AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

88TACD2026

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") brought by the Appellant under section 28B(14) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended ("EMPI Act 2020") against assessments raised by the Revenue Commissioners ("the Respondent") in respect of the Employment Wages Subsidy Scheme ("EWSS"). The assessments were raised for the periods July to December 2020, January to September 2021, November 2021 and April 2022 ("the relevant periods") and were in the total amount of €313,400.00. The assessments were raised on the basis that the Appellant had failed to abide by the terms of the EWSS.

2. The appeal proceeded by way of an oral hearing, which was held on 11 November 2025. The Appellant was represented by Junior Counsel and the Respondent was represented by Senior Counsel. The CEO of the Appellant attended and gave evidence as a witness on behalf of the Appellant.

3. Prior to the hearing, the Appellant notified the Commission that the Appellant wished to have its appeal hearing in private. Therefore, the appeal hearing was held in private and this determination will be redacted before its publication on the Commission's website, under section 949AO of the TCA 1997.

Background

4. The EWSS was introduced by the Financial Provisions (Covid-19) (No. 2) Act 2020, which inserted section 28B into the EMPI Act 2020 and replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic and provided for a flat rate subsidy to qualifying employers based on the number of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.

5. The Appellant is a company which was incorporated on [redacted] and participated in the EWSS from July 2020. In 2021 and 2022, the Appellant and the Respondent engaged in correspondence regarding eligibility for the EWSS. On 12 July 2022 and 23 August 2022, the Respondent informed the Appellant that the Appellant did not qualify for the EWSS. On 12 July 2024 and 24 September 2024, the Respondent restated its position and informed the Appellant that the Respondent would raise assessments under section 28B of the EMPI Act 2020.

6. On 30 September 2024, the Respondent raised assessments against the Appellant on the basis that it had failed to abide by the terms of the EWSS:

Period of Assessment	Amount €
July 2020	[redacted]
August 2020	[redacted]
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]
July 2021	[redacted]
August 2021	[redacted]
September 2021	[redacted]
November 2021	[redacted]
April 2022	[redacted]
Total	€313,400.00

7. On 18 October 2024, the Appellant submitted a Notice of Appeal to the Commission in respect of those amounts.

8. The Appellant and the Respondent subsequently submitted Statements of Case under section 949Q of the Taxes Consolidation Act 1997 ("TCA 1997") and pre-hearing documentation under section 949S of the TCA 1997, as well as additional documentation at the hearing. The Commissioner has considered all the documentation submitted by the parties in this appeal.

Legislation and Guidelines

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

> *"(2) Subject to subsections (4) and (5), this section shall apply to an employer where -*
>
> *(a) (i) in accordance with guidelines published by the Revenue Commissioners under subsection (20)(a), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce -*
>
> *(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period'),*
>
> *(II) in the case where the business of the employer has not operated for the whole of the corresponding period but the commencement of that business's operation occurred no later than 1 November 2019, there will occur in the part of the specified period, which corresponds to the part of the corresponding period in which the business has operated, at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the*

employer's business or in the customer orders being received by the employer by reference to that part of the corresponding period, or

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

(A) 30 per cent, or

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

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

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

and

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

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

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

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

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

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

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

(A) 30 per cent, or

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

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

or

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

and

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

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

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

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

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

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

(A)30 per cent, or

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

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

or

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

and

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

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

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

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

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

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

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

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

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

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

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

(i) the employer shall immediately log on to ROS and declare that, from the first day of the income tax month following the relevant income tax month (in subparagraph (ii) referred to as 'the relevant day'), the employer is no longer an employer to which this section applies, and

(ii) on and from the relevant day, the employer shall not be an employer to which this section applies and shall not represent that his or her status is otherwise than as referred to in this subparagraph nor cause the Revenue Commissioners to believe it to be so otherwise.

[…]

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

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

[…]

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

[…]

(14A) A person aggrieved by an assessment or an amended assessment to relevant tax made on that person may appeal the assessment or amended assessment, as the case may be, to the Appeal Commissioners, in accordance with section 949I of the

Act, within the period of 30 days after the date of the notice of assessment or the amended assessment, as may be appropriate.

[…]

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

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

> *(a) the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (2), (2A) or (2B), will occur by reason of Covid-19 and the disruption that is being caused thereby to commerce, and*
>
> *(b) the matters to which an employer shall have regard in determining the appropriate class of Pay-Related Social Insurance to be operated by an employer in relation to a qualifying employee for the purposes of compliance by the employer with subsection (7)(e).”*

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

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

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

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

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

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

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

Evidence

Appellant's Evidence

[redacted]

13. [redacted] ("the witness") was the CEO of the Appellant. He stated that he started the Appellant in 2018. [redacted] The witness stated that in [redacted] 2019 he took a lease on a premises and took on the first employee. He said he was in contact straightaway with his biggest customer ("the Company") [redacted]

14. [redacted]

15. Counsel took the witness to a letter from the Company ("the Company's Letter"). The witness agreed with the statement in that letter that: "*As expected, Covid-19 significantly impacted our business due to the severe restrictions imposed by the government over the last 2 years* [redacted]*. Therefore, our actual purchases made from the company were not in line with our original orders.* [redacted].

16. [redacted]

[redacted]

17. Counsel brought the witness to the following documents and asked about the figures:

17.1. A document titled "Paydates between 1 September to 31 December 2020"[1]. The witness stated that the figures meant the Appellant fulfilled €1,858,638 of orders from forecast orders of €4,520,000. He stated that the figure of €4,520,000 under "Base Year" were forecast orders, which meant what he would expect to turn over with their customer. The witness said that he would have updated the monthly forecasts.

17.2. A document titled "Paydates between 1 January to 30 June 2021"[2]. The witness stated that the figures of 51.86% (€2,095,080) referred to the percentage of what they achieved in fulfilled orders, out of €4,351,697 in projected orders under "Base Line (Projected Orders)".

17.3. An untitled document[3]. The witness stated that the figure of €5,362,275 referred to total fulfilled orders for January to December and the figure of €7,695,000 under "Base Year" was projected turnover for that year without Covid.

17.4. A letter from the Appellant to the Respondent received on 27 June 2022 ("the Appellant's Letter")[4]. The witness confirmed that the figures in Column A under "Monthly Sales 2020" and "Monthly Sales 2021" referred to "total fulfilled orders" from the Company and everything else. He stated that the columns of expected sales with the Company for 2020 and 2021 referred to turnover which the Appellant would have done with the Company had Covid not happened and those figures were arrived at from previous years' experience.

18. During cross-examination, the witness accepted that the Appellant informed the Respondent by letter of 10 July 2020 that it had been trading since April 2019. [redacted] When Counsel took the witness to the EWSS Eligibility Review Form ("ERF") at page 752 of Book 3 of the Documents, the

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[1] Indexed "ERF July – December 2020" at page 749 of Book 3 of the Documents and containing figures under July to December, and figures under "Base Year Actual Orders".
[2] Submitted by the Appellant at the hearing and containing figures under January to June 2021, and figures under "Base Line (Projected Orders)".
[3] Indexed "ERFs submitted to Revenue via ROS" at page 752 of Book 3 of the Documents and containing figures under July to December 2021 and January 2022, and figures under "Base Year".
[4] At page 230 of Book 2 of the Documents.

witness agreed that the Appellant submitted this on 5 October 2021. When asked about the figure of €7,695,000, the Appellant stated that it was actual orders for 2019. He agreed that the ERF showed orders of €110,000 for April 2019. When Counsel asked how this tallied with the position that the Appellant did not commence trading until May 2019, the witness said they were orders which he expected to fulfil afterwards. He denied that the Appellant was paid those sums in April.

19. When Counsel asked: "*But in terms of comparing like with like, clearly one looks to see what orders took place actually in 2019 and one compares them then to the orders that were taking place in 2020, isn't that right?*", the witness stated "*Yes*" and when Counsel asked: "*So, for instance, if you receive some oral suggestion that, look we might extend our contract for a further, it might be worth 3 million over the year, that's not 3 million into a particular month, it's spread out over each of the months, isn't that right?*", the witness replied: "*It's fulfilled over a number of months but the contract, or the sale is in that month*."

20. When Counsel took the witness to the Company's Letter, the witness agreed that it was undated and unauthored, and said it came by email. He said he asked the Company for a letter to explain the turnover and what they would have expected to have done without Covid. The witness gave the name of the person who he thought had written the letter.

21. When Counsel then took him to the Appellant's Letter, the witness confirmed that the figures under "2019 Sales" referred to "*completed orders, sales*". When Counsel pressed the witness on what he meant by the term "orders" in the Appellant's Letter, the witness stated: "*what I was expecting to do*" and "*forward orders*". When pressed on whether the Appellant provided the Respondent with purchase orders, invoices, or any documentation to substantiate the Appellant's figures other than three invoices for April 2019, the witness said: "*I think we've furnished anything that we've been asked for*".

22. When Counsel asked the witness about the figure of €4,495,000 in a letter from the Appellant to the Respondent received on 12 August 2022, which was stated to be 6/12 of €8,990,000, the witness confirmed that the Appellant did not fulfil €8,990,000 of orders in 2019 and agreed that the actual fulfilled orders for that period was €2,165,696. When Counsel asked if there were purchase orders for June and December 2019 for €3,000,000 respectively, the witness said "*no*".

23. [redacted] When Counsel then put to him that the Appellant sought to create a picture of ceasing one activity and starting another, the

witness stated: "*No, I'm not trying to make out there was a complete cessation*". [redacted]

24. When asked about rolling reviews, the witness stated that the Appellant conducted the required rolling reviews and "*had been doing that all along, the whole way through Covid*" and he was surprised that he had not furnished such reviews when requested by the Respondent because he was doing it every week.

25. [redacted]

26. [redacted]

Submissions

Appellant's Submissions

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

    27.1. The Respondent raised assessments which were based on incorrect comparator periods[redacted]

27.2. The EMPI Act 2020 is a taxing statute. For a tax to be imposed it must be clear and unambiguous, which is consistent with the judgment in *Bookfinders Ltd v The Revenue Commissioners* [2020] IESC 60. Certain aspects of the EMPI Act 2020 are remedial. In cases of doubt the criteria for eligibility should be construed liberally, in particular when considering the definition of "customer order", which is undefined in the EMPI Act 2020. Equally, liability for alleged ineligibility should not be imposed doubtfully. [redacted]

27.3. [redacted] The Appellant commenced a new business on 2 May 2019. [redacted]

27.4. The first specified period is 1 July 2020 to 31 December 2020 and the corresponding period is 1 July 2019 to 31 December 2019. The orders for the first specified period were in the amount of €1,858,000 as compared with orders for the corresponding period in the amount of €4,520,000, which is a reduction of 58%. The orders for the first specified period were orders crystallised into sales and the orders for the comparator period were orders received, as shown in pages 749-750 of Book 3 of the Documents, the Company's Letter, and the Appellant's oral evidence.

27.5. The second specified period is 1 January 2021 to 30 June 2021. The Appellant commenced a new business on 2 May 2019 and therefore a different statutory test applies to the second specified period. The orders for the second specified period would have been in the amount of €4,351,697 as compared with orders in the amount of €2,094,605. That comparison was as between orders that would have been fulfilled had it not been for Covid and orders crystallised into sales, which is a reduction of 51.86%, as shown in the Appellant's Letter and the oral evidence. The Appellant distinguished between the receipt of orders and the fulfilment of orders. If one accepts the witness's evidence that the orders received in 2019 were [redacted], one is entitled to conclude that the Appellant was eligible for the EWSS. There must be a difference between “customer orders” and “turnover”.

27.6. *Buckley v The Revenue Commissioners* [2024] IEHC 414 (“*Buckley*”) makes clear that the commencement of a trade is a mixed question of fact and law. Case-law distinguishes preparatory activities from the commencement of trade, as in *The Birmingham and District Cattle By-Products Limited v The Commissioners of Inland Revenue* (1919) 12 Tax Case 92*, Spa Estates v O’hArgain* (Unreported, High Court (Kenny J) 20th June 1975), *Slater v Commissioner of Inland Revenue* [1996] 1 NZLR 759. The witness testified that the transactions in April 2019 were preparatory activities to be able to trade fully.

27.7. *Mansell v Revenue and Customs Commissioners* [2006] STC (SCD) 605 (“*Mansell*”) was cited in *Revenue Commissioners v O’Farrell* [2018] IEHC 71 (“*O’Farrell*”) and is the test for the commencement of trade: when acting for the purpose of generating a profit starts in earnest. The question is whether a business is operating or preparing to operate.

27.8. In *Tryka Ltd v Newall (HM Inspector of Taxes)* [1963] 41 TC 146 (“*Tryka*”), the Court found that isolated transactions related to a former trade do not mean the former trade continued. [redacted]

27.9. The third specified period is 1 January 2021 to 31 December 2021 and the corresponding period is 1 January 2019 to 31 December 2019. The orders for the first specified period were in the amount of €5,362,275 as compared with orders for the corresponding period in the amount of €7,695,000. The orders for the first specified period were orders crystallised into sales and the orders for the comparator period were orders received, as shown in pages 752-754 of Book 3 of the Documents, as well as the Company’s Letter and the Appellant’s oral evidence.

27.10. The Appellant conducted the rolling reviews required. Counsel stated that the Appellant did not point to contemporaneous evidence of rolling reviews but the absence of such documentary evidence does not of itself disentitle a taxpayer from EWSS if one is satisfied on oral evidence that rolling reviews were conducted.

Respondent's Submissions

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

    28.1. The Appellant failed to demonstrate to the satisfaction of the Respondent that its business has experienced or was expected to experience a 30% reduction in turnover or customer orders during the claims period in accordance with section 28B of the EMPI Act 2020. The Appellant registered for the EWSS on 31 August 2020 and made the following declaration:

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

    28.2. The EMPI Act 2020 is not a taxing statute. Ordinary canons of statutory interpretation apply. In the alternative, if it is a taxing statute, section 28B of the EMPI Act 2020 should not be interpreted to provide financial assistance which was not clearly provided for, in accordance with *Revenue Commissioners v. Doorley* [1933] I.R. 750.

    28.3. The Appellant commenced trading in December 2018. [redacted]

    28.4. The Appellant did not furnish rolling reviews to support its eligibility for the EWSS during the periods July 2020 to June 2021.

    28.5. It was incorrect for the Appellant to compare expected orders in 2019 with orders for 2020 and 2021. The Company's Letter refers to "expected orders". This does not amount to "customer orders", which are specific and can be matched to an invoice.

    28.6. [redacted]

[redacted] Applying *Mansell*, the Appellant began operational activities in April 2019, took on employees, had orders for €110,000, and the facilities were operational. Furthermore, *Cronin (Inspector of Taxes) v Lunham Brothers Ltd* [1985] 3 ITR 363 shows that a trade is organic, and in this case the Appellant's focus moved from [redacted]

28.7. The first specified period is 1 July 2020 to 31 December 2020, which must be compared with 1 July to 31 December 2019. The Appellant's Letter shows a 14% decrease if one compares the actual orders from 2020 with the actual orders from 2019 (€1,858,639 compared to €2,165,696).

28.8. The second specified period is 1 January 2021 to 30 June 2021, which must be compared with 1 January 2019 to 30 June 2019. The business existed before 1 May 2019 and the Appellant's Letter shows a 261% increase if one compares the actual orders from 2021 with the actual orders from 2019 (€2,094,605 compared to €580,515).

28.9. Even if the Commissioner does not agree with the Respondent on the commencement of trade, there are contradictions in the Appellant's projections and comparators. The Company's Letter is inadmissible. Its author is unknown. Nobody from the Company attended to give evidence. The Appellant accepts there were purchase orders for the Company yet no documentary evidence of this was provided.

28.10. The third specified period is 1 January 2021 to 31 December 2021, which must be compared with 1 January 2019 to 31 December 2019. The Appellant's Letter shows a 95% increase if one compares the actual orders from 2021 with the actual orders for 2019 (€5,361,718 compared to €2,746,212). The fourth specified period flows from that.

Material Facts

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

29.1. The Appellant is a company which was incorporated on [redacted].

29.2. [redacted]

29.3. [redacted]

29.4. [redacted]

29.5. The Appellant's business commenced operations before 1 May 2019.

29.6. The Appellant participated in the EWSS from July 2020.

29.7. On 30 September 2024, the Respondent raised assessments against the Appellant for the relevant period in the total amount of €313,400.00.

29.8. The Appellant did not provide documentary evidence of having conducted rolling reviews for the periods July 2020 to June 2021.

29.9. For the first specified period, the figures do not show a decrease of at least 30% in the 2020 customer orders when compared with the 2019 customer orders.

29.10. For the second specified period, the figures do not show a decrease of at least 30% in the 2021 customer orders when compared with the 2019 customer orders.

29.11. For the third specified period, the figures do not show a decrease of at least 30% in the 2021 customer orders when compared with the 2019 customer orders.

Analysis

Burden of Proof

30. This appeal relates to the raising of assessments by the Respondent for the relevant periods. In an appeal before the Commission, the burden of proof rests on the Appellant, which in this appeal must show that the Respondent was incorrect to raise assessments in the total amount of €313,400.00 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, Charleton J stated at paragraph 22 that:

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

31. The Court of Appeal confirmed this position in *JSS & Ors v A Tax Appeal Commissioner* [2025] IECA 96, in which McDonald J stated at paragraph 34 that:

> *"the taxpayer bears the burden of demonstrating that a tax assessment is wrong."*

32. The standard of proof in considering this appeal is the civil standard of proof, that is, on the balance of probabilities.

Statutory Interpretation

33. It is also necessary to note that in *Hanrahan v The Revenue Commissioners* [2024] IECA 113, the Court of Appeal clarified the approach to the burden of proof where an appeal relates to the interpretation of law only, stating:

> *"Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake…In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation".*

34. Both parties made submissions on how the EMPI Act 2020 should be interpreted. On the one hand, the Appellant contended that the EMPI Act 2020 is a taxing statute with remedial aspects and in cases of doubt, the criteria for eligibility should be construed liberally, particularly when considering the definition of "customer order", and liability for ineligibility should not be imposed doubtfully. On the other hand, the Respondent contended that the EMPI Act 2020 is not a taxing statute and ordinary canons of construction apply. In the alternative, the Respondent submitted that if the EMPI Act 2020 is a taxing statute, it should not be interpreted to broaden the scope of its financial assistance, in accordance with *Commissioners v Doorley* [1933] I.R. 750.

35. The Commissioner observes that section 28B(11) of the EMPI Act 2020 provides that if an employer was not entitled to payments under the EWSS, such payments shall be refunded to the Respondent. Section 28B(12) provides that amounts to be refunded shall be treated as income tax due. Section 28B(14A) provides for a right of appeal against an assessment to such a tax, while section 28B(19) provides that the administration of section 28B is under the care and management of the Respondent. It is therefore clear to the Commissioner that the EMPI Act 2020 treats the recovery of payments of EWSS as an assessment to tax.

36. The Commissioner is satisfied that the appropriate approach to interpreting the EMPI Act 2020 can be found in well-settled principles of statutory interpretation as set out by McDonald J in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*"). Those principles are expressly stated to apply to "*any statutory provision*" and contain specific points in relation to taxation statutes:

"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"."*

37. In adopting these principles of statutory interpretation, the Commissioner is fortified by the fact that when considering the EWSS in *Fire Safety Security Advantage Limited (formerly Superior Group Irl Limited) v The Revenue Commissioners* [2025] IEHC 78 ("*Fire Safety*"), Mulcahy J referred to the "helpful review of the principles" in *Perrigo* and also noted that in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43, the Supreme Court emphasised the primacy of the words used while explaining that even plain words should not be divorced from context.

38. Accordingly, the Commissioner is satisfied that the correct and prudent approach is to consider the parties' submissions on the EMPI Act 2020, including the Appellant's submission on the interpretation of the term "customer orders", with the above principles of statutory interpretation in mind.

Requirement to carry out rolling reviews

39. Section 28B(5) of the EMPI Act 2020 required participants in the EWSS to carry out a review of the business circumstances immediately upon the end of each month. If, on foot of this review, it was manifest that the anticipated decrease of at least 30% in either turnover or customer orders would not occur, the employer was obliged to immediately

remove him or herself from the scheme. This is confirmed by the Guidelines, which also confirmed that: "*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period*" and set out tables providing further details. The Guidelines also stated that: "*employers should retain their evidence/basis for entering and remaining in the scheme*".

40. In this appeal, the Respondent stated that the Appellant did not furnish rolling reviews to support eligibility for the EWSS during the periods July 2020 to June 2021. The Appellant submitted that it conducted the required reviews but did not provide contemporaneous evidence of such rolling reviews, contending that the absence of such evidence did not disentitle a taxpayer from EWSS if the oral evidence satisfies the Commissioner that rolling reviews were conducted.

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

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

42. As noted earlier, the Appellant was required to retain all records relating to the EWSS and undertook to do so. Furthermore, with the burden of proof on the Appellant in this appeal, the Commissioner would expect the Appellant to adduce documentary evidence of having met the requirement to conduct rolling reviews. The Commissioner considers that in forming this view, she is supported by the fact that when considering the EWSS, the High Court in *Fire Safety* stated that: "*the appellant was required to discharge the burden of proving that it was entitled to have received some or all of the subsidies it did. It, therefore, always "needed" to provide evidence which established that to be the case*".

43. When giving evidence, the witness stated that the Appellant had conducted rolling reviews as required all through Covid and "*had been doing that all along, the whole way through Covid*", and was surprised that the Appellant had not furnished them when requested. The witness also stated that he would have updated the monthly forecasts. Yet the Commissioner cannot accept that these assertions, of themselves, establish on the balance of probabilities that the required rolling reviews were conducted.

44. Consequently, the Commissioner finds as a material fact that the Appellant provided no documentary evidence of having conducted rolling reviews for the periods July 2020 to June 2021, as required by section 28B(5) of the EMPI Act 2020 and the Guidelines.

45. As the Commissioner has found that the Appellant provided no documentary evidence of having carried out rolling reviews for the periods July 2020 to June 2021 and as it was a requirement for participation in the EWSS that rolling reviews be carried out on a monthly basis, the Commissioner concludes that the Appellant has not established in this appeal that it met that requirement for entitlement to EWSS for all the relevant periods.

46. In those circumstances, the Commissioner is satisfied that the Respondent was correct to disentitle the Appellant from payments of EWSS for the periods July 2020 to June 2021.

Requirement to demonstrate reduction

47. In addition to the matter of rolling reviews, the Commissioner must consider whether the Appellant has satisfied the requirement to demonstrate a reduction of at least 30% in turnover or customer orders being received.

48. It is important to note that the question arising is not simply whether the Appellant's business was affected by the pandemic during the specified periods, but whether it met the criteria prescribed by legislation.

49. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders during a specified period compared to the appropriate corresponding period. In *Fire Safety* the High Court confirmed that it is the turnover or customer orders in the entirety of each period which must be compared.

50. In this case, the Appellant relied on its customer orders to claim eligibility for the EWSS. In correspondence between the Appellant and the Respondent between 2021 and 2022, as well as in its appeal submissions, the Appellant provided several figures in relation to its customer orders. As the figures relied upon by the Appellant differed slightly within its appeal submissions, at the hearing the Commissioner asked Counsel to confirm the Appellant's position on each of the specified periods. The Commissioner has therefore proceeded on the basis that the figures given by Counsel in response to the Commissioner's question represent the Appellant's position in this appeal.[5]

[5] Transcript, pages 197 – 202.

First Specified Period

51. The first specified period was from 1 July 2020 to 31 December 2020. Therefore, in accordance with section 28B(2)(a)(i)(I) of the EMPI Act 2020, the applicable corresponding period was 1 July 2019 to 31 December 2019.

52. The Appellant submitted that the figures to be compared in respect of the first specified period were €1,858,000, which represented customer orders crystallised into sales, with €4,520,000 in respect of the corresponding period, which represented the orders received. The figure of €4,520,000 was stated to derive from the Company's Letter and the witness's oral evidence.

53. [redacted] The Appellant submitted that the EMPI Act 2020 does not define the term "customer orders" and in cases of doubt, the criteria for eligibility for the EWSS should be construed liberally. Furthermore, the Appellant submitted that there must be a distinction between the terms "customer order" and "turnover" in section 28B of the EMPI Act 2020.

54. The Commissioner agrees with the Appellant's submission that the term "customer order" must be presumed to have a meaning other than "turnover", for the reason that this reflects the principle of statutory interpretation upheld in *Perrigo* that "*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*".

55. The Commissioner regards the ordinary and natural meaning of the phrase "customer order" as a request from a person who buys goods or services for something to be made or supplied. [redacted] The Commissioner is satisfied that the applicable principles of statutory interpretation require her to consider the ordinary meaning of the term "customer order" within, and not divorced from, its statutory context.

56. Turning then to the statutory context, section 28B(2)(a)(i)(I) of the EMPI Act 2020 requires the Appellant to demonstrate that by reason of Covid-19 and the disruption to commerce, the Appellant experienced or was anticipated to experience in the period from 1 July 2020 to 31 December 2020 at least a 30 per cent reduction in the customer orders being received, by reference to the same period in 2019.

57. It is pertinent to note that section 28B(2)(a)(i)(I)[6] does not refer to "forecast" or "expected" customer orders in the corresponding period. The Commissioner is satisfied from the wording and context of 28B(2/2B/2A)(a)(i)(I) that the employer was required to compare customer orders received in the corresponding period with the customer orders being received in the specified period. It was by doing so that the employer could ascertain whether a reduction of at least 30% would occur. Consequently, the Commissioner is satisfied that the legislation does not permit the Appellant to use "forecast" or "expected" customer orders for the corresponding period.

58. In fairness, the Commissioner did not understand the Appellant to dispute this analysis, bearing in mind that when Counsel asked: "*But in terms of comparing like with like, clearly one looks to see what orders took place actually in 2019 and one compares them then to the orders that were taking place in 2020, isn't that right?*", the witness stated "*Yes*".

59. Accordingly, the Commissioner is satisfied that in this appeal, the Appellant must demonstrate the customer orders which were received in the corresponding periods.

60. In oral submissions, the Appellant contended that it received customer orders of €4,520,000 in the corresponding period. Yet the Commissioner observes that in evidence, the witness referred to the figure of €4,520,000 as "*forecast orders*". When pressed on what he meant by "orders", he stated: *"what I was expecting to do*" and "*forward orders*". [redacted] The Company's Letter then referred to the "*fall off in these anticipated order levels*".

61. [redacted]

62. The Commissioner can appreciate as a general point that there may be a time gap between a customer order and the fulfilment of that customer order. [redacted]

[6] Also section 28B(2A)(a)(i)(I) of the EMPI Act 2020 and section 28B(2B)(a)(i)(I).

[redacted]

63. As to the Appellant's case that it did in fact receive customer orders in the amount of €4,520,000 in 2019, the Commissioner finds the evidence adduced to support this to be insufficient. [redacted] When asked how he knew it was worth €3,000,000 or €4,520,000, the witness said the Company would know what the contracts were worth. Yet the Company's letter was undated and unsigned and although the Appellant named the person he thought had written the letter, nobody from the Company attended the hearing of this appeal to speak to the Company's Letter, or to the customer orders received by the Appellant from the Company. Therefore, the Commissioner did not have the benefit of testimony from the Company on the customer orders which were received from the Company by the Appellant. For the avoidance of doubt, the Commissioner notes that no other customer of the Appellant attended to give evidence either.

64. For clarity, even had the Company or another customer of the Appellant attended the hearing, the Commissioner would expect to have been presented with documentation to corroborate the customer orders which were stated to have been received by the Appellant in the corresponding periods.

65. Conversely, when the witness was asked about purchase orders, invoices, or any documentary evidence to substantiate the Appellant's figures other than three invoices for April 2019, he said he thought the Appellant had furnished anything it was asked for. He confirmed that there was no formal contract between the Appellant and the Company, and no purchase orders of €3,000,000 for June or December 2019. [redacted]

66. At this juncture, it is apposite to reiterate that the Appellant was required to retain records to support its claim for the EWSS and the burden of proof is on the Appellant. When considering the EWSS in *Fire Safety*, the High Court confirmed that: "*the appellant was required to discharge the burden of proving that it was entitled to have received some or all of the subsidies it did. It, therefore, always "needed" to provide evidence which established that to be the case*". In this appeal, the Appellant did not deny that on registering for the EWSS, the Appellant undertook to retain all records relating to the EWSS, including the base of eligibility, for review by the Respondent.

67. Yet in the circumstances as outlined above, the Commissioner has found the Appellant's case, that it was entitled to the EWSS, to be insufficiently corroborated by documentary evidence. Accordingly, the Commissioner is not satisfied to conclude on the balance of probabilities that the Appellant received customer orders in the amount of €4,520,000 in the corresponding period.

68. The Appellant's Letter stated that the customer orders which the Appellant actually received for July to December 2019 were €2,165,696 and that the customer orders which it received for July to December 2020 were €1,858,639. The witness agreed with this in oral evidence. These figures do not show a decrease of at least 30% in the 2020 customer orders when compared with the 2019 customer orders. The Commissioner has found this to be a material fact.

69. As a result, the Commissioner finds that the Appellant did not demonstrate a reduction or anticipated reduction in customer orders of at least 30% in the first specified period by reference to the corresponding period.

Third Specified Period

70. The third specified period was from 1 January 2021 to 31 December 2021. Therefore, in accordance with section 28B(2B)(a)(i)(I) of the EMPI Act 2020, the applicable corresponding period was 1 January 2019 to 31 December 2019.

71. The Appellant submitted that the figures to be compared in respect of the third specified period were €5,362,275, which represented customer orders crystallised into sales, with €7,695,000, which represented the orders received, and pointed to the ERFs, as well as the Company's Letter and the Appellant's oral evidence.

72. Yet the Commissioner observes that in evidence, the witness referred to the figure of €7,695,000 as *"projected turnover for that year without Covid*". For the reasons set out in the Commissioner's consideration of the first specified period, the Commissioner cannot accept that "*projected turnover*" can be used as customer orders received in 2019. In cross-examination, the witness later said that the figure of €7,695,000 was actual orders in 2019. Even so, for the reasons set out in the Commissioner's consideration of the first specified period, the Commissioner finds the evidence on the customer orders which were stated to have been received in the corresponding period to be insufficient.

73. The Appellant's Letter showed that the customer orders which the Appellant received for January to December 2019 were €2,746,212 and that the customer orders which it received for January to December 2021 were €5,361,718. The witness agreed with this in oral evidence. These figures do not show a decrease of at least 30% in the 2021

customer orders when compared with the 2019 customer orders but instead show an increase. The Commissioner has found this to be a material fact.

74. As a result, the Commissioner finds that the Appellant did not demonstrate a reduction or anticipated reduction in customer orders of at least 30% in the third specified period by reference to the corresponding period.

75. In accordance with section 28B(2B) of the EMPI Act 2020, the Appellant's eligibility for April 2022 depended on its eligibility in the third specified period. Therefore the Commissioner finds that the Appellant was not entitled to EWSS for April 2022.

Second Specified Period

76. Turning now to the second specified period, a further question arises for consideration. Where a business commenced after 1 May 2019, for the period from 1 January 2021 to 30 June 2021, it was entitled to compare its turnover/customer orders against projected turnover/customer orders, under section 28B(2A)(a)(i)(III) of the EMPI Act 2020.

77. The Appellant contended that it was a new business which commenced operations after 1 May 2019 and was therefore entitled to compare its customer orders with projections for the second specified period. The Appellant submitted that the customer orders for the second specified period would have been in the amount of €4,351,697, as compared with customer orders in the amount of €2,094,605. This comparison was between orders that would have been fulfilled had it not been for Covid and orders crystallised into sales, in accordance with the Appellant's Letter and the oral evidence.

78. The Commissioner notes that section 28B(2A) of the EMPI Act 2020 refers to the "*commencement of the operation of the employer's business*". Furthermore, section 28B(2A) requires the employer to demonstrate the required reduction in accordance with guidelines published under subsection (20)(a), which in turn required the Respondent to publish guidelines on matters regarding the required reduction in section 28B. Therefore, the Commissioner considers it appropriate to interpret the phrase "*commencement of the operation of the employer's business*" in accordance with the Guidelines. Having examined the Guidelines, the Commissioner notes that in addressing the reduction in turnover or customer orders, the Guidelines refer to when a business "*commenced trade*".

79. [redacted]

80. However, the Commissioner has concluded that this was not a case in which one trade ceased and then another commenced after 1 May 2019. In reaching this conclusion, the Commissioner has had regard to the following factors.

81. [redacted]

82. [redacted] The Commissioner does not view these sales as equivalent to an "isolated transaction" of the kind described in *Tryka*, where a one-off purchase of joinery board from the prospective purchaser of a company was found to be "*of a sufficiently isolated character and sufficiently small amount*" so as not to indicate trading.

83. In addition, the Commissioner observes that the picture given by the Appellant was, at times, inconsistent. On the one hand, the Appellant submitted that in 2019 one trade ceased and then another commenced after 1 May 2019. On the other hand, [redacted] the witness maintained that it was not the Appellant's case that there was a complete cessation of a trade. [redacted]

84. [redacted]

[redacted]

85. [redacted]

86. The Commissioner does not consider that the case-law relied on by the Appellant supports its contention that the Appellant commenced a new trade [redacted] after 1 May 2019. The Commissioner finds that the activities undertaken by the Appellant before that date amounted to more than "preparatory activities".

87. In forming this view, the Commissioner has applied the principles outlined in *Mansell*. The Commissioner is cognisant that while Irish case-law is binding, English case-law has persuasive but not binding status. However, the Commissioner observes that the Irish High Court applied the *Mansell* principles in *O'Farrell* and therefore respectfully considers that it is permissible and appropriate to apply those principles.

88. In *Mansell*, the Special Commissioner stated: "*It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities - and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise.*"

89. [redacted]

90. Having regard to the Irish High Court judgment of *Buckley*, the Commissioner is mindful that no single factor is determinative of whether a person is engaged in a trade. However, the Commissioner is satisfied that when viewed as a whole, the evidence overall points towards the fact that on the balance of probabilities, the Appellant commenced trade [redacted] before 1 May 2019.

91. Additionally, the Commissioner finds it noteworthy that in separate correspondence on 10 July 2020 and 22 December 2021, the Appellant informed the Respondent that it had been trading since April 2019. When asked about the discrepancy between those statements and the Appellant's appeal submission, [redacted]. However, the Commissioner is not satisfied that this adequately explains the Appellant's previous statements to the Respondent in 2020 and 2021. The Commissioner considers that those statements accurately reflect that the Appellant commenced trade [redacted] before 1 May 2019, for the reasons given.

92. Consequently, the Commissioner has found it to be a material fact that the Appellant commenced the operation of its business before 1 May 2019. It therefore follows that the Commissioner is satisfied that the Appellant was not entitled to use the exception for businesses set up after 1 May 2019.

93. The Appellant's Letter stated that the orders which the Appellant received for July to December 2019 were €2,165,696 and that the orders which it received for July to December 2021 were €3,267,113, with which the witness agreed in evidence. These figures do not show a decrease of at least 30% in the 2021 customer orders when compared with the 2019 customer orders but instead show an increase. The Commissioner has found this to be a material fact.

94. Accordingly, the Commissioner finds that the Appellant did not demonstrate a reduction or anticipated reduction in customer orders of at least 30% in the specified periods by reference to the corresponding periods.

95. For the avoidance of doubt, even had the Commissioner accepted the Appellant's argument that it commenced business operations after 1 May 2019, the Commissioner would not have been satisfied to rely on the figures used by the Appellant as projections. As previously stated, the Appellant was required to retain records to support its claim for the EWSS and the burden of proof is on the Appellant to show entitlement to the EWSS. Accordingly, the Commissioner would have expected to have been provided with documentation to substantiate the projections used by the Appellant.

96. Given the above, the Commissioner finds that the Appellant was not entitled to the EWSS payments as it did not meet the statutory requirement to demonstrate a reduction or anticipated reduction in customer orders of at least 30%.

Conclusion

97. It follows from the above that the Commissioner determines that the Appellant was not entitled to receive the payments for the relevant periods under the EWSS.

98. The Commissioner appreciates that the Appellant will be disappointed with this outcome. Having heard from the witness and considered the submissions, the Commissioner understands the Appellant's position that its business was impacted by the pandemic. Furthermore, the Commissioner wishes to acknowledge the point made that the Appellant's staff were required to attend physically during the pandemic to deliver the Appellant's product. Nonetheless, the Commissioner is obliged to apply the statutory criteria. The Commissioner therefore restates that the question arising for the purposes of entitlement to the EWSS is not simply whether an employer's business was affected by the pandemic, but whether it met the criteria prescribed by legislation.

99. In conclusion, the Commissioner has determined that:

    99.1. The Appellant did not provide documentary evidence of having conducted rolling reviews in all of the relevant periods and failed to demonstrate for the periods July 2020 to June 2021 that it conducted rolling reviews as required under section 28B(5) of the EMPI Act 2020.

    99.2. The Appellant did not demonstrate a reduction or anticipated reduction in turnover of at least 30% in the specified periods by reference to the corresponding periods as required under sections 28B(2), (2A), and (2B) of the EMPI Act 2020.

    99.3. The Appellant was not entitled to receive the payments for the relevant periods under the EWSS.

Determination

100. For the reasons set out above, the Commissioner determines that the Appellant has not succeeded in showing that the Respondent was incorrect to raise the assessments for the relevant periods in the total amount of €313,400.00 and those assessments shall stand.

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

Notification

102. 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

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

Jo Kenny
Appeal Commissioner
12 June 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.