AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

68TACD2024

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

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 September 2020 to January 2022, as well as March and April 2022, in the total amount of €108,385.52.

2. The assessments were raised on the basis that the Appellant had failed to demonstrate to the satisfaction of the Respondent that its business had expected 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. The Appellant argued that under International Financial Reporting Standards ("IFRS") it was entitled to exclude so-called "passthrough" costs from its turnover for the purposes of EWSS.

3. The appeal proceeded by way of a hearing on 14 March 2024.

Background

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

5. On 20 and 24 February 2023, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

Period of Assessment	Amount €
September 2020	3518.68
October 2020	6066.68
December 2020	6066.68
January 2021	6066.68
February 2021	6066.68
March 2021	6066.68
April 2021	6066.68
May 2021	6066.68
June 2021	6066.68
July 2021	7150.01
August 2021	6066.68
September 2021	6066.68

October 2021	6066.68
November 2021	6066.68
December 2021	6066.68
January 2022	7583.35
March 2022	2599.98
April 2022	2599.98
Total	**108,385.52**

6. On 30 March 2023, the Appellant appealed against the assessments to the Commission. The appeal was brought outside the 30 days allowed for the making of an appeal, but following enquiries from the Commission, the Appellant's agent provided a reason for the late appeal and the appeal was accepted by the Commission on that basis. An oral hearing was held on 14 March 2024.

Legislation and Guidelines

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

> "*(1)… 'qualifying period' means the period commencing on 1 July 2020 and expiring on 31 March 2021 or on such later day than 31 March 2021 as the Minister may specify…*
>
> *(2) Subject to subsections (4) and (5), this section shall apply to an employer where –*
>
> *(a) (i) in accordance with guidelines published by the Revenue Commissioners under subsection (20)(a), the employer demonstrates to the satisfaction of the Revenue Commissioners that, by reason of Covid-19 and the disruption that is being caused thereby to commerce –*
>
> *(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as 'the specified period') at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in*

either the turnover of the employer's business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period')…

and

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

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

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

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

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

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

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

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

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

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

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

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

[…]

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

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

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

[…]

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

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

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

8. 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. From 1 January 2021, the relevant specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019 (section 28B(2A)). From 1 July 2021, the relevant specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019 (section 28B(2B)). From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020 (section 28B(2C)). Otherwise in respect of these time periods, and insofar as is relevant for this appeal, section 28B remained as set out herein.

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 (1 November 2021 version) stated that

> "*Employers must undertake a review of the six month period on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.*
>
> *This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period…as illustrated below*:

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

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

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

If an employer becomes aware prior to the end of the month that they will no longer meet the eligibility criteria (e.g. unexpected donation or grant received at the start of a month), they should deregister immediately and cease to claim subsidies.

Subsidies correctly claimed in accordance with the terms and conditions of the scheme prior to deregistration will not be repayable…"

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. 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."

Evidence

[redacted]

12. [redacted] ("the witness") was a director of the Appellant company. He stated that the Appellant was a design company, [redacted]. Before the pandemic, the Appellant had [redacted]. When the pandemic started, most of the Appellant's clients stopped working so its projects were cancelled. If it had not been for the EWSS payments, the Appellant would have had to close.

13. In order to make things easier for its clients, the Appellant decided to provide a service of managing their invoices for them: "*So where, for example, the builder would instead of client receiving invoices from builder, electrician, architect, plumber, all the invoicing and they had to pay them separately, they only invoiced us. We pass the same amount in one invoice onto the client, they paid one invoice and we gave that money to the suppliers*." When these costs were passed through the Appellant, the Appellant did not take a profit from them, but did charge a separate fee for the service provided.

14. Regarding the Appellant's principal/agent argument, the witness stated, in response to questions from the Commissioner, that the Appellant acted as the agent, with the other contractor acting as principal, in respect of the client: "*so they're the ones who are essentially charging the client money for the work that they are doing*." The witness stated that the client had a direct contract with the principal (i.e. the other contractor). While there were no example contracts provided, the witness referred to an invoice dated 2 July 2021 which he stated showed passthrough costs, including stone from [redacted], architect services from [redacted], plumbing services, and a couch from [redacted]. The witness stated that, from his memory, he did not believe that the Appellant made anything from the net total of €23,349 on the invoice.

15. On cross examination, the witness confirmed that the Appellant now had [redacted] proprietary directors, [redacted]. He stated that the Appellant was

incorporated in [redacted] with a registered office in [redacted] The Appellant moved to another registered office/premises in [redacted], and then moved to a different registered office in [redacted].

16. The witness stated that the Appellant carried out estimated projections for 2020 and the first half of 2021, but stated that he did not think the projections had been provided to the Respondent. He stated that the Appellant relied on its accountants to provide the necessary information. His agent interjected to confirm that the Appellant did not have evidence of rolling reviews for 2020 and H1 2021 with it at the hearing.

17. Regarding the Appellant's corporation tax ("CT") returns, the witness confirmed that its return for 2019 was filed on a self-assessment basis and had not been amended. The return showed turnover of €291,417 with profits of €170,994. Regarding the 2020 CT return, the witness agreed that it stated it had been prepared under FRS 102. The return showed turnover of €845,417 with gross profits of €227,937. The witness stated that this reflected the increase in passthrough costs generated as a result of the service provided to the Appellant's clients. He accepted that there was a difference between turnover and costs.

18. The 2021 CT return again stated that it was prepared in accordance with FRS 102. Turnover was stated to be €654,664, with a gross trading profit of €153,033. The witness agreed that the Appellant's sales data, as provided to the Respondent, was consistent with the figures in the Appellant's CT returns. The witness again explained his understanding of "passthrough" costs that should not be included in turnover, and stated that only where the Appellant made money should income be treated as turnover: "*That is our turnover cost because we made money on that*."

19. The Respondent had asked for the Appellant's unabridged financial statements as part of its review into the Appellant's eligibility to participate in the EWSS. The unabridged statements showed different turnover amounts (i.e. with "passthrough" costs removed) to the abridged statements. The witness stated that he did not believe the unabridged financial statements had been amended in any way since being adopted by the Appellant's board. He was asked about discrepancies between the unabridged and abridged accounts, including different Directors' Responsibility Statements, different registered offices for the Appellant, and the same typo ("Dunblin") appearing throughout the unabridged accounts for the relevant years. He agreed that these discrepancies did not make sense but again stated that he had not amended the unabridged accounts subsequent to their adoption by the Appellant.

20. Counsel for the Respondent stated that, even using the Appellant's own figures net of passthrough costs, it was not eligible for EWSS payments in 2020. This was because it had only suffered a decrease of 18.73%. The witness accepted on those figures that the Appellant was not eligible, even taking its case at its height. However, he reiterated that he believed the Appellant had carried out rolling reviews.

21. The witness was asked about the invoice he had referred to previously, which he stated showed passthrough costs. He was asked about apparent differences in the amounts charged by the Appellant to the other contractors compared to the amounts it charged to the client. He stated that there might have been another invoice but he could not be sure.

22. On re-examination, he stated that the Appellant had no visibility in 2020 and 2021 on what work it might receive, and therefore it would have been very difficult to make projections. He stated that the Appellant's arrangements with its clients were verbal rather than written contracts, which is why it had not provided evidence of the contracts to the Commissioner.

Submissions

Appellant

23. In written submissions, the Appellant's agent stated that

> "*The appellant's argument is against [the Respondent's] decision to consider passthrough costs which are associated with their client's project costs. [The Respondent] has taken the view that these amounts should be considered turnover for the purposes of reviewing EWSS eligibility. The appellant's argument is that as per the accounting standard IFRS 102 (23.4) it reads that an entity shall include in revenue only the gross inflows of economic benefits received and receivable by the entity on its own account. It also refers to an agent relationship stating that the amounts collected on behalf of the principal are not revenue to the entity. Considering that this construction related costs are going from [the Appellant's] clients into [the Appellant] to be then paid to the relevant contractors that this should not be considered revenue of the company for the purposes of reviewing EWSS eligibility*."

24. In oral submissions, the Appellant's agent reiterated that it was the Appellant's case that paragraph 23.4 of FRS 102 allowed for the exclusion of passthrough costs from turnover. The entity should include in its revenue only the gross inflows of economic benefit. When asked by the Commissioner why the Appellant's passthrough costs had been included in its CT returns for the relevant years, the agent stated that in his opinion that had been incorrect and he had advised the Appellant to amend its CT returns. He stated that the

discrepancies between the unabridged and abridged accounts arose due to a change in his firm's accounts system, which led to incorrect information being inputted when the unabridged accounts were uploaded.

Respondent

25. In written submissions, counsel for the Respondent, David Quinn BL, stated that no rolling reviews had been carried out by the Appellant from September 2020 until June 2021. Commencing July 2021, the Respondent had introduced the Eligibility Review Form ("ERF"), and the Appellant had submitted ERFs from July 2021 onwards. In the hearing, counsel confirmed to the Commissioner that the Respondent considered that the ERF satisfied the requirement to perform rolling reviews.

26. In its written submissions, the Respondent stated that the Appellant's CT returns for 2020 and 2021 showed that its turnover had increased significantly since 2019. The Respondent rejected the contention that the Appellant could deduct passthrough costs from its turnover. Even if paragraph 23.4 of FRS 102 was relevant to the appeal (which was denied), the Appellant's turnover on its CT forms was also, presumably, computed in accordance with FRS 102.

27. The submissions further stated:

> "*[When] one considers at the Appellant's own financial disclosures and CT1 returns, the Appellant's argument rings hollow. The Appellant's own directors signed a Director's Responsibilities Statement stating that its Financial Statements were made in accordance with FRS 102. Note 2 to the abridged financial statements define turnover as 'Turnover comprises the invoice value of goods supplied by the company, exclusive of trade discounts and value added tax.' The Appellant's CT1 returns for the relevant years state that the accounting framework under which the financial statements were prepared is FRS 102. In its financial statements, it is apparent that the Appellant has computed its turnover including that income which it now seeks to exclude. Therefore, it is remains wholly unclear how the paragraph has any bearing upon the computation of the Appellant's turnover for the purposes of the EWSS*."

28. Regarding the Appellant's principal/agent argument, the Respondent stated that this was first raised in the Appellant's Statement of Case. It was submitted that the Appellant had not demonstrated that such a relationship existed with its subcontractors, and the evidence supplied by it to the Respondent demonstrated that it had performed value added functions in relation to the passthrough costs and had charged its customers for those functions performed by it.

29. In oral submissions, counsel submitted that the evidence suggested that rolling reviews had not been performed by the Appellant. If it had performed them in 2020, even on the basis of the removal of passthrough costs, it would have seen that it was not eligible to participate in the EWSS. Furthermore, the Appellant's CT returns showed that its turnover dramatically increased in 2020 and 2021 compared to 2019. There was no evidence to substantiate the Appellant's principal/agent argument, and no authority provided to substantiate the argument regarding passthrough costs.

30. The evidence of the witness demonstrated that the Appellant had charged a margin on the "passthrough" services provided to its client, and the witness had candidly admitted he did not know how the margin was calculated.

Material Facts

31. 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:

    31.1. The Appellant is a design agency [redacted].

    31.2. The Appellant participated in the EWSS from September 2020 to January 2022, as well as March and April 2022, and received payments in the total amount of €108,385.52.

    31.3. The Appellant had participated in the EWSS on the basis that it was entitled to disregard "passthrough" costs when calculating its turnover. The CT returns filed by the Appellant for 2020 and 2021 had included "passthrough" costs in turnover which it subsequently sought to exclude for the purposes of EWSS. The CT returns stated that they were prepared in accordance with FRS 102.

    31.4. The Appellant had not provided any accounting, legal or taxation authorities to justify its argument regarding "passthrough" costs. Ultimately it appeared to have conflated turnover with profits.

    31.5. The Appellant had gained a monetary benefit from the provision of the "passthrough" services to its clients. By its own account, it had charged a separate service fee. Furthermore, the evidence suggested that the Appellant had charged a mark-up on at least some of the "passthrough" costs received from clients.

31.6. There was no evidence provided by the Appellant from its clients or other contractors to substantiate its argument that it had acted as an agent for its clients, with the other contractors acting as principal, in respect of the services provided.

31.7. When its "passthrough" costs were included in its turnover, the Appellant experienced an increase in turnover for the relevant specified periods compared to the relevant 2019 corresponding periods.

31.8. The Appellant had not performed rolling reviews between September 2020 and June 2021 inclusive.

Analysis

32. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent was incorrect to raise assessments in the total amount of €108,385.52 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"

33. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders being received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. From 1 July 2021, the specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019. From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020.

34. The principal dispute between the parties was whether the Appellant was entitled to discount "passthrough" costs from its turnover for the purposes of EWSS. However, the Respondent had also alleged a failure by the Appellant to perform rolling reviews, and that matter will be addressed first before considering the passthrough costs argument.

Requirement to carry out rolling reviews

35. 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*".

36. The Commissioner considers that there is insufficient evidence before him that would enable him to find that the Appellant carried out rolling reviews between September 2020 and June 2021. The Appellant's witness seemed to say in oral evidence that rolling reviews were performed on an informal, verbal basis, but he was unable to point to any documentary evidence to substantiate this.

37. The Guidelines stated that "*Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period."* The Commissioner is satisfied that the Appellant did not provide copies of any rolling reviews allegedly carried out by it from September 2020 to June 2021, and he finds as a matter of fact that no rolling reviews were performed by the Appellant for those months.

38. 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.*"

39. As it is found that the Appellant did not carry out rolling reviews between September 2020 and June 2021, and 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 September 2020 and June 2021. Consequently, the

Commissioner determines that the Respondent was entitled to seek repayment of the subsidies provided to the Appellant for those months, in the total amount of €52,052.12.

40. The Commissioner notes that the Respondent accepted that the Appellant provided ERFs from July 2021 onwards, and that this satisfied the requirement to provide rolling reviews. In its written submissions, the Respondent stated that "*the Appellant did not supply any documentation supporting these projections"* in the ERFs. However, given that ERFs were submitted by the Appellant, no finding against it is made under this heading for July 2021 onwards.

Whether the Appellant was entitled to discount "passthrough" costs

41. The primary argument raised by the Appellant was that it was entitled to remove "passthrough" costs from its turnover for the purpose of its EWSS calculations. The Commissioner understood the Appellant's argument to be that its passthrough costs arose as a result of a service provided by it to its clients, whereby it managed invoices from other contractors and suppliers. The Appellant stated that it charged a separate fee for the provision of this service, but did not take any mark-up or profit in respect of the amounts charged by the contractors/suppliers to the client. As a result, the payments from the client to the contractors/suppliers simply "passed through" the Appellant's accounts and should not be included in the Appellant's turnover.

42. The first question to be considered is whether, in principle and as a matter of definition, the Appellant's argument is correct. Unfortunately, no precedent or authority was provided by the Appellant to justify its contention that it was entitled to discount passthrough costs, or even defining what passthrough costs were. It stated that it based its understanding on the FRS 102 accounting standards, and in particular paragraphs 23.3 and 23.4 thereof.

43. An employer was entitled to participate in the EWSS if it expected to experience a reduction of at least 30% in either turnover or customer orders. In this appeal, the Appellant has contended that it experienced a reduction in its turnover, rather than customer orders. "Turnover" is not defined in section 28B of the EMPI Act 2020. In its written submissions, the Respondent referred to a number of definitions of turnover appearing elsewhere. 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".

44. Section 485 of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), which provides for the Covid Restrictions Support Scheme, defines turnover for its purposes as "*any amount recognised as turnover in a particular period of time in accordance with the correct rules of commercial accounting, except for any amount recognised as turnover in that particular period of time due to a change in accounting policy*" (subsection 12). The Respondent also referred to the definition of turnover in the Collins English Dictionary: "*the value of the goods or services sold during a particular period of time*."

45. Appendix I to FRS 102 (January 2022), "Glossary", defines turnover as:

"*The amounts derived from the provision of goods and services after deduction of:*

(a) trade discounts;

(b) value added tax; and

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

46. The Commissioner agrees with the submission of the Respondent that the above definitions appear to be aligned. He also considers it clear that none of the definitions refer to the exclusion of "passthrough" costs – a phrase which does not appear in any of the above definitions. Furthermore, the Commissioner is satisfied that the Appellant's understanding of "passthrough" costs in this appeal does not come within (a) trade discounts, (b) value added tax, or (c) any other taxes, which are excluded from the above definitions of turnover.

47. Consequently, the Commissioner is not satisfied that the Appellant has demonstrated that the definition of "turnover" permits the exclusion of so-called passthrough costs. The Appellant received monies for the provision of goods and services to its clients, which did not come within the three exceptions set out in FRS 102 or section 275 of the Companies Act 2014, and therefore *prima facie* should have been included in its turnover.

48. However, the Appellant has sought to rely on paragraphs 23.3 and 23.4 of FRS 102. These provide that:

"*23.3 An entity shall measure revenue at the fair value of the consideration received or receivable. The fair value of the consideration received or receivable takes into*

account the amount of any trade discounts, prompt settlement discounts and volume rebates allowed by the entity.

23.4 An entity shall include in revenue only the gross inflows of economic benefits received and receivable by the entity on its own account. An entity shall exclude from revenue all amounts collected on behalf of third parties such as sales taxes, goods and services taxes and value added taxes. In an agency relationship, an entity (the agent) shall include in revenue only the amount of its commission. The amounts collected on behalf of the principal are not revenue of the entity."

49. In particular, the Appellant argued that paragraph 23.4 allowed it to exclude the amounts it received, as "agent", from its clients on behalf of the "principal" contractors. The Commissioner considers that the question of whether those amounts fell within the exception set out in paragraph 23.4 falls to be decided on the evidence proffered by the Appellant.

50. Having considered the evidence provided, the Commissioner is not satisfied that the Appellant has demonstrated that these "passthrough" costs should be excluded from its turnover. Firstly, it was a matter of fact that the passthrough costs had been included as turnover in the Appellant's CT returns for 2020 and 2021. While the EMPI Act 2020 does not state that turnover for the purposes of EWSS must be the same as the turnover stated in a company's CT returns, given that the definition of turnover is consistent across the provisions discussed above, the Commissioner would expect that they would be the same. This is particularly the case where the CT returns were stated to be computed in accordance with FRS 102, as the Appellant's had been. Certainly, the Commissioner would expect that a company would be able to clearly explain and justify any difference between its turnover for EWSS purposes and its turnover as stated in its CT returns. The Commissioner did not consider that any clear explanation was provided by the Appellant in the appeal. While its agent stated that he believed the turnover as stated in the CT returns was incorrect, it had not been amended by the Appellant. In the circumstances, the Commissioner is satisfied that there is no basis for him to simply disregard and ignore the stated turnover of the Appellant as provided in its unamended CT returns.

51. Furthermore, the Commissioner is not satisfied that, leaving aside what the Appellant stated in its CT returns, the evidence before him was sufficient to prove the Appellant's assertions that its "passthrough" costs should be excluded from turnover pursuant to paragraph 23.4 of FRS 102. There was no evidence provided showing the contractual relationship between the Appellant and its clients; in particular, there was no documentary or third-party evidence to support the assertion that it was agreed that the Appellant would

provide a “management” service in respect of the client’s invoices from other contractors, and would charge a separate fee for the management service provided. The witness stated that the contracts were verbal rather than written in nature; however, no evidence was submitted from any of the clients which would go to prove the Appellant’s assertion that it provided a passthrough service via the management of the clients’ invoices. Neither was there evidence provided from any of the other contractors regarding their relationship with the Appellant.

52. Furthermore, while in his oral evidence the witness stated that the Appellant simply passed through the monies received from its clients to the other contractors, the Commissioner considered his evidence to be quite vague and unspecific on this point. He referred to an invoice dated 2 July 2021 to [redacted] which he stated listed “passthrough” items. However, the Commissioner considers that this invoice simply shows a list of goods and services, with associated prices. The Commissioner does not consider that this invoice by itself shows that any of these costs could properly be treated as “passthrough”, as argued by the Appellant. No corresponding bank accounts or other financial statements were provided to show the monies “passing-through” the Appellant’s accounts to the ultimate beneficiaries.

53. In addition, while the witness claimed that the Appellant charged no mark-up on these costs, there was evidence which suggested the contrary. In cross-examination, correspondence was put to the witness suggesting that the Appellant had charged a fee on some of its invoices, including from [redacted] (€173 for processing and call out), [redacted] (€745 profit for assembly on site), and a conservation architect (€250 for site visits and consultation). The witness could not explain these additional fees, and suggested that there could have been additional invoices. However, in the circumstances, the Commissioner is not satisfied that the Appellant has demonstrated that the “passthrough” costs received by it should be excluded from its turnover.

54. Ultimately, it seemed to the Commissioner that the Appellant had conflated its turnover with profits. It argued that it had not directly made money on the passthrough invoices so it should not include them for the purposes of EWSS. However, the Oireachtas did not base the test for participation in the EWSS on profitability, but on a company’s turnover. The Commissioner is satisfied that the evidence demonstrated that the invoices which the Appellant sought to discount should be included in its turnover for EWSS, as they arose from goods and services provided by it. The Appellant had, on its own evidence, charged a fee for the provision of the service of invoice management. Furthermore, the evidence

put forward by the Respondent suggested that the Appellant had added value to at least some of the invoices, and had charged additional fees as a result.

55. Finally, the Commissioner notes that the Appellant argued that it was acting as an agent to the clients, with the other contractors acting as principal. The Commissioner understood this to form part of its contention regarding passthrough costs, rather than a separate stand-alone argument, and that this relationship allowed it to discount all but the "commission" charged by it. However, no evidence was provided by the Appellant to enable the Commissioner to find that such a principal-agent relationship existed. As with its over-arching argument about passthrough costs, no written contracts or evidence from the Appellant's clients or other contractors was put before the Commissioner.

56. The Commissioner considers that it is common in building/design contractual relationships that the *principal* contractor will act on behalf of the client with respect to numerous sub-contractors, with the invoices from those sub-contractors going through the principal to the client. The Commissioner is satisfied that there was simply no evidence before him which could allow him to find that such typical relationship was inverted in the case of the Appellant, so that, even though it had a direct relationship with its clients, it was in fact acting as an agent rather than the principal contractor vis-à-vis those clients, with the sub-contractors in the position of principal.

57. In conclusion, the Commissioner is satisfied that the Appellant has failed to show that it was entitled to discount its so-called "passthrough" costs from its turnover for the purposes of its participation in the EWSS. There was no definition of turnover put before the Commissioner, either from the EMPI Act 2020 or otherwise, which clearly provided for the exclusion of passthrough costs. Furthermore, the evidence showed that (1) the Appellant had included its passthrough costs in its CT returns, and had not adequately explained why a different approach should be taken with EWSS; (2) the Appellant had failed to sufficiently explain the contractual relationship between it and its clients, in order to show that it had agreed to provide a service of invoice management paid for by way of a separate fee agreement, and/or that it was acting as an agent with the other contractors in the position of principal(s); and (3) the Appellant had failed to show that it had gained no monetary benefit from the passthrough costs, and/or as a matter of fact that the monies passed through its account from the client to the other contractors without any additional fee charged by the Appellant.

58. Furthermore, the Commissioner is satisfied that, when the so-called "passthrough" costs are included in turnover, the Appellant experienced a significant increase in its turnover compared to 2019. According to its CT returns, in 2019 its turnover was €291,417. In

2020, turnover was €845,417 and in 2021, it was €654,664. In order to be eligible for EWSS, it was necessary to demonstrate a reduction of at least 30% in turnover for the specified period compared to the relevant 2019 corresponding period. However, the Appellant's turnover, including the so-called passthrough costs, increased rather than decreased compared to 2019. Therefore, it was not entitled to participate in the EWSS and, consequently, the Commissioner is satisfied that the appeal is unsuccessful.

Determination

59. 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 €108,385.52 for September 2020 to January 2022, as well as March and April 2022. Therefore, the assessments stand.

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

Notification

61. 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

62. 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
9 April 2024