AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

82TACD2026

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by the Appellant pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended ("EMPI Act 2020") against ten assessments raised by the Respondent in respect of the Employment Wages Subsidy Scheme ("EWSS"). The assessments were raised for September 2020 to June 2021 in the total amount of €8,872,812.51.

2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business had experienced or was expected to experience a 30% reduction in turnover during the relevant periods, in accordance with section 28B of the EMPI Act 2020. In particular, the Respondent was not satisfied that the Appellant's [redacted] sections constituted separate business divisions for the purposes of EWSS.

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, provided for a flat rate subsidy to qualifying employers based on the numbers of paid and eligible employees on the employer's payroll, and 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] retailer in the State and [redacted]. The Appellant carries on a wide variety of business, including [redacted] When Covid-19 restrictions were implemented, [redacted]. However, [redacted] sales business was designated as a non-essential service, and was consequently obliged to close at various periods in 2020 and 2021.

5. The Appellant considered that its business was structured into [redacted] separate business divisions, being [redacted] considered that the Main Guidelines on the operation of the EWSS ("the Guidelines") published by the Respondent permitted it to bring an application for EWSS in respect of [redacted]. It contended that the turnover of [redacted] declined by 30% during the period from 1 July 2020

to 31 December 2020 ("the First Period"), and by 45% during the period from 1 January 2021 to 30 June 2021 ("the Second Period"), compared to the relevant corresponding periods. It claimed EWSS payments for staff employed in [redacted] between September 2020 and June 2021.

6. On 8 February 2024, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

Period of Assessment	**Amount €**
September 2020	[redacted]
October 2020	[redacted]
November 2020	[redacted]
December 2020	[redacted]
January 2021	[redacted]
February 2021	[redacted]
March 2021	[redacted]
April 2021	[redacted]
May 2021	[redacted]
June 2021	[redacted]
Total	**8,872,812.51**

7. In particular, the Respondent did not accept that the Appellant's [redacted] sections [redacted]onstituted separate business divisions for the purposes of the Guidelines.

8. On 8 March 2024, the Appellant appealed against the assessments to the Commission. An oral hearing was held in the appeal, commencing 7 July 2025. The Appellant was represented by [redacted], instructed by [redacted]. The Respondent was

represented by [redacted] and [redacted], instructed by the Revenue Solicitor's Office. The hearing was scheduled to last five days. However, the hearing did not conclude as originally anticipated, and a further three days were held commencing 10 February 2026. The hearing was held in private at the request of the Appellant.

Legislation and Guidelines

9. Section 28B of the EMPI Act 2020, as in force from 1 July 2020, provided *inter alia* that:

"*(1)… 'qualifying period' means the period commencing on 1 July 2020 and expiring on 31 March 2021 or on such later day than 31 March 2021 as the Minister may specify…*

(2) Subject to subsections (4) and (5), this section shall apply to an employer where –

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

(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period')…

and

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

(3) The conditions referred to in subsection (2)(b) are –

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

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

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

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

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

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

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

(b) if, based on the result of that review, it is manifest to the employer that the outcome referred to in clause (I), (II) or (III), as the case may be, of subsection (2)(a)(i) that had previously been envisaged would occur will not, in fact, now occur, then –

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

[…]

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

(12) An amount that is required to be refunded by an employer to the Revenue Commissioners in accordance with subsection (11) (in this section referred to as 'relevant tax') shall be treated as if it were income tax due and payable by the employer

from the date the wage subsidy payment referred to in that subsection had been paid by the Revenue Commissioners to the employer and shall be so due and payable without the making of an assessment.

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

[…]

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

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

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

10. Section 28B of the EMPI Act 2020 was amended from time to time to *inter alia* account for changes to the qualifying periods as the EWSS continued into 2021 and 2022. Section 63(3) of the Finance Act 2020 inserted subsection 2A into section 28B, which provided that from 1 January 2021, the relevant specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. Otherwise however, insofar as is relevant for this appeal, section 28B remained as set out herein.

11. As required by section 28B(20), the Respondent published Main Guidelines on the operation of the EWSS ("the Guidelines"). There were a number of versions of the Guidelines published by the Respondent during the lifetime of the EWSS. The principal relevance of the Guidelines to this appeal concerns their provisions relating to separate business divisions. For the periods under appeal, the Commissioner is satisfied that these provisions remained substantively unchanged in the various applicable versions of the Guidelines.

12. Appendix I (“Additional Guidance on determining Reduction in Turnover or Customer Orders”) to the Guidelines (version published 14 August 2020) stated at page 17 that:

> “*The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division. In such a case, each of the Business Divisions of such an entity which meets the eligibility criteria may be eligible for the subsidy. The decline in turnover or customer orders in each Business Division must be capable of being separately identified or otherwise the entity as a whole has to be assessed. Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic. Revenue, having regard to risk indicators, may need to examine closely the evidence/basis for entering the scheme of certain EWSS applications that are made in respect of one or more Business Divisions rather than made in respect of the overall entity*.”

13. Appendix II (“Additional Guidance on employees”) to the Guidelines (version published 14 August 2020) stated at pages 20 and 21 that

> “*In recognition of arrangements in place within entities with separate business divisions or whose activities are undertaken across several separate entities, we have included here additional guidance to assist employers in determining what employees they can claim subsidy in respect of.*
>
> *Where employees provide services for a company who meet the eligibility criteria, but, for payroll purposes, they are employed by an associated company, then the subsidy may be available provided the group can show, and provide supporting documentation to the effect, that the employees concerned were, wholly or mainly (i.e. more than 50%), employed in one or other of a group’s trading companies which meet the criteria. The companies adversely affected must be able to show that they are otherwise eligible, in respect of those employees, for the subsidy. The subsidy, if applicable, will be paid to the payroll company regardless of whether it is itself eligible.*
>
> *There are situations where corporate structures affecting employees will vary. Corporate structures may involve several closely entwined entities which use a single employer registration for a number of separate Divisions or entities within a group, or single entities have a number of separate divisions within a standalone entity. Where it can be demonstrated that specific employees were wholly or mainly (i.e. more than*

50%) employed in the impacted Divisions, the subsidy may be paid to the employer in respect of those employees, subject to meeting other eligibility criteria.

As an example, where there are clearly 2 or more separate and distinct Business Divisions within the one company carrying on distinct businesses in their own right, an employer may apply the eligibility tests to each Business Division of the company separately. However, the employer will need to be able to prove that each such separate Business Division meets the eligibility tests in its own right. To the extent that one or other of the Business Divisions qualify for the subsidy, then the subsidy will be available to the employees of that Division only. Each Business Division in a company must have a clearly defined and separate management structure to the other Business Divisions in the company and these structures must have been well established before the advent of the COVID-19 Pandemic.

In any such case, employers will need to show that the employees concerned are not transferable across different businesses in the company.

Employees based in the Head Office Division can be treated as being eligible for the subsidy by reference to those head office employees whose working time is spent, wholly or mainly (i.e. more than 50%), performing functions that relate to the Business Division that is eligible for the subsidy.

Any staff member whose duties include working in more than one Division is to be excluded unless the employer can prove that such an individual's working time is spent, wholly or mainly (i.e. more than 50%), working in the business Division that is eligible for the subsidy.

Only a company which can clearly demonstrate by reference to pre-existent documentation (prior to COVID-19 pandemic restrictions in March 2020) that it is organised in a structured way into a Head Office Division and various clearly separate Business Divisions will qualify for the subsidy.

These guidelines are equally applicable to Irish branches of foreign entities."

Evidence

14. There was a large amount of evidence proffered in this appeal, including numerous books of documents (6) and correspondence (3), as well as witness statements and oral evidence from eight factual witnesses[1], and reports and oral evidence from two expert

[1] As well as a further witness statement from a ninth factual witness who did not give oral evidence; see footnote 2 below.

witnesses. Five of the factual witnesses were from [redacted] with the remainder from the Appellant itself. The parties each retained and called an expert witness to give evidence at the hearing.

15. All of the Appellant's witnesses as to fact submitted statements of their evidence in advance of the hearing. It was agreed by the parties that these statements would be submitted as each witness's evidence in chief[2]. Senior Counsel for the Appellant brought each of the witnesses through the main aspects of their statements, and the witnesses were then cross examined by counsel for the Respondent. The Commissioner has considered the written statements and the oral evidence of each of the witnesses, as well as the expert reports. The evidence of the witnesses is summarised below.

[redacted]

16. The witness was [redacted], having previously worked in senior positions in retailers in [redacted] He talked about his role in communicating weekly with store managers on the key issues [redacted]. He discussed how t[redacted] was managed and directed[redacted] and in the Appellant. He stated that the [redacted] team in [redacted] produced prescriptive documents for the store managers across the [redacted]

17. The witness was a member of the [redacted], which was chaired by the [redacted] He stated that there was a separate profit and loss ("P&L") account and a dedicated balance sheet for the [redacted] business in [redacted] He stated that there were approximately [redacted] people in the wider [redacted] He talked about the process for how a [redacted] product was launched and introduced [redacted]. [redacted]

18. [redacted]

[2] There was one exception to this procedure. The witness statement of [redacted] of the Appellant was admitted as her agreed evidence and she did not provide oral evidence at the hearing. Her witness statement addressed the Appellant's administrative procedure for processing EWSS claims. The Commissioner is satisfied that her evidence does not need to be considered further for the purposes of this determination.

[redacted]

19. [redacted] The witness stated maintaining inventory accuracy was extremely important, [redacted]

20. On cross examination, the witness accepted that he joined [redacted] after the years at issue in the appeal. [redacted] He agreed that the [redacted] made all of the important decisions regarding the production and marketing of [redacted]. He did not accept that the sole job of the stores was to sell products, because the running of stores was much more complicated than that. [redacted]

21. The witness agreed that all [redacted] products were sourced by [redacted], and the contracts were [redacted] He agreed that during the years under appeal no revenues from the Appellant were transferred to [redacted], and that instead they were reported under [redacted] He accepted that the [redacted]. [redacted]

[redacted]

22. The witness was the [redacted][3] [redacted]. Prior to joining [redacted].

23. The witness stated that [redacted] had a separate P&L account, and was an entirely self-sufficient business division [redacted] He stated that [redacted] He stated that the structure pre-existed his joining [redacted].

24. [redacted].

25. [redacted] He agreed that there was specialisation on his team to manage the various aspects of the [redacted]. He also agreed that his team was located [redacted] He agreed that his team set out how the products were to be offered to the public in the stores.

26. He agreed that [redacted] sold its products [redacted]

27. [redacted]

[3] Referred to [redacted] hereafter for consistency and clarity.

i[redacted][4] [redacted]

[redacted]

28. The witness stated that he was [redacted]. He joined the company in [redacted] and had held a number of positions since, including [redacted] He stated that as store manager he had responsibility for the whole store,[redacted]. Large stores had [redacted] The store manager was responsible for executing [redacted] to its customers. He stated that the strategy and guidelines came down to the store managers, but that there were feedback channels from the stores [redacted]

29. The witness's current role concerned all of the stores [redacted]. He stated that the store structure operated in the same way [redacted]. He stated that he sat on [redacted] and had done so during Covid-19. [redacted] He stated that the section of the report titled[redacted] was intended to explain the company's business priorities to the shareholders, [redacted]

30. He stated that his role was to service t[redacted]

31. He stated that [redacted] He stated that it went to great lengths to make sure that it qualified for EWSS. He stated that, during the years under appeal, [redacted]

[4] [redacted]

f[redacted]

32. On cross examination, the witness stated that he considered the Appellant to be [redacted]. He agreed that the Appellant was responsible for the stocking, sale and distribution of products [redacted] He agreed that the business of [redacted] was predominantly [redacted]

33. He agreed that during the years under appeal, [redacted] He was asked about the structure of stores [redacted]

34. He was asked about [redacted] staff, [redacted]. [redacted]

35. In response to a question from the Commissioner, the witness stated that he believed the [redacted]

[redacted]

36. The witness was the [redacted] and was responsible for running, *inter alia*, [redacted] during the years under

appeal. He stated that from the point of view of the [redacted] reports, [redacted], but in terms of the operating structure of the business, only the [redacted] business was operated by [redacted]. Since [redacted] the [redacted] business has been under the management of [redacted]

37. He stated that the [redacted] Otherwise, [redacted]

38. He stated that he believed that [redacted] were [redacted] discrete businesses. The [redacted] He would meet weekly with key members of the [redacted] team, regarding matters such as financial planning, marketing, and localisation. His team also liaised directly with store managers, for example in relation to [redacted]

39. [redacted]

40. On cross examination, the witness stated that [redacted]

41. The witness was asked about t[redacted]

[redacted]

42. The [redacted] He stated that he was responsible for all [redacted] During the years under appeal, the [redacted] was not under his remit. Since [redacted]

43. He stated that he reported into [redacted] but that the majority of his direction came from [redacted]. He stated that his responsibilities were broader than [redacted], and included [redacted] He stated that, over time, his role had reported into different people within the organisation. [redacted].

44. He stated that, in order to be successful, the [redacted]

45. He stated that the [redacted] team was led by him, and that there was no overlap in staffing between [redacted] He stated there were separate P&L accounts for the [redacted] He stated that his team received feedback from [redacted] on what was relevant to [redacted] customers.

46. On cross examination, the witness confirmed that he rejoined [redacted], and that the [redacted] He stated that he did not have day-to-day involvement in [redacted] but that he understood at a high level how the business had been run. He stated that [redacted] would join his management team from time to time "*to understand what opportunities there were to leverage some of our skill set and experience and seek counsel from my leadership team.*"

47. He stated that the [redacted] announcement in [redacted] was a demonstration of intent, rather than a shift in [redacted]. He stated that he considered that the [redacted] business had a different management structure, and different operating systems and procedures, from [redacted] When asked whether he agreed that [redacted] sold products through [redacted]

48. He stated that he attended the [redacted] management meetings, and sometimes attended the [redacted] management meetings, and that "*we all have significant skin in the game of ensuring that we're all successful.*" He stated that the [redacted] management team was not experienced in how to set up and execute [redacted], and that this was why his team assisted them to buy the right products in the right quantities.

49. He agreed that the [redacted] and [redacted] P&L accounts were made up of both [redacted] business. On re-examination, he confirmed that the [redacted] business began selling [redacted]. He stated [redacted] sales were recorded on his team's P&L account, but that if a customer [redacted] [redacted]

[redacted]

50. The witness is currently [redacted] for the Appellant. He was [redacted]. He stated that the Appellant had about [redacted] employees in 2020. He stated that it was clear to him that the Appellant's business was divided into [redacted] divisions: [redacted] The products sold by the [redacted] divisions were very different. The customers of the [redacted] divisions were different, as only 40% of customers shopped for [redacted] The competitors of the [redacted] divisions differed. The activities of the [redacted] divisions were totally separate, as were their suppliers.

51. He stated that employees of the Appellant were always hired to a specific department. The skills and capabilities of an employee of the [redacted] department were completely different to the skills and capabilities of someone working in [redacted] supported one of the [redacted] divisions. Only employees in [redacted] were included in the EWSS claim. The decision on whether or not a particular store would have a [redacted] was based on the size and complexity of the store.

52. The witness's leadership team during Covid-19 included a [redacted]. The witness's primary role was to lead stores [redacted] and to make sure that the strategy of each business division was executed correctly in store. He stated that he wore [redacted] hats – he could look at a store through the eyes of [redacted], [redacted]

53. He stated that the Covid-19 pandemic was unprecedented, and presented a grim economic scenario, both for the economy at large and the Appellant in particular. It was clear to him and his management team that the Appellant had [redacted] divisions, and therefore it decided to apply for EWSS in respect of its [redacted] division, which was classified as non-essential and therefore closed during lockdowns. [redacted]

54. He stated that he was aware of communication between his Finance Director and the Respondent in late summer/autumn 2020 regarding the Appellant's eligibility for the EWSS. He stated that if the Respondent had helped the Appellant to interpret the Guidelines, he would have considered such guidance, but the Appellant was essentially advised that EWSS operated on a self-assessment basis.

55. He stated that the Appellant hired more employees leading up to Christmas 2020, as it had to work on the basis that it might be able to trade as normal. Forecasting was very difficult during the pandemic, and social distancing rules meant that some customers were afraid to come out to shop at all. The Appellant did not know whether it would be able to source supplies, and did not know what decisions would be made by the Government. It decided that the best way to forecast was to work on the basis of the ten-week period after shops reopened in June 2020 following the first lockdown.

56. The Appellant adopted four potential scenarios for its forecasting during the period from 1 July 2020 to 31 December 2020, i.e. the First Period. The first scenario involved a

national lockdown in November and December. The second scenario involved some local lockdowns, principally in Dublin. The third and fourth scenarios were more optimistic as they did not envisage lockdowns.

57. The witness stated that the Appellant reported its turnover on a [redacted] basis by reference to its [redacted] divisions, [redacted]

58. [redacted]

59. He stated that, as [redacted] he had separate weekly calls with [redacted] divisions. He stated that there were monthly strategic meetings between his team and [redacted] team. The Appellant received weekly reports from [redacted] team on how the [redacted] was performing. He stated that the Appellant was a 'matrix organisation' which meant that, for example, when modifications were planned to a store, the Appellant had to engage with each of the [redacted] divisions to ensure their needs were met. [redacted] would be interested in store refurbishments insofar as they concerned [redacted] Any investment in t[redacted] in an [redacted] store would be accounted for in the [redacted] P&L accounts.

60. On cross examination, the witness stated that he was [redacted] for the Appellant from [redacted] He stated that he was responsible for [redacted] He stated that [redacted] a term that the Appellant used for anyone that was not [redacted].

61. [redacted]. It seemed to him that the biggest decline in turnover concerned the [redacted]. Regarding forecasting for the purposes of EWSS, he stated that the Finance Director engaged with him on how best to

proceed, and the witness stated that they should work on the basis of the trading that they had experienced since exiting lockdown. He stated that social distancing meant that there would be a cap on the amount of sales they could achieve because it would limit the amount of people who could come into the stores. He accepted that in May 2021, [redacted]

62. He stated that he was aware of ongoing issues between the Respondent and the Appellant's Finance Director in 2020 and 2021 regarding the Appellant's eligibility under EWSS, but he was not involved in that correspondence. He stated that he never had any doubt that the Appellant had [redacted] separate business divisions.

63. He stated that the Appellant took a cautious approach to its forecasting, and that it believed there were a number of different scenarios it needed to consider. The complexity of the issues facing it was vast. Scenario 1 involved a national lockdown, and Scenario 2 involved local lockdowns. Scenario 3 took the average week's trading that the Appellant experienced in the ten-week period, and Scenario 4 took the maximum weekly sales. Taking the scenarios collectively, the Appellant concluded that it was going to suffer a 30% decline in turnover in [redacted]

64. He was asked why the Appellant considered a potential lockdown in November and December 2020, as there was no national lockdown in place when it first carried out the forecasting in August 2020. He stated that the Appellant had to try to anticipate what decisions the Government might make, and that one possibility was a lockdown. He was asked why the Appellant hired additional staff in the run-up to Christmas 2020 when it was forecasting a significant reduction in turnover on previous years. He stated that it was necessary to plan forward and to assume that there would not be a lockdown, and that "*There was a lot more activity that needed to be done in a Covid world than a non-Covid world.*" This included the requirement to "*police the store*" to ensure that there was no more than the maximum allowed number of customers, in the buildings generally and on each floor, and to ensure adherence to compliance measures including social distancing.

65. The witness stated that turnover in the Appellant's [redacted] division for the six month period from July to December 2019 was approximately [redacted]. He stated that the third and fourth scenarios in the Appellant's forecasting for the purposes of EWSS did not forecast a 'normal' Christmas, but Christmas in a Covid-19 pandemic. He stated that its business was essentially a 'start-up' because what happened prior to Covid-19 was irrelevant. He stated that the Appellant forecast on the basis of predicted cash takings, which were used to calculate percentage reductions.

66. He was asked about the announcement in October 2020 that the country would be placed in a Level 5 lockdown for six weeks commencing 22 October, and was asked why the Appellant had not accordingly changed its scenario planning to remove the possibility of a lockdown in December. He stated that there was always a possibility that a full lockdown could be instated, and indeed a full lockdown was reinstated at the end of December 2020.

67. It was put to him that the actual turnover for December 2020 of [redacted] was only slightly below the December 2019 figure of [redacted]. He confirmed that the Appellant's turnover figures represented [redacted] sales. In December 2020, the Appellant achieved [redacted] of [redacted] sales, which was more than double the figure for December 2019. In response to the Commissioner, the witness confirmed that this was the gross sales figure, [redacted]. He was asked why the Appellant did not apply a four-scenario approach to the Second Period, i.e. January – June 2021. He stated that he thought it was because the Appellant had greater clarity at that stage on trading in the Covid-19 environment.

68. He did not agree that the role of the Appellant was "*simply*" to sell [redacted] He stated that the Appellant was a retailer, and that its customers could buy its products [redacted] He stated that [redacted]

69. The witness stated that there was collaboration between the Appellant and [redacted]"

70. He stated that the [redacted] marketing carried on by [redacted] was technical in nature, and very different to traditional marketing [redacted]

71. [redacted].

72. On re-examination, the witness stated that in correspondence with the Respondent, the Appellant had informed it that not all its stores had [redacted]. He stated that there was a difference between the number of people the Appellant employed, and full-time equivalents. He stated that the number of EWSS claims for a period could vary depending on whether it was a four-week or five-week period, but that did not mean that the number of employees varied. December was a five-week period, and November was a four-week period. He stated that some employees were paid weekly and some paid monthly.

73. He was brought to a Government press release from May 2020 which stated that "*The risk of a second wave of the virus is ever present.*" He stated that this messaging fed into the first and second scenarios of the Appellant's forecasting. He stated that the views of the National Public Health Emergency Team ("NPHET") were transmitted to retailers by way of IBEC and Retail Ireland, and he understood that NPHET's view was that it was necessary to remain cautious and vigilant.

74. He stated that he was not aware of a prescribed methodology for forecasting in the Guidelines, and that the Guidelines did not advise businesses to alter predictions based on seasonality or to alter assumptions during claim periods. He stated that, compared to December 2019, the Appellant needed "*a lot less*" staff on the shop floor in December 2020. However, he went on to say that additional activity was required compared to pre-pandemic, such as monitoring the numbers of customers allowed in store.

75. He stated that the Respondent did not communicate any concerns regarding the Appellant's forecasting in formal correspondence during the First or Second Periods. He also stated that no concerns about forecasting were raised by the Respondent prior to the issuance of the notices of assessment.

76. In response to questions from the Commissioner, the witness stated that as three of the four scenarios forecast by the Appellant in respect of the First Period showed that it would experience a reduction in turnover of at least 30%, it concluded that it was eligible for EWSS.

[redacted]

77. The witness was the [redacted] for the Appellant. She stated that she commissioned market research for [redacted] [redacted] The [redacted] [redacted] division commissioned its own research. She discussed weekly trade and marketing meetings that she held, and talked about tailoring marketing to [redacted]. She stated that she had monthly strategy meetings with the [redacted] team. She said that she saw her role as making sure that the brand messaging [redacted] was consistent, and making sure that the language and tone used was fit for purpose [redacted]

78. On cross examination, she confirmed that there were separate managers on her team [redacted] agreed that she wore "*different hats*" at different times when managing the different areas of the Appellant.

[redacted]

79. The witness was the [redacted] of the Appellant, and was a chartered accountant. She had not worked with the Appellant during the years under appeal, but had reviewed the scenario planning carried out for the purposes of its EWSS application. She stated that she [redacted]

80. She believed that the Appellant had been correct not to rely on trends from previous years when forecasting turnover for the First Period, and that it had been appropriate to rely instead on the ten weeks of trading following the lifting of restrictions in June 2020. She stated that the average turnover for each week across those ten weeks was [redacted], with the highest turnover being [redacted]. She stated that the four scenarios utilised by the Appellant ranged from worst case (Scenario 1) to best (Scenario 4). Scenario 2 was based on a localised Dublin lockdown. Scenarios 3 and 4 explored the impact just of social distancing with no lockdowns. Scenario 3 envisaged the average turnover per week, i.e. [redacted] Scenario 4 took the highest turnover per week, i.e. [redacted]

81. The witness stated that the Appellant updated its actual turnover on a monthly basis, and reviewed its forecasts based on the most recent data. For the Second Period, she stated

that there was much more information available to the Appellant, and therefore it did not have to forecast on the basis of four different scenarios.

82. On cross examination, she confirmed that she worked for [redacted] and that she did not work for the Appellant during the years under appeal. She stated that she understood that she was a witness to fact and was not an expert. She agreed that she was not independent of the Appellant. She stated that for the First Period, she had access to all of the files that were shared with the Respondent as well as [redacted] correspondence with the Respondent. On further questioning, she stated that she could not be absolutely sure that there were not additional calculations.

83. She stated that the Appellant explored two further "stretch" scenarios in its correspondence with the Respondent enclosing its 30 November forecast, in addition to the four scenarios. She agreed that [redacted] correspondence with the Respondent stressed the importance of trading in November and December for determining whether the Appellant would experience a decrease in turnover of at least 30%.

84. On re-examination, the witness stated that she had not seen any variations between what [redacted] had told the Respondent she had done in her forecasting, and what she had actually done in the relevant files. She stated that she did not identify any gaps in the documentation retained by the Appellant regarding its participation in the EWSS.

[redacted] – *Expert retained by the Appellant*

85. The witness ("the Appellant's expert") stated that he was [redacted] He had provided an expert report which he adopted as his evidence. He stated that the EWSS Guidelines did not provide definitions of the terms "business division" or "management structure", so he had attempted to provide working definitions. He stated that he visited some of the Appellant's stores and also carried out interviews with some of its senior management to assist his analysis.

86. He stated that he could not find a clear definition of "business division" in the academic literature. His suggested working definition was "a major section of a business with responsibility for a particular area of commercial activity." He stated that it seemed that the Respondent's expert witness agreed with this working definition. He stated that the multi-divisional form was developed to address the needs of discrete businesses. Different indicators that might indicate the existence of multiple business divisions included discrete customer segments, separate competitors and suppliers, specific functions and different technologies.

87. Another aspect the witness considered was “the value chain”. This offered an opportunity to identify the activities the business engaged in to deliver value to its customers. If the value chain differed across divisions, this would reinforce a conclusion that separate business divisions existed, and further that they would require separate management structures and practices.

88. His suggested working definition of “management structure” was “the arrangement of and relations between the parts or elements (of a business) to deal with or control and/or organise things or people, or both things and people within a more complex whole.” He said that the phrase “organisation structure” was often “*naively*” associated with an organisation chart, but he believed this misrepresented the complexity of management by focusing on hierarchical reporting lines. Management structures were the structures put in place to operationalise clarification of objectives, the planning activities, the organising activities, the directing activities and the controlling activities that existed within a business.

89. [redacted] One way to address these issues was to create a matrix-type organisation, where a store manager [redacted] was attendant to multiple demands across divisions.

90. The witness stated that the Appellant’s target demographics for [redacted] differed. The functions and the technologies used to satisfy those needs also differed. The competitors differed across the divisions. The suppliers were [redacted]

91. The witness noted that the Appellant reported revenues separately across its [redacted] businesses. His understanding was that [redacted]

92. The different divisions had different standard operating procedures. They also had separate employment contracts for their staff. He accepted that many of the major strategic decisions were made at the level of [redacted] But there was considerable interaction between senior management of the Appellant and [redacted]. There was local adaptation of the strategy coming from [redacted] There was also a management structure

and framework to ensure that the local stores ran efficiently and effectively. The witness concluded that the Appellant had separate business divisions and separate management structures for those divisions.

93. On cross examination, he agreed that the Respondent's expert had expressed agreement on some of his definitions, but disagreed with him on the application of those definitions to the Appellant. He accepted that the store managers wore [redacted] hats in respect of the Appellant's [redacted]. He stated that he believed there were [redacted] separate businesses because they had discrete competitors and were serving discrete demographics with discrete needs.

94. He agreed that [redacted] He also agreed that all of the Appellant's income was distributed to [redacted] He stated that there were separate [redacted], and this was also manifested in [redacted] However, he accepted that there were no separate directors of [redacted]

95. The witness noted that there were [redacted] in some of the stores that oversaw [redacted] He agreed that, as they were below store managers, they were more concerned with operational matters. However, he said that it was important not to bifurcate operational and strategic management. He was asked about the [redacted] report that had been prepared on behalf of the Appellant, and he stated that he did not agree with its description of the Appellant [redacted]. He believed it did more than that would imply, including adapting products, engaging in marketing and organising separate training for [redacted].

96. The witness stated that he did not use the term [redacted] but accepted it was used in [redacted] and was also used by the Appellant. He agreed that to have a "management structure" [redacted], the Appellant had to have individuals in place as managers. However, he reiterated his opinion that an organisation chart was a poor representation of a management structure. He stated that the organisation of personnel in a hierarchical structure were merely one aspect of a management structure. He noted that the [redacted] management team engaged with the divisional management teams in [redacted]

97. The witness agreed that one would want to be in a position to identify the net profitability of different business divisions. He accepted that the Appellant reported gross profits on a [redacted] basis, but did not report operating profits. He agreed that [redacted] did not have a [redacted] division. He was asked why the Appellant would therefore need a

[redacted] division, and he stated that he believed there was reporting of separate activities across the [redacted] businesses.

98. The witness agreed that there was no matrix system involved in the management structure within the Appellant, but stated that the Appellant was [redacted]

[redacted] *– Expert retained by the Respondent*

99. The witness ("the Respondent's expert") outlined her professional qualifications and stated that she was [redacted] She had prepared two reports, which she adopted as her evidence; an initial report and a report replying to that of the Appellant's expert. She did not agree with him that the Appellant had [redacted] separate business divisions.

100. The witness noted that the Appellant was [redacted]. The Appellant's activities were centred on selling products provided to it [redacted]. [redacted]. The responsiveness to [redacted] was minimal. All of the logistics were arranged [redacted] it was also focused on the sale of products.

101. The witness stated that the organisation chart reflected managerial responsibilities. It was a tool that gave a picture of who made what decisions. When the Appellant was asked about its management structure, it provided an organisation chart. Senior management made the important decisions, and there was no division between [redacted] It was not possible to have a bottom-up divisionalisation. It would be extremely difficult, if not impossible, for a manager to wear [redacted] hats when making decisions.

102. The witness stated that she found an absence of divisional management reporting lines from the Appellant to [redacted]. She did not see any signs of a matrix structure. If there were divisions within the Appellant, one would expect to see staffing costs appropriated accordingly, but there was no evidence of this. She stated that the organisational structure dictated the management structure. If the Appellant had separate divisions, she would have expected to see divisional managers. She would also have expected to see distinct strategies for each division, [redacted]

103. The KPIs for the Appellant concerned low level activities such as managing waste. These were important but they were not decision-making activities. If the Appellant was organised into divisions, the witness would have expected corresponding financial targets that were managed carefully. While there was separate training for [redacted] this was at the operative rather than managerial level. There was no need for the Appellant to manage stock volumes [redacted].

104. She stated that she generally did not disagree with the definitions applied by the Appellant's expert, but believed they were more appropriately applied [redacted]. If there were different value chains for [redacted] one would have expected them to be managed separately, [redacted]. [redacted] The Appellant had an arm's length relationship with [redacted] During the relevant time period, revenues from [redacted]

105. The witness stated that it was not always clear to her whether the analysis in the Appellant's expert's report concerned the Appellant [redacted]. She had focused on the Appellant. [redacted] There was no rationale for the Appellant to be divisionalised, and its management structure reflected its activity of selling goods in its stores.

106. On cross examination, the witness stated that she had used the term "management chart" interchangeably with "organisation chart", and that she considered "organisation chart" and "management structure" to have very similar meanings. It was put to her that she had incorrectly conflated "organisation chart" with "management structure" in her analysis of the academic literature contained within her report. She stated that she considered that structure was inherent within the organisation chart, and that an organisation chart could be a proxy for the management structure. It was put to her that there was no academic support for this view.

107. She agreed that the oral evidence demonstrated lines of communication between the Appellant's management [redacted] and accepted that there was informal feedback provided by the Appellant [redacted] However, she did not accept that there was any evidence of formal reporting lines from the Appellant to

[redacted] She agreed that the Appellant's senior management attended separate meetings for [redacted]

108. She agreed that the section manager of a store directed employees on their activities. She accepted that [redacted] employees had separate employment contracts, and that the evidence showed that a [redacted] employee would not be moved to [redacted] and vice versa. However, she still considered that if these were separate divisions, they would have separate divisional management.

109. The witness stated that she was asked to draft a replying report to the Appellant's expert's report, and that she noticed a conflation between the Appellant and [redacted] in his report. She stated that her focus was on decision making at all levels, and did not accept that she focused on strategic decision making only. She stated that [redacted] was engaged in different value chain activities to the Appellant. She agreed that all [redacted] were engaged in selling products. She also agreed that the Appellant's accounts reported on a [redacted] basis. She accepted that she had not made clear in her replying report that there were areas where she agreed with the Appellant's expert. She agreed that the Appellant implemented strategic decisions, and that the Appellant's senior management contributed to [redacted]

Submissions

Appellant

110. In written submissions, the Appellant stated that its business was structured into [redacted] separate business divisions, with each having a separate and distinct management structure that existed well before the Covid-19 pandemic. Following the onset of the pandemic, and notwithstanding the very significant restrictions on its ability to conduct its [redacted] business, and the financial consequences which flowed therefrom, the Appellant decided to continue the employment of all of its staff in the [redacted] business division, thereby incurring significant cost.

111. The EWSS Guidelines were statutory guidelines issued pursuant to section 28B(20) of the EMPI Act 2020, and therefore the Respondent was incorrect to describe the provisions regarding separate business divisions as a "*concessionary treatment*". The EWSS Scheme was an emergency measure, and it was submitted that the Commissioner could and should have regard to this legislative intention when interpreting the Guidelines and determining the appeal.

112. Had the Appellant not been eligible to avail of the EWSS Scheme to support employment, there would have been a strong possibility that it would have had to make [redacted] staff

redundant. Those employees would not only have lost their connection with the Appellant, but would also have had to claim the Pandemic Unemployment Payment from the Government. EWSS claims were only made for employees who were working in the Appellant's [redacted] business division, and who were at the grades of [redacted]

113. The Appellant carried out financial forecasts on a monthly basis, as required by the EMPI Act 2020. The Appellant considered four potential scenarios when preparing its monthly turnover forecasts. On the last day of each month, the Appellant carefully considered which scenario or combination of scenarios was most likely to be applicable for the coming months when preparing its monthly projections for the purposes of assessing its eligibility for the EWSS subsidies.

114 [redacted].

115. In opening submissions, Senior Counsel for the Appellant stated that the Respondent had placed the Appellant on strict proof of satisfying all the eligibility criteria for the EWSS. This created a challenge for the Appellant, which had attempted to show compliance with all of the requirements under the Act and the Guidelines. Senior Counsel outlined some of the evidence that was to be heard from the witnesses called on behalf of the Appellant.

116. [redacted]. [redacted]s.

117. The Guidelines had not been drafted using the sort of language that was found in the Taxes Consolidation Act 1997 as amended ("TCA 1997"), for example. There was a lack of defined terms, and the eligibility criteria for the EWSS were scattered throughout the Guidelines. This had caused difficulties and resulted in the differences between the Appellant and the Respondent. It was important to bear in mind that Appendix 1 to the Guidelines was concerned with complex businesses. The Appellant submitted that the taxpayer should have the benefit of any ambiguity in the interpretation of the Guidelines. The terms "business division" and "management structure" should be interpreted in the context of a complex business such as the Appellant.

118. In 75TACD2024, the Commission found that there were four requirements necessary to satisfy the "separate business divisions" test in the Guidelines: (i) the business division must have a clearly defined and distinct management structure in place; (ii) the business division must be separate to the other business divisions; (iii) the distinct management structure must be formalised; and (iv) the distinct management structure must have been well established prior to the advent of the Covid-19 pandemic. The Appellant satisfied each of those requirements, and had demonstrated that its [redacted] division anticipated a reduction in turnover of at least 30% compared to the relevant corresponding periods.

119. The Guidelines allowed the Commissioner to look beyond the Appellant's own management structure [redacted]. [redacted]. The Appellant's business did not stop at the level of [redacted] Furthermore, Appendix II to the Guidelines showed that consideration was not limited just to the Appellant's activities.

120. In closing submissions, Senior Counsel stated that the Appellant had prepared a table of proofs to demonstrate its fulfilment of the eligibility requirements of the EWSS. She discussed the relevant provisions of the EMPI Act 2020, and noted that it was unusual in that it concerned a forward-looking forecast. The High Court (Mulcahy J) in *Fire Safety Security Advantage Ltd v Revenue Commissioners* [2025] IEHC 78 ("*Fire Safety Security*") had also noted this aspect of the legislation.

121. The Appellant did not consider that Appendix II applied to it, and this contained the only reference to separate business divisions being a "*concession*" under the Act. Further to a request from the Commissioner, the Appellant had prepared figures showing forecast turnover from [redacted] together with [redacted] business. On this basis, only the September 2020 month would no longer qualify for EWSS.

122. The Appellant's approach to its forecasting, whereby it considered four scenarios for the First Period, was entirely legitimate. There was no exact methodology for forecasting set out in the legislation or in the Guidelines. The Appellant's analysis was sophisticated and appropriate to the complexity of its business.

123. The Guidelines did not state that each business division required its own divisional manager. They did not use the phrase "organisation chart" but instead stated "management structure". They did not require that each business division had to start and end in the one entity. They did not state that the management structure had to be contained in the one entity. Appendix I was not directed to the public at large but was directed to complex businesses and should be interpreted in that context.

124. If the Oireachtas intended to use the term "organisation chart" it could have done so. But it was clear from the Respondent's expert that she equated "organisation chart" with "management structure". The Appellant's expert's focus was far wider in that he looked at the Appellant's activities. However, even if the Commissioner concluded that it was necessary to show a separate management structure within the Appellant itself, the Appellant had done so.

125. It was clear from the Appellant's financial statements that its [redacted] was a separate division and had been treated as such prior to the Covid-19 pandemic. The Respondent had sought to focus on [redacted], but these were subject to [redacted] [redacted] and therefore had to be structured in a certain way. [redacted] was entitled to treat the entirety of [redacted] but this was not central to what the Commissioner had to decide. The Respondent's position was contradictory – it stated that the focus was on the Appellant but had spent lots of time considering [redacted] The Respondent had accepted in its findings letter of December 2021 that the Appellant had used [redacted] reporting in its accounts.

126. In response to a question from the Commissioner, Senior Counsel stated that the figures provided that included aspects of [redacted] focused on the [redacted] in the Appellant's stores. If the figures had included all [redacted] it was accepted that the Appellant would not have satisfied the 30% reduction in turnover requirement in either period.

127. In replying submissions, Senior Counsel stated that the portions of the [redacted] report that Senior Counsel for the Respondent had referred to in his submissions had not been put to the Respondent's expert during her examination. What was being done by the Respondent's SC was an attempt to backfill her evidence. There was no transferability of staff between divisions; in [redacted] were simply carrying out a service on behalf of [redacted]

Respondent

128. In written submissions, the Respondent stated that it raised the assessments against the Appellant on the basis that the Appellant had not demonstrated that its business experienced, or was expected to experience, a 30% reduction in turnover for the relevant pay dates.

129. It appeared to be accepted that the Appellant, as a whole, did not satisfy the statutory eligibility criteria. In fact, between July and December 2020, the Appellant suffered an actual reduction in turnover of c.[redacted] relative to the corresponding period. Similarly, between January and June 2021, the Appellant suffered an actual reduction in turnover of c. [redacted] relative to the corresponding months in 2019.

130. The Respondent did not accept that the Appellant's [redacted] section constituted a separate business division. Additionally, the Respondent did not consider that the Appellant's rolling reviews were carried out in accordance with the Guidelines. It was submitted that the Guidelines were clear in their language and were unambiguous. Insofar as any ambiguity could be said to arise in connection with the Guidelines then it was accepted by the Respondent that they ought to be interpreted in the context of the EMPI Act 2020, as they did, in effect, extend the parameters of the EWSS scheme.

131. It was clear from turnover figures that the Appellant's turnover had been decreasing year on year for some time prior to the pandemic. In each of the years prior to 2020 the Appellant suffered an overall reduction in its turnover [redacted]. [redacted] However, it was clear from section 28B(2) and (2A) that the 30% reduction in turnover had to be attributable to Covid-19 and the disruption caused thereby.

132. In each of the Appellant's stores, the store manager was responsible for operations in their particular store, [redacted] This did not reflect a "*clearly defined and separate management structure*", which was a condition to demonstrate that it had separate business divisions. The Appellant was better characterised as a single retail business [redacted]

133. In closing submissions, Senior Counsel stated that there were two matters that the Commissioner had to consider: whether the Appellant had separate and distinct business divisions, and whether the rolling reviews were carried out in accordance with the Guidelines. If the Commissioner was not satisfied that the Appellant had separate business divisions, the question of the rolling reviews might not fall to be determined.

134. It was agreed between the parties that the EMPI Act 2020 fell to be interpreted in line with the rules pertaining to the Tax Acts. The introductory text of the Act helped to outline the context in which it was enacted. The Respondent submitted that the judgment in *Revenue*

Commissioner v Doorley [1933] IR 750 ("*Doorley*") was applicable, and the legislation should not be interpreted broadly.

135. It was confirmed by the *ex tempore* judgment of the Court of Appeal in *Fire Safety Security* that the EWSS was administered on a self-assessment basis. It seemed that the Appellant had advanced the argument that [redacted] constituted a separate division in order to try to satisfy the eligibility criteria. It was clear from the Guidelines that it was the Appellant itself ("*the entity*") that had to be divided into separate business divisions. When the Respondent enquired as to its management structure, the Appellant provided its own management chart. While there was informal communication between the Appellant and [redacted] the Appellant had failed to show that it was formally divided into separate business divisions.

136. The Respondent's expert had provided evidence that management involved making decisions, and not simply implementing decisions. However, only [redacted] of the Appellant's stores had [redacted] and in the remaining [redacted] there was no separation above the level [redacted]. The store managers all wore [redacted] hats. Therefore, any division was purely operational rather than managerial.

137. All of the [redacted] matters were dealt with by staff employed in [redacted] sections. There was also transfer of staff from one alleged division to another. In [redacted], and similarly the [redacted]s. The products were then sold by the retail division. This was what the Appellant did – it sold the products given to it by [redacted]

138. The Appellant's SC had criticised the Respondent's expert for using the terms "management structure" and "organisation structure" interchangeably. But the [redacted] report that the Appellant had submitted to the Respondent had stated that "management structure" was referred to more commonly as "organisation structure". The [redacted] report also described the Appellant as [redacted] which again supported the Respondent's expert's position that the Appellant's primary activity was sales.

139. The Appellant was only in a position to identify its gross profits in respect of the [redacted] alleged business divisions. But in order to make proper decisions on a divisional basis it would have to be able to identify its indirect costs. In particular, it was not able to identify its labour costs across the [redacted] alleged divisions. Furthermore, the Appellant's own accounts referred to [redacted]. [redacted] were completely intertwined and it made no sense to claim they were separate divisions.

140. There was not a reasonable and durable basis for the Appellant's reviews for the First Period. The evidence of [redacted] was hearsay and was therefore unreliable. The only evidence that could be relied upon when considering the Appellant's rolling reviews was that of [redacted]. When carrying out its reviews, it included scenarios involving lockdowns. However, no such lockdowns had been announced at that stage, so they should not have been included. It also did not take subsequent announcements that lockdowns were being lifted into account. The projections did not properly reflect the circumstances that were prevailing at the relevant time.

Material Facts

141. The parties submitted a brief Statement of Agreed Facts that set out some non-contentious matters. However, the substantive issues in the appeal were not agreed. Having read the documentation submitted, and having listened to the oral factual and expert evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

141.1. The Appellant is a [redacted] [redacted] retailer located and incorporated [redacted] During the periods under appeal, the Appellant had [redacted]

141.2. Following the onset of the Covid-19 pandemic, the Appellant registered for the Employment Wages Subsidy Scheme ("EWSS") in respect of its [redacted] employees. It registered for EWSS on the basis that its business was separated into [redacted] distinct business divisions; [redacted]

141.3. When Covid-19 restrictions were implemented, [redacted]

141.4. During the First Period (i.e. 1 July 2020 to 31 December 2020), the Appellant received [redacted] in EWSS cash subsidy payments and [redacted] in Employer PRSI Credit from the Respondent. During the Second Period (i.e. 1 January 2021 to 30 June 2021), the Appellant received [redacted] in EWSS cash subsidy payments and [redacted] in EWSS Employer PRSI Credit from the Respondent.

141.5. On 8 February 2024, the Respondent raised assessments against the Appellant for the total amount of EWSS payments received by it i.e. €8,872,812.51. The assessments were raised primarily on the basis that the Respondent did not accept that the Appellant was formally structured into individual business divisions.

141.6. The Appellant contended that its [redacted] division's turnover declined by 30% during the First Period, and by 45% during the Second Period, compared to the relevant corresponding periods. The Respondent contended that the Appellant as a whole saw a reduction in turnover of around [redacted] during the First Period, and of around [redacted] during the Second Period.

141.7. The Appellant carried out rolling reviews of its turnover during its participation in the EWSS. During the First Period, it considered four different scenarios depending on the potential restrictions that might be imposed on retailers. During the Second Period, it applied one scenario.

141.8. [redacted].

141.9. [redacted].

141.10. The Appellant's primary activity was selling goods [redacted]

141.11. The Appellant had different competitors [redacted].

141.12. The Appellant had different key performance indicators ("KPIs") for i[redacted] However, these were primarily concerned with day-to-day operational matters. [redacted]

[redacted].

141.13. The Appellant reported its gross profit on a [redacted] basis [redacted] The Appellant did not point to any other contemporaneous documentation that stated it had [redacted] separate divisions.

141.14. The Appellant had different contracts for its [redacted] staff working in [redacted] sections. [redacted]. However, overall, there was no separate management structure [redacted] There was no individual manager for any of the [redacted] purported divisions.

141.15. In December 2020, in response to a request by the Respondent to "*provide the separate management structure for each of the divisions*", the Appellant provided a copy of its organisation chart and stated "*Please find attached management structure as requested.*"

141.16. There was regular engagement between the Appellant's management [redacted]. However, there was no formal reporting relationship between the Appellant's management and [redacted] such as could give rise to a matrix management structure.

141.17. The Appellant did not have separate business divisions but was a unified retail organisation that was focused on selling the goods that were provided to it [redacted]

141.18. [redacted]

141.19. [redacted]

[redacted]

141.20. [redacted]

141.21. The Appellant accepted that if [redacted] turnover was not treated separately but was included in [redacted] turnover, it did not satisfy the EWSS requirements for a forecast decrease in turnover of 30% in either the First or Second Period.

Analysis

142. The burden of proof in this appeal rests on the Appellant, which must show that the Respondent was incorrect to raise the assessments in respect of the EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"

143. 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 received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 (i.e. the First Period) and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 (i.e. the Second Period) and the corresponding period was 1 January 2019 to 30 June 2019.

144. The primary issue to be determined is whether the Appellant was entitled to rely on Appendix I to the Guidelines to separate its turnover between what it contended were its individual business divisions of [redacted] The Respondent also contended that the rolling reviews carried out by the Appellant during the First Period were not in compliance with the Guidelines. While the Appellant stated that it had been placed by the

Respondent on strict proof of its compliance with all of the eligibility criteria of the EWSS, the Commissioner is satisfied that nothing further falls to be considered in this regard.

145. The Commissioner will firstly address how the Guidelines should be interpreted when considering whether the Appellant had separate business divisions. The conclusions on interpretation will then be applied to the evidence adduced.

Interpretation of the Guidelines

146. Section 28B of the EMPI Act 2020 provides the legislative framework for the EWSS. Section 28B(20) directed the Respondent to publish the Guidelines, and the Guidelines (*inter alia*) clarified that the EWSS could potentially be applied to individual business divisions of "entities". Appendix I to the Guidelines, insofar as relevant, stated that

> "*The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division. In such a case, each of the Business Divisions of such an entity which meets the eligibility criteria may be eligible for the subsidy. The decline in turnover or customer orders in each Business Division must be capable of being separately identified or otherwise the entity as a whole has to be assessed. Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic. Revenue, having regard to risk indicators, may need to examine closely the evidence/basis for entering the scheme of certain EWSS applications that are made in respect of one or more Business Divisions rather than made in respect of the overall entity*."

147. Appendix II to the Guidelines was titled "Additional Guidance on employees" and further discussed the potential applicability of EWSS to "*entities*" with separate business divisions. The Appellant claimed that Appendix II did not apply to it, whereas the Respondent asserted that it did. The Commissioner finds Appendix II particularly complex and difficult to understand in places, e.g. "*Corporate structures may involve several closely entwined entities which use a single employer registration for a number of separate Divisions or entities within a group, or single entities have a number of separate divisions within a standalone entity.*" However, he is satisfied that this appeal can be determined by consideration of the paragraph quoted above from Appendix I, and that the additional information contained in Appendix II does not require further consideration.

148. Although capitalised, the term "Business Division" was not defined in the Guidelines. Neither was the term "management structure". The Appellant's expert provided working definitions of both, with which the Respondent's expert stated she did not disagree in principle, but she did not accept should be applied to the Appellant. The evidence of both experts was focused on whether the Appellant had individual business divisions with their own management structures.

149. It was accepted by both sides that, following the judgment in *Fire Safety Security*, the EMPI Act 2020 fell to be interpreted as a taxation statute. In *Perrigo Pharma International Designated Activity Company v McNamara* [2020] IEHC 552 ("*Perrigo*"), the High Court (McDonald J) summarised (at paragraph 74) the principles of statutory interpretation as they apply to taxation:

> "*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
> >
> > *(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
> >
> > *(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*
> >
> > *(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".*"

150. The Appellant submitted that Appendix I was directed at complex businesses such as itself, and that the terms "business division" and "management structure" should be interpreted in the context of a complex business such as the Appellant. The Commissioner has no difficulty accepting that the evidence before him demonstrates that the Appellant, [redacted] is a complex business.

151. However, the Commissioner notes that Appendix I is not stated to apply only to "complex businesses", and that it does not limit the potential applicability of the "individual business divisions" provision to companies of a certain size or number of employees. In Determination 75TACD2024, the Commission considered the potential applicability of the "individual business divisions" test to a small company (approximately 20-25 employees). While the Commission found that it did not satisfy the requirements of the test, this was not because Appendix I was stated to only apply to complex or large businesses. In the

circumstances, the Commissioner does not agree with the Appellant that Appendix I is limited to complex businesses, and consequently he does not accept that it should be interpreted in that light. The Commissioner does not consider that either of the phrases "individual business divisions" or "management structure" is a term of art, and therefore is satisfied that they should be given their ordinary meaning; *Inspector of Taxes v Kiernan* [1981] IR 117.

152. On the other hand, the Respondent argued that the "individual business division" provision was in effect an extension of the parameters of the EWSS and that therefore the principle in *Revenue Commissioners v. Doorley* [1933] IR 750 ("*Doorley*") should be applied so that Appendix I be given a strict interpretation. However, the Commissioner considers that the Guidelines constitute secondary legislation, as they were published by the Respondent under section 28B(20) of the EMPI Act 2020. Secondary legislation cannot expand the scope of primary legislation but can merely give effect "*to the principles and policies which are contained in the statute itself*"; *Cityview Press v An Comhairle Oiliúna* [1980] IR 381. As the Commissioner is obliged to interpret the Guidelines in line with the Constitution, he finds that Appendix I does not expand the scope of section 28B but merely fills in the details of the primary legislation. Consequently, he is satisfied that the principle in *Doorley* does not apply.

153. Therefore, the Commissioner considers that "*the ordinary, basic and natural meaning of the words*" in Appendix I, as per McDonald J in *Perrigo,* should be applied by him in determining this appeal. An important question that arises is whether the requirement for individual business divisions with separate management structures applies at the level of the Appellant itself, as argued by the Respondent, or whether the Commissioner should have regard [redacted] as submitted by the Appellant.

154. The Commissioner considers that the evidence before him demonstrated that, in order to properly understand the Appellant's business, it is necessary to have regard [redacted], and he is satisfied that there is nothing in Appendix I that precludes him from considering this wider context. However, the Commissioner considers that Appendix I is clearly concerned with the individual business divisions of the "*entity*". It is also clear that the "*entity*" in this instance is the Appellant [redacted] This is because the first sentence of Appendix I states that

> "*The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division.*"

155. Consequently, the decline in turnover applies at the level of the "*entity*", either as a whole or by reference to its individual business divisions. In this appeal, it was the turnover of the Appellant, [redacted], that was relevant. Therefore, it follows that the entity, for the purposes of the Guidelines, was the Appellant.

156. Appendix I goes on to say that "*In such a case, each of the Business Divisions of such an entity which meets the eligibility criteria may be eligible for the subsidy.*" It is clear therefore that it is the individual business divisions of the entity, i.e. the Appellant, that need to satisfy the requirements of Appendix I, and that if they do not do so, it is not permissible to look beyond the Appellant[redacted] to attempt to satisfy them.

157. Furthermore, Appendix I goes on to say that, "*Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic.*" The Commissioner considers that this requirement, that each business division have its own management structure, applies to business divisions of the "*entity*" and not to another corporate body or organisatio[redacted]. This is clear from the context of the paragraph, which is concerned with business divisions of the "*entity*":

> "*The 30% reduction in turnover or customer orders may be applied at the level of the <u>entity</u> as a whole or, if an <u>entity</u> is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division. In such a case, each of the Business Divisions of such an <u>entity</u> which meets the eligibility criteria may be eligible for the subsidy. The decline in turnover or customer orders in each Business Division must be capable of being separately identified or otherwise the <u>entity</u> as a whole has to be assessed. Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic.*"

158. Therefore, the Commissioner is satisfied that the Appellant needs to demonstrate that it had individual business divisions, with each business division having a clearly defined and distinct management structure. While neither "business division" nor "management structure" is defined in the EWSS, the Commissioner will utilise the definitions agreed upon by the two expert witnesses. Furthermore, as the Appellant claimed EWSS in

respect of its employees within [redacted] (as so contended), [redacted]tself had to satisfy the eligibility criteria to qualify for EWSS.

159. To conclude on this section, the question(s) to be determined is whether the Appellant was formally divisionalised into [redacted], with each division being "*a major section of a business with responsibility for a particular area of commercial activity*." The Appellant also had to show that each division had a clearly defined and distinct management structure, where management structure is defined as "*the arrangement of and relations between the parts or elements (of a business) to deal with or control and/or organise things or people, or both things and people within a more complex whole*." If the Appellant has demonstrated the requisite divisionalisation, it is also necessary for it to show that [redacted] satisfied the EWSS eligibility criteria.

Whether the Appellant had separate business divisions

160. There was a large amount of evidence proffered in this appeal, including numerous books of documents (6) and correspondence (3), as well as witness statements and oral evidence from eight factual witnesses, and reports and oral evidence from two expert witnesses. It was clear from the evidence that the Appellant i[redacted], [redacted] it was perhaps unsurprising that each side was able to point to different aspects of the Appellant's business, [redacted], that were used to support its case and attempt to refute the other's. A large part of the challenge facing the Commissioner in this appeal is attempting to disentangle much of the complexity of the evidence in order to determine whether the Appellant itself, [redacted], satisfied the requirements of the Guidelines.

The Appellant's principal activities

161. In seeking to disentangle this complexity, and to find a way to focus the evidence on what needs to be determined, the Commissioner believes it useful, in the first instance, to consider what the Appellant itself does. A helpful starting point is the Appellant's directors' report and financial statements for the year to [redacted] 2019. At[redacted] of that report, under "Principal Activities", it is stated that "[redacted]." This statement of its principal activities is repeated in the director's report for the year ended [redacted] 2020, and again in the director's report for the year ended [redacted] 2021.

162. The Commissioner is satisfied that the above description tallies with the evidence he heard during the hearing. While [redacted] appeared unhappy at the suggestion during cross examination that the Appellant's role was to "*simply sell the products that it is given*

to sell [redacted], he did not disagree with the description in the directors' reports, and agreed that the Appellant was a retailer.

163. While not seeking to minimise the challenges involved in carrying out those activities, the Commissioner considers that the Appellant's principal activities were therefore relatively straightforward. While the evidence demonstrated that the operational aspects of the Appellant's business were frequently complex, the Commissioner is satisfied that the Appellant's principal activities did not include [redacted]

164. [redacted] In contrast, [redacted] said that his overall role was "*basically to lead stores* [redacted] *and to make sure that the strategy of each business division was executed correctly in store.*"

[redacted]

165. [redacted]

[redacted]

[redacted].

166. [redacted]

5 [redacted]

[redacted]s.

167. [redacted]

168 [redacted]

169. [redacted]

170. Therefore, the Commissioner is satisfied that the evidence demonstrated that the role of the Appellant was focused on selling [redacted]

Management of [redacted]

171. The Commissioner considers that it is useful to consider how [redacted] were managed [redacted]

r[redacted]

172. The Commissioner accepts that there is some evidence of separation within the Appellant, which it sought to rely upon to justify its argument that it was divisionalised. There was separation of staffing between [redacted] at the operations level ([redacted]), with employees given different employment contracts and training depending on the area to which they were recruited. [redacted].

Reporting of Appellant’s income

173. Significant emphasis was placed by the Appellant on the [redacted] reporting in its directors’ reports and financial statements of gross profit according to [redacted]. The 2019 report provides, under the heading “Sales”, that [redacted], [redacted], and then goes on to state turnover for [redacted]

174. The Commissioner does not agree that this analysis in itself demonstrates a divisionalisation of the Appellant. He considers it not insignificant that all of the Appellant’s income was [redacted]. Further, he considers that the Appellant was unable to point to any other contemporaneous documentation that explicitly stated that it was separated into divisions.

Whether the Appellant was formally divisionalised

175. Ultimately, the Commissioner is not satisfied that the Appellant was able to demonstrate its separation into [redacted] divisions. He considers that the evidence showed that [redacted]. However, much of the activity that the Appellant pointed to, in attempting to show it was divisionalised, concerned [redacted]

[redacted]. The activities of the Appellant were primarily directed to selling the goods [redacted].

176. The Commissioner accepts that the Appellant may informally consider itself divisionalised into [redacted], and notes that the Appellant's expert stated that such signalling can represent to both insiders and outsiders that separate divisions exist. However, the Guidelines are clear that the Appellant must have been formally structured into separate divisions. The Commissioner is satisfied that the preponderance of evidence goes to show that it was not formally divisionalised. In particular, the Appellant had not demonstrated why its primary activity, [redacted] required it to be formally divisionalised, and the Commissioner concludes that it was not.

The Appellant's management structures

177. The Commissioner considers that his view is fortified by consideration of whether the Appellant had clearly defined and distinct management structures in place for its alleged divisions. As noted above, both of the expert witnesses agreed that "management structure" was not a term that was widely used in the academic community, and much of their oral evidence was spent on their views as to whether or not the Appellant had distinct management structures. However, both agreed on a working definition of "*the arrangement of and relations between the parts or elements (of a business) to deal with or control and/or organise things or people, or both things and people within a more complex whole*."

178. The Commissioner considers that there was some evidence of separation of management between [redacted] within the Appellant, at least at the lower end of the chain of management. As previously noted, employees were hired to work in specifically in [redacted] section ([redacted]). There were [redacted]

179. The [redacted] sections within the Appellant each had different KPIs, although it seemed to the Commissioner that these were focused on operational matters, such as waste management, rather than anything more strategic or high level. Furthermore, [redacted]

180. It was not in dispute that the Appellant did not have a sole manager responsible for each of [redacted]. [redacted]

[redacted]. However, the Appellant argued that its senior managers wore [redacted] hats and were able to appraise matters through the prism [redacted], as required.

181. The Guidelines required that each business division have a "*clearly defined and distinct*" management structure. However, the Commissioner is satisfied that the Appellant did not have a distinct management structure for each of [redacted] as its senior management was unified. The Commissioner considers that, in order for the Appellant to be able to demonstrate a separate management structure for each of its contended divisions, it would at least require a head of division for each of [redacted]

The expert evidence

182. There was significant disagreement between the experts as to whether or not "management structure" was synonymous with "organisation chart". Overall, the Commissioner was more persuaded by the evidence of the Respondent's expert that an organisation chart was a useful proxy for showing the management structure of a business. He considers it noteworthy that in December 2020, in response to a request by the Respondent to "*provide the separate management structure for each of the divisions*", the Appellant's [redacted] provided a copy of its organisation chart [redacted] and stated "*Please find attached management structure as requested.*" The Commissioner considers that this suggests that the Appellant's understanding of its management structure when it applied for EWSS was similar to that set out in its organisation chart.

183. The Appellant's expert argued that the Appellant had a matrix-style management structure [redacted]. The Commissioner has already acknowledged that there was frequent engagement by the Appellant's senior management [redacted] However, the Commissioner accepts the argument of the Respondent's expert that there was a lack of evidence of formal reporting lines from the Appellant's management [redacted] and that the existence of a matrix structure would require such formality. In any event, even if there was some type of matrix relationship between the Appellant [redacted], the Commissioner considers that this would not be sufficient to show that the "*entity*", i.e. the Appellant, itself had a clearly defined and distinct management structure for each of its contended divisions.

184. Overall, while satisfied that both experts gave independent and well-argued evidence, the Commissioner preferred the evidence of the Respondent's expert. He considers that the Appellant's expert tended to conflate the Appellant with [redacted], and did not sufficiently identify the aspects of the Appellant's business that were managed and controlled by it, [redacted] The Commissioner has already addressed the argument that the Appellant had a matrix style of management. Other matters to which the Appellant's expert gave significant weight were the different demographics that the Appellant targeted with [redacted], as well as the different competitors that it had across its offerings, [redacted]. The Commissioner accepts that this was the case.

185. However, he was persuaded by the replying evidence of the Respondent's expert that there was a lack of differentiation on the part of the Appellant to address these demographic differences – [redacted] The Commissioner also found more compelling the evidence of the Respondent's expert that the consideration of "value chain" activities (e.g. logistics and procurement) pointed to a lack of divisionalisation of the Appellant, for the reasons already discussed.

186. Consequently, for all of the above reasons, the Commissioner is satisfied that the Appellant has not demonstrated that it had [redacted] individual business divisions with clearly distinct management structures, as required by the Guidelines. However, even if it could be said that the Appellant had separate business divisions for i[redacted] the Commissioner considers that the evidence to suggest the existence of a separate [redacted] was very weak.

The Appellant's [redacted] 'division'

187. The Appellant's role in the sale of [redacted]

[redacted].

188. [redacted]. [redacted]

189. [redacted].

190. [redacted] [redacted] [redacted] The only documentary evidence to suggest that the Appellant had [redacted] division was the [redacted] reporting in its annual financial statements, but the Commissioner does not consider that this by itself is in any way sufficient to prove the existence of a separate division. Without more, it merely proves the fact that the Appellant reported its gross profits on a [redacted] basis.

191. It was not in dispute that the Appellant had no staff assigned to its putative [redacted] division. The Commissioner considers that no satisfactory rationale was put forward by the Appellant as to why it allegedly required a separate [redacted] division, in circumstances where it had no [redacted] staff or [redacted] management [redacted]. [redacted].

192. Therefore, the Commissioner concludes that, even if the Appellant had separate [redacted] divisions, it did not have a separate [redacted] division. Consequently, it was not entitled

to reduce its turnover for the purposes of its EWSS eligibility by removing the '[redacted] portion of its [redacted] turnover. [redacted]

Treatment by the Appellant of [redacted] turnover

193. During the hearing, the Commissioner asked the parties to prepare turnover figures on the basis that [redacted] did not constitute a separate division. On the final day of the hearing, the Appellant submitted figures[6] that combined [redacted] with the "[redacted]. However, the Commissioner considers that there is no basis in either the EMPI Act 2020 or the Guidelines for dividing up the [redacted] turnover in such a subjective or arbitrary way, and he does not agree with the Appellant that it was appropriate to do so.

194. It was accepted by the Appellant that if the entirety of its forecast [redacted] turnover was included in [redacted], it would not have satisfied the turnover test for either the First or Second Periods, in that it would not have anticipated suffering a decline in turnover of at least 30% compared to the relevant corresponding period. Consequently, the Commissioner finds that, even if [redacted] were separate divisions (and for the avoidance of doubt, he has already found that they were not), the [redacted] would not have satisfied the EWSS eligibility requirements and consequently the Appellant was not entitled to participate in the EWSS.

Rolling reviews

195. As he has found that the Appellant was not entitled to participate in the EWSS on the basis that it did not satisfy the requirements for individual business divisions set out in Appendix I to the Guidelines, it is not necessary to make any formal findings on the Respondent's objections to the rolling reviews carried out by the Appellant in respect of the First Period. However, as a significant amount of time was spent by the Respondent during cross examination and submissions on the issue, the Commissioner considers it appropriate to make some brief comments, setting out what he would have found if the Appellant had otherwise satisfied the eligibility requirements.

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[6] These figures were calculated retrospectively, but done on a "forecasted" basis. Given the circumstances in which the Appellant was asked to calculate these figures, the Commissioner is satisfied that this was appropriate.

196. In the Commissioner's experience, the Appellant's approach during the First Period, of comparing its 2019 turnover to four potential scenarios, was unusual. The Commissioner agrees with the Respondent that this approach is not directly in line with the example set out in the Guidelines, which appears to anticipate one potential scenario for forecast turnover being applied. However, this does not mean that the Appellant's approach was <u>prohibited</u> by the legislation or the Guidelines, and the Commissioner concludes that it was not. Section 28B(5)(a) of the EMPI Act 2020 simply required an employer to "*review his or her business circumstances*" at the end of each month. While the Guidelines were more detailed, they did not explicitly require an employer to apply only one potential scenario, or prohibit the utilisation of a number of different scenarios.

197. Overall, the Commissioner was satisfied that the Appellant's projections on turnover were well-considered and reasonable (obviously aside from the finding that it was not entitled to proceed on the basis that it had individual business divisions). In particular, the Commissioner considered the criticisms by the Respondent of the Appellant applying two scenarios that envisaged future lockdowns to be misplaced. The Covid-19 pandemic was an unprecedented event, and nobody knew in summer/autumn 2020 what would transpire that coming winter. Consequently, it was wholly appropriate for the Appellant, in applying its four-scenarios approach, to include scenarios envisaging a lockdown. As it happened, a national lockdown *was* reimposed at the very end of 2020.

198. Additionally, the Commissioner was satisfied that the evidence of [redacted] while strictly speaking hearsay, was relevant and appropriate, in circumstances where the former employee of the Appellant who had carried out the rolling reviews at the time was unavailable to attend the hearing. Therefore, if any formal findings on the question of its rolling reviews were required, the Commissioner would have found that the Appellant satisfied the requirements of section 28B(5) of the EMPI Act 2020 and the Guidelines in respect of the First Period reviews. The Respondent accepted at the hearing that there was no issue in respect of the rolling reviews for the Second Period.

Conclusion

199. In conclusion, the Commissioner determines that the Appellant failed to demonstrate that it was entitled to apply the "individual business divisions" provisions of Appendix I to the Guidelines. In particular, it failed to demonstrate that it was formally structured into separate business divisions of [redacted], with each having their own clearly defined and distinct management structure. Even if it had been able to show that it had separate divisions for [redacted], it failed to demonstrate that it had [redacted] division, and consequently its alleged [redacted] division would not have satisfied the turnover test for

either the First or Second Period. Therefore, it was not entitled to participate in the EWSS and its appeal is unsuccessful.

Determination

200. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments in the total amount of €8,872,812.51 for September 2020 to June 2021. Therefore, the assessments stand.

201. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

202. 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

203. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Simon Noone
Appeal Commissioner
27 May 2026

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.