51. The Commissioner has listened to the evidence of the witness and the Appellant's oral submissions, and has read the Appellant's written submissions. Having done so, the Commissioner understands that the Appellant considers that the legislation operates unfairly in relation to its particular business and discriminates against it as a company which was effectively in "start-up" mode in 2019. Nonetheless, the Commissioner's jurisdiction confers no discretion to disapply, or create exceptions to, the statute where it is claimed to be unfair. The Commissioner has no jurisdiction to consider allegations of unfairness on the part of the Respondent. The Commissioner's jurisdiction "*is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA*", see *Lee v Revenue Commissioners* [2021] IECA 18.
52. The Commissioner appreciates that the Appellant will be disappointed with this outcome. However, the Commissioner is obliged to apply the legislation in making a determination. The Commissioner is satisfied in this appeal that the EMPI Act 2020 and the Guidelines enacted pursuant to that Act, do not permit the application of a different corresponding period to that set out in sections 28B(2A) and (2B) of the EMPI Act 2020.
53. Finally, the Commissioner wishes to acknowledge the Appellant's submissions on difficulties in its dealings with the Respondent on this matter. However, the Commission has no supervisory jurisdiction over the conduct of the Respondent's officials, or over its procedures. That complaint therefore falls outside the scope of this appeal.

Conclusion

54. In conclusion, the Commissioner has determined that:
- 54.1. The Appellant did not provide documentary evidence of having conducted rolling reviews in the relevant period and therefore failed to demonstrate that it conducted rolling reviews as required under section 28B(5) of the EMPI Act 2020.
- 54.2. The Appellant did not demonstrate a reduction or anticipated reduction in turnover of at least 30% in the specified periods by reference to the corresponding periods as required under sections 28B(2A) and (2B) of the EMPI Act 2020.
- 54.3. The Appellant was not entitled to receive the payments for the relevant period under the EWSS.

Determination

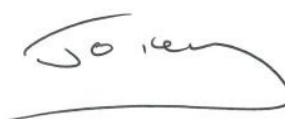
55. For the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the Respondent was incorrect to raise the assessments for the relevant period in the total amount of €75,700.00 and those assessments shall stand.
56. This Appeal is determined in accordance 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

57. 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

58. 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.



Jo Kenny
Appeal Commissioner
26 February 2025

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997