



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH  
TAX APPEALS COMMISSION

129TACD2024

Between

[REDACTED]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by [REDACTED] (“the Appellant”) pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for July 2021 to April 2022 in the total amount of €32,680.
2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that her business had experienced or was expected to experience a 30% reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.

**Background**

3. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020, and replaced the Temporary Wage Subsidy Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic, and provided for a flat-rate subsidy to qualifying employers

based on the numbers of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.

4. On 23 March 2023, the Respondent raised assessments in the following amounts against the Appellant, on the basis that she had not abided by the terms of the EWSS:

<b>Period of Assessment</b>	<b>Amount €</b>
July 2021	4750.00
August 2021	3850.00
September 2021	4750.00
October 2021	3850.00
November 2021	3800.00
December 2021	4800.00
January 2022	3450.00
February 2022	2030.00
March 2022	1000.00
April 2022	400.00
<b>Total</b>	<b>32680.00</b>

5. The Respondent also raised assessments for May and June 2021; however, on receipt of additional supporting documentation from the Appellant's agent, it subsequently vacated those assessments. On 28 March 2023, the Appellant appealed against the remaining assessments to the Commission. An oral hearing was held in the appeal on 25 June 2024. The Appellant was represented by her agent, and the Respondent was represented by counsel.

## Legislation and Guidelines

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

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

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

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

*(ii) in the case where the business of the employer has not operated for the whole of the corresponding period [i.e. 1 July 2019 to 31 December 2019] 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 [i.e. 1 July 2020 to 31 December 2020], 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...*

*and*

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

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

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

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

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

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

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

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

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

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

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

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

*[...]*

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

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

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

*[...]*

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

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

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

7. Section 28B of the EMPI Act 2020 was amended from time to time to *inter alia* account for changes to the qualifying periods as the EWSS continued into 2021 and 2022. As at 1 July 2021, section 28B(2B) stated *inter alia* that:

*“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 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...*

*(ii) in the case where the business of the employer has not operated for the whole of the third corresponding period [i.e. 1 January 2019 to 31 December 2019] 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 [i.e. 1 January 2021 to 31 December 2021], 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..."*

8. As at 1 January 2022, section 28B(2C) stated *inter alia* that

*"Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 January 2022 to the date on which the qualifying period expires in respect of the employer where –*

*(a) 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, there will occur in the period from 1 December 2021 to 31 January 2022 ...*

*(ii) in the case where the commencement of the operation of the employer's business occurred on or after 1 May 2019, 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 average monthly turnover of the employer's business or in the average monthly customer orders being received by the employer by reference to the average monthly turnover of the employer's business or the average monthly customer orders being received by the employer –*

*(i) in the period from 1 August 2021 to 30 November 2021 (in this subparagraph referred to as 'the reference period')..."*

9. As required by section 28B(20), the Respondent published Main Guidelines on the operation of the EWSS ("Guidelines"). The Guidelines stated that:

*"The 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."*

10. The Guidelines further stated:

*"Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period. It is reasonably expected that the assumptions which underpin the projections will be reliable, will reflect the operating conditions of the business, and will remain materially unchanged. However, Revenue appreciates that in exceptional circumstances, certain unforeseen events may occur which require the employer to*

*revise the original budget estimate e.g. imposition of further Government restrictions (post the review date) impacting trade, receipt of an unexpected donation, entering into a significant new sales contract etc.*

*Where Revenue determines that an employer, at any time over the term of the scheme, claimed and received payment by applying accounting practices that are clearly not appropriate, or by deliberately misrepresenting the true financial position of the business, it will be excluded from the EWSS in its entirety. No further claims will be accepted, and all subsidy paid and PRSI credit issued will be immediately repayable together with interest and penalties. The business may also face possible criminal prosecution.”*

11. In late 2021, there was a surge in Covid-19 infections due to the Omicron variant, which led to increased restrictions on certain businesses. The Guidelines, as updated on 26 January 2022, stated *inter alia* that

*“The scheme is open to employers who file their payroll submissions electronically through Revenue Online Service (ROS) and who were registered at, and had correctly received a valid subsidy by, 31 December 2021, or who re-entered the scheme from 1 January 2022....*

*[...]*

*We are aware that certain employers became ineligible for EWSS from 1 December 2021 on foot of the eligibility review undertaken on 30 November 2021. However, as a result of public health restrictions introduced from 20 December 2021, the December projections prepared on 30 November may now be overstated...*

*If such employers deregistered after 30 November 2021 following the eligibility review on that date, please re-register through ROS before 31 December 2021, submit your November ERF including the revised projections for December 2021, and not those prepared at 30 November.”*

## **Evidence**

██████████ – *The Appellant*

12. The Appellant stated that she opened her hairdressing business on ██████████ 2019 in ██████████. She said that their projected figures were higher than their actuals due to Covid-19. She said that the EWSS payments helped pay rent owed by her and helped pay towards her staff’s wages. Also *“it all went into future proofing the salon to keep that*

*business afloat because there was a lot of excess costs coming through from Covid.” She said she had [REDACTED] staff when her business first opened and now has [REDACTED]*

13. On cross examination, she was brought through her income tax returns for 2019 to 2022. She agreed that they stated that her turnover for [REDACTED] – December 2019 was €48,195, her turnover for 2020 was €84,519, her turnover for 2021 was €96,974 and her turnover for 2022 was €183,486. She accepted that the figures provided by her in the Eligibility Review Forms (“ERFs”) provided to the Respondent showed that she was not entitled to participate in the EWSS for July 2021 to April 2022.
14. She accepted that her turnover in Q2 2021 was 20% greater than the corresponding period in 2019. She believed she had carried out rolling reviews. She stated that she provided all the information she had to her agent. She was asked why, in later correspondence, her agent provided a turnover figure for 2019 of €83,272, and said she believed it was projected. She accepted this was not correct.

## **Submissions**

### *Appellant*

15. In written submissions, the Appellant’s agent stated that

*“The business owner claimed EWSS in good faith in 2021 and 2022. In order to qualify for EWSS turnover needed to have reduced by 30% per month compared to 2019 turnover.*

*In our opinion using the actual turnover for 2019 as a comparative in this case is both misleading and disproportionate. The business made a loss in 2019 and owner’s drawings were minimal. We have asked [the Respondent] to look at this point on numerous occasions but they are adamant the 2019 actual turnover amount is the only figure they will use which has resulted in their demands for repayment of the EWSS received. This is a small business employing [REDACTED] people on a full time basis, repayment of this will cause serious cashflow problems on the business and could potentially force closure.*

*[...]*

*While [the Respondent is] correct is their interpretation of the legislation we would appeal to them to take a more commercial and common sense approach to this case.”*

16. In oral submissions, the Appellant’s agent confirmed that it was accepted that the Respondent’s interpretation and application of the legislation was correct. Regarding the



“revised” turnover for 2019 provided to the Respondent, the agent stated that the original turnover of €48,195 was correct, but that the revised figure of €83,272 would have been what the Appellant needed to achieve in order to break even. He stated that he could not point to anywhere in the EMPI Act 2020 that allowed him to take this approach.

### *Respondent*

17. In written submissions, the Respondent provided an outline of its engagement with the Appellant regarding her participation in the EWSS. It stated that the Appellant participated in the scheme on a self-assessment basis. Using the turnover figures on the Appellant’s income tax returns, and on the ERFs submitted by her to the Respondent, she was not entitled to subsidies from July 2021 to April 2022. She subsequently sought to rely on an inflated turnover figure for [REDACTED] to December 2019 which was not permissible.
18. In oral submissions, counsel stated that the Respondent was obliged to apply the legislation as it was, and could not replace it with another scheme that one might consider fairer. The Respondent believed that the correct test to be applied was that set out in section 28B(2B)(a)(i)(II). It was possible that the Appellant could argue that she came within the test as set out in section 28B(2C)(a)(ii), although the Respondent believed that this test applied to businesses that de-registered from EWSS before re-registering in late 2021/early 2022 on foot of the Omicron variant. In any event, the Respondent had also reviewed the Appellant’s figures on the basis of the (2C) test, and had determined she was not eligible.
19. It was not clear if rolling reviews had been performed by the Appellant, but even on the basis of her own ERFs she was not eligible. In response to a query from the Commissioner, counsel stated that he did not have an answer as to why the Respondent re-started the Appellant’s EWSS payments after it received her ERFs in December 2021, despite the ERFs showing she was not eligible.

### **Material Facts**

20. 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:
  - 20.1. The Appellant owns and runs a hairdressing salon which commenced trading in [REDACTED] 2019.
  - 20.2. The Appellant participated in the EWSS. The Respondent subsequently raised assessments for payments received by the Appellant under the EWSS from July

2021 to April 2022 in the total amount of €32,680. The Appellant appealed against the assessments to the Commission.

- 20.3. The Appellant's income tax return for 2019 stated that she had turnover of €48,195. Her income tax return for 2020 stated that she had turnover of €84,519. Her income tax return for 2021 stated that she had turnover of €96,974. Her income tax return for 2022 stated that she had turnover of €183,486.
- 20.4. The Appellant submitted ERFs to the Respondent during her participation in the EWSS which stated that her turnover for [REDACTED] to December 2019 was €47,387. Her agent provided correspondence to the Respondent in December 2022 which stated that her turnover for [REDACTED] to December 2019 was €48,587. However, in January 2023, her agent provided a 'revised' turnover figure for [REDACTED] to December 2019 of €83,272.
- 20.5. Her agent stated that the revised turnover figure provided in January 2023 was calculated on the basis of what turnover would have been required in order for the Appellant's business to break even for [REDACTED] to December 2019.
- 20.6. In evidence and submissions, the Appellant accepted that the Respondent's interpretation and application of the legislative provisions was correct, and that she was not eligible for EWSS payments from July 2021 to April 2022.

### **Analysis**

21. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise the assessments in respect of the EWSS payments made to her. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"
22. The fundamental difficulty that the Appellant faces in this appeal is that she has not challenged the calculations put forward by the Respondent to show that she was not entitled to EWSS payments for July 2021 to April 2022, and indeed has accepted that she was not entitled to the payments. Given that the burden of proof rests on the Appellant, this means her appeal cannot succeed.
23. Using the 2019 turnover figure originally provided by the Appellant, as well as 2021 figures provided by her in January 2023, the Respondent calculated that her turnover

increased by 14.35% during the relevant specified period, as defined by section 28B(2B). In submissions, the Respondent stated that the Appellant might claim she was entitled to payments in 2022 under section 28B(2C), although the Respondent's view was that subsection (2B) continued to apply. The Respondent also performed calculations using the test set out in subsection (2C) and concluded that the Appellant was not eligible on this basis either. The Appellant did not make any submission that subsection (2C) rather than (2B) should apply, and the calculations submitted on her behalf appear to have been based on the test set out in subsection (2B). Therefore, while noting that the Respondent has calculated that the Appellant was not eligible under either test, the Commissioner will proceed on the basis that section 28(2B) is applicable.

24. It seemed to the Commissioner that the sole argument raised by the Appellant to support her appeal was the 'revised' turnover of €83,272 for ██████ to December 2019, provided by her agent in January 2023. The agent submitted that it was not commercially realistic for the Appellant to use her actual 2019 turnover, given she did not commence trading until ██████ 2019. Therefore, he recalculated her turnover for ██████-December 2019 on the basis of what she would have had to achieve in order to break even for the period.
25. The Commissioner does not consider that the Appellant was entitled to recalculate her 2019 turnover in such a manner. There is nothing in section 28B(2B) which permits a participant in the EWSS to replace actual turnover during the relevant part of the corresponding period, which in this case is ██████ to December 2019, with a hypothetical turnover based on what would be required in order to break even or achieve profitability. In this regard, the Commissioner considers it important to note that the test for participation in the EWSS, as prescribed by the legislature, is based on turnover rather than profits. Finally, for the avoidance of doubt, the Commissioner is satisfied that there is nothing in section 28(2C) either which would permit the approach taken by the Appellant herein.
26. Consequently, the Commissioner is satisfied that the Respondent was correct to raise the assessments against the Appellant for July 2021 to April 2022. In passing, he notes that the Respondent stopped the Appellant's EWSS payments in October 2021 due to the failure by the Appellant to submit ERFs. She subsequently submitted ERFs and in December 2021 the Respondent resumed her EWSS payments. However, as argued by the Respondent at the hearing, the ERFs demonstrated that she was not in fact entitled to receive EWSS subsidies, and the Respondent was unable to provide a reason to the Commissioner at the hearing as to why it resumed payments to her. The Commissioner considers that this was unfortunate; however, the EWSS was a self-assessed scheme,

and therefore the onus for assessing eligibility rested on the Appellant and not the Respondent.

27. The Commissioner appreciates that this determination will be disappointing for the Appellant, and he accepts the challenges she encountered in establishing a new business shortly before the pandemic occurred. However, as explained at the hearing, the Commissioner's role is limited to interpreting and applying the legislation, and for the reasons set out herein, he determines that the appeal is unsuccessful.

### **Determination**

28. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments in the total amount of €32,680 for July 2021 to April 2022, and therefore the assessments stand.
29. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 as amended ("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**

30. 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**

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



Simon Noone  
Appeal Commissioner  
29 July 2024