

Table of Contents

Introduction	3
Background.....	3
Documentation Presented to the Commission	6
Witness Evidence	24
The Appellant’s Director – Mr [REDACTED]	24
Mr. [REDACTED] – The Appellant’s bookkeeper.....	30
Legislation and Guidelines	32
Submissions	38
Appellant	38
Respondent.....	40
Material Facts	44
Analysis	45
Determination	54

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter “the Commission”) as an appeal against ten Notices of Assessment raised by the Revenue Commissioners (“the Respondent”) pursuant to section 28B (13) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (“EMPI Act 2020”) in respect of the Employment Wage Subsidy Scheme (“EWSS”). The assessments were raised for the periods November 2020 to August 2021 (inclusive) and the quantum of those assessments is €93,071.
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 period, in accordance with section 28B of the EMPI Act 2020.
3. The appeal proceeded by way of an oral hearing on 29th February 2024. The Appellant was represented by Counsel and its solicitor. Also in attendance on behalf of the Appellant were two members of its solicitor’s team, its book-keeper, its company secretary and its director (“the Appellant director”). The Commissioner heard sworn testimony from the Appellant’s director and the Appellant’s book-keeper. The Respondent was represented by Senior and Junior Counsel, its solicitor and three members of its staff.

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. The EWSS replaced the Temporary Wage Subsidy Scheme (“TWSS”) and came into effect from 1st September 2020. 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. The Appellant was incorporated on [REDACTED] and registered for PREM and Corporation Tax on 1st May 2018 and Value Added Taxation (“VAT”) on 1st September 2018. On 19^h October 2020, the Appellant registered for the EWSS with effect from that date. When registering for the EWSS, via the Revenue Online Service (“ROS”), the Appellant was required to make a declaration which acknowledged that it would abide by the terms and conditions of the scheme and would undertake to retain all documents concerning eligibility for review by the Respondent if deemed necessary. As such, the

Appellant was on notice that a failure to adhere to such terms could result in the recoupment of EWSS payments. The Appellant made the following declaration:

“I declare that I have read the eligibility criteria for the Employment Wage Subsidy Scheme and that the business qualifies for the scheme. I undertake that the business will abide by the terms and conditions of the scheme. I understand and accept that failure by the business to adhere to the terms of the scheme could result in recoupment of monies together with interest, penalties and prosecution. I undertake that the business will retain all records relating to the scheme, including the basis of eligibility, for review by Revenue.”

6. The Appellant claimed payments under the EWSS from the 3rd November 2020 for the periods between October 2020 to August 2021 in the amount of €93,924. The Appellant did so on the basis that it was a “new business” and applied the “new business” turnover test.
7. On 4th November 2021, the Respondent requested information and documentation from the Appellant’s taxation agent in support of the Appellant’s EWSS claims. Following an exchange between the Appellant and the Respondent, the Appellant replied (with supporting documentation) on 2nd December 2021.
8. On 21st December 2021, the Respondent advised that while the Appellant had registered itself as a “new business” for the purposes of the eligibility criteria, it had commenced trading prior to 1st November 2019. As such, the Respondent stated that the Appellant was not a “new” business for the purpose of the Scheme. Given this position, the Respondent further stated that the EWSS guidelines required that the Appellant assess its eligibility by comparing 2020/2021 turnover to its 2019 turnover. Accordingly, the Respondent requested monthly rolling reviews from October 2020 to August 2021 on that basis and provided the Appellant with the relevant portions of the EWSS guidelines and templates to assist it to prepare those reviews.
9. By reply on 2nd February 2022, the Appellant stated the EWSS guidelines provided that “Separate Business Divisions” were to be considered in isolation when assessing EWSS eligibility. The Appellant argued that its business was three separate divisions, namely, (1) ██████████, (2) ██████████ (3) ██████████t. The Appellant further contended that the latter two should be considered “new” businesses. The Appellant stated:

“Hence, we think the intention of the scheme and more correct interpretation would be to apply the review periods on a business division basis. Such a basis would allow comparison of:

- *Actual results for business divisions which were in existence at the start of the pandemic, and*
- *Projected results for any business divisions that commenced in the period of the pandemic.*

Applying this rationale to your letter of 21 December 2021, we would disagree with the suggestion that we have simply expanded an existing business. Rather our company has invested and heavily diversified. Our company was not trading as either [REDACTED] in Q1 2020, at the start of the pandemic.”

10. Within its correspondence of 2nd February 2022, the Appellant attached calculations prepared on the basis of what it deemed were its “existing” and “new” businesses. Those calculations were not prepared on a “rolling monthly review basis” as required by the EWSS guidelines.
11. By correspondence dated 11th February 2022, the Respondent advised the Appellant that as per the EWSS guidelines, in order for elements of its business to be considered a “separate business division”, each business division must have a clearly defined and distinct management structure in place. The Respondent further advised that each such division must be separate to the other business divisions and the distinct management structure must be formalised and have been well established prior to the advent of the Covid-19 pandemic. The Appellant was further advised that per the information available, there was only one business in existence for the purposes of the EWSS.
12. On 15th February 2022, the Appellant replied stating that it did not accept the Respondent’s position and offered further arguments in support of its position.
13. By way of reply on 8th March 2022, the Respondent rejected the Appellant’s arguments and requested the Appellant to provide it with monthly rolling reviews for 2020 and 2021 by reference to the 2019 turnover as a comparator.
14. Subsequently, on 20th May 2022, the Appellant provided the requested monthly rolling reviews. By way of reply on 14^h June 2022, the Respondent advised the Appellant that based upon the information it had submitted, it was deemed ineligible for the EWSS subsidies received for the periods November 2020 to August 2021.
15. The Respondent issued its Notices of Assessment on 6th July 2022 as follows:

	Period	€
1	1/11/20 to 30/11/20	7,374
2	1/12/20 to 31/12/20	10,780
3	1/01/21 to 31/01/21	7,812
4	1/02/21 to 28/02/21	7,612
5	1/03/21 to 31/03/21	9,615
6	1/04/21 to 30/04/21	8,018
7	1/05/21 to 31/05/21	7,712
8	1/06/21 to 30/06/21	11,471
9	1/07/21 to 31/07/21	11,212
10	1/08/21 to 31/08/21	11,465
	Total	93,071

16. On 9th August 2022, the Appellant submitted its Notice of Appeal to the Commission. While the Notice of Appeal was submitted outside the 30-day timeframe stipulated under section 28B (14A) EMPI Act 2020, the Respondent did not object to acceptance of the Appellant's appeal as the Appellant submitted it had not received the postal copies of the assessments until 11^h July 2022 and hence its appeal was within time.

Documentation Presented to the Commission

17. Included within the documentation presented to the Commission was the following:

17.1. A copy of the Partnership Form 1's, which operated the Appellant's trade before it was incorporated into a limited company for the years ended 2016, 2017 and 2018. These confirmed that the Partnership operated a single trade as a [REDACTED] [REDACTED] for those years.

17.2. The Appellant's abridged financial statements ("accounts") for the years ended 31st August 2018 to 31st August 2022 (inclusive). The 2018 accounts were prepared as dormant accounts on the basis that the Partnership conducted activities that year. The balance sheet of the accounts contained the following information:

Financial Period Ended	2019	2020	2021	2022
Wages & Salaries	125,713	68,045	141,697	254,744
Director's Remuneration	33,293	25,806	53,233	78,170
Average Staff Numbers**	8	6	6	10
Loss/Profit for Financial Period	-50,992	8,938	33,908	-37,417
Negative Assets	-50,892	-41,954	-8,046	-45,463
** This included the Appellant Director for all periods				

17.3. The Appellant's corporation tax returns for the ten-month period ended 31st August 2018 and for the years ended 31st August 2020 to 31st August 2022 (inclusive). Those

17.8. A number of photographs taken from Facebook posts, dated [REDACTED] [REDACTED] [REDACTED]. These showed:

17.8.1. The layout of [REDACTED]. This detailed a [REDACTED]
[REDACTED]
[REDACTED]

17.8.2. A wide angle shot of [REDACTED]. This showed a [REDACTED]
[REDACTED]
[REDACTED]

17.8.3. The [REDACTED]. These showed a number [REDACTED]
[REDACTED].

17.8.4. The view from the [REDACTED]
[REDACTED]

17.8.5. The view from [REDACTED]
[REDACTED]

17.8.6. A close up shot of the [REDACTED]

17.9. An undated comparison of “actual turnover” to “forecast turnover” which contained the percentage reduction in turnover. This included the following figures:

Date	Actual Turnover	Forecast Turnover	% Reduction in Turnover
Jul-20	20,389.81	30,000	32%
Aug-20	20,109.35	30,000	33%
Sep-20	19,458.56	30,000	35%
Oct-20	14,039.10	30,000	53%
Nov-20	47,866.71	71,500	33%
Dec-20	74,067.82	133,740	45%
Jan-21	46,934.47	89,128	47%
Feb-21	47,520.60	89,128	47%
Mar-21	61,101.89	110,240	45%
Apr-21	60,904.86	114,272	47%
May-21	66,229.85	116,240	43%
Jun-21	68,935.96	116,240	41%
Jul-21	69,422.58	116,240	40%
Aug-21	70,572.00	116,240	39%
Sep-21	65,415.00	90,128	27%
Oct-21	64,192.00	90,128	29%

17.10. Underneath those figures, the following narrative was included – “Note 1 [REDACTED]
[REDACTED] opened and although new venture, we knew the turnover would fall below

30% threshold, albeit it not reaching its full potential [REDACTED]
we decided to come off the EWSS scheme as we no longer reach the 30% reduction
in turnover criteria”.

17.11. In response to an enquiry from the Respondent dated 2nd December 2021 on the
nature of the Appellant’s business activities, the Appellant replied as follows:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

When restrictions came in last December 24th we had to close [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

We have an older customer clientele [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

With restrictions lifted at present we can still see (especially the older people)
they are somewhat still nervous being in crowds and will avoid it if possible. I
managed to keep all staff on the books for 2021 but only for the assistance of
the wage subsidy. I would definitely have had to reduce days and staff numbers
due to decline in turnover due to the pandemic otherwise.

Currently from our financial projections we experience some weeks more than
30% down in Turnover but on average we are just below the 30% qualifying
threshold, which was my reasoning for coming off the EWSS support scheme,
although if more restrictions are imposed in the coming weeks, I will need to
review my staff requirements to ensure my business can sustain its current
levels of staffing. I am however hoping to keep the same staff levels as it is

extremely hard currently to get good quality staff which my business has to have to succeed.

I hope this provides you with an understanding of my business.”

17.12. A letter from the Appellant dated 2nd February 2022 which stated:

“We note your comments regarding “new” business. From our review, there is no definition of ‘business’ in either the legislation or in the Revenue Guidelines. However, the guidelines do clearly provide for separate business divisions. We are of the view that business divisions are more appropriate to our company than a simple business viewpoint, for the reasons we outline below.

The guidelines suggest that the review periods are by reference to the business, rather than the business divisions. If that ‘business’ interpretation is applied, the guidelines are clearly lacking in that they do not explicitly reference an existing business diversifying in the period of the pandemic. Examples in the guidelines around monetising the same product in a different manner, i.e. a restaurant providing take away when prohibited from opening, are insufficient to cover a business. It is not unreasonable to think that a business would diversify after the first lockdown in to new business divisions. The intention of the EWSS is to support that business when it is impacted by a second or subsequent lockdown, supporting employers to remain open and retain staff rather than to let staff go.

Hence, we think the intention of the scheme and more correct interpretation would be to apply the review periods on a business division basis. Such a basis would allow comparison of:

- Actual results for business divisions which were in existence at the start of the pandemic, and*
- Projected results for any business divisions that commenced in the period of the pandemic.*

Applying this rationale to your letter of 21 December 2021, we would disagree with the suggestion that we have simply expanded an existing business. Rather our company has invested and heavily diversified. Our company was not trading as either [REDACTED], at the start of the pandemics diversifying in the period of the pandemic.

As at March 2020, our business was trading as a [REDACTED]
[REDACTED]
[REDACTED]

In September 2020 we took a lease on a substantially larger premises at [REDACTED]
[REDACTED]
[REDACTED] Noting these material changes, in our view, three business units need to be considered in the context of EWSS

- [REDACTED]. We detail at Appendix I 2019 actual results as against actual performance for EWSS periods in 2020 and through to June 2021. We note the 30% reduction in turnover test was satisfied in September and October 2020. Based on forward projections and rolling numbers, the 30% test would have been satisfied over the 3-month period from August through to October 2020. Thereafter, the change in premises improved the performance of the [REDACTED].

- [REDACTED] Whilst we had previously traded as [REDACTED], we closed our [REDACTED] [REDACTED] in July 2019. We detail at Appendix II our actual and forecast results from November 2020 (being our first month of trading) to June 2021. We note the 30% reduction in turnover test was satisfied in January and February 2021, and on a rolling basis in March 2021. For completeness, we would note that if we compare 2021 results against our earlier [REDACTED], the 30% reduction in turnover test was also satisfied in July 2020 and in each month from January to May 2021, and would have been satisfied over the 6-month rolling period from January through to June 2021.

- [REDACTED]. This is a new business unit, which commenced in December 2020. We detail at Appendix III our actual and forecast results from December 2020 to June 2021. We note the 30% reduction in turnover test was satisfied in all months.

We must also not overlook that we could have incorporated a new company (or companies) to operate the [REDACTED] businesses from September 2020. Many business owners structure their affairs in stand-alone companies. For ease of administration, we thought it better to consolidate in a single entity. Had we in fact taken that multi-company route, that company's entitlement to claim EWSS would have been by reference to projections only.

The likelihood being that the original company (██████████) could have claimed EWSS from July through to October 2020, but not thereafter, and the second company (██████████) could have claimed EWSS for all months from commencement to 30 June 2021.

We would appreciate if you were to consider our comments above and review our incomes by business unit. If you are then in agreement with our approach, we can identify the staff working in each qualifying business unit by month, allowing us to re-compute the correct EWSS entitlement.”

17.13. The referred to appendices were as follows:

Appendix 1				
██████████ Business - Projections				
Month	2019		2020 Forecast	
	Actual	Actual		Actual
	€	€	€	%
Jul-20	17,007	19,912		Incr
Aug-20	26,565	19,462		-27
Sep-20	28,673	18,773		-35
Oct-20	29,231	13,460		-54
Nov-20	25,273	31,763	34,000	Incr
Dec-20	31,961	28,836	46,000	-11%
	<u>158,710</u>	<u>132,206</u>	<u>80,000</u>	
Aug-Oct 2020	84,469	51,695		-39%

██████████				
Month	2019		2020 Forecast	
	Actual	Actual		Actual
	€	€	€	%
Jan-21	14,425	32,037	46,000	Incr
Feb-21	12,670	31,915	46,000	Incr
Mar-21	14,973	42,654	46,000	Incr
Apr-21	15,300	42,812	46,000	Incr
May-21	17,497	45,824	46,000	Incr
Jun-21	14,756	46,196	46,000	Incr
	<u>89,621</u>	<u>241,438</u>	<u>276,000</u>	

Appendix 2

██████████ - Projections

Month	2019		2020 Forecast		
	Actual	Actual		Actual	Forecast
	€	€	€	%	%
Jul-20	19,818	-	-	n/a	n/a
Aug-20	-	-	-	n/a	n/a
Sep-20	-	-	-	n/a	n/a
Oct-20	-	-	-	n/a	n/a
Nov-20	-	15,269	20,000	100%	-24%
Dec-20	-	34,663	40,000	100%	-13%
	<u>19,818</u>	<u>49,932</u>	<u>60,000</u>		

Month	2019		2021 Forecast		
	Actual	Actual	Actual	Forecast	
Jan-21	25,674	13,925	22,000	-46%	✓ -37%
Feb-21	24,620	14,780	22,000	-40%	✓ -33%
Mar-21	25,886	17,367	22,000	-33%	✓ -21%
Apr-21	25,043	17,091	22,000	-32%	✓ -22%
May-21	28,962	19,243	22,000	-34%	✓ -13%
Jun-21	26,746	21,471	22,000	-20%	✓ -2%
Jan-Mar 21	<u>156,931</u>	<u>103,877</u>	<u>132,000</u>		✓ -30.19%

Appendix 3

Business - Projections

Month	2019		2020	
	Actual	Actual	Forecast	Forecast
	€	€	€	%
Jul-20	-	-	-	
Aug-20	-	-	-	
Sep-20	-	-	-	
Oct-20	-	-	-	
Nov-20	-	-	-	
Dec-20	-	9,462	30,240	-69%
	-			
	<u>0</u>	<u>9,462</u>	<u>30,240</u>	

Month	2019		2020	
	Actual	Actual	Forecast	Forecast
	Jul-20	-	-	16,128
Aug-20	-	-	16,128	-100%
Sep-20	-	-	30,240	-100%
Oct-20	-	-	34,272	-100%
Nov-20	-	-	30,240	-100%
Dec-20	-	-	30,240	-100%
	-	-	157,248	

17.14. A further letter from the Appellant to the Respondent which was undated. This stated:

“...In the first instance, we acknowledge that we likely have over claimed EWSS, and a partial repayment is owing. However, we cannot accept the comments in your letter of the 11th regarding separate business divisions at March 2020. The reference quoted from the Revenue Guidelines is clearly drafted to prevent firms from altering their internal structures in the period of the pandemic solely to satisfy the 30% test. It is very illogical to suggest a firm with only one business division is precluded from the scheme because the firm had only one business division in March 2020. It is also illogical to suggest a firm cannot claim where it has sought to expand in the period of the pandemic.

In our mind, the key question at this juncture is whether a stated intention of the EWSS scheme per the Dept of Finance is to preclude a firm from claiming the EWSS where they expand or diversify in the period of the scheme. If that is a stated intention, then your approach holds. If it is not a stated intention, then we must approach this issue on the basis that the Revenue Guidelines are incomplete, in that they do not adequately address situations such as our own.

We appreciate that the guidance can't cover all eventualities, hence the numerous revisions to the TWSS and EWSS guidance since the inception of each scheme. There is no clear answer or example within the guidance which applies to the facts of our case. In the absence of same, we would appreciate the opportunity to discuss a reasonable approach with you, or failing that perhaps the matter could be escalated within Revenue?

We would appreciate if you were to also note:

- It is our view that your suggested approach prejudices our firm, as we expanded within the existing company. We would have been entitled to claim had we segregated new business lines into a new company. It is not unreasonable to suggest we are also prejudiced as against competitors, had an equivalent venture been started from scratch.*
- We expanded / diversified in the period after the first lockdown, a decision justified by reference to financial projections. Subsequent lockdowns and restrictions adversely impacted our firm. It is without doubt that the new business lines could not achieve projected incomes owing to Covid and the restrictions imposed.*
- It is our understanding that the EWSS scheme was put in place to support firms to retain and maintain employment. As part of our expansion / diversification, we hired specialist staff in the period of the pandemic; [REDACTED] for example, specialist staff who we did not otherwise employ or have reason to employ in early 2020. We kept those staff on payroll throughout the pandemic on the legitimate expectation that we could claim the EWSS. Had we not been entitled to claim the EWSS, we would have had to let staff go.*
- Any repayment of EWSS claimed will adversely affect the company and put [REDACTED] into a Balance Sheet negative*

equity position and as director of this company I will be forced to consider closure of the company and as a result all the efforts made to keep people in employment during the pandemic including diversifying the business to adapt to the financial pressures due to Covid will all be in vain.

I would appreciate if you would give the above consideration in arriving at your conclusion, as our employees and their families, including my own family rely on [REDACTED] to continue trading into the future and provide security for them after 2 years of uncertainty due to the pandemic.”

17.15. By way of reply on 8th March 2022, the Respondent stated:

“... In your letter you stated: -

“It is very illogical to suggest a firm with only one business division is precluded from the scheme because the firm had only one business division in March 2020”.

Revenue have not said this - The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual business divisions, at the level of the individual business division. In such a case, each of the business divisions of such an entity, which meets the eligibility criteria, may be eligible for the subsidy. The decline in turnover or customer orders in each business division must be capable of being separately identified or otherwise the entity as a whole has to be assessed. Each business division must have a clearly defined and distinct management structure in place separate to the other business divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic.

“It is also illogical to suggest a firm cannot claim where it has sought to expand in the period of the pandemic”.

Section 2 of Emergency Measures in the Public Interest (Covid-19) Act 2020 states: -

“Subject to subsections (4) and (5), this section shall apply to an employer for the period 1 July 2020 to 31 December 2020 (in this

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

In addition to having tax clearance for the duration of the scheme, an employer must be able to demonstrate that

- *their business is expected to experience a 30% reduction in turnover or orders between 1 July and 31 December 2020 for 2020 pay dates, and between 1 January to 30 June for January to June 2021 pay dates looking at the period as a whole rather than a monthly basis and*
- *this disruption is caused by Covid -19.*

It is abundantly clear from the above that, in order to claim EWSS, the business would have had a reduction in turnover, which was caused by Covid-19. EWSS claims will not be considered eligible for businesses that expanded during Covid-19.

"In our mind, the key question at this juncture is whether a stated intention of the EWSS scheme per the Dept of Finance is to preclude a firm from claiming the EWSS where they expand or diversify in the period of the scheme".

Yes, as per section 2 of the 'Emergency Measures in the Public Interest (Covid-19) Act 2020.

"It is our view that your suggested approach prejudices our firm, as we expanded within the existing company. We would have been entitled to claim had we segregated new business lines into a new company. It is not unreasonable to suggest we are also prejudiced as against competitors, had an equivalent venture been started from scratch".

Whether the business expanded within one company or to more companies is irrelevant, as Revenue will look at the companies as a whole to see if they meet the eligibility criteria set down in legislation. Any venture starting from scratch will also have to demonstrate eligibility for EWSS.

"We expanded / diversified in the period after the first lockdown, a decision justified by reference to financial projections. Subsequent lockdowns and restrictions adversely impacted our firm. It is without doubt that the new

business lines could not achieve projected incomes owing to Covid and the restrictions imposed”.

The introduction of the Employment Wage Subsidy Scheme (EWSS) as a Government support to business was with the intention of keeping employees employed in those businesses. It was never the intention that EWSS would support expansion of business during Covid-19.

“It is our understanding that the EWSS scheme was put in place to support firms to retain and maintain employment. As part of our expansion / diversification, we hired specialist staff in the period of the pandemic; [REDACTED] [REDACTED] for example, specialist staff who we did not otherwise employ or have reason to employ in early 2020. We kept those staff on payroll throughout the pandemic on the legitimate expectation that we could claim the EWSS. Had we not been entitled to claim the EWSS, we would have had to let staff go”.

I refer to my previous point wherein the introduction of EWSS was to support business impacted by Covid-19 and was not introduced to support those businesses that were in a financial position to expand.

“Any repayment of EWSS claimed will adversely affect the company and put [REDACTED] into a Balance Sheet negative equity position and as director of this company I will be forced to consider closure of the company and as a result all the efforts made to keep people in employment during the pandemic including diversifying the business to adapt to the financial pressures due to Covid will all be in vain”.

I understand that this will be a disappointing finding for you (and I accept that it might be your opinion that the legislation should have been framed differently) but Revenue is obliged to operate in a consistent manner and in accordance with the legislation as it is written. However, EWSS was introduced as a support to businesses impacted by Covid-19 and it was never intended to support businesses that were capable of expanding during Covid-19.

Please now provide monthly rolling reviews for all claims in 2020 and 2021 using 2019 turnover as the comparative. Please note that the rolling reviews provided to date have not been in the format set out in the guidelines.”

17.16. The Appellant subsequently provided the following figures to the Respondent on 31st March 2022:

Turnover Month	TOTAL				
	2019	2020	2021		
	Actual €	Actual €	Forecast €	Actual	Forecast
July	36,825	19,912		✓	-46%
August	26,565	19,462		✓	-27%
September	28,673	18,773		✓	-35%
October	29,231	13,460		✓	-54%
November	25,273	47,032	54,000	✓	86% ✓ -13%
December	31,961	72,961	116,240	✓	128% ✓ -37%
	-				
	<u>178,528</u>	<u>191,600</u>	<u>170,240</u>		

Month	2019	2021	2021		
	Actual	Actual	Forecast		Forecast
January	40,099	45,962	84,128	✓	15% ✓ -110%
February	37,290	46,695	84,128	✓	25% ✓ -126%
March	40,859	60,021	98,240	✓	47% ✓ -140%
April	40,343	59,903	102,272	✓	48% ✓ -154%
May	46,459	65,066	98,240	✓	40% ✓ -111%
June	41,502	67,667	98,240	✓	63% ✓ -137%
	<u>246,552</u>	<u>345,314</u>	<u>565,248</u>		

17.17. On 5th May 2022, the Respondent wrote to the Appellant as follows:

“...To allow Revenue assess eligibility for EWSS [REDACTED] [REDACTED] are required to prepare a separate monthly “Rolling Review” for each of the months EWSS was claimed i.e. October 2020 to August 2021 (11 separate monthly reviews). To assist you with this I sent you templates (see attached) for completion on the 11/2/22. Note: “Projected Turnover in Current Climate” referred to in the templates is Projected Turnover in the COVID Climate

In your email dated the 1/4/22 you only provided 2 reviews (see attached) and these were not as set out in the templates provided. I am now affording you

another opportunity to complete the templates. I will require this information by the 22 May 2022. Failure to do so will leave me with no option but to consider [REDACTED] ineligible for all EWSS claimed. In addition, because you are not a New Business for EWSS you will have to file an Eligibility Review Form (ERF) through ROS for the months June, July & August 2021.”

17.18. By reply on 20th May 2022, the Appellant provided the requested “rolling reviews” for the periods October 2020 to August 2021. However, despite the turnover generally increasing on a month to month basis, the Appellant continued to use a set figure of €20,000 per month for the following periods under the rolling reviews. The final such review detailed the following:

Rolling review - August 2021		
	2021	2019
January	45,962	40,099
February	46,695	37,290
March	60,021	40,859
April	59,903	40,343
May	65,066	46,459
June	67,667	41,502
July	69,423	36,825
August	70,572	26,565
September	20,000	28,673
October	20,000	29,231
November	20,000	25,273
December	20,000	31,961
	<u>565,309</u>	<u>425,080</u>
		33%

17.19. Upon receipt of the rolling reviews, the Respondent wrote to the Appellant as follows:

“...

I have reviewed the Rolling Reviews you submitted on the 20/05/22. There was not a reasonable and durable basis to the reviews carried out for October 2020, January 2021 and February 2021 to determine that the business was expected to experience a 30% reduction in turnover.

- In the October 2020 review you forecast the same turnover (€20,000 per month) for November and December 2020. Fixed turnover does not reflect the commercial reality of your business where turnover will vary*

from month to month. In addition, I note from the actual turnover was €47,032 for November and €72,961 for December.

- In the January 2021 review you forecast a fixed turnover of €20,000 per month for February to June 2021 when actual turnover was €47,032 November 2020, €72,961 December 2020 and €45,962 January 2021. I note actual turnover for February was €46,695.*

- In the February 2021 review you continued to predict €20,000 per month for March 21 to June 2021 despite the level of turnover in the preceding months. I note actual turnover for March was €60,021. Notwithstanding this I note that the company did not suffer a 30% reduction in turnover anyway, the reduction of 29.97% is just short of the 30% required.*

I attach a letter setting out the overall eligibility position for EWSS and the steps you need to take to regularise matters.”

17.20. A note of a telephone conversation between the Respondent and the Appellant director dated 15th February 2023. This stated:

“I spoke to [REDACTED] (director) and explained that before going to appeal Revenue would like to consider further whether or not [REDACTED] [REDACTED] operated separate business divisions. I advised that the EWSS guidelines set out specific criteria regarding what separate business divisions are for the purpose of EWSS. I would write to [REDACTED] in the coming days setting out the criteria and would also request information to demonstrate that they operated separate business divisions for the purposes of EWSS. Mr [REDACTED] agreed to review my letter. He also pointed out that the business that operated during Covid had expanded and was much bigger than the one that operated in 2019, consequently he felt the comparisons with 2019 turnover do not give an accurate reflection of how the business was affected by Covid. I explained that where a business was in existence in 2019 that had to be the base year for comparison unless the company operated separate business divisions. [REDACTED] pointed out that he used the EWSS to pay employees, I advised that was in order provided the company were eligible for the scheme and entitled to receive the subsidy. [REDACTED] asked if he was required to repay some or all of the subsidies could the company enter an instalment arrangement. I informed him that this would be a matter for the Collector Generals Division.”

17.21. A copy of the Appellant's letter of 9th March 2023 addressed to the Respondent. This stated:

"...

1. ██████████ commenced trading in November 2016.

2. ██████ division commenced trading in August 2015, the ██████████ commenced May 2017 & the ██████████ was set up in November 2020 but was unable to trade due to Covid-19 restrictions.

3. As at March 2020, our business was trading as a ██████████ ██████████ ██████████. In September 2020 we took a lease on a substantially larger premises at ██████████. We subsequently moved ██████████ that unit and also re-commenced ██████████ from that premises. Noting these material changes, in our view, three business units need to be considered in the context of EWSS:

- ██████████. This business unit was operational in 2019. We detail at Appendix I 2019 actual results as against actual performance for EWSS periods in 2020 and through to June 2021. We note the 30% reduction in turnover test was satisfied in September and October 2020. Based on forward projections and rolling numbers, the 30% test would have been satisfied over the 3-month period from August through October 2020. Thereafter, the change in premises improved the performance of the ██████████ business.

█████████. Whilst we had previously traded as ██████████, we closed our ██████████ at ██████████ in July 2019. We detail at Appendix II our actual and forecast results from November 2020 (being our first month of trading) to June 2021. We note the 30% reduction in turnover test was satisfied in January and February 2021, and on a rolling basis in March 2021. For completeness, we would note that if we compare 2021 results against our earlier ██████████, the 30% reduction in turnover test was also satisfied in July 2020 and in each month from January to May 2021, and would have been satisfied over the 6-month rolling period from January through to June 2021.

• [REDACTED]. This is a new business unit, which commenced in December 2020. We detail at Appendix III our actual and forecast results from December 2020 to June 2021. We note the 30% reduction in turnover test was satisfied in all months.

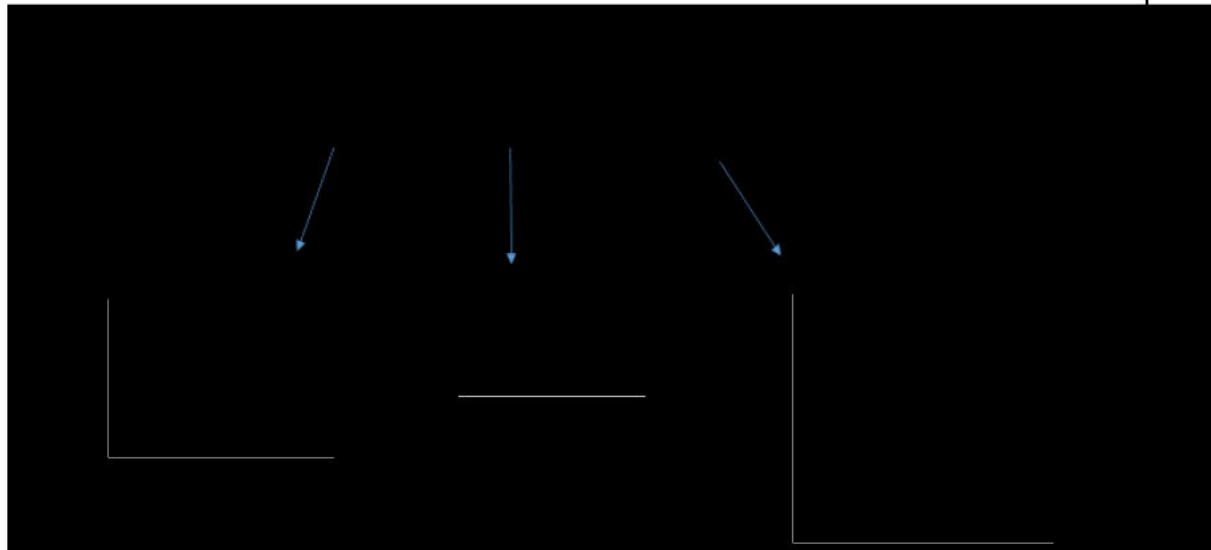
4. Appendix 4 shows the company structure and employees applicable to each business division. Their percentage time is recorded here also.

5. The turnover for the entire entity in 2019 was €425,081. [REDACTED]
[REDACTED] See Appendices I-III for detailed analysis.

I would like also to attach our previous points of note; these are set out below for ease of reference. This was submitted to [REDACTED] on 2 February 2022.

[Extracts from letter included at 17.14 above set out]

17.22. The Company structure and list of employees referred to as “Appendix 4” in the above letter detailed at sub-paragraph 17.22 was as follows:



The referred to Appendices 1 through to 4 in the same letter were those detailed at sub-paragraph 17.13 above.

17.23. A copy of an invoice from a firm of contractors dated 2nd November 2020. This was entitled “new shop” and detailed works and charges done to the Appellant’s premises at [REDACTED].

17.24. Copy of an invoice from an electrical supplier dated 5th November 2020. This referred to the Appellant and detailed a number of electrical goods supplied to the Appellant.

17.25. An email from [REDACTED] County Council which contained details of the Appellant's rates payable for 2018 on [REDACTED] (€2,231.05), for 2019 and 2020 on [REDACTED] (€911.20 and €909.37) and for 2021 on [REDACTED] (€5,948.61).

17.26. A letter from one of the Appellant's suppliers dated 29^h January 2024. This stated:

"To whom it concerns: [REDACTED] opened his new business in [REDACTED] [REDACTED] on Nov 5th 2020 in challenging Covid times. It was great to have a good news story at the time and to see a new Business opening in a sector that was under enormous pressure..."

17.27. A second such letter dated 31st January 2024. This stated:

"To whom it may concern. [REDACTED] is a customer of [REDACTED] [REDACTED] for over 11 years. We delivered to his two old business(sic) in [REDACTED] [REDACTED] for a number of years.

Since November 2020, we do business with [REDACTED] in his new premises [REDACTED] [REDACTED] We wish him continued success in his new business."

17.28. A copy of the Appellant's lease in respect of the premises situate at [REDACTED] [REDACTED]. This stated that the lease commenced on 1st September 2020 and that the rent payable for the premises was €13,000 (plus VAT) for years 1 and 2 and €14,560 for years 3 to 5. The lease also contained a number of Special Conditions attached to it.

Witness Evidence

The Appellant's Director – [REDACTED]

18. [REDACTED] having being sworn in by the Commissioner advised that he was an active director in the Appellant since [REDACTED] but prior to incorporating the company had operated the business activities conducted by the Appellant in partnership with another individual, [REDACTED]. The witness stated that he had left school at the age of 16 and trained as a [REDACTED] before going into the partnership with [REDACTED].

19. The witness advised that he registered the Appellant for VAT in 2018 and opened what he considered was a new business in November 2020. He explained that when the Appellant moved business premises in 2020, it ventured into a new business activity which was the [REDACTED] and had re-opened the [REDACTED] which it had previously operated. The witness explained that despite the Appellant having previously

operated a [REDACTED] it considered the re-opened [REDACTED] a new business. In his own words, he stated¹:

“The only thing that wasn't new was the tax number but, at the time, it didn't make sense on two fronts to dissolve that company and incorporate another company because, one, of the finance to do that and secondly, because there was no professional advice available, at that time, to get advice because everyone was off during restrictions. So that's why. So I kept that company number for the new business we opened.”

20. The Appellant's director further explained that the Appellant's business activities in 2019 consisted of a [REDACTED] which was operated from [REDACTED] and a [REDACTED] which was operated from a separate building located at [REDACTED]. The Appellant Director stated that while that business model worked well from a Health and Safety perspective [REDACTED] [REDACTED] the fixed costs (light and heat, broadband, etc.) the Appellant was incurring were effectively doubled owing to the separate business premises.
21. The witness advised that the Appellant closed the [REDACTED] located at [REDACTED] at the end of June 2019 but did not cease the Appellant's tax registrations as it was still operating the [REDACTED] at [REDACTED] up to March 2020 when the Covid-19 pandemic became prevalent.
22. The witness stated that the Appellant ceased trading completely for “four or five weeks to see what was going to happen” at the onset of the pandemic before being informed that its business activities were considered “essential services” and it was permitted to remain open. The witness advised that the Appellant resumed its [REDACTED] when it became aware of that position.
23. The witness explained that the Appellant opened its new business in November 2020 at its new business premises which was situate at [REDACTED] and housed the existing [REDACTED] business, the newly revamped [REDACTED] and the completely new [REDACTED]
24. The witness stated that he understood from the EWSS legislation and guidelines that the objective of the Scheme was to keep staff at work if the business was permitted to remain open as an “essential service”. The witness advised that he looked at the costs of closing

¹ Transcript, day 1 page 20 at lines 9-15.

the business to the Exchequer, which were calculated on 10 staff receiving €350 per week on the Pandemic Unemployment Payment Scheme (“PUP”) and came to a total of €161,000. As the Appellant only received the sum of €93,071 in EWSS payments, and continued to pay its tax and rates during the period it remained open, the witness submitted that Appellant saved the Exchequer some €67,000 by adapting the course of action it did.

25. The witness stated that he only became aware of the legislative requirement to have separate business divisions when the Respondent advised him of this position when checking the Appellant’s eligibility for EWSS. The witness stated that this was not economically feasible for a business the size of the Appellant’s since, as it operated four separate businesses, it would have been required to engage four separate business managers.

26. The witness further stated that when he registered the Appellant for the EWSS, he ticked the category “new business” as he believed that was the correct option. Without the availability of professional advice, at that time, the witness submitted that he adapted the best course of action.

27. Under cross examination, the witness stated:

27.1. The business activities of the partnership, which were subsequently transferred to the Appellant were described within the Form 1 of the partnership as [REDACTED]

27.2. He bought his partner out of the partnership in 2018 for €5,000 and since then he operated his business activities through the Appellant, of which he owned 100% of the issued share capital.

27.3. That the turnover and total wages of the partnership were as follows:

	Turnover	Wages
31 st December 2016	€726,460	€124,506
31 st December 2017	€726,948	€127,370
31 st December 2018	€692,751	€148,528

27.4. That the turnover, total wages, number of staff employed by the Appellant and his wages were stated in the Appellant’s financial statements as follows:

Year Ended	Turnover	Total Wages	No. of Staff	Director Wages
31 st August 2019	€510,775	€125,000	8	€33,293
31 st August 2020	€253,894	€ 68,045	6	€19,656
31 st August 2021	€658,565	€141,697	6	€53,233

27.5. When asked why, that information available to the Respondent (see sub-paragraph 17.4 above), suggested that the Appellant had more staff in the periods EWSS was claimed than those shown in accounts for the above financial periods, the witness stated he was unsure why such differences arose.

27.6. That the majority of the Appellant's staff engaged within its previous business premises transferred to the new business premises. In addition, the witness confirmed that the Appellant took on a number of new staff during the period in which it claimed EWSS.

27.7. When asked whether the ability to keep existing staff and take on new staff suggested that the Appellant's business was expanding and enjoying a favourable situation from a turnover perspective during the claim period, the witness disagreed, stating²:

"Because my [REDACTED] was closed and [REDACTED] was closed and they were supposed to open at any week because they kept pushing out, to flatten the curve as they said and they were going to try and open for Christmas. And in our business all those staff had to be trained and you can't just bring someone in on a Monday and expect them to [REDACTED] on a Wednesday, they need to be trained up. So we were bringing those staff on, with the help of the subsidy, to keep them, to get them trained up, so we're ready for when we open when the Covid restrictions were lifted."

27.8. That his director's salary for 2019 and 2020 was relatively modest. When asked why his salary increased by 250% between the years 2020 and 2021, the Appellant stated:³

"That is why I worked, anyone that opens a new business, you'll only get out of it what you put into it, that's why I was there seven days a week trying to push it, trying to drive it and, I think it was only fair to see fit to be paid for it."

² Transcript, pages 71-72 at lines 24-5.

³ *Ibid.* page 63 at lines 24-29.

27.9. That despite closing the [REDACTED] July 2019, the Appellant re-opened the [REDACTED] when the “new” business commenced trading from the new premises on 2nd November 2020. In his own words, he stated⁴:

“When I opened my new business I re-introduced the [REDACTED] because I’m a [REDACTED] It was what I wanted to do.”

27.10. During the periods the Appellant claimed EWSS, it only operated the business as a [REDACTED]. The witness stated that the [REDACTED] was unable to open during those periods owing to restrictions in place and as “large events” were also unable to be held owing to those restrictions, it was also unable to operate [REDACTED].

27.11. When presented with the Facebook posts (see sub-paragraph 17.6 and 17.7 above), which indicated that the “new business” was a continuation of the “old business” owing to the language and narrative contained therein and the fact that the old business was only closed for one week before relocating, the witness stated that he disagreed that the language suggested this.

27.12. When asked if the EWSS guidelines and legislation suggested that the Scheme could be used to subsidise the expansion of a business, the Appellant stated⁵:

“I thought the legislation was ambiguous when it came to my situation.”

27.13. That special condition number 8 within the lease for the new premises contained the following:

“In the event of Covid-19 Government ordered shutdown to the extent that the tenant is not permitted to trade from the demised premises, it will enjoy a rent holiday for the period of such shutdown. However, if the tenant continues to trade from the premises, for example, [REDACTED], then the rent shall remain payable but a rate of 60% of the agreed rent herein for the duration of such a shutdown.”

27.14. When asked what the purpose of that clause was, the witness stated⁶:

“The purpose of this clause is that my landlord accepted that we were severely disrupted by Covid. He seen the amount of money we invested in the new business to get it to a standard where we could open and be ready for when

⁴ Transcript, page 47 at lines 6-8.

⁵ *Ibid.* page 64 at lines 13-14.

⁶ *Ibid.* page 87 at lines 9-17 and lines 22-26.

the lockdown lifted, that we were ready to [REDACTED] So, I think he acknowledged the fact that we were severely affected by Covid and I think that's, I think we're after moving away from that fact.

Well, if you look at it from the divisional point of view, we can't pay full rent where we're only operating off two divisions when you're paying rent for four divisions and, I think the fact that he accepted that clearly states that it's very clear.”

- 27.15. When asked if there was any reference to divisions in the lease, the Appellant advised that there was not.
- 27.16. That the [REDACTED] element of the business did not open until August 2021 as it was unable to do so under legislation prior to that date.
- 27.17. That throughout the year 2020, he regularly transferred the sum of €2,000 from the Appellant's bank current account to its deposit account.
- 27.18. When asked if the Appellant was not being genuine in terms of its participation in the EWSS as its turnover had increased, its staff and director wages had increased and despite the Appellant expending such costs it was able to regularly save €2,000 per week, the Appellant said he disagreed this was the position.
- 27.19. The turnover for 2022 was in or around 10% greater than his turnover for 2021.
- 27.20. The [REDACTED] increased by 313% in terms of its 2020 and 2021 turnover.
- 27.21. When asked how the organisational chart at 17.22 above detailed that some of the employed staff worked [REDACTED] when it was shut, the Appellant stated that he prepared the chart based upon where the staff were employed to work rather than where they actually worked during the periods support payments were made.
- 27.22. When asked if the forecasts provided to the Respondent to validate the EWSS claims were prepared on a rolling review basis, the witness advised that they were not and were only prepared on such basis when requested by the Respondent. The witness stated⁷:

“I did after when I was requested by Revenue. But at the time I didn't because, again I'll ask you, how can you benchmark four divisions against two divisions? I think it is very unjust to ask me do that.”

⁷ Transcript, page 136 at lines 13-16.

27.23. When asked if he appreciated that it was an obligation pursuant to the legislation to carry out such a review, the witness stated⁸:

"I appreciate there was no legislation there for my business."

27.24. When asked if the reason the Appellant was putting money aside (into the deposit account), was to cover the repayment of EWSS payments it had wrongly received, the witness stated⁹:

"No, I was putting money aside because we found ourself after opening a new business, which was going pretty well and I was never in -- how will I put it -- all my tax affairs are up-to-date. I had a Corporation Tax that was going to be coming in. I was tax planning on the advice of my book-keeper, [REDACTED] and to have that put aside for that. I didn't know what was coming down the road. I wouldn't have drawn the subsidy if I thought I wasn't entitled to it. I drew the subsidy because I followed the guidelines, I followed the advice."

[REDACTED] – The Appellant's bookkeeper

28. [REDACTED] advised that he was an ACCA accountant and worked with the Appellant for six years on a self-employed basis from his home office. He stated that functions encompassed day-to-day book-keeping for the Appellant recording sales, purchases, payroll, cash flows and margin analysis.

29. The witness advised, in noting that the EMPI Act 2020 did not contain a definition of a "new business", that he prepared the various comparisons of actual versus forecast turnover (paragraphs 17.9, 17.13 and 17.16 above refer). When asked why the turnover comparison was done on the basis of forecast turnover rather than actual turnover for 2019, the witness stated¹⁰:

"So the table initially started out as Actual 2020 and Forecasts 2021, because it was determined at the time that [REDACTED] was a new business in a new premises with various new divisions attached to it, so we were benchmarking our actual turnover for 2020 against forecasts for 2021."

30. The witness explained that he only provided the Respondent with a copy of the actual versus 2019 figures¹¹:

⁸ Transcript, page 136 at lines 19-20.

⁹ *Ibid.* page 136 and 137 and lines 23-4.

¹⁰ *Ibid.* page 183 at lines 9-14.

¹¹ *Ibid.* page 183 at lines 14-20

“after the effect when we were, when the questioning started coming from the Revenue in terms of how we arrived at the figures and they required us to put in the 2019 figures to benchmark against that. But for the purpose of EWSS for what we supplied we worked off the forecast for 2021.”

31. The witness further explained the rationale for using the forecast rather than actual 2019 figures as follows¹²:

“On the basis that it's a new business and on that basis there are no comparable figures for the business, because with the new business there was four divisions within that. Internally we had [REDACTED]. We had then a [REDACTED]. So when we refer to a [REDACTED] we're referring it to, as purely [REDACTED]. And the purpose of that is to monitor the performance of each business unit to ensure the division is actually profitable, it's carrying itself and that there's not one division supporting another loss-making division. So internally we need those divisions segregated for that purpose from an accounting perspective.”

32. When questioned about the document he prepared, which compared the actual turnover versus the 2019 turnover (see paragraph 17.18 above), the witness advised¹³:

“It was a retrospective document that we prepared purely on the request from Revenue, pages 118 and 208 to 210 inclusive were the documents that we used for the EWSS Assessment in determining whether we were going to claim the EWSS or not. This was done retrospectively trying to understand, what we were trying to do then is break this down by division then after on page 120. It's only a subset of the total situation.”

33. When asked whether he accepted the figures used for assessing eligibility for the EWSS were not prepared on the basis of “rolling reviews”, the witness advised¹⁴ *“No, it's not, not as it appears here”*. The witness further confirmed that rolling reviews were only prepared on the Appellant's behalf when requested by the Respondent¹⁵.

34. When asked why the rolling review forecasts were prepared using a static turnover figure of €20,000 per month when the actual month-to-month turnover was increasing and whether that document was misleading, the witness stated¹⁶ *“Well what's misleading is*

¹² Transcript, pages 183 and 184 at lines 22-6.

¹³ *Ibid.* page 193 at lines 9-16.

¹⁴ *Ibid.* page 194 at line 26.

¹⁵ *Ibid.* page 195 at line 14.

¹⁶ *Ibid.* page 202 at lines 5-6.

that you're comparing it to 2019, not forecasts?". Upon subsequent questioning by Counsel, the witness confirmed that leaving the turnover figure static at €20,000 per month, when monthly turnover was increasing was "misleading"¹⁷.

35. When asked why somebody with his "presumed competence" (as a member of a recognised accountancy body) had such difficulty in providing the Respondent with the requested rolling reviews, the witness stated¹⁸:

"The detail behind that, I'd have to look at the detail behind that before I'd be able to make an informed decision on that. My point is, although these were requested by Revenue post facto, on the basis that EWSS, we applied for it based on our forecast, which is on page 118. Yes, this may be incorrect. It may not have got the due care and attention that it should have done, but it didn't form the decision, or the application process that we did at the time for EWSS."

36. When asked whether the Appellant would not have expanded its business and taken on the additional staff it did without the benefit of the EWSS payments it received during those periods, the witness stated¹⁹ *"He (sic) would not have been in a position"*.

Legislation and Guidelines

37. 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

¹⁷ Transcript, page 206 at line 27.

¹⁸ *Ibid.* page 206 at lines 16-25.

¹⁹ *Ibid.* page 217 at line 7.

by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as 'the corresponding period'),

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

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

(A) 30 per cent, or

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

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

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.

[...]

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

(20) The Revenue Commissioners shall prepare and publish guidelines with respect to – (a) the matters that are considered by them to be matters to which regard shall be had in determining whether a reduction, as referred to in subsection (2), 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).

[...]

(23) (a) In so far as it relates to income tax, this section shall be construed together with the Income Tax Acts...

38. 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.

39. Additionally, from 1 August 2020, subsection 14A was inserted into section 28B:

“A person aggrieved by an assessment or an amended assessment to relevant tax made on that person may appeal the assessment or amended assessment, as the case may be, to the Appeal Commissioners, in accordance with section 949I of the Act, within the period of 30 days after the date of the notice of assessment or the amended assessment, as may be appropriate.”

40. As required by section 28B (20), the Respondent published Main Guidelines on the operation of the EWSS²⁰ (“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.”

41. 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:

²⁰ Numerous versions of these guidelines were produced by the Respondent to incorporate legislative changes. The latest version, dated 3rd February 2022 is available at: <https://www.revenue.ie/en/employing-people/documents/ewss/ewss-guidelines.pdf>

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...”

42. 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.”

Submissions

Appellant

43. The Appellant stated during the pandemic, it attempted to contact the Respondent numerous times to seek guidance on the operation of the EWSS. Absent such guidance and as the Appellant’s accountant was unavailable during the pandemic, it submitted that it applied the provisions of the EMPI Act 2020 to the best of its ability without any guidance or support.
44. As there is no definition of a “new business” within the EWSS guidelines and as the Appellant had opened a new business in November 2020, the Appellant submitted that it was not possible for it to compare “actual” turnover to 2019 comparatives as mandated by the EWSS legislation. The Appellant stated that while it had previously operated a [REDACTED], as that division of its business ceased operating in July 2019, then it was not relevant as a turnover comparator for the purposes of determining its eligibility for EWSS.
45. The Appellant stated that its wage bill was very high and staff were at full capacity despite the new [REDACTED] of its business being unable to open owing to Covid related restrictions in place at that time. The Appellant submitted that these staff numbers demonstrated its commitment to keep its staff at work during the period of restrictions and this was in keeping with the guidance issued by the Respondent on the function of the EWSS.
46. The Appellant stated that it had registered for the EWSS as a “new business”. If this was incorrect, the Appellant submitted that the onus was on the Respondent to advise the Appellant that it was not a new business at the time of registration and/or for the Respondent to provide the Appellant with the necessary tax registration forms for it to register as a new business. Further, or in the alternative, the Appellant submitted that the

Respondent's online portal should have advised the Appellant that if it was a new business, it was required to obtain a new tax registration number before its claim could be processed.

47. The Appellant submitted that section 28B EMPI Act 2020 is not a taxing statute and therefore the normal canons of statutory interpretation ought to be applied to the "multiple ambiguities" contained within that Act. As that legislation does not provide a definition of "new business", "established business" or "separate business division", the Appellant submitted that those words should be given their ordinary meaning.
48. By applying the ordinary meaning of those words, the Appellant submitted at the time the Appellant applied for EWSS registration, its business activity was in a state of being divided into parts or branches, each of which were adversely affected by the Covid-19 pandemic. As a result of this sub-division, the Appellant submitted that it genuinely believed that the whole of its operations commenced after the pandemic presented, or at the very least that two of its "branches" met that description.
49. Given this position, the Appellant submitted that the reason for the distinction between different businesses in sections 28B (2), 2(A) and (B) of the EMPI Act 2020 was that a business established after 1st November 2019 would not have had a trade before Covid-19 and as such would not have had any 2019 comparable turnover figures. The Appellant submitted that this was the true intent of the legislator in enacting those provisions.
50. In addition, the Appellant submitted that sections 28B (2), 2(A) and (2B) of the EMPI Act 2020 are ambiguous by themselves in that they refer to the "commencement of operations" which could infer the "commencement of a branch of a business" or the "commencement of a business as a whole".
51. While no legislative definition of "separate business division" is contained within the EMPI Act 2020 or elsewhere, the Appellant noted that the EWSS guidelines stated that those guidelines were put in place to provide "*additional guidance on employees... within entities with separate business divisions or whose activities are undertaken across separate business entities*".
52. As such, the Appellant submitted that the Respondent seeks to amend an Act of the Oireachtas by inserting a definition for "separate business division" using a guidance document as an instrument, which was subject to frequent revision. The Appellant submitted that this action was contrary to the well-established canons of statutory interpretation.
53. The Appellant further submitted that the objective of the EWSS was to support businesses such as that of the Appellant, to keep staff in employment and to stimulate the economy.

The Appellant submitted that the actions it had taken fulfilled those purposes and as such, its claim for EWSS should be allowed. Furthermore, the Appellant submitted that had it incorporated a new company and obtained a new tax registration number to house its activities, then there would have been no ambiguity that the Appellant would have been entitled to receive payments under the EWSS and the Respondent would not have raised its assessments.

54. In summation, the Appellant submitted that the assessments issued by the Respondent should be reduced to nil on the grounds that it had complied with the legislative requirements entitling it to avail of those payments. In the alternative, the Appellant submitted, in the event it was deemed that the [REDACTED] components of its business were an existing business activity for the purposes of EWSS, that the Appellant should be allowed to claim for the [REDACTED] of its business and accordingly that the assessments should be reduced to reflect the sum of €31,024 payable.

Respondent

55. The Respondent submitted that the relevant provisions of section 28B EMPI Act 2020 are not ambiguous or obscure and as such that the principles of statutory interpretation do not apply to the Appellant's appeal. However, in the event that the Commissioner held that the provision is obscure, the Respondent submitted that if those provisions are interpreted by reference to the traditional canons of interpretation or by reference to those apposite to taxing statutes, the result is the same.
56. The Respondent submitted that the interpretation of statutes (generally) is provided for in section 5 of the Interpretation Act 2005 and the interpretation of taxation statutes was the subject of detailed exposition in the dicta of McKechnie J. in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50, paragraphs 62 to 72, the judgment of O'Donnell J. in *Bookfinders Limited v The Revenue Commissioners* [2020] IESC 60, and judgment of Murray J. in *Used Cars Importers Ireland Ltd v Minister for Finance* [2020] IECA 298.
57. Turning to the EWSS guidelines, the Respondent submitted that section 28B (2), (2A) and (2B) of the EMPI Act 2020 specifically provide that for an employer to be considered eligible it must establish that it has been adversely affected. Furthermore, the Respondent submitted that the statutory provision requires that an applicant must do so *'in accordance with guidelines published by the Revenue.'*

58. The Respondent stated that section 28B (20) EMPI Act 2020 provides that those guidelines shall set out the “*matters that are considered by them to be matters to which regard shall be had in determining entitlement to EWSS payments.*”
59. The Respondent stated that it produced and published guidelines pursuant to subsection (20) EMPL Act 2020 entitled ‘*EWSS - Guidelines on the operation of the Employment Wage Subsidy Scheme*’. The Respondent submitted that these guidelines, like the Act, are clear in their language and are unambiguous but insofar as any ambiguity could be said to arise in connection with those guidelines, then, as with the Act, the purpose of the Scheme is apposite.
60. The Respondent submitted that for the Appellant to be eligible for EWSS payments, it was required to comply with the provisions of the “turnover/customer order test” as provided under sections 28B (2) (2A) and (2B) EMPI Act 2020. The Respondent submitted that as the Appellant had commenced trading prior to 1st May 2019, then for the purpose of the EMPI Act 2020, it was considered at all material times an “established business”.
61. In support of this submission, the Respondent opened the United Kingdom (“UK”) case of *Maidment (Inspector of Taxes) v Kibby and Another* [1993] STC 494 (“*Maidment*”). In *Maidment*, the appellant had a fast food takeaway business and then they bought another fast food business in another town. It was held:
- "On the primary facts, it was open to the commissioners to conclude that the taxpayers had not succeeded to a new trade but had expanded their existing trade into the premises at Caldicot -- the business at Caldicot in respect of which the taxpayers made profits after June 1987 was not the same business as the one to which they had succeeded."*
62. In addition, the Respondent opened the case of *Cannon Industries Ltd. v Edwards* 42 TC 625 (“*Cannon*”) in which the appellant carried on the trade of manufactured gas appliances and gas chemical plant for sale to other companies. In *Cannon*, it acquired a new business of assembling electric food mixers for retail sale and it had common arrangements for book-keeping, banking and the payment of wages and the court found that it was an extension of the company's existing trade.
63. In line with *Maidment* and *Cannon*, the Respondent submitted that while the Appellant had diversified its trading activities (by re-introducing its [REDACTED] and the new [REDACTED]), as those activities were complimentary to its existing business activities and shared the same premises and “common arrangements”, then the position was that the Appellant had not commenced a new trading activity but in place had expanded its

existing trade. As such, the Respondent submitted that the Appellant's business was that of an "established business" rather than a "new business".

64. In holding that the Appellant's business was an established business, the Respondent submitted that the Appellant:

"must demonstrate to the satisfaction of the Revenue Commissioners that, by reason of the Covid-19 and the disruption being caused thereby to commerce [...] there will occur in the specified period at least a 30 per cent reduction in either the turnover of the employer's business or in the customer orders being received by the employer by reference to [the relevant comparator periods, depending upon the claim period]."

65. More particularly, the Respondent submitted that for the claims made from between November and December 2020, the relevant turnover/customer orders test is provided for in section 28B (2) EMPI Act 2020. In effect, the Respondent submitted that sub-section 28B (2) EMPI Act 2020 requires that an "established business" applicant (i.e. commencing no later than 1st November 2019) compare its turnover or customer orders for periods July to December 2020 with those in July to December 2019.

66. Similarly, the Respondent submitted, for the claims made from January 2021 and June 2021, the turnover/customer orders test is provided for in section 28B(2A) EMPI Act 2020. In effect, the Respondent submitted that sub-section 28B (2A) EMPI Act 2020 requires that an 'established business' applicant (i.e. commencing no later than the 1st May 2019) compare its turnover or customer orders for periods January to June 2021 with those in January to June 2019.

67. Finally, the Respondent submitted that for the claim made from July 2021 to August 2021, the turnover/customer orders test is provided for in section 28B(2B) EMPI Act 2020. In effect, the Respondent submitted that sub-section 28B (2B) EMPI Act 2020 requires that an 'established business' applicant (i.e. commencing no later than the 1st November 2019) compare its turnover or customer orders for the periods January to December 2021 with those in January to December 2019.

68. Accordingly, the Respondent submitted that the legislation is clear and unambiguous regarding the comparison periods for calculation the 30% reduction in turnover or customer orders.

69. The Respondent submitted that in line with the dicta of Charleton J in *Menolly Homes Ltd v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, the burden of proof was on the Appellant to demonstrate that its turnover had decreased by 30% from the

comparator turnover in order to be eligible to fulfil the statutory requirements under the EMPI Act 2020 entitling it to receive EWSS payments.

70. In addition, the Respondent submitted that, insofar as the Appellant submitted that its business consisted of separate business divisions, that the onus of proving that those divisions existed was for the Appellant to discharge. The Respondent submitted that its published guidelines made this position clear as those guidelines state:

“The 30% reduction in turnover or customer orders may be applied at the level of the entity as a whole or, if an entity is formally structured (and has been since before the COVID-19 pandemic restrictions in March 2020) into individual Business Divisions, at the level of the individual Business Division. In such a case, each of the Business Divisions of such an entity which meets the eligibility criteria may be eligible for the subsidy. The decline in turnover or customer orders in each Business Division must be capable of being separately identified or otherwise the entity as a whole has to be assessed. Each Business Division must have a clearly defined and distinct management structure in place separate to the other Business Divisions and these structures must be formalised and have been well established before the advent of the COVID-19 pandemic. Revenue, having regard to risk indicators, may need to examine closely the evidence/basis for entering the scheme of certain EWSS applications that are made in respect of one or more Business Divisions rather than made in respect of the overall entity.”

71. The Respondent submitted that the Appellant has not satisfied the foregoing requirements to have itself considered as “separate business divisions” that included two “new businesses”. Rather, the Respondent submitted the Appellant is an established business that was ineligible to claim EWSS payments because it failed to satisfy the statutory eligibility criteria per sections 28B (2), (2A) and (2B) EMPI Act 2020.

72. Further or in the alternative, the Respondent submitted that under its EWSS guidelines, the Appellant must demonstrate in order to be eligible for support payments that:

1. separate management structures existed between the business divisions in the company.
2. these structures were well established before the advent of the Covid-19 pandemic.
3. the employees were not transferable across different business divisions within the company and

4. such organisational structures are clearly demonstrated by reference to documentation pre-dating the Covid-19 pandemic (i.e. prior to March 2020).

73. In conclusion, the Respondent submitted that it is the Appellant who bears the onus of proving that it was eligible to receive the disputed EWSS payments. More particularly, the Respondent submitted that the Appellant must prove that it comprises three separate business divisions that were well established before the advent of the pandemic, with clearly defined and formalised management structures. Having done so, the Respondent submitted that the Appellant must then demonstrate compliance with the requirements of s. 28B (2), (2A) and (2B) of the EMPI Act 2020. The Respondent further submitted that the Appellant could not satisfy the statutory criteria as it is an established business for the purposes of the EMPI Act 2020 and did not satisfy the requisite reduction in turnover necessary for inclusion on the EWSS. For those reasons, the Respondent submitted that the Appellant's appeal should be dismissed and the Notices of Assessments affirmed.

Material Facts

74. The Commissioner finds the following material facts which are not in dispute between the parties:

74.1. The Appellant commenced trading activities on 1st September 2018.

74.2. The trading activities of the Appellant were the [REDACTED].

74.3. In or around July 2019, the Appellant ceased trading [REDACTED].

74.4. In November 2020, the Appellant moved its trading activities to a new premises situated at [REDACTED]. Those trading activities were the operation of the [REDACTED].

74.5. Within the new premises, the Appellant also established a [REDACTED]. [REDACTED] did not commence trading until August 2021.

74.6. The Appellant registered for inclusion on the EWSS on 19th October 2020.

74.7. For the periods October 2020 to August 2021, the Appellant received the sums of €93,924 in EWSS payments.

74.8. As the Appellant was deemed not to fulfil the legislative requirements for inclusion on the EWSS, the Respondent issued ten notices of assessment on 6th July 2022. Those assessments required the Appellant to repay the sum of €93,924 in EWSS payments it had received.

75. In addition, the Commissioner finds the following material facts from the documentation and submissions of the parties:

- 75.1. The Appellant registered for inclusion on the EWSS as a “new business”.
- 75.2. At all material times, the Appellant’s corporation tax returns detailed that it operated a single trade. That trade was described as the operation of [REDACTED]
- 75.3. Upon request, the Appellant provided the Respondent with two separate schedules of turnover comparisons. Those schedules compared actual turnover with projected turnover.
- 75.4. Subsequently, the Appellant provided the Respondent with a schedule of turnover which compared actual turnover with reference to turnover for various base periods in 2019.
- 75.5. The above schedule at 75.4 was prepared in or around 31st March 2022 on a “rolling review basis”. Despite the turnover increasing on a month to month basis, the Appellant continued to use a set figure of €20,000 per month as its projection of the following months’ turnover.
- 75.6. The referred to schedule at 75.4 disclosed that turnover for October 2020 decreased by 54% when compared to the October 2019 base period. For the periods November 2020 to June 2021, the schedule showed that the Appellant’s turnover increased for those months, by reference to the applicable base period, by percentile amounts ranging from 15% to 128%. No actual or comparison figures were provided to the Commissioner for the months of July or August 2021 as these were not required under the EWSS guidelines.
- 75.7. The Appellant’s turnover increased from €253,894 in the year ended 31st August 2020 to €658,565 in the year ended 31st August 2021.
- 75.8. The Appellant’s business was managed and controlled by the Appellant director and it did not maintain separately managed business divisions.
- 75.9. The Appellant complied with the requirements under section 3 EMPI Act 2020.

Analysis

76. 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 €93,924 for EWSS payments made between October 2020 and August 2021 inclusive. 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.”

77. While the Appellant submits that section 28B EMPI Act 2020 is not a taxation statute, sub-sections 19 and 23 of that Act dictate otherwise. They state:

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

(23) (a) In so far as it relates to income tax, this section shall be construed together with the Income Tax Acts...”

78. As those sub-sections state the administration of the EMPI Act 2020 shall be under the care and management of the Respondent, and that the section shall be construed together with the Income Tax Acts, it follows that the EMPI Act 2020 is a taxation statute. However, the Commissioner notes that McDonald J in *Perrigo Pharma International DAC v John McNamara, the Revenue Commissioners and ors.* [2020] IEHC 552 (“*Perrigo*”) did not differentiate in coming to his findings between the “normal canons of statutory interpretation” and those of specific application to the interpretation of taxation statutes. As such, the Commissioner does not agree with the Appellant’s submissions and finds that the principles promulgated in *Perrigo* apply insofar as they are necessary to interpret the provisions of section 28B EMPI Act 2020.

79. Those principles were set out in paragraph 74 of *Perrigo* as follows:

“The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766: "Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and

without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.”

80. The Commissioner notes from the Appellant’s submissions that its position is that the provisions of section 28B EMPI Act 2020 are flawed as they do not contain a number of key definitions which include “new business”, “established business” and “separate business division”.

81. The provisions of section (2) (i) EMPI Act state:

“(I) there will occur in the period from 1 July 2020 to 31 December 2020 (in this subsection referred to as ‘the specified period’) at least a 30 per cent reduction, or such other percentage reduction as the Minister may specify in an order made by him or her under subsection (21)(b), in either the turnover of the employer’s business or in the customer orders being received by the employer by reference to the period from 1 July 2019 to 31 December 2019 (in this subsection referred to as ‘the corresponding period”),

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

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

(A) 30 per cent, or

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

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

82. While noting the phrases “new business” and “established business” are not used within that sub-section, it is apparent to the Commissioner that the wording used in sub-section (I) applies to a business which was in existence on 1st July 2019 and is therefore an “established business”, that subsection (II) applies to a business which commenced operation on or after 2nd July 2019 but before 1st November 2019 and is therefore a “new business” and subsection (III) which refers to a business which commenced trading after 1st November 2019 which is also a “new business”.

83. The Commissioner notes that the Appellant interchangeably stated that it operated three or four “business divisions” within its business and it submits that the Respondent “*seeks to amend an Act of the Oireachtas by inserting a definition for “separate business division” using a guidance document as an instrument, which was subject to frequent revision”*”.

84. Section 28B (2) EMPI Act 2020 states:

“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).”

85. As the above section places the Respondent’s guidelines on a statutory footing, the Commissioner does not agree with the Appellant’s submissions in which it alleges the Respondent “*seeks to amend an act of the Oireachtas”*”. As noted from paragraph 11 above, within the Respondent’s correspondence of 11th February 2022, it advised the Appellant that as per the EWSS guidelines, in order for elements of its business to be considered a “separate business division”, each business division must have a clearly defined and distinct management structure in place. The Respondent further advised that each such division must be separate to the other business divisions and the distinct management structure must be formalised and have been well established prior to the advent of the Covid-19 pandemic.

86. It therefore follows that for a “separate business division” to exist the following criteria must be fulfilled:

- (i) Each business division must have a clearly defined and distinct management structure in place.
- (ii) Each such division must be separate to the other business divisions.
- (iii) The distinct management structure must be formalised.
- (iv) The distinct management structure must have been well established prior to the advent of the Covid-19 pandemic.

87. Turning back to the number of “business divisions” said to be in operation by the Appellant. As noted the Appellant claims to interchangeably have had three or four such divisions, namely (1) [REDACTED] (2) the [REDACTED] (3) the [REDACTED] and (4) [REDACTED] urant. For the reasons provided in paragraphs 88 to 90 below, the Commissioner does not agree that the Appellant had any divisions in its business and in place operated a single trade which had a number of different product offerings. In addition, as the offerings by the [REDACTED] [REDACTED] and the [REDACTED] are inextricably linked the Commissioner finds as a material fact that the Appellant had three strands to its business activity which shall be referred to as follows:

- (i) [REDACTED].
- (ii) [REDACTED].
- (iii) [REDACTED]
[REDACTED]

88. The Commissioner notes that the Appellant set up its [REDACTED] when it moved to its new premises in November 2020 but the [REDACTED] did not commence trading until restrictions eased in August 2021. The Commissioner further notes that section 28B (2) (i) (I) (II) and (III) EMPI Act 2020 (which sets, in part, the eligibility criteria for inclusion on the EWSS) only relates to a business or business activities which were trading on 1st July 2019 or commenced trading on or after 1st November 2019. As the Appellant’s [REDACTED] only commenced trading in August 2021 (which coincided with the date it ceased registration for the EWSS), the Commissioner finds that it was not able to fulfil the trading condition necessary for inclusion in the EWSS scheme and hence it was not entitled to receive any supports under the Scheme.

89. Turning to the [REDACTED], the Commissioner notes that the Appellant ceased this activity in July 2019 and recommenced it when the Appellant opened its new premises in November 2020. In line with the findings in *Maidment* and *Cannon*, the Commissioner finds that the re-opening of the [REDACTED] by the Appellant in November 2020 was an extension of the Appellant's existing trade (on that date i.e. [REDACTED]) rather than the commencement of a new trade by the Appellant. In coming to that finding, the Commissioner notes that the Appellant had previously provided that activity, that it was complementary to the other services it offered and in line with *Cannon* that it shared "common arrangements" with the other activities conducted by the Appellant for book-keeping, banking and the payment of wages.
90. In line with the Commissioner's findings at paragraph 89 above, it follows on the dates which the Appellant claimed EWSS payments, it was conducting a single trade of [REDACTED] [REDACTED]. As such, the Commissioner is required to consider whether that single trade was eligible for inclusion in the EWSS or whether the Appellant is required to repay some or all of those sums received under the Scheme.
91. 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.
92. While the time periods changed with subsequent amendments, the underlying methodology did not. Therefore, it was necessary to compare the "specified period" with the "corresponding period", and calculate on the basis of those periods whether a 30% reduction in turnover was anticipated.
93. This methodology was explained further in the Guidelines prepared by the Respondent. There were a number of iterations of the Guidelines, although, as with the Act itself, the underlying methodology for assessing entitlement to EWSS payments did not change. For example, the Guidelines issued on 8 July 2021 stated that:

"an employer must be able to demonstrate to the satisfaction of Revenue that their business is expected to experience a 30% reduction in turnover or customer orders in the period from 1 January to 31 December 2021 for paydates on or between 1 July

and 31 December 2021, and this disruption to normal operations is caused by COVID19. This reduction in turnover or customer orders is relative to...the period 1 January to 31 December 2019 where the business was in existence prior to 1 January 2019...”

94. The Guidelines also provided worked examples showing how eligibility was to be calculated, as well as a table setting out how the calculations were to be performed. The 8 July 2021 version of the Guidelines provided the following table:

Paydates in July to December 2021			
Date review is undertaken	Total of Column A & B equals 2021 figure		2019 Comparative period
	Actual results (A)	Projections (B)	
30 June 2021	January to June 2021	July to December 2021	Actual results for period January to December 2019
31 July 2021	January to July 2021	August to December 2021	
31 August 2021	January to August 2021	September to December 2021	
30 September 2021	January to September 2021	October to December 2021	
31 October 2021	January to October 2021	November and December 2021	
30 November 2021	January to November 2021	December 2021	

95. As the Appellant’s business was trading on 1st July 2019, having regard to the “specified periods” detailed at paragraph 92, the Appellant was required to demonstrate to the satisfaction of the Respondent that it suffered a 30% reduction in turnover or customer orders for the periods it claimed the EWSS payments (October 2020 to August 2021) when compared to its corresponding 2019 turnover.

96. The Commissioner notes that the Respondent unsuccessfully requested this information from the Appellant a number of times before it was received from the Appellant on 20th May 2022. The provided information demonstrated that the Appellant’s turnover significantly increased for the periods in which it claimed EWSS payments which was evident from the increased number and payments to staff (including the Appellant director), the expansion of the business and the accumulation of savings by the Appellant. As the Appellant’s turnover did not reduce by the requisite 30% amount required under section 2 (1) EMPI Act 2020 it follows that the Appellant’s appeal cannot succeed.

97. Furthermore, the Commissioner considers that, even if the Appellant had incurred a 30% reduction in turnover in the period which it claimed EWSS payments, its appeal could not succeed. This is because the required figures were, as freely admitted by the Appellant director and its bookkeeper, only prepared and provided to the Respondent in **May 2022** and were not prepared in accordance with the legislation which required rolling reviews to have been conducted contemporaneously.

98. As noted in a previous Determination of the Commission²¹:

“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.”

99. Before concluding, the Commissioner addresses a number of matters raised by the Appellant in its submissions and evidence. In the first instance, the Appellant submits that no professional advice was available to it during its registration phase on the EWSS and that it was unable to contact the Respondent for such guidance. As accountants and taxation advisors were considered “essential services” throughout the most part of restrictions and as the Appellant had the benefit of the services of a member of a recognised accountancy body (its bookkeeper), the Commissioner does not agree with this submission. Furthermore, in noting that no correspondence or contemporaneous notes of any alleged attempted engagement with the Respondent was produced by the Appellant, the Commissioner does not agree with the Appellant’s submission that it was unable to contact the Respondent at the time of registration. Furthermore, the Commissioner notes that registration for inclusion on the EWSS was done on a “self-assessment basis” and if in doubt it was incumbent on the Appellant to err on the side of caution or contact the Respondent for clarification on the matters in doubt before obtaining payments under the scheme.

100. The Commissioner also notes the difficulty the Respondent had in obtaining the information that it requested to establish whether the Appellant was eligible for inclusion on the Scheme and that multiple versions of different forecast figures were presented to it, in addition to different dates the ██████████ division allegedly came into being. While the Appellant submits that it used the EWSS payments received to keep its staff at work, the Commissioner finds that the Appellant used those funds to take on additional staff and expand its business offerings, neither of which fell within the spirit or intent of the Scheme. It is apparent from the growth in turnover from the 2020 to 2021 financial statements, the costs incurred in moving premises, the funds transferred to the Appellant’s deposit account and the increased salary paid to the Appellant director throughout the periods in which the

²¹ 83TCAD2023

Appellant claimed EWSS, that those payments were not necessary for the continued operation of the Appellant's business throughout the periods of Covid restrictions.

101. Finally, the Commissioner notes within the Appellant's submissions its position is that had the Appellant ceased operating and the activities it conducted offered by a newly incorporated company with a "new" tax number, then it would have been eligible for EWSS payments. While noting that the Appellant did not undertake this course of action, in the event that it had, the Commissioner would have found that it was still ineligible to receive EWSS payments as it would have been considered to have restructured its operations for the purpose of availing of the EWSS, which as noted from the Respondent's correspondence of 8th March 2022 (paragraph 17.15 above refers) is contrary to the EWSS guidelines.

102. In conclusion, for the reasons set out herein, the Commissioner is satisfied that:

- (a) the Appellant was not eligible for inclusion on the EWSS as it failed to demonstrate that it incurred a 30% reduction in turnover for the periods it claimed EWSS payments compared to comparable 2019 figures.
- (b) the Appellant applied the wrong test when seeking to justify its EWSS claims,
- (c) the Appellant failed to contradict the Respondent's contention that, using the correct test, it was not entitled to EWSS payments.
- (d) The Appellant was not entitled to use figures calculated on a retrospective basis to claim for EWSS payments.

As a consequence, the Commissioner is satisfied that the Appellant's appeal cannot succeed.

Determination

103. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by the parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments against the Appellant in the total amount of €93,071 for October 2020 to August 2021 inclusive. Therefore, those assessments stand.

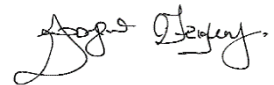
104. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

Notification

105. This determination complies with the notification requirements set out in section 949AJ of TCA 1997, in particular section 949AJ (5) and section 949AJ (6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ (6) TCA 1997. This notification under section 949AJ 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

106. 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.



Andrew Feighery
Appeal Commissioner
23rd April 2024