



91TACD2024

Between

[REDACTED]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by [REDACTED] (“the Appellant”) pursuant to section 28B(14A) of the Emergency Measures in the Public Interest (Covid-19) Act 2020 as amended (“EMPI Act 2020”) against assessments raised by the Revenue Commissioners (“the Respondent”) in respect of the Employment Wages Subsidy Scheme (“EWSS”). The assessments were raised for September 2020 to December 2020, in the total amount of €40,300.
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 experienced or was expected to experience a 30% reduction in turnover or customer orders during the relevant periods, in accordance with section 28B of the EMPI Act 2020.
3. The appeal proceeded by way of a hearing on 2 May 2024.

**Background**

4. The EWSS was introduced by the Financial Provisions (Covid-19) (No 2) Act 2020, which inserted section 28B into the EMPI Act 2020, and replaced the Temporary Wage Subsidy

Scheme. The EWSS was introduced in the context of the restrictions implemented on foot of the Covid-19 pandemic, and provided for a flat-rate subsidy to qualifying employers based on the numbers of paid and eligible employees on the employer's payroll, and also charged a reduced rate of employer PRSI of 0.5% on wages paid that were eligible for the subsidy payment.

5. On 17 May 2023, the Respondent raised assessments in the following amounts against the Appellant, on the basis that it had not abided by the terms of the EWSS:

Period of Assessment	Amount €
September 2020	5684.00
October 2020	9916.00
November 2020	11000.00
December 2020	13700.00
<b>Total</b>	<b>40,300.00</b>

6. On 11 June 2023, the Appellant appealed against the assessments to the Commission. An oral hearing was held on 2 May 2024.

### Legislation and Guidelines

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

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

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

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

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

*and*

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

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

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

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

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

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

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

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

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

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

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

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

*[...]*

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

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

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

*[...]*

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

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

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

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

*"The scheme is administered by Revenue on a "self-assessment" basis. Revenue will not be looking for proof of eligibility at the registration stage. We will in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering and remaining in the scheme."*

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

*"Employers must undertake a review on the last day of every month (other than July 2020 and the final month of the scheme) to be satisfied whether they continue to meet the above eligibility criteria and to take the necessary action of withdrawing from the scheme where they do not.*

*This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period...*

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

10. The Guidelines further stated:

*"Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period."*

## **Evidence**

██████████ – Director of the Appellant

11. ██████████ ("the witness") gave evidence on behalf of the Appellant. He stated that the Appellant was a small contracting company, and that it was essential that it kept its crew together during the Covid-19 pandemic as there was a shortage of skilled trades. So to keep the company going, it availed of the EWSS.

12. The Appellant had work that was being invoiced in September and October 2020 that had been completed at the start of that year and the end of the previous year. When he provided his figures to the Respondent initially, he had not realised that he should have done so on a work-completion basis. The Appellant carries out jobs that can take a lot of time.
13. On cross examination, the witness accepted that he had not provided any projections with the first set of figures provided, and had not compared them to July – December 2019; he had only provided actuals for July – December 2020. The figures were provided on the basis of invoices raised by the Appellant.
14. He said that he had his *“finger on the pulse of where I am with my suppliers, where I am with my work”* and that he did carry out rolling reviews, but accepted that *“I wouldn’t have done it in a written format”*.
15. The second set of figures was provided on 28 January 2023. The witness agreed that, on these figures, the Appellant did not qualify for EWSS payments in November and December 2020. He stated that these figures were reviewed by his accountant; however, he subsequently changed his evidence and stated that he provided the figures and that they were not reviewed by his accountant (although he later suggested that the figures may actually have been reviewed after all). He also accepted that turnover was compared on a direct month-to-month basis between 2019 and 2020.
16. It was put to the witness that the Respondent notified him that there was a discrepancy between his turnover figures and the figures provided in his corporation tax (“CT”) returns. In response he said he was unable to comment. He accepted that the Respondent calculated that he had incurred a reduction in turnover of 18% for the period as a whole: *“Well, that’s for the period as a whole; yes.”* He believed that the comparison should be carried out on a month-by-month basis.
17. The third set of figures was provided in April 2023. While those figures were stated to show a 45% reduction in turnover from April to December 2020 compared with the same period in 2019, he accepted that the legislation required a comparison between July to December 2020 with the same period in 2019. He agreed that the Appellant’s financial accounts and CT returns were calculated on the basis of when the invoices were raised. He accepted that the submission of the third set of figures was the first time that compliance with FRS 102 was referenced.
18. He did not accept the contention that the Appellant’s agent had split and moved figures in order to artificially inflate and deflate turnover for certain months to be eligible for EWSS:

*“...the only thing I can say is that I would have gone through what we had and the work would have been listed as to when it actually happened.”*

19. He agreed that his CT returns were compiled by the agent who represented him at the hearing. He agreed that the Appellant’s accounts stated that they were compiled in accordance with FRS 102, and he agreed that the financial statements had not been amended. He agreed that the turnover for 2020 as stated in his EWSS figures did not equate to the figure on his CT return, and he accepted that there was a difference of €53,947. He also accepted that the figures for November/December 2020 were amended down from €99,687 to €29,917. He accepted that there was an inconsistency in the figures supplied to the Respondent.

## **Submissions**

### *Appellant*

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

*“[The Appellant] submitted figures to [the Respondent] on the 15/12/2022 in order to allow [the Respondent] to carry out an eligibility assessment. [The Appellant’s agent] subsequently carried out a review of the submitted figures and noted that jobs that were invoiced in the period Jul-Dec 2020 related to work initiated and in some instances near completion prior to April 2020. Due to the nature and size of our clients operation they do not invoice on a percentage completion basis. However, when preparing the year end Financial Statements, Debtors and Work in Progress are included to reflect the reality of the financial position of the company.*

*In light of the circumstances outlined above we believe had the company a more sophisticated accounting system in place the correct turnover figures for the period under review would have been available at the time [the Appellant] made the initial submission. Had the correct accounting treatment been in place our client’s response would have clearly shown the company was eligible for subsistence under the scheme.*

*[The Appellant’s agent] submitted the final updated figures on the 4th May 2023 ... Turnover is in accordance with FRS 102 Section 23. The reduction in turnover was 44.88%. The company satisfies the criteria laid out in Section 28B and therefore qualifies for subsistence under the scheme.*

*Very little new work was commissioned in Jul - Dec 2020 which further outlines the impact of the pandemic. The sector was again shut from Jan 2021 - April 2021.”*

21. At the hearing, the Appellant's agent stated that the initial returns provided to the Respondent were incorrect, as they were not prepared on the correct accounting basis. Once they had been, the 30% reduction test was met, as there had been a 44% reduction in turnover. Regarding the requirement to carry out rolling reviews, the Appellant was a small company, but its director (i.e. the witness) was aware of the position regarding turnover and was satisfied that the Appellant fulfilled the criteria to participate in the EWSS.
22. Only the third set of figures was in accordance with the Companies Acts and FRS 102; the previous sets were prepared without a full understanding of accounting standards. It was accepted that the Appellant's financial statements and CT returns had not been amended.

### *Respondent*

23. In written submissions, the Respondent stated that the Appellant had failed to provide evidence that it carried out rolling reviews for the months in question, and had failed to provide sufficient documentation to support its claim to participate in the EWSS. The Appellant had submitted three sets of figures to justify its claim for subsidies, and there were inconsistencies between those sets of figures:

*“By correspondence dated 15 December 2022, the Appellant's director furnished the Respondent with a copy of its company turnover which included the period July to December 2020, which indicated that the total turnover for this period was €238,744.21. However, by correspondence dated 28 January 2023, the Appellant's director supplied revised figures and indicated that the Appellant had failed to include credit notes that had been issued on account during the periods, 2019 and 2020. The Appellant revised the 2020 turnover figures downwards to €230,201 and correspondingly, increased the 2019 turnover figures to €280,636. It is submitted that the Appellant's director incorrectly compared the individual monthly turnover, rather than comparing the period July to December as a whole and as a result, the Appellant was not eligible for EWSS payments the subject of the within appeal.*

*A further submission was submitted by the Appellant's Agent on 27 April 2023 which recalculated the turnover entirely for both periods in 2019 and 2020. The turnover for the period in 2020 was further reduced to €174,828 and the turnover for the specified period in 2019 was further increased to €317,203. It is submitted that the repeated adjustment to the turnover figures by the Appellant and or its Agent has resulted in an*



*artificial inflation of the turnover figures when compared to the Appellant's filed tax returns and the Eligibility Review Forms submitted via ROS on 23 November 2022.*

*[...]*

*It is submitted that the Appellant has arbitrarily increased its turnover for the year 2019 and artificially decreased the turnover for the year 2020 by attempting to revise its system of accounting during the compliance intervention...the Appellant is attempting to inflate its reduction in turnover for the purpose of claiming EWSS by attempting to change its method of accounting for the claim periods in dispute only, and to depart from the initial figures as supplied by the Appellant's director and the filed Eligibility Review Forms. At no stage has the Appellant's Agent suggested that such an approach and/or change to the accounting system should be implemented for the claim periods accepted and that are not in dispute... It is submitted that for the purpose of EWSS, turnover is the overall sales of services or products within the specified period, 1 July to 31 December 2020, compared with the same period in 2019 in the present case and thus, is determined by reference to when the invoices are actually raised."*

24. In oral submissions, counsel stated that the Respondent's primary argument was based on the lack of rolling reviews performed by the Appellant. It was a core feature of any self-assessment regime that the Respondent should be provided with documentation to support eligibility, but the Appellant had not done this in respect of the requirement to carry out rolling reviews.
25. It seemed that the first and second sets of figures provided by the Appellant were done on a month-by-month comparison, which did not comply with the legislation. There were no projections utilised in any of the three sets of figures provided. The three sets of figures provided were inconsistent. The first set showed a reduction in turnover of 11%, and the second set showed a reduction of 18%. The third set, which showed a purported reduction of 44%, involved an artificial inflation of the 2019 period and a corresponding deflation for the relevant period in 2020. The witness accepted that the same accounting methods were used for the Appellant's financial statements and CT returns, which had not been amended to account for the amended approach set out in the third set of figures. It was necessary to compare like-with-like, so that the same accounting principles were used throughout.
26. In response to a question from the Commissioner, counsel stated that the Respondent did not necessarily have an objection to a taxpayer providing figures on a completion basis rather than an invoice basis, as long as the same basis was used consistently in its returns and statements.

## Material Facts

27. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

- 27.1. The Appellant is [REDACTED] providing sub-contractor services in the construction industry.
- 27.2. The Appellant participated in the EWSS between September 2020 and August 2021 and claimed total payments under the EWSS in the amount of €121,106.
- 27.3. On 17 May 2023, the Respondent issued Notices of Assessment in respect of the months of September to December 2020, inclusive. It sought repayment of the EWSS payments received by the Appellant during those months, in the total amount of €40,300.
- 27.4. In support of its claim to be entitled to the EWSS payments for September to December 2020, the Appellant had submitted three sets of turnover figures. The first set was submitted on 15 December 2022 and showed a reduction in turnover during the relevant specified period (July – December 2020) compared to the relevant corresponding period (July – December 2019) of 11%.
- 27.5. The second set of turnover figures was submitted on 28 January 2023 and showed a reduction in turnover during the relevant specified period compared to the relevant corresponding period of 18%. When submitting its second set of turnover figures to the Respondent, the Appellant carried out a straight month-to-month comparison of its turnover figures, and stated that on that basis it accepted that November and December 2020 did not qualify for EWSS. The Appellant's witness reiterated this position in his evidence at the hearing.
- 27.6. The third set of turnover figures was submitted on 27 April 2023 (and supplemented with additional supporting material on 4 May 2023) by the Appellant's agent on the Appellant's behalf. This set of figures purported to show a reduction in turnover during the relevant specified period compared to the relevant corresponding period of 45%. The Appellant's agent stated that the third set had been calculated in accordance with FRS 102.
- 27.7. The third set of figures differed from the previous sets of figures in that some invoices that had originally been issued during the relevant specified period (July to December 2020) were subsequently reallocated in part to other months

outside the relevant specified period, on the basis that part of the work relating to the invoices had been performed outside the relevant specified period (i.e. a percentage completion basis).

- 27.8. The Appellant had not applied this new approach to invoice allocation to periods after December 2020. Its corporation tax (“CT”) returns and abridged accounts were stated to have been prepared in accordance with FRS 102 but had not been prepared on the basis of the percentage completion approach to invoice allocation applied by the Appellant in its third set of figures submitted to the Respondent for the purposes of its EWSS claim.
- 27.9. The Appellant had not sought to amend its CT returns or its accounts to apply the same percentage completion approach as utilised by it in its third set of figures submitted to the Respondent.
- 27.10. The Respondent carried out a reconciliation of the Appellant’s third set of figures against its CT returns. It calculated that, for the year ended 31 October 2020, the third set of figures showed turnover of €417,777, compared to the turnover stated on the CT return for that year of €363,830. Conversely, for the year ended 31 October 2021, the third set of figures showed turnover of €330,654 compared to the turnover stated on the CT return for that year of €412,249.
- 27.11. Consequently, the Appellant had sought to artificially inflate its turnover prior to the specified period, and artificially deflate its turnover during the specified period, in order to justify its claim for EWSS payments from September to December 2020.
- 27.12. The Appellant had not performed rolling reviews between September and December 2020.

## **Analysis**

28. Before considering the substantive matters in this appeal, the Commissioner considers it appropriate to note that the Respondent submitted a supplemental book of documentation the day before the hearing, which included a reconciliation of the third set of figures provided by the Appellant. In response, the Appellant’s agent emailed the Commission to state that he had previously requested this information from the Respondent, but had not been provided with it. He also stated that “*The introduction of this previously withheld information has severely prejudiced our case.*” Following receipt of this email, the Commission emailed the Appellant’s agent to request him to confirm, *inter alia*, whether he was seeking an adjournment of the hearing. In response, the Appellant’s agent

confirmed that he was not seeking an adjournment, and the hearing proceeded as scheduled.

29. In the circumstances, the Commissioner is satisfied that the Appellant was not prejudiced by the submission of the Respondent's supplemental documentation. He notes that the reconciliation provided by the Respondent concerned the Appellant's own figures, and therefore the Appellant was in a position to deal with the figures at the hearing. In any event, there was no request for an adjournment on behalf of the Appellant, and therefore the hearing proceeded as scheduled.
30. 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 €40,300 for EWSS payments made to it. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"
31. The EWSS provided for wage subsidies during the Covid-19 pandemic where an employer was expected to experience a reduction of at least 30% in either turnover or customer orders being received during a specified period compared to the appropriate corresponding period. When the EWSS was introduced, the specified period was 1 July 2020 to 31 December 2020 and the corresponding period was 1 July 2019 to 31 December 2019. From 1 January 2021, the specified period was 1 January 2021 to 30 June 2021 and the corresponding period was 1 January 2019 to 30 June 2019. From 1 July 2021, the specified period was 1 January 2021 to 31 December 2021 and the corresponding period was 1 January 2019 to 31 December 2019. From 1 January 2022, the relevant specified period was 1 December 2021 to 31 January 2022 and the corresponding period was 1 December 2019 to 31 January 2020.
32. Counsel for the Respondent stated that its primary argument was that the Appellant had failed to carry out rolling reviews as required by the EMPI Act 2020 and the Guidelines. Additionally, the Respondent did not accept the basis for the third set of turnover figures provided by the Appellant.

#### *Requirement to carry out rolling reviews*

33. Section 28B(5) of the EMPI Act 2020 required participants in the EWSS to carry out a review of their business circumstances immediately upon the end of each month. In foot of this review, it was manifest that the anticipated decrease of at least 30% in either

turnover or customer orders would not occur, the employer was obliged to immediately remove him or herself from the scheme. This was confirmed by the Guidelines, which also confirmed that *“This review must be undertaken on a rolling monthly basis comparing the actual and projected business performance over the specified period”* and set out tables providing further details. The Guidelines also stated that *“employers should retain their evidence/basis for entering and remaining in the scheme”*.

34. In his evidence, the Appellant’s witness indicated that he carried out ongoing rolling reviews and satisfied himself that the Appellant was entitled to participate in the scheme. The Commissioner understood his evidence to be that such reviews were carried out mentally by him, on an informal basis. Certainly, the witness accepted that he had not carried out written rolling reviews. He submitted that the Appellant was a small company and did not have capacity to perform monthly written rolling reviews. He also stated that it was impossible to make projections at that time as the impact of Covid-19 was very severe in the construction industry.
35. The Commissioner does not dispute that the carrying out of monthly rolling reviews may have been somewhat challenging, particularly for smaller companies, and he also accepts that there was a great deal of uncertainty about the impact of the pandemic, particularly in its earlier stages, which would make the compiling of projections difficult.
36. However, when entering the EWSS, the Appellant undertook to abide by its terms and conditions, and it was a clear condition of participation in the EWSS that monthly rolling reviews utilising projected turnover be carried out. The EWSS was an optional scheme for employers that was based on self-assessment, and therefore the Commissioner does not consider it unreasonable or unduly onerous that each employer had to assess on an ongoing monthly basis whether it continued to be entitled to participate in the scheme.
37. Furthermore, the Commissioner is satisfied that the Guidelines made clear that monthly rolling reviews had to be written/paper-based, and that a mere mental check in the mind of the employer was not sufficient. In this regard, the Guidelines stated *“Revenue expects that employers will retain evidence of appropriate documentation, including copies of projections, to demonstrate continued eligibility over the specified period.”* The Commissioner is satisfied that the Appellant did not provide copies of any rolling reviews allegedly carried out by it from September 2020 to December 2020, and indeed the witness confirmed that no such written reviews were performed. Consequently the Commissioner finds as a matter of fact that no rolling reviews, as required by section 28B of the EMPI Act 2020 and the Guidelines, were performed by the Appellant for those months.

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

*“the plain meaning of section 28B is that the carrying out of monthly rolling reviews was a necessary condition for participating in the EWSS. Subsection (2) states that section 28B shall apply to an employer, but that this is subject to subsections (4) and (5). As discussed herein, subsection (5) requires the carrying out of monthly rolling reviews. Therefore, it is clear that if an employer failed to carry out monthly rolling reviews, it was not entitled to participate in the EWSS.”*

39. As it is found that the Appellant did not carry out rolling reviews between September 2020 and December 2020, and as it was a requirement for participation in the scheme that rolling reviews be carried out on a monthly basis, it follows that the Appellant was not entitled to receive EWSS payments between September 2020 and December 2020. Consequently, the Commissioner determines that the Respondent was entitled to seek repayment of the subsidies provided to the Appellant for those months, in the total amount of €40,300.

40. While this is determinative of the appeal, the Commissioner will address the other matters that arose at the hearing.

*Whether the Appellant's figures demonstrate entitlement to EWSS payments*

41. The Appellant submitted three sets of figures to the Respondent in an attempt to show that it was entitled to EWSS payments for September to December 2020. The first set was submitted on 15 December 2022 and showed a reduction in turnover during the relevant specified period (July – December 2020) compared to the relevant corresponding period (July – December 2019) of 11%.

42. The second set of turnover figures was submitted on 28 January 2023 and showed a reduction in turnover during the relevant specified period compared to the relevant corresponding period of 18%. When submitting its second set of turnover figures to the Respondent, the Appellant carried out a straight month-to-month comparison of its turnover figures, and stated that on that basis it accepted that November and December 2020 did not qualify for EWSS. The Appellant's witness reiterated this position in his evidence at the hearing. However, no formal concession regarding these months was made by its agent, who continued to submit that the Appellant was entitled to payments for September to December 2020 inclusive.

43. The third set of figures was submitted on 27 April 2023, and supplemented with additional supporting material on 4 May 2023. This set of figures purported to show a reduction in turnover during the relevant specified period compared to the relevant corresponding period of 45%. The Appellant's agent stated that the third set had been calculated in accordance with FRS 102 and thus was the only correct set of figures provided. This was because the figures had been calculated on a percentage completion basis rather than when the associated invoices were raised by the Appellant.
44. The Commissioner accepts the evidence of the Appellant's witness that its invoices are often raised some months after the work to which the invoices relate has been completed by it. However, he considers that there are a number of difficulties with the approach taken by the Appellant in calculating its third set of figures. Firstly, the witness accepted that the Appellant's financial statements and CT returns were prepared on the basis of when invoices were raised, rather than work was completed. While the Appellant's agent contended that only the percentage completion basis complied with the FRS 102 accounting framework, the Commissioner notes that the Appellant's CT returns for 2020 and 2021, and its financial statements for 2019, 2020 and 2021, were stated to have been prepared in accordance with FRS 102. At the hearing, the witness confirmed that the Appellant's financial statements and CT returns had not been amended to change the basis of computation to percentage completion.
45. Secondly, the witness did not challenge the reconciliation carried out by the Respondent, which compared the third set of figures to the Appellant's relevant CT figures. This showed total turnover for the year ended 31 October 2020, as per the third set of figures, of €417,777, compared to the total turnover as stated in the CT return for that year of €363,830. Conversely, for the year ended 31 October 2021, the CT return showed turnover of €412,249 compared to the third set of figures of €330,654. While the precise figure is unclear (principally because it seems that the Appellant submitted more than one version of the figures), the reconciliation shows that the difference between the EWSS figures and the CT return is accounted for by substantially reduced turnover figures for November and December 2020 (approx. €60,000) for EWSS compared to the CT return.
46. Therefore, it is clear that the third set of figures inflated turnover for the period before July to December 2020, and reduced it for that period, compared to the Appellant's financial statements and CT returns, as well as the first and second set of figures. This can be seen from the list of reallocated invoices submitted by the Appellant to the Respondent. For example, invoice number [REDACTED], raised in August 2020, was subsequently split between March and August of that year.

47. The Respondent confirmed at the hearing that it was not impermissible in principle to prepare accounts on a percentage completion basis, but that it would expect that a consistent approach would be taken. The Commissioner is satisfied that there was no consistency to the approach taken by the Appellant in preparing its third set of figures. Not only were they compiled using a different approach to the Appellant's financial statements and CT returns, there appeared to have been no analysis carried out on its 2021 invoices, to see which of them should be reallocated to July – December 2020 on the basis that they related to work carried out during that earlier period. Consequently, the Commissioner is satisfied that the reallocation carried out for the purposes of the third set of figures had the result that turnover during the relevant specified period of July to December 2020 was reduced, and turnover during the relevant corresponding period of July to December 2019 was inflated. The unavoidable conclusion is that the figures were deliberately manipulated to enable the Appellant to purport to claim that it was entitled to participate in the EWSS for September to December 2020. As such, the third set of figures submitted by it was not credible.

48. Furthermore, and in any event, the Commissioner does not consider that it was open to the Appellant to submit multiple different sets of figures on an *ex post facto* basis to attempt to justify its participation in the EWSS. In 28TACD2024, the Commissioner stated that

*“The Commissioner considers that there is nothing in section 28B of the EMPI Act 2020 which allows for such retrospective calculations to be carried out to justify receipt of subsidy payments. Rather, the wording is clearly prospective in nature: “there will occur in the specified period at least a 30 per cent reduction...” Hence the need for projections to be carried out for the specified period, which were then to be compared against the corresponding period to assess eligibility.”*

49. There were no projections carried out by the Appellant in this instance; rather, it was paid subsidies for September to December 2020 and then subsequently submitted three different sets of figures in an attempt to justify receipt of those subsidies. The Commissioner is satisfied that there is nothing in the EMPI Act 2020 which permits such an approach. Consequently, for all of the reasons set out herein, he is satisfied that the Respondent was correct to issue the assessments for September to December 2020, and the appeal is therefore unsuccessful.



## Determination

50. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising EWSS assessments in the total amount of €40,300 for September 2020 to December 2020. Therefore, the assessments stand.

51. 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

52. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

## Appeal

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



Simon Noone  
Appeal Commissioner  
22 May 2024