36TACD2023

**Between/**

[redacted] **AND** [redacted]

**trading as** [redacted]

**Appellant**

**-v-**

**THE REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

## *A. Introduction*

**1.** This matter comes before the Tax Appeals Commission by way of an appeal against a decision made by the Respondent on 3 February 2012 to refuse to allow the Appellant partnership to offset against its VAT liabilities overpayments of VAT made by the partnership during certain periods between September 2005 and April 2007.

## B. ***Factual background and history of the proceedings***

**2.** There is no material dispute between the parties in relation to the facts giving rise to this appeal.

**3.** The Appellant partnership was formed for the purposes of [redacted] and registered for VAT with effect from 1 October 2004. No written partnership agreement was entered into between the two partners. The application for registration was stated by the partnership's tax agent to be for the purposes of [redacted], and the Appellant waived its exemption from VAT on the [redacted].

**4.** The Appellant partnership did not file VAT returns after August 2005 and the Respondent requested the outstanding returns in March 2010. VAT returns for the periods from 1 March 2005 to 30 June 2011 were submitted on 10 October 2011.

**5.** Those VAT returns showed a liability to VAT on the part of the partnership of €25,598 in respect of VAT periods between July/August 2005 and June 2011.

**6.** The VAT returns also showed that the Appellant partnership had made overpayments of VAT during the VAT periods and in the amounts as follows:-

| | | |
|---|---|---|
| **2005** | Sept/Oct | € 1,439.73 |
| **2006** | Jan/Feb | € 134.98 |
| | May/Jun | € 7,577.74 |
| | Sept/Oct | €18,810.62 |
| | Nov/Dec | € 1,132.48 |

| | | |
|---|---|---|
| **2007** | Mar/Apr | € 1,397.21 |
| | Jul-Dec | € 4,006.62 |
| | **Total** | **€34,499.38** |

**7.** The Appellant's agent requested that the Appellant's overpayments of VAT be offset against its liabilities to VAT. By letter dated 3 February 2012, the Respondent refused this request, stating as follows:-

> *"Section 865 Taxes Consolidated* [sic] *Act sets out the procedure for making claims for refunds of tax. I am precluded by subsection 4 from making a refund of tax where the claim has not been made within 4 years from the end of the chargeable period to which the claim relates. This is a statutory provision.*
>
> *The claim for refund of VAT made in October 2011 that relates to the periods from September 2005 to April 2007 are outside the statutory time limit and cannot be refunded.*
>
> *Subsection 7 allows an appeal to be lodged with the Appeal Commissioner…"*

**8.** By letter to the Respondent dated 18 October 2012, the Appellant sought to appeal against the decision of 3 February 2012. The letter stated that the Appellant partnership wanted to bring a late appeal, which it said was necessitated by the serious illness of the precedent acting partner, which had resulted in his being unable to deal with his tax affairs.

**9.** The grounds of appeal were stated in the letter to be as follows:-

> *"The grounds for the appeal are that the Revenue Commissioners are not precluded from allowing an offset for the excess VAT paid by the client in the above periods against other VAT due by the same client. Section 99 VAT*

*Consolidation Act 2010 simply provides that an application for a refund must be made within four years of the end of the VAT period concerned. However, in this case no application for a refund was made. Rather an application was made to offset the VAT overpaid against VAT due for subsequent periods.*

*The provisions of section 865B Taxes Consolidation Act 1997 do not apply by virtue of Section 128(5) Finance Act 2012 which provides that Section 865B applies only:*

> *"as respect any tax … paid or remitted to the Revenue Commissioners or the Collector-General, as the case may be."*

*In this case the offset application is made in respect of tax paid to suppliers and not to tax paid by our client to the Revenue Commissioners or the Collector-General.*

*Furthermore, without prejudice to this we reserve the right to challenge the validity of the retrospective nature of Section 865B Taxes Consolidation Act 1997."*

**10.** By letter dated 1 February 2013, the Respondent acknowledged receipt of the Appellant's appeal. The letter stated that, because section 865B of the Taxes Consolidation Act 1997 as amended (hereinafter "**TCA 1997**") precluded the offset of tax where repayments are prohibited and referred to any tax paid or remitted to the Revenue Commissioners, and because VAT charged by a VAT-registered individual is so charged under the provisions of the VAT Act and is remitted to the Revenue Commissioners, the Respondent considered the grounds of the Appellant's appeal invalid.

**11.** On 8 February 2013, the Appellant's agent appealed against this refusal of the appeal to the Office of the Appeal Commissioners and on 2 April 2013, the Appeal Commissioners advised the Appellant in accordance with section 933(1)(d)(ii) of TCA 1997 that they had admitted the appeal and had listed the matter for hearing.

**12.** On 30 April 2013, the Appellant by its agent furnished written submissions to the Appeal Commissioners, which stated that the decision of the Respondent was being challenged on the following grounds:-

**(1)** No part of the sum of €34,499.39 was due by either member of the Appellant partnership and the Respondent was placed on full proof that the sums claimed or any part of them were due and owing by the members of the Appellant partnership;

**(2)** Without prejudice to the foregoing, the Respondent was not precluded from allowing an offset for the excess VAT paid by the Appellant partnership in the relevant periods against other VAT due by the partnership. Section 99 of the Value-Added Tax Consolidation Act 2010 (hereinafter "**VATCA 2010**") simply provided that an application for a refund must be made within four years of the end of the VAT period concerned. However, in this case no application for a refund was made, rather an application was made to offset the VAT overpaid against VAT due for subsequent periods;

**(3)** The provisions of section 865B of TCA 1997 do not apply by virtue of section 128(5) of the Finance Act 2012 which provides that section 865B applies only "*as respects any tax… paid or remitted to the Revenue Commissioners or the Collector General, as the case may be*";

**(4)** The offset application in this case was made in respect of tax paid to suppliers and not tax paid by the Appellant to the Revenue Commissioners or the Collector General;

**(5)** The Respondent, in refusing to allow an offset for the excess VAT paid by the Appellant in the relevant periods against other VAT due by the Appellant, was acting unreasonably, arbitrarily and with undue, unfair and/or excessive rigidity;

**(6)** The provisions of VATCA 2010 and the amendments thereto had no retrospective application to the situation of the Appellant in respect of the sums allegedly due by the Appellant to the Respondent;

**(7)** The Respondent had been unfairly and unjustly enriched by refusing to allow an offset for the excess VAT paid by the Appellant in the relevant periods against other VAT due by the Appellant;

**(8)** The legislation under and by virtue of which the Respondent had refused to allow an offset for the excess VAT and/or the manner in which the Respondent had sought to apply the said legislation to the Appellant was contrary to the provision of the European Convention on Human Rights and the various Protocols thereto, including but not limited to Article 1 of the First Protocol to the said Convention;

**(9)** The legislation under and by virtue of which the Respondent had refused to allow an offset for the excess VAT and/or the manner in which the Respondent had sought to apply the said legislation to the Appellant breached the provisions of the European Convention on Human Rights and the various Protocols thereto and/or was incompatible with the provisions of the European Convention on Human Rights and the various Protocols thereto;

**(10)** The Respondent, in refusing to allow an offset for the excess VAT paid by the Appellant against other VAT due by the Appellant, had acted in breach of trust and/or unconscionably;

**(11)** The Respondent, in refusing to allow an offset for the excess VAT paid by the Appellant against other VAT due by the Appellant, had acted unfairly and inequitably;

**(12)** The Respondent, in refusing to allow an offset for the excess VAT paid by the Appellant against other VAT due by the Appellant, had failed to afford the Appellant a fair trial in accordance with the provisions of Article 6 of the European Convention on Human Rights and the various Protocols thereto;

**(13)** Without prejudice to the foregoing, the Appellant reserved the right to challenge the validity and compatibility of TCA 1997 and, in particular, section 865B thereof and its retrospective nature, as applied to the Appellant and generally, with the Constitution of Ireland;

**(14)** Without prejudice to the foregoing, the Appellant reserve the right to challenge the validity and compatibility of VATCA 2010, as applied to the Appellant and generally, with the Constitution of Ireland; and,

**(15)** The Respondent, in refusing to allow an offset for the excess VAT paid by the Appellant against other VAT due by the Appellant, had acted negligently, in breach of duty, in breach of statutory duty and/or in breach of the Appellant's natural and Constitutional rights.

**13.** Written submissions were also furnished on behalf of the Respondent on 30 April 2013. Those submission stated that the VAT3 Forms recording overpayments of VAT for the VAT periods from Sept/Oct 2005 to Mar/Apr 2007 inclusive were submitted on 10 October 2011, and therefore the Appellant's claim for repayment in respect of those periods was made outside the four-year time limit for repayments.

**14.** The Respondent further submitted that section 865B applies and deals with the offset of tax where repayment is prohibited. It applies in respect of any tax (within the

meaning of section 865B) paid or remitted to the Revenue Commissioners or the Collector General whether before, on or after the passing of the Finance Act 2012 (31 March 2012). Subsection (2) specifies that the section applies to "*tax*", the repayment of which cannot be made to a person under section 99 of VATCA 2010.

**15.** The Respondent further submitted that section 865B(1) refers to "*tax*" as including VAT. It also included, but importantly was not specifically limited to, "*any sum required to be deducted or withheld by any person and paid or remitted to the Revenue Commissioners or the Collector General.*" VAT charged by a VAT-registered individual was so charged under the provisions of the VAT Act and was remitted to the Revenue Commissioners. VAT was specifically included as coming within the definition of "*tax*" and therefore comes within the provisions of section 865 B.

**16.** The Respondent further submitted that section 865B(4) allows for an exception to the general rule that no offset is permissible where repayment is not permitted; an offset of tax would be allowed against any tax due and payable in respect of a relevant period which had arisen from action taken by Revenue at a time that was four years or more after the end of the relevant period. In accordance with this provision, the Respondent was prepared to allow an offset of €1,440 in respect of 2005, an offset of €790 in respect of 2006 and an offset of €1,397 in respect of 2007.

**17.** Following a hearing before the Appeal Commissioner, the Appellant was afforded an opportunity to furnish further grounds of appeal, which it did on 20 February 2014. The additional grounds of appeal submitted on behalf of the Appellant were as follows:-

**(1)** At the time (7 October 2011) that the Appellant applied for a refund/offset of VAT paid by the Appellant during the periods from 1 July 2005 to 30 June 2011, the Finance Act 2012 (and, in particular, section 128 of the said Act which inserted section 865B of TCA 1997) had not been enacted and,

accordingly, there was no statutory provision to preclude the Respondent from allowing an offset of VAT paid by the Appellants during periods outside the four-year period within which a refund of VAT could be made under section 99 of VATCA 2010 as amended; and,

**(2)** Further, and without prejudice to the foregoing, insofar as section 865B of TCA 1997, as inserted by section 128 of the Finance Act 2012, purports to operate retroactively, same is unconstitutional, contrary to European law, in breach of Article 1 of the First Protocol to the European Convention on Human Rights and contrary to natural justice in that it is an unwarranted, unjustified, disproportionate and/or unreasonable interference with the Appellant's property rights by virtue, *inter alia*, of its purporting to retroactively deprive the Appellant of a right to offset VAT paid by the Appellant during periods outside the four-year period within which a refund of VAT could be made without providing for any or any adequate transitional period within which the Appellant could effectively realise and vindicate their said right.

**18.** Following a further hearing before the Appeal Commissioner, the Respondent was afforded an opportunity to make additional written submissions in relation to the effective date of section 865B and the apparent retrospective effect of section 865B(2). The Respondent duly furnished additional written submissions dated 3 June 2014.

**19.** The Respondent's further written submissions stated that since the enactment of the Finance Act 2000, section 1006A of TCA 1997 and the Regulations enacted thereunder (S.I. 399/2001) provided for offset between taxes in cases where a taxpayer was due a repayment. Section 1006A provided that where a taxpayer was due a repayment, the Revenue Commissioners could offset the repayment against a

customer's outstanding liability under other tax heads if necessary, or withhold making of the repayment where there were outstanding returns.

**20.** The submissions further observed that section 1006A was repealed by section 97 and Schedule 4, paragraph 2 of the Finance (No. 2) Act 2008. Paragraph 6 of Schedule 4 provided that the Schedule came into effect "*and applies as respects any tax that becomes due and payable on or after 1 March 2009.*" The submissions pointed out that it was notable that the legislation did not repeal section 1006A in respect of repayment claims made on or after 1 March 2009, but instead stated that the repeal would be effective by reference to the date upon which the relevant tax became due and payable.

**21.** The submissions stated that the effect of the repeal of section 1006A was therefore as follows:-

**(i)** A repayment claim could be made pursuant to section 1006A but only in respect of tax due and payable prior to 1 March 2009;

**(ii)** An offset could be operated in relation to a taxpayer's other tax liabilities but only where the liabilities to be offset against the repayment related to tax falling due and payable prior to 1 March 2009;

**(iii)** Section 1006A was treated as repealed in respect of a repayment claim where the tax the subject of the repayment claim fell due and owing after 1 March 2009; and,

**(iv)** Section 1006A was treated as repealed in respect of liabilities to be offset against a repayment claim where those liabilities related to tax that became due and payable on or after 1 March 2009.

**22.** It was submitted on behalf of the Respondent that, in the instant appeal, the repayment claim filed on 10 October 2011 related to taxable periods prior to 1 March

2009. As a result, the repayment claim was available for offset pursuant to section 1006A but only in respect of tax liabilities falling due and payable prior to 1 March 2009.

**23.** The Respondent's submissions further stated that, pursuant to section 865B(2), where, as in the instant appeal, a refund is prohibited by section 99 of VATCA 2010 on the basis that the four year time limit for claiming refunds has elapsed, the Respondent is prohibited from operating an offset in respect of the repayment claim which would be out of time if it were requested as a refund. They further pointed out that section 865B applies to any tax paid or remitted to the Revenue Commissioners or the Collector General, as the case may be, whether before, on or after the passing of the Finance Act 2012, *i.e.* 31 March 2012.

**24.** The Respondent submitted that if the Appellant was seeking to offset its repayment claim against tax liabilities falling due and payable post-1 March 2009, then there was no offset available pursuant to section 1006A as it had already been repealed by the Finance (No. 2) Act 2008. As a result, the enactment of section 865B(5) could not be said to adversely affect the Appellant in that, as it would not have had a right of offset prior to the enactment of section 865B(2), the enactment of the section did not deprive them of any right. The Respondent submitted that, in real terms, section 865B(2) recognised the right of offset but legislated to render it consistent with the refund entitlement by confining it to the limitation period in respect of refunds contained in section 99 of VATCA 2010.

**25.** The submissions further argued that if the Appellant was seeking to offset its repayment claim against tax liabilities falling due and payable prior to 1 March 2009, then there was an offset available pursuant to section 1006A. The effect of section 865B(5) was not to take from the Appellant its entitlement to this offset, but instead

to confine its entitlement to an offset to the limitation period which applied in respect of refunds pursuant to section 99 of VATCA 2010. Furthermore, section 865B(2) confined the offset entitlement to the four year limitation period "*notwithstanding any other enactment or rule of law*" and, as a result, the section had primacy over that aspect of section 1006A which predated its repeal.

**26.** The submissions asserted that it was fair and reasonable that the legislature would strive to achieve consistency between its refund/repayment regime and its offset regime. The offset regime was not removed or repealed but was instead merely altered to bring it into line with the refund/repayment regime. As a result, the legislation was proportionate and reasonable and was not unduly harsh or burdensome on the taxpayer.

**27.** Turning to constitutionality, the Respondent's further submissions noted that while section 865B was enacted on 31 March 2012, it limited the entitlement to offset in respect of repayment claims to a four-year period "*after the end of the taxable period to which it relates*", and submitted that this limitation could be applied to repayment claims made prior to the enactment of the section. The submissions implicitly accepted that section 865B purported to operate retrospectively.

**28.** The submissions went on to state that, while retrospective tax legislation is generally regarded as unsatisfactory, there was no doubt but that retrospective tax legislation could be lawful. The constitutionality of a statute was qualified by various factors including, *inter alia*, whether the statute constituted an "*unjust attack*" on property rights, and whether the legislation in question could be said to be proportional. The Respondent pointed out that Article 15.5.1 of the Constitution did not impose a general prohibition on retrospective legislation.

**29.** Having referred to Article 40.3.2 and Article 43, the submissions stated that while taxation is considered an interference with property rights, legislative enactment will not be unconstitutional unless it constitutes an unjust attack on property rights. The Respondent argued that section 865B(2) did not remove or repeal the right of the taxpayer to claim an offset but rather brought the offset entitlement into line with the four year limitation period relating to refunds. In doing so, it ensured legal certainty, consistency and fairness for taxpayers, and the Respondent submitted that this was not unconstitutional. The Respondent further submitted that the enactment of section 865B passed the proportionality test.

**30.** The Office of the Appeal Commissioners next sought additional submissions from the Appellant and these were furnished on 28 August 2015. The Appellant stated that section 1006A did not have any application to the Appellant's situation or to the issue the subject matter of the appeal. Instead, it simply provided a mechanism by which the Respondent could, where a repayment was due to a taxpayer in respect of a claim or overpayment, either offset the amount of the claim or repayment against a liability due under the Tax Acts or, alternatively, withhold the making of the repayment until such time as outstanding tax returns had been delivered. The Appellant pointed out that the Respondent had not at any time served upon the Appellant a notice pursuant to section 1006A(2A).

**31.** The Appellant further submitted that the Respondent's submissions failed to address a key issue identified by the Appellant, namely that at the date that an application was made by the Appellant for an offset, being 7 October 2011, section 128 of the Finance Act 2012 had not yet been enacted and therefore section 865B had not been inserted into TCA 1997. Accordingly, at the time that the request for an offset was initially made by the Appellant, there was nothing to prohibit the Respondent from granting such offset.

**32.** The Appellant accepted that section 128(5) of the Finance Act 2012 provided that section 865B would apply as respects any tax paid or remitted to the Revenue Commissioners or the Collector General, as the case might be, whether before, on or after 31 March 2012. It submitted, however, that this did not and could not in law operate to retrospectively invalidate a pre-existing request for an offset of an overpayment of VAT made prior to the enactment of section 865B. Instead, in accordance with the canons of statutory interpretation and the presumption of constitutionality which attached to section 865B, section 128(5) could only refer to an application for an offset made after 31 March 2012, whether the tax the subject matter of the offset claim was paid or remitted before, on or after 31 March 2012.

**33.** The Appellant further submitted that to interpret section 128(5) in any other manner would be contrary to the principle of "*double construction*", which provides that where there are two possible interpretations of a specific legislative provision, one of which would result in the provision bearing a constitutional meaning and the other of which would result in it bearing in unconstitutional meaning, the legislative provision in question must be interpreted in a manner which would result in it bearing a constitutional meaning. The Appellant referred me to ***Madden –v- Minister for the Marine*** **[1997] 1 ILRM 136** in this regard.

**34.** The Appellant submitted that it would be patently contrary to the constitutional protections of a citizen's property rights contained in Article 40.3.2 and Article 43 and contrary to natural justice if section 865B was interpreted so as to retroactively invalidate a prior, validly-made claim for an offset of an overpayment of taxes which the Respondent had, for whatever reason, failed, refused or neglected to process as of the date of the enactment of section 128 of the Finance Act 2012.

**35.** In conclusion, the Appellant submitted that it accepted that, pursuant to section 99 of VATCA 2010, an application for a refund of VAT must be made within four years after the end of the taxable period to which the refund relates. Accordingly, at the time that the Appellant sought a refund/offset of VAT on 7 October 2011, the Appellant would not have been entitled to a refund of VAT in respect of any taxable period which had ended more than four years prior to the date of the application for the refund.

**36.** It submitted that, notwithstanding this, at the date on which the Appellant's application for an offset was made, there was no prohibition or preclusion on the Respondent allowing an offset of the VAT paid by the Appellant in respect of taxable periods more than four years prior to the date of the application for such an offset. While such a prohibition did come into being with the enactment of the Finance Act 2012 on 31 March 2012, this was not the case at the time that the Appellant made an application for an offset of VAT on 7 October 2011.

**37.** The Office of the Appeal Commissioners then sought further submissions from the Respondent and additional submissions dated 19 July 2016 were duly furnished.

**38.** Those submissions stated that the statutory right to claim a refund of VAT was set out in section 99 of VATCA 2010 and that the operative provision for a refund of tax was contained in section 99(1). There was a limiting provision in section 99(4), which stated that a claim for a refund could only be made within four years after the end of the taxable period to which it related. The submissions also pointed out that section 99(6) provides that the Revenue Commissioners "*shall not refund any amount of tax except as provided for in this Act or any order or regulations made under this Act.*"

**39.** The submissions noted that the Appellant had conceded that it was out of time to claim a refund of VAT pursuant to section 99 and instead sought to advance its claim for a refund of VAT on the basis of the proposition that there was no statutory

provision to preclude the Respondent from allowing an offset of VAT out of time. The Respondent submitted that this proposition was misconceived.

**40.** The Respondent submitted that, simply put, the right to a refund of VAT is contained in section 99 and that right is subject to a temporal limitation in that it must be exercised within the statutory time limit of four years. There was nothing unusual in this – it mirrored the general approach to refunds and payments in the administration of tax in what was described as a "*balanced scheme*" in ***Revenue Commissioners –v- Droog*** **[2011] IEHC 142**. The Appellant had conceded that it was out of time to claim a refund and that, the Respondent submitted, should be the end of the matter. In addition, there was a clear, express and unequivocal prohibition on any refund of tax other than as provided for by the 2010 Act. The Respondent submitted that the Appellant was out of time to claim a refund of VAT and, as such, the manner in which any refund of VAT might have been dealt with had the claim been in time (whether that be by way of repayment or by way of offset) simply did not arise in this appeal.

**41.** Following the establishment of the Tax Appeals Commission on 16 March 2016, a decision was made that, having regard to the fact that the Appeal Commissioner who had presided over the previous hearings in the appeal had vacated his office prior to a determination being made, the appeal would be reheard by a new Appeal Commissioner in accordance with the provisions of section 28 of the Finance (Tax Appeals) Act 2015.

**42.** Subsequent to the commencement of the appeal, but prior to the re-hearing of the appeal before me, the first-named member of the Appellant partnership died on [redacted] 2016.

## *C. Re-hearing of the appeal and subsequent submissions*

**43.** At the hearing before me, Counsel for the Appellant stated that the Appellant's position was as set forth in the Appellant's written submission dated 28 August 2015. Counsel submitted that the essential argument put forward by the Appellant was contained in the first additional ground of appeal advanced by the Appellant on 20 February 2014 (quoted at paragraph 17(1) above). In essence, the Appellant submitted that at the time that the Appellant requested an offset in October 2011, there was no reason in law or in fact why the Respondent could not have allowed that offset, and the enactment some six months later of the Finance Act 2012, inserting section 865B into TCA 1997 did not alter this position.

**44.** Counsel submitted that the Respondent had failed to show that the enactment of section 865B could or did operate with retrospective effect. The Appellant accepted that section 99 of VATCA 2010 provided that an application for a refund of VAT had to be made within four years after the end of the taxable period to which the application related, but submitted that the legislature had only harmonised the position as between tax refunds and offsets when it enacted section 865B. Counsel submitted that the enactment of section 865B was itself evidence of the fact that additional legislation was required in order to bring offset provisions into line with the provisions governing refunds or repayments.

**45.** Counsel further submitted that the Respondent's reliance upon section 1006A was effectively a "*red herring*"; that section, it was submitted, simply empowered the Respondent to refuse to process a refund or a repayment were there were outstanding tax returns and further provided that the Respondent could offset monies against other tax liabilities. It did not in any way preclude the Respondent from offsetting the overpayments of VAT in the instant appeal.

**46.** Counsel further submitted that the only proper and constitutional interpretation of section 128(5) of the Finance Act 2012 was that section 865B would only affect requests for an offset of a refund or repayment of tax made after 31 March 2012, irrespective of when that tax had been paid. The legislation could not operate to retrospectively invalidate a pre-existing, validly made request for an offset made prior to 31 March 2012.

**47.** Counsel further submitted that the practice of the Respondent prior to 31 March 2012 had been to allow overpayments to be offset against liabilities even if the right to repayment had been time-barred, and submitted that this was consistent with the Respondent's approach to "no loss of revenue" applications, as detailed in paragraph 3.5 of the *Code of Practice for Revenue Audit and other Compliance Interventions* then in force.

**48.** In response, Counsel for the Respondent submitted that there were two issues before me. Firstly, I had to decide whether there was a valid appeal before me and then, if I was satisfied that a valid appeal existed, I would secondly have to decide whether the Appellant had the right to an offset in the particular circumstances of this appeal.

**49.** Counsel submitted that, in considering the substantive aspect of the appeal, I should have regard to the fact that the issues between the parties only arose in the first instance because of default on the part of the Appellant. The Appellant had failed to make VAT returns in a timely manner, and was therefore out of time to claim the repayment of overpaid VAT. It was for that reason alone that the Appellant was now seeking to establish an entitlement to an offset.

**50.** Counsel for the Respondent further submitted that a multiplicity of arguments had been put forward by the Appellant, including assertions that the Respondent had

acted unreasonably, unfairly, contrary to the Constitution, in breach of fair procedures, in breach of the European Convention on Human Rights, inequitably and unconscionably. Counsel submitted that many of these issues fell outside the jurisdiction of the Tax Appeals Commission and could not properly be considered by me.

**51.** Counsel submitted that the key provision for consideration in the appeal was section 99 of VATCA 2010. Subsection (4) provided that a claim for a refund under that Act could only be made within four years after the end of the taxable period to which it related. Furthermore, subsection (6) provided that the Respondent could not refund any amount of tax except as provided for in the Act or any order or regulations made thereunder. Counsel submitted that it was important to note that subsection (6) was an absolute prohibition on a taxpayer obtaining a refund of VAT by any means other than in accordance with the 2010 Act or secondary legislation made thereunder.

**52.** Counsel submitted that the legislation provided a general right to a refund where tax had been overpaid, but that this was subject to a temporal limit. This temporal limit was similar to that contained in the Income Tax Acts. In essence, a taxpayer had four years to put their affairs in order and the Respondent had four years to audit a taxpayer; this had been described in the ***Droog*** case as a balanced scheme, and there was a similar balance in the VAT legislation.

**53.** Counsel submitted that the Appellant had premised its case on it having made a proper and lawful application for an offset prior to 31 March 2012, but it had failed to show where that proper and lawful application resided, or what part of the tax code allowed for such an application to be made. Counsel submitted that the legislation did not confer any right to an offset upon taxpayers. Instead, the legislative provisions referring to offset were clearly a power given to the Respondent to ensure the correct collection and recovery of tax. Counsel submitted that this view was reinforced by

the fact that section 1006A and its successor, section 960H, were located in the 'Collection and Recovery' provisions of TCA 1997, and also referred me in this regard to an extract from *Maguire : Irish Income Tax* (2017 ed.) at paragraph 2.617.

**54.** Counsel submitted that a taxpayer did have a right under the legislation to apply for a refund or a repayment; an offset was simply one mechanism by which a refund or repayment could be given to a taxpayer that met the requirements of the legislation. Put another way, a right to a refund or repayment had to exist before a right of offset could arise.

**55.** Counsel submitted that the Respondent formerly did not have the right, absent a request from a taxpayer, to simply take one tax liability and offset it against another in the absence of a legislative power to do so; that was why the legislature had enacted section 1006A.

**56.** In relation to section 865B, Counsel submitted that the enactment of this section merely confirmed the existing law at the time of the enactment, and did not change the fundamental position, save to say that an exception to the four-year rule could be made where tax became due and payable by reason of an assessment made or amended, or some other action taken by Revenue, at a time more than four years after the relevant period. The Respondent had accepted that this exception, contained in subsections 865B(3) and (4), did apply to a limited extent in the instant appeal (as detailed in paragraph 16 *supra***)** and had allowed the Appellant the benefit of same.

**57.** In support of her submission in this regard, Counsel referred me to the FINAK Commentary on the enactment of section 128 of the Finance Act 2012, which stated:-

> *"Section 865(4) TCA97 provides that a claim for a payment of taxes must be made within 4 years of the end of the chargeable period to which the claim*

*relates. Thus a repayment of corporation tax for the year ended 31 December 2008 must be claimed by 31 December 2012.*

*It is understood that some taxpayers have argued that the 4 year time limit in Section 865 only applies to repayment claims and that it was possible to seek the offset of an overpayment for a period more than 4 years old against a more recent liability to tax, thus obtaining the benefit of the overpayment. The technical basis for this is unclear. Revenue in general did not accept this approach but some tax practitioners have reported instances of the offset of overpayments being facilitated. Section 128 now clarifies the treatment."*

**58.** Counsel submitted that section 865B was, to a large degree, not relevant to the facts of the instant appeal because the provisions of section 99 of VATCA 2010 meant that the Appellant had no right to a repayment and, without the right to a repayment or refund, there could simply be no right to offset.

**59.** Counsel further submitted that it was highly implausible that the legislature would have enacted a piece of legislation which, as contended for by the Appellant, operated to impose a charge or obligation on a taxpayer which was retrospective in nature; this, she submitted, was supportive of the Respondent's suggested interpretation of the legislation. She further submitted that it would be inappropriate for me to accept that the enactment of section 865B was in itself evidence that there had previously been no prohibition on offsetting overpaid taxes where the right to repayment was time-barred, and referred me in this regard to the decision in ***Cronin –v- Cork and County Property Company Ltd*** **[1986] IR 559**.

**60.** Counsel further submitted that the Appellant's interpretation of the legislation would result in the anomalous result that a taxpayer who had overpaid taxes, but could not

claim repayment of same because of the four-year time limit, and who had an outstanding liability to tax would be in a better position than an equivalent taxpayer who had no outstanding tax liabilities. The former could, prior to 31 March 2012, obtain the benefit of the overpayment by exercising a right of offset, while the latter could not. Counsel submitted that this could not have been the intention of the legislature.

**61.** At the conclusion of the re-hearing, I requested additional submissions from the parties in relation to two additional issues, namely:-

**(i)** Whether the death of the first-named partner prior to the re-hearing impacted upon my jurisdiction to determine the appeal; and,

**(ii)** Whether the decision of the High Court in ***Kanwell Developments –v- Revenue Commissioners*** **[2008] IEHC 380**, which had not been referred to by the parties, was of relevance to the issues in the appeal.

**62.** Further written submissions were submitted on behalf of the Appellant on 5 June 2018. In relation to the death of the first-named partner, it was submitted that absent an express provision in the Taxes Consolidation Act 1997, there was no reason why I should not continue to determine the appeal. It was further submitted, without prejudice to the foregoing, that it was an express term of the partnership agreement that the partnership would subsist following the death of either partner and that the deceased partner's interest therein would pass to his lawful successor. The Appellant therefore submitted that section 33(1) of the Partnership Act 1890 was not applicable in the instant appeal.

**63.** In relation to ***Kanwell Developments***, the Appellant submitted that the Respondent had acknowledged at the rehearing of the appeal that the enactment of section 865B did not retrospectively preclude the Respondent from granting the offset sought by

the Appellant, but instead submitted that the lack of an express statutory provision authorising such an offset meant that it was precluded from allowing the offset requested by the Appellant.

**64.** The Appellant submitted that the ***Kanwell*** judgement was of central relevance to the issue to be determined in the appeal, and referred me in particular to the passage from the judgement of Hedigan J where he stated:-

> *"There is no statutory authority specifically providing for such an offsetting arrangement as was made herein. There is no statutory prohibition in place either in respect of such an arrangement.*
>
> *The plaintiff argued that because there is no statutory provision providing for a right to set off one taxpayer's repayment against another taxpayer's liabilities, the defendant is precluded from doing so. The defendant submits that there is no authority for this proposition. Their case is that no statutory power is or was necessary where the setoff is done at the request of the taxpayer to whom the repayment is due. The defendant's argument is that if the defendant owes money to a taxpayer and is requested by the taxpayer to pay the money to a third party, the defendant is (absent some statutory prohibition) entitled to do so.*
>
> *…*
>
> *I agree with the submission of the defendant that* [***Revenue & Customs Commissioners –v- Total Network SL*** **[2008] 2 W.L.R. 711**] *is in fact authority for their argument that the Revenue Commissioners could act herein as they did notwithstanding an absence of specific authority. On the evidence before this Court, such a form of offsetting has been used for many years and I see no reason to call it into question here.*
>
> *…*

*In short, the defendant argues that the offsets were made at the specific request of the plaintiff and that, as a result, the defendant was entitled to make those offsets and no statutory authority or mandate was required in order for the defendant to make these offsets. I agree with this submission."*

**65.** The Appellant submitted that the decision supported its argument that there was a long-standing custom and practice within Revenue of allowing overpayments of tax to be offset, notwithstanding the absence of an express statutory power permitting them to do so.

**66.** Additional submissions were received from the Respondent on 28 September 2018. In relation to the partnership issue, the Respondent put the Appellant on proof of the submission that the partnership agreement expressly provided that the partnership would subsist following the death of either partner, and reserved its position in this regard.

**67.** In relation to ***Kanwell***, the Respondent submitted that the decision in that case was clearly distinguishable from the facts of the instant appeal. The case concerned a valid VAT refund due to the plaintiff, whereas in the instant appeal the Appellant's entitlement to a refund was time-barred. ***Kanwell*** was concerned with the question of whether an overpayment of tax could properly be offset against the tax liabilities of someone other than the taxpayer, and did not consider whether there was an entitlement to an offset in general.

**68.** The Respondent submitted that Hedigan J in ***Kanwell*** was dealing with an offset as a mechanism to refund or repay a valid refund or repayment claim by a taxpayer. This was distinctly different from the Appellant's position, which appeared to be that there was a substantive right to repayment of VAT by way of an offset.

## *D. Relevant Legislation*

**69.** The provisions of section 99 of VATCA 2010 relevant to this appeal provide as follows:-

> *(1) Subject to subsections (2) and (3), where in relation to a return lodged under Chapter 3 of Part 9 or a claim made in accordance with regulations, it is shown to the satisfaction of the Revenue Commissioners that, as respects any taxable period, the amount of tax (if any) actually paid to the Collector-General in accordance with Chapter 3 of Part 9 together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8, the Commissioners shall refund the amount of the excess less any sums previously refunded under this subsection or repaid under Chapter 1 of Part 8 and may include in the amount refunded any interest which has been paid under section 114.*
>
> *…*
>
> *(4) A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates.*
>
> *…*
>
> *(6) The Revenue Commissioners shall not refund any matter tax except as provided for in this Act or any order or regulations made under this Act.*

**70.** Section 119(1) of the 2010 Act provides that any person aggrieved by a determination of the Revenue Commissioners in relation to, *inter alia*, a claim for repayment of tax, may appeal the determination to the Appeal Commissioners.

**71.** The relevant provisions of section 865B of TCA 1997, as inserted by section 128(1)(d) of the Finance Act 2012 with effect from 31 March 2012, provide as follows:-

*(1) In this section –*

*"Acts" means –*

*…*

*(g) the Value-Added Tax Consolidation Act 2010 and the enactments amending or extending that Act,*

*…*

*"relevant period", in relation to a repayment, means –*

*…*

*(f) in the case of value-added tax, the year of assessment or accounting period, as the case may be, within which falls the taxable period in respect of which the repayment arises,*

*…*

*"tax" means any … value-added tax … and includes –*

*…*

*(d) any sum required to be deducted or withheld by any person and paid or remitted to the Revenue Commissioners or the Collector-General, as the case may be,*

*…*

*"taxable period" has the same meaning as in section 2 of the Value-Added Tax Consolidation Act 2010.*

*(2) Subject to subsections (3) and (4), where a repayment of any tax cannot be made to a person by virtue of the operation of –*

*…*

*(c) section 99 of the Value-Added Tax Consolidation Act 2010,*

*…*

*then, notwithstanding any other enactment or rule of law, that repayment shall not be set against any other amount of tax due and payable by, or from, that person.*

*(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.*

*(4) (a) The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.*

*(b) The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period.*

*(5) No tax shall be set against any other amount of tax except as is provided for by the Acts.*

**72.** Prior to its repeal, section 1006A of TCA 1997 was headed "*Offset between taxes"* and the relevant provisions thereof provided as follows:-

*(1) In this section –*

*"Acts" mean –*

*…*

*(c) the Value-Added Tax Act, 1972, and the enactments amending or extending that Act,*

*…*

*"claim" means a claim that gives rise to either or both a repayment of tax and a payment of interest payable in respect of such a repayment under any of the Acts and includes part of such a claim;*

*…*

*"overpayment" means a payment or remittance under the Acts (including part of such a payment remittance) which is in excess of the amount of the liability against which it is credited;*

*…*

*(2) Notwithstanding any other provision of the Acts, where the Revenue Commissioners are satisfied that a person has not complied with the obligations imposed on the person by the Acts, in relation to either or both –*

*(a) the payment of a liability required to be paid, and*

*(b) the delivery of returns required to be made,*

*they may, in a case where a repayment is due to the person in respect of a claim or overpayment –*

*(i) where paragraph (a) applies, or where paragraphs (a) and (b) apply, instead of making the repayment set the amount of the claim or overpayment against any liability due under the Acts, and*

*(ii) where paragraph (b) only applies, withhold making the repayment until such time as the returns required to be delivered have been delivered.*

*(2A) Where the Revenue Commissioners have set or withheld a repayment by virtue of subsection (2), they shall give notice in writing to that effect to the person concerned and, where subsection (2)(ii) applies, interest shall not be*

*payable under any provision of the Acts from the date of such notice in respect of any repayment so withheld…*

**73.** Provisions similar to those contained in section 1006A are now found in section 960H.

## *E. Analysis and Findings*

**74.** The first issue which requires to be considered in deciding this appeal is the preliminary question of whether or not there is a valid appeal before me. The Respondent submits that there is not, and that I should exercise my jurisdiction pursuant to section 949N of TCA 1997 to refuse to accept the appeal on the grounds that it is not valid and/or is without substance or foundation.

**75.** I believe that this question has, however, already been answered by my predecessor. In my view, the letter from the Office of the Appeal Commissioners dated 2 April 2013 makes it clear that the appeal had been accepted. While the letter could perhaps have been more happily worded, it does make express reference to section 933(1)(d)(ii) of TCA 1997, which applied where the Appeal Commissioners had decided to allow an application for an appeal. Even without the benefit of this contemporaneous record of the decision of the Appeal Commissioners to admit the appeal, it is apparent from the manner in which the proceedings thereafter progressed before my predecessor that he understood there was a valid appeal before him and acted accordingly.

**76.** I am therefore satisfied that there is a valid appeal before me and that I may proceed to determine same accordingly.

**77.** The second issue which requires consideration is whether the death of the first-named partner in the Appellant partnership subsequent to the commencement of the appeal but prior to its determination impacted upon my ability to continue with the appeal and determine same.

**78.** Section 33(1) of the Partnership Act, 1890 provides that, subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

**79.** It was submitted on behalf of the Appellant that there was an express agreement between the partners that the partnership would subsist notwithstanding the death of any one of them; the Respondent said that it would require formal proof of such agreement and reserved its position in this regard.

**80.** I am satisfied that it is not necessary to establish that the partners made the agreement contended for by the Appellant. Even if there was no such agreement, section 38 of the 1890 Act provides that after the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution. Having regard to the decision of the High Court in ***Leech –v- Stokes Brothers & Pim*** **[1937] IR 787**, I am satisfied that the second-named partner had, as the last surviving partner, the right under law to continue this appeal even if the partnership had been dissolved on the death of his partner.

**81.** I will therefore proceed to decide the substantive question in this appeal, namely whether or not the Appellant partnership had the right as of October 2011 to require

the VAT it had overpaid to be offset by the Respondent against its VAT liabilities, notwithstanding that the time during which it could have claimed a refund of the overpaid VAT had elapsed.

**82.** While the Respondent did in its submissions dated 3 June 2014 make reference to and place some emphasis upon section 1006A of TCA 1997, I am satisfied that that section is not relevant to the core issue in this appeal. The aforesaid submissions of the Respondent referred to an offset being "*available*" under section 1006A, and this could reasonably have been read as meaning 'available to the Appellant'.

**83.** However, I am satisfied that the provisions of section 1006A, and of its replacement, section 960H, do not operate to confer any right or entitlement on a taxpayer. Instead, they conferred a power upon the Respondent. That power, exercisable when a repayment was due to a taxpayer because of a claim or an overpayment, enabled the Respondent to set off the amount of the repayment against a liability of the taxpayer under the Acts, instead of making the repayment to which the taxpayer would otherwise be entitled.

**84.** Prior to the enactment of section 1006A, the Revenue Commissioners had for many years accepted customer requests to use a tax repayment for one period to meet a separate tax liability in another period or another taxhead. The legislation was "*simply intended to build on the existing system by providing a more consolidated offsetting operation in the context of Integrated Tax Processing, while at the same time ensuring a more effective response to defaulting taxpayers*" (see Lyons, '*Offsetting or Withholding of Repayments of Overpayments*', (2001) 6 Irish Tax Review 605, cited by Hedigan J in ***Kanwell***).

**85.** This interpretation is, in my view, consistent with the fact that the legislative provisions were inserted by the legislature in Part 42 of TCA1997, which governed

the collection and recovery of tax by the Revenue Commissioners. It is also consistent with the brief commentary on section 960H found in *Maguire : Irish Income Tax*, referred to in paragraph 53 above.

**86.** As section 1006A and section 960H operated to confer a power on the Respondent rather than a right on the Appellant, they do not assist the Appellant in this appeal and do not require further consideration.

**87.** I therefore turn to consider the provisions of section 865B. It was common case between the parties that if the Appellant's request that the VAT it had overpaid be set off against its VAT liabilities had been made after 31 March 2012, section 865B would have precluded the Respondent from acceding to that request. However, the Appellant submitted that because the request was made before section 865B was inserted into TCA 1997, there was no statutory provision which prevented the offset being made by the Respondent, and the Respondent should have granted that request in accordance with its own custom and practice.

**88.** The Appellant's submission in this regard is premised on the basis that section 865B effected a substantive change in the law, and introduced for the first time a prohibition on offsetting a repayment if the right to claim that repayment was time-barred. It followed from this that the Appellant argued that section 865B, as a legislative provision that effected a substantive change in the law, could not apply with retrospective effect to claims for offset made prior to its enactment, notwithstanding the wording of section 128(5) of the Finance Act 2012, which provided that it would apply as respects any tax paid or remitted to the Revenue Commissioners or the Collector-General whether before, on or after the passing of this Act.

**89.** The Appellant made cogent and persuasive submissions as to why section 865B could not and should not be interpreted as having operated with retrospective effect, and I accept many of the propositions advanced by the Appellant in the course of these submissions.

**90.** However, the Appellant's arguments were premised on its assertion that, prior to enactment of section 128 of the Finance Act 2012 and the consequent insertion of section 865B into TCA 1997, there was no statutory provision which prohibited or precluded an offset being made by the Respondent, even if the overpayment of tax being offset could no longer be the subject of a claim for repayment because the four-year period to make such a claim had expired.

**91.** Having carefully considered the submissions made by the parties, I am satisfied that this assertion is incorrect. Instead, I agree with the Respondent that section 865B confirmed and restated the law which already existed in relation to offsets where the right to a refund was time-barred.

**92.** It was submitted on behalf of the Appellant that the mere fact that the legislature thought it necessary to insert section 865B into TCA 1997 shows that a substantive change to the law was being effected. I do not accept this argument as correct. In the first instance, I agree with the Respondent that this approach to interpreting the legislation is flawed. The Supreme Court made in clear in ***Cronin –v- Cork and County Property*** that it is inappropriate to construe a statute in the light of amendments subsequently made. Such amendments can, at best, only be neutral as they may have been made for any one of a variety of reasons.

**93.** I agree with the Respondent that the better interpretation of section 865B is that it restated or confirmed the law as it stood prior to that section's enactment, namely that an offset of a refund could not be made if the refund was time-barred. The

Appellant submitted that such an interpretation would mean that the enactment was otiose or unnecessary. I believe that this submission is answered by the fact that section 865B introduced for the first time an exception to the four-year time limit, by providing in subsections (3) and (4) that an offset would be available where a repayment of tax was time-barred if the tax liability against which it was being set arose by virtue of some action taken by the Revenue Commissioners more than four years after the end of the relevant period. It was the need to introduce this exception that made the enactment of section 865B necessary.

**94.** I therefore do not accept as correct the Appellant's submission that section 865B introduced for the first time a statutory prohibition on an overpayment of tax being offset against a tax liability if a claim for a refund of the overpaid tax was time-barred.

**95.** In reaching this conclusion, I believe that regard must be had to the provisions of section 99 of VATCA 2010, which is in my view the key legislative provision in this appeal.

**96.** It was common case between the parties that section 99(4) meant that the Appellant had by October 2011 ceased to be entitled to claim a refund under the Act in respect of the VAT it had overpaid between September 2005 and April 2007. It is also relevant to point out that section 99(6) provided that the Respondent could not refund any amount of tax except as provided for by the 2010 Act or any order or regulations made thereunder. I would state for the sake of completeness that provisions equivalent to subsections (4) and (6) of section 99 were, prior to the enactment of the 2010 Act, found in section 20(4)(b) and section 20(7) of the Value-Added Tax Act 1972, as amended.

**97.** I agree with the Respondent's submission that an enforceable right to a refund or a right to repayment must exist in favour of a taxpayer before there can exist a right to

have that refund or repayment offset against a tax liability. It is inherent in the very nature of a set off that an asset must exist to be put against a liability. Murdoch's *Dictionary of Irish Law* pithily defines a set off as a counterbalancing of mutual debts between parties. If an overpayment of tax can no longer be refunded by the Revenue Commissioners by reason of the time allowed to claim that refund having elapsed, there is no liability on the part of the Revenue which can be set against the taxpayer's liability to tax.

**98.** I further agree with the Respondent that an offset is not a stand-alone right which can be exercised or invoked by a taxpayer. The Appellant stated repeatedly in its submissions that it had made "*a proper and lawful claim for an offset*" prior to the enactment of section 865B. However, I accept as correct the point made by the Respondent that there is no provision in the legislation for a taxpayer to claim an offset.

**99.** I believe the correct view is, as contended for by the Respondent, that the right conferred upon taxpayers who have overpaid tax is the right to a refund or repayment, which is subject to temporal limits, and that an offset of the refund or repayment against another tax liability is merely one mechanism by which the Respondent can give effect to the refund or repayment.

**100.** I further agree with the Respondent that the decision in ***Kanwell*** does not assist the Appellant. That decision is clearly distinguishable from the instant appeal, as it was concerned with whether the Revenue Commissioners were entitled in law to offset a refund which was due to one company against the tax liabilities of related companies. There was no question of the right to refund being time-barred in that case.

**101.** In summary, I find that when the Appellant submitted its Form VAT3 returns to the Respondent in October 2011, it was no longer entitled to claim a refund of the VAT it had overpaid between September 2005 and April 2007. Its right to claim a refund had been extinguished by the operation of section 99(4). The Respondent was in addition expressly prohibited by section 99(6) from making a refund of tax in any manner other than under the 2010 Act.

**102.** I find that as the Appellant was not entitled to claim a refund of those overpaid taxes in October 2011, it was not entitled to have the amount of the overpayment credited against its tax liabilities by means of an offset. This was the position in law under and by virtue of section 99 alone, irrespective of the fact that section 128 of the Finance Act 2012 had not yet inserted section 865B into TCA 1997. The subsequent enactment of section 865B did not affect the Appellant's legal position, and it is therefore unnecessary to consider whether the legislature acted lawfully in enacting same.

**103.** If the Appellant had claimed a refund in a timely manner (for example, by submitting its outstanding VAT returns in August 2009), it would have been entitled to receive a repayment of the overpaid taxes from the Respondent. It could have requested the Respondent to give effect to that repayment by offsetting the overpaid taxes against its other tax liabilities, and I accept that the Respondent was likely to have acceded to that request, notwithstanding that the legislation does not confer upon a taxpayer the right to an offset.

**104.** However, the Appellant did not in the instant case make its claim in a timely manner, so it did not have a right to repayment in October 2011, and it therefore did not have a right to an offset, even though section 865B had not yet been enacted.

## *F. Conclusion*

**105.** For the reasons outlined above, I find that the Appellant has not succeeded in its appeal, and that the Respondent was correct in deciding on 3 February 2012 to refuse to allow the VAT overpaid by the Appellant in the periods the subject matter of this appeal to be set off against the Appellant's liability to VAT arising in other periods.

**106.** I therefore find determine pursuant to section 949AL(1) that the said decision of the Respondent shall stand.

**Dated the 21st of December 2022**

**MARK O'MAHONY**
**Appeal Commissioner**

**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**