



AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

133TACD2024

████████████████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by ██████████ (“the Appellant”) pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for July 2020 to September 2021 in the total amount of €36,478.02.
2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that his 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 29 November 2022, the Respondent raised assessments in the following amounts against the Appellant, on the basis that he had not abided by the terms of the EWSS:

Period of Assessment	Amount €
July 2020	1759.34
August 2020	1759.34
September 2020	1759.34
October 2020	2816.67
November 2020	2383.33
December 2020	2816.67
January 2021	2816.67
February 2021	2383.33
March 2021	2816.67
April 2021	2383.33
May 2021	2383.33
June 2021	2383.33
July 2021	2816.67
August 2021	2383.33
September 2021	2816.67

Total	36,478.02
--------------	------------------

5. On 3 January 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held on 9 July 2024. The Appellant represented himself 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. As at 1 January 2021, section 28B(2A) stated *inter alia* that:

“Subject to subsections (4) and (5), this section shall apply to an employer for the period from 1 January 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 second corresponding period [i.e. 1 January 2019 to 30 June 2019]

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 [i.e. 1 January 2021 to 30 June 2021], 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...

8. 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..."

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. In respect of the "rolling reviews" mandated by section 28B(5) of the EMPI Act 2020, the Guidelines (September 2020 version) stated that

“Employers must undertake a review 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...

If an employer no longer qualifies, they must deregister for EWSS through ROS with effect from the following day (that being the 1st of the month) and cease claiming the subsidy...”

11. 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.”

Evidence

██████████ – *The Appellant*

12. The Appellant stated that he took over the business of the An Post branch in ██████████ in ██████████ 2019. He stated that the onset of the Covid-19 pandemic in 2020 led to a decrease in business. An Post advised him to consider the supports available, and he registered for EWSS. He stated that the figures provided to him by An Post showed that his turnover was down over 30%.
13. On cross examination, the Appellant stated that he did not personally retain the documentation showing his eligibility to participate in the EWSS, which he left with his accountant. His accountant was unavailable to attend the hearing. He stated that he did review his eligibility on a monthly basis but did not retain evidence of these monthly rolling reviews.
14. He was brought through his Form 11 income tax returns. He agreed that they stated his trade was “*Post Office contractor*” and he stated that this was correct. In 2019, his income tax return showed he received €32,985 from An Post. In 2020, his income tax return showed he received €49,912 from An Post. In 2021, his income tax return showed he received €43,376 from An Post. He agreed that his income tax returns had not been amended and that they provided a correct reflection of his trade as a Post Office contractor for 2019-2021.

15. He was asked about a spreadsheet provided by his accountant to the Respondent on 1 June 2022. He accepted that the spreadsheet was not a rolling review and that his accountants did not provide rolling reviews to the Respondent. The spreadsheet stated that his turnover for January to June 2019 was over €1 million. His accountant had stated that *“Turnover for the purposes of EWSS calculations is based on the monthly net aggregate monetary amounts transacted as detailed in An Post performance analysis supplied to our client. Turnover per the Form 11 in 2019 is more correctly defined as ‘commission’ as paid by An Post to [the Appellant] for managing the local An Post branch.”*
16. He accepted that the monetary amount of transactions conducted through his shop did not constitute his turnover. He stated that An Post challenged him to grow his business. He agreed that he did not pay tax on turnover of over €1 million in 2019. He accepted that his business bank account did not show anything like €1 million being transacted through it. He accepted that his actual turnover for 2021, as contended by his accountant on the basis of “net aggregate monthly amounts” transacted through his shop, was not correct.
17. Further spreadsheets were provided by his accountant on 28 September 2022. He accepted that these were not rolling reviews. He agreed that the figures provided were “aggregated transactions” rather than turnover. He could not explain the reference on the spreadsheets to “Maximum Target Turnover” for the relevant months in 2020 and 2021. He did not know what the figures included for each month were. He said his accountant did not run the figures by him before submitting them to the Respondent. He accepted that, even on the basis of the figures supplied, he was approximately €250,000 above the “target max turnover” for July to December 2020.
18. He accepted that the figures provided on his behalf were wrong. When asked by counsel for the Respondent whether he wished to withdraw his appeal, he stated *“I don’t think I have a choice, I have to withdraw.”* The Commissioner interjected to say that he did have a choice, and should only withdraw his appeal if he was fully sure he wanted to do so. The Appellant did not confirm that he wished to withdraw the appeal, so the Commissioner stated that the appeal would proceed to conclusion.

Submissions

Appellant

19. In written submissions, the Appellant stated *inter alia* that

“The Respondent has indicated that my turnover is only the gross profits that I obtain from selling product and services provided under the An Post franchise. I do not agree

with this as it's my Business to increase and generate more turnover in the business and hence grow commissions and gross profits.

The turnover of the business declined by in excess of the threshold for which I could apply for EWSS."

20. In oral submissions, the Appellant stated that he was approached by An Post in [REDACTED] to take over the local post office. All the costs of the new business were borne by him exclusively. At the start, things were promising, but Covid-19 meant that loyal customers stayed at home. At first, online sales and returns were booming but this did not last. The Appellant's business model had been to try and upsell customers when they came into the shop, but this was not possible when people stayed at home during the pandemic.
21. During the pandemic the Appellant felt that the EWSS payments were the only way he could survive to keep the post office open to serve the community. He stated that as the pandemic continued he made attempts to encourage customers to come back but people's behaviours had changed. All the subsidies received went towards paying his staff, and he had not taken a salary out of the business in five years. He did not profit from the EWSS.

Respondent

22. In written submissions, the Respondent stated that the Appellant participated in the EWSS on a self-assessment basis. He had undertaken to retain all records relating to the scheme. The Appellant had not provided rolling reviews, despite a number of requests from the Respondent.
23. The Respondent considered turnover to be the revenue derived from the provisions of goods and services. The Appellant had not demonstrated that his turnover was reduced by at least 30% for the months under appeal compared to the relevant part of the corresponding period in 2019. The turnover test that was applicable was that set out in sections 28B(2)(a)(i)(II), 28B(2A)(a)(i)(II), and/or 28B(2B)(a)(i)(II) of the EMPI Act 2020.
24. In oral submissions, counsel stated that rolling reviews were not provided by the Appellant, albeit Eligibility Review Forms ("ERFs") had been submitted for June, July and August 2021. Even if the ERFs were accepted to qualify as rolling reviews, the figures inserted therein were not a correct reflection of the Appellant's turnover. The Appellant had accepted that the information provided on his behalf regarding his turnover was incorrect.

Material Facts

25. 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:
- 25.1. The Appellant is a contractor for An Post and has run a post office branch in [REDACTED] since [REDACTED] 2019.
- 25.2. The Appellant received EWSS payments between July 2020 and September 2021 in the total amount of €36,478.02. On 29 November 2022, the Respondent raised assessments for the EWSS payments received by the Appellant. He subsequently appealed against the assessments to the Commission.
- 25.3. The Appellant's income tax returns showed that: in 2019 he received €32,985 from An Post; in 2020 he received €49,912 from An Post; and in 2021 he received €43,376 from An Post.
- 25.4. The Appellant, via his accountant, had submitted turnover figures to the Respondent that were calculated by reference to the aggregated value of the transactions conducted in his post office branch on behalf of An Post, rather than the amount of revenue derived by him from An Post.
- 25.5. The Appellant had carried out rolling reviews from July 2020 to May 2021. He had submitted ERFs to the Respondent for June, July and August 2021.

Analysis

26. 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 him. 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.*"
27. In this appeal, the Appellant commenced his trade as a post office contractor in April 2019, and therefore the turnover test to be applied is as set out in section 28B(2)(a)(i)(II) of the EMPI Act 2020 for the payments received by him from July to December 2020, section 28B(2A)(a)(i)(II) for the payments between January and June 2021, and section 28B(2B)(a)(i)(II) for the payments between July and September 2021. In summary, it is

necessary for the Appellant to demonstrate a reduction in turnover of at least 30% for the specified periods under appeal compared to the relevant corresponding periods in 2019.

28. In addition to contending that the Appellant had not demonstrated that he had met the turnover test, the Respondent also alleged a failure by the Appellant to perform rolling reviews, and that matter will be addressed first.

Requirement to carry out rolling reviews

29. Section 28B(5) of the EMPI Act 2020 required participants in the EWSS to carry out a review of their 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 was 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”*.

30. In this appeal, the Appellant stated that he carried out rolling reviews, but accepted that evidence of same had not been provided by his accountant to the Respondent. In this regard, the Commissioner notes that the Guidelines stated *“Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period.”*

31. The necessity of carrying out rolling reviews has been considered by the Commissioner in previous determinations concerning EWSS. As stated in 83TACD2023:

“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.”

32. As the Appellant has not provided any evidence of having carried out rolling reviews from July 2020 to May 2021, the Commissioner finds as a matter of fact that no rolling reviews were performed by him for those months. As it was a requirement for participation in the scheme that rolling reviews be carried out on a monthly basis, it follows that the Appellant was not entitled to receive EWSS payments between June 2020 and May 2021.

33. The Respondent stated that ERFs were submitted by the Appellant for June, July and August 2021. While the turnover inputted on these ERFs was incorrectly calculated, as discussed below, the Commissioner makes no finding against the Appellant under this heading for those months. Furthermore, it was not clear to the Commissioner whether an ERF for September 2021 was submitted, although he notes that on the copy ERFs submitted by the Respondent at the hearing, there is an entry completed for that month. Consequently, the Commissioner makes no finding against the Appellant under this heading for September 2021.

Whether the Appellant's figures demonstrate entitlement to EWSS payments

34. The Appellant accepted that his income tax returns for 2020 and 2021 showed an increase in the amounts received by him from An Post for running the post office branch compared to 2019. His argument in written submissions was that he was entitled to rely on the aggregated value of the transactions carried out in the post office as "turnover" for the purposes of EWSS. While the Appellant did not stand over this argument in cross-examination, the Commissioner will consider it nonetheless.

35. "Turnover" is not defined in section 28B of the EMPI Act 2020. Section 275 of the Companies Act 2014 defines a company's turnover as:

"the amounts of revenue derived from the provision of goods and services falling within the company's ordinary activities, after deduction of –

(a) trade discounts,

(b) value-added tax, and

(c) any other taxes based on the amounts so derived,

and, in the case of a company whose ordinary activities include the making or holding of investments, includes the gross revenue derived from such activities".

36. Furthermore, the Oxford English Dictionary (online edition) defines "turnover" as "*The value of the goods and services that a company sells in a particular period of time; the amount of money received in sales in a given period.*" In its submissions, the Respondent stated that it considered turnover to constitute the revenue derived from the provisions of goods and services.

37. The Commissioner agrees with the Respondent's understanding of turnover, and he does not agree that the Appellant was entitled to use the aggregated value of the transactions performed in the Appellant's post office on behalf of An Post. The Appellant derived no revenue directly from the transactions themselves, and instead was paid by An Post for

the services provided by him on its behalf. The revenue received by him from An Post was as stated on his income tax returns. While the Appellant stated that he was challenged by An Post to grow the business, this does not mean that he was entitled to claim the value of the transactions carried out in his post office as his own turnover.

38. Consequently, as the Appellant's argument that he was entitled to EWSS payments rested on his method of calculating turnover which the Commissioner finds was not correct, and as his income tax returns show instead that his turnover increased in 2020 and 2021 compared to 2019, it follows that the Appellant was not entitled to receive EWSS payments between July 2020 and September 2021, and therefore the appeal is unsuccessful.
39. In passing, the Commissioner notes that the Appellant accepted during cross-examination that, even on the basis of the figures submitted on his behalf in September 2022, he was not entitled to the payments received by him. The Commissioner also notes that those figures included references to "Maximum Target Turnover". However, the Commissioner considers that it was incumbent on participants in the EWSS to accurately calculate their turnover, and, in the event that their turnover did not meet the relevant test set out in section 28B of the EMPI Act 2020, to deregister from the scheme.
40. In conclusion, the Commissioner appreciates that this determination will be disappointing for the Appellant, who undoubtedly performs an important role by providing post office services to his [REDACTED] community. However, as accepted by himself at the hearing, and for the reasons set out herein, he was not entitled to the EWSS payments received by him from July 2020 to September 2021, and the assessments raised by the Respondent are upheld.

Determination

41. 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 €36,478.02 for July 2020 to September 2021. Therefore, the assessments stand.
42. 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

43. 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

44. 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
31 July 2024