AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

[redacted]

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellants") in relation to five Notices of Assessment ("the assessments") dated **17 May 2016** and **30 May 2016**, raised by the Revenue Commissioners ("the Respondent"), in relation to excise duties, as follows:

    (i) Assessment dated 17 May 2016, in respect of the period **6 June 2012 to 1 October 2012**, in the amount of €168,588 ([redacted])("company 1");

    (ii) Assessment dated 17 May 2016, in respect of the period **15 July 2014 to 20 November 2014**, in the amount of €19,950 ([redacted]) ("person 1");

    (iii) Assessment dated 17th May 2016 in respect of the period **1 October 2014 to 31 March 2015**, in the amount of €78,827 [redacted]) ("company 2");

    (vi) Assessment dated 30 May 2016 in respect of the period **9 April 2010 to 21 August 2010**, for €288,373 ([redacted]) ("company 3");

    (v) Assessment dated 30 May 2016 in respect of the period **7 January 2011 to 30 June 2011**, in the amount of €1,563,063 ([redacted]) ("company 4").

2. The transactions the subject of this appeal are:

    (i) the purchase of 447,411 litres of Marked Mineral Oil ("MMO") from company 1;

    (ii) the supply of 52,000 litres of MMO to person 1;

    (iii) the purchase of 209,234 litres of MMO from company 2;

    (iv) the purchase of 749,713 litres of MMO from company 3;

    (v) the purchase of 4,145,616 litres of MMO from company 4.

3. The Respondent raised the assessments on the basis there had been non-compliance by the Appellants with the Mineral Oil Tax Regulations 2001, the Mineral Oil Tax Regulations 2012 (collectively, "the Regulations") and that the Appellant had not shown that the MMO was used or held for use in accordance with section 99(10) of the Finance Act 2001 ("FA 2001"). Consequently, the assessments were raised in respect of the transactions.

4. It is the case that MMO that is intended for use for heating or in agricultural machinery is chargeable at a lower rate of excise duty. By contrast, road diesel (referred to as "DERV") is chargeable at the standard rate of excise duty. The excise duty assessments herein

represented the difference between the excise duty applicable at the standard rate and the excise duty applicable at the lower rate on the requisite litres of MMO purchased from the various companies and the supply of MMO to person 1. In this appeal there is also reference to Kerosene (sometimes referred to in this appeal as "KERO") and Home Heat (sometimes referred to in this appeal as "H Heat"). There is also reference by the Appellants to "Gas Oil" which is an alternative name for MMO. Thus, where the fuel is described as "Gas Oil", it refers to MMO. For consistency, the Commissioner intends to use the term MMO in her Determination.

5. By Notices of Appeal dated **17 June 2016** and **24 June 2016**, the Appellants duly appealed the assessments to the Commission, setting out their grounds of appeal in relation to each assessment in each Notice of Appeal.

6. In **September 2016**, the Appellants filed five separate Statements of Case in relation to each of the appeals. In **August 2018**, the Respondent filed its Statement of Case covering all five of the appeals. On **14 May 2021** and **7 March 2022**, the Appellants filed their Outline of Argument in relation to the appeals. On **2 July 2019**, the Respondent filed its Outline of Argument in relation to the appeals and on **2 March 2023**, the Respondent filed an Amended Outline of Arguments. On **8 October 2024**, the Appellants submitted Outline Legal Submissions and two lever arch folders of legislation and case law, which was day nine of the hearing of the appeals. The Commissioner will address these submissions in more detail hereunder in her Determination.

Adjournment applications

7. The hearing of these appeals was due to commence on **17 April 2023**, for 4 days. However, on **20 March 2023**, the Appellants made a request for an adjournment of the hearing, on the grounds that they were in receipt of the Respondent's hearing documentation since early March 2023, and required time to consider the documents which ran to a number of booklets. In accordance with section 949E TCA 1997, the Commissioner directed that all hearing documentation should be filed in advance of the hearing and on or before 27 March 2023. The Respondent objected to the application for an adjournment on the grounds that the contents of the booklets of documentation did not alter the Respondent's position as set out in its Statement of Case and Outline of Arguments. The Commissioner having initially refused the application, considered further submissions from both parties and granted the adjournment, relisting the appeals for hearing on **9 October 2023,** for 4 days.

8. On **22 September 2023,** the Appellants made an application for an adjournment of the hearing of the appeals due to commence on 9 October 2023 "*to allow the Revenue*

Commissioners to liaise with us". On **29 September 2023**, the Commissioner refused the application, due to lack of compelling grounds being proffered by the Appellants.

9. On **2 October 2023**, the Appellants made a further application for an adjournment of the hearing of the appeals due to commence on 9 October 2023. On **3 October 2023**, the Commissioner refused the application due to lack of compelling grounds being proffered.

10. On **3 October 2023**, the Appellants again renewed their application for an adjournment of the hearing of the appeals due to commence on 9 October 2023, on the grounds that they required "*sufficient time to acquire new evidence which has been sought and will be provided by a third-party namely Three and which is now imperative as a result of communication from the respondent to The Tax Appeals Commissioner yesterday evening*".

11. On **4 October 2023**, the Commissioner refused the Appellants' application for an adjournment on the grounds that the information "*which the Appellants refer to, relates to engagements with the revenue commissioners outside of the appeals process and not the appeal of the Excise Assessments herein*".

12. On **4 October 2023**, the Appellants corresponded with the Commission requesting that the Commissioner reconsider her decision to refuse the application for an adjournment of the hearing of the appeals due to commence on 9 October 2023. The Appellants corresponded with the Commission a second time on the same date seeking again an adjournment on the basis that the Appellants had lost a family member [redacted]. On **6 October 2023**, following submissions from the parties as to availability, the Commissioner adjourned the hearing of the appeals to **18 December 2023,** for 4 days.

13. On **10 October 2023**, the Appellants requested an adjournment of the appeals listed for hearing on 18 December 2023 on the grounds that they "*will have two of our* [redacted] *employees going home Christmas on that date. The lead into Christmas is a very busy time of year us for apart from short staffing. I must respectfully ask that dates after 24th of February be considered. It will be almost impossible for both* [redacted] *and to be away from of business at that time of year*". This application arose despite the Appellants confirming their availability to the Commissioner for dates inclusive of 18 December 2023.

14. On **12 October 2023**, the Commissioner acceded to the application and proposed a number of hearing dates in 2024, having regard to the parties indicated availability. The Commissioner relisted the appeals for hearing on **4 March 2024,** for 4 days. However, on **16 October 2023**, the Appellants contacted the Commission to request a date after 24 April 2024. The Commissioner did not accede to the application on the grounds that "*the Commission has been more than fair to the Appellants in terms of adjournments being*

granted at their request and has accommodated the Appellant in terms of the dates offered for a new hearing date, including not proceeding with the matter on 18 December 2023 as listed".

15. On **24 October 2023**, the Appellants made a further application for an adjournment of the appeals listed for hearing on 4 March 2024, on the grounds "*to enable us to be in the right frame of mind and in as stress-free environments as is possible we respectfully ask that a date after the first of April be selected*". On **1 November 2023**, the Commissioner acceded to the application on the basis that "*the Appellants have stated that if this request is consented to "we will not make any further requests for an adjournment". It is on this basis that the Commissioner will adjourn this matter to* ***10.00 on 15 April 2024 for hearing for 4 days****. There will be no further adjournments granted in relation to these appeals.*"

16. The hearing of the appeals commenced on **15 April 2024** for 4 days. The Appellants were unrepresented. However, the Appellants' tax agent was present at the hearing of the appeal, but confirmed he was not presenting the appeals. The Respondent was represented by senior counsel. The hearing did not conclude within the scheduled 4 days. Therefore, the hearing was listed to recommence on the agreed date of **1 July 2024**, for 3 days. This date was agreed to by the Appellants and the Respondent on the fourth day of the hearing of the appeals.

17. On **9 May 2024**, the Appellants made an application for an adjournment of the appeals listed for hearing on 1 July 2024. On **14 May 2024**, the Commissioner refused the application due to lack of compelling grounds being proffered.

18. On **20 May 2024**, the Appellants renewed their application for an adjournment. On **27 May 2024**, the Commissioner refused the application due to lack of compelling grounds being proffered.

19. On **27 May 2024**, the Appellants corresponded with the Commission again requesting that the Commissioner revisit her decision not to grant an adjournment. On **30 May 2024**, the Commissioner refused to revisit her decision, due to lack of compelling grounds being proffered.

20. On **4 June 2024**, the Appellants made a further application for an adjournment of the appeals listed for hearing on 1 July 2024, for 3 days. On **10 June 2024**, the Commissioner refused the application as no compelling grounds were proffered for the application, but that the Appellants were instructing new representatives. On **7 June 2024**, [redacted] Solicitors corresponded with the Commission to indicate that they were coming on record in relation to the Appellants.

21. On **17 June 2024,** an application was made by the Appellants' new representatives, [redacted] Solicitors, for an adjournment of the hearing due to recommence on 1 July 2024, on the basis that the Appellants' new representatives had come on record and required time to take instructions from their clients. In addition, it was requested that the appeals be listed for 10 days. The Commissioner acceded to the application and the hearing was scheduled to recommence on **2 October 2024**, for 8 days.

22. During the interviewing period between **7 June 2024** and **2 October 2024**, correspondence ensued between the parties' representatives and the Commission which the Commissioner will address in more detail hereunder. However, it is pertinent to state at this juncture that part of the correspondence was a request dated **13 September 2024**, from the Appellants that the Commissioner issue four witness summonses in accordance with section 949AE TCA 1997. The Appellants stated various reasons why it was imperative that the witnesses were summonsed, including that the evidence that [redacted] "*will be able to provide relates to how the cheques referred to in the hearing got into his possession and, to explain the ROM reports referred to in the hearing*"; the evidence that [redacted] "*will be able to provide relates to his purchase ledger which was referred to at the hearing. The transactions were recorded as a diesel purchase and oil purchase. However, our instructions are that they related to transport services, rental of trailers and tyres, the consequence it is believed of a default on the system when the supplier was set up*"; the evidence that [person 1] "*will be able to provide relates to the cheques which were cashed and which were referred to at the hearing. We are instructed that [person 1] will also provide evidence that he never purchased gas oil from the Appellants*"; the evidence that [redacted] "*may be able to provide is in respect of [company 1] and [company 4] and in relation to the delivery and drawback arrangement that operated at that time. In addition, as a payment arrangement has been made between the [Respondent] and* [redacted]*, evidence may be provided on the issue of whether the claimed excise is being paid by* [redacted].

23. The Commissioner acceded to the request and issued a witness summons for the following individuals to appear at the hearing of the appeals:

    (i) [redacted], former director of [company 2] [redacted];

    (ii) [redacted]

    (iii) Person 1, [redacted]

    (iv) [redacted].

24. Despite the witness summonses being issued by the Commissioner, the four witnesses did not attend at the hearing of the appeals, in answer to the summonses. The Commissioner states this as a matter of fact in this appeals.

25. When the hearing of the appeal recommenced on **2 October 2024**, the Appellants were represented by senior counsel and the Respondent continued to be represented by senior counsel. The hearing recommenced with the cross examination of the first named Appellant. The hearing of the appeals concluded on day twelve.

26. On day nine of the hearing, counsel for the Appellants submitted a 49 page document entitled "Outline Legal Arguments" dated 8 October 2024 and two lever arch folders with 33 Tabs in the first folder and 21 Tabs in the second folder, which contained both the statutory provisions and the case law referred to in the submissions. There was strenuous objection made by counsel for the Respondent to the submission of such voluminous documentation at such a late stage in the proceedings.

27. Moreover, in accordance with section 949I(6) TCA 1997, counsel for the Respondent argued that at this remove, there was no basis for permitting admission of the legal arguments, which could have reasonably been included in the Appellants' Notices of Appeal or Statements of Case or Outline of Arguments. Counsel for the Respondent described it as an attempt to ambush the Respondent. The Commissioner did not disagree with the Respondent in that regard and considered that the filing of such voluminous documentation at such a late stage was far outside the Commission's procedures, including its statutory procedures of which fair procedures is the bedrock. Aside from the statutory provisions of section 949I(6) TCA 1997, the Commissioner considers that counsel for the Appellants proffered no good reason why many of the legal arguments raised and articulated in detail in the document had not been raised at an earlier stage than day nine of the proceedings, in circumstances where none of the legal arguments made were novel.

28. The Commissioner did not accept that mention of certain legal arguments being raised in correspondence that ensued between the parties in the interim period amounted to the legal arguments being raised prior to day nine of the hearing. The Commissioner was offered no reason why legal submissions were not filed in advance of day nine if the Appellants' new representatives intended to make such arguments at the hearing of the appeals. Moreover, the Commissioner did not accept that the Appellants were "lay litigants" prior to the Appellants' new representatives coming on record. The Appellants have had the benefit of numerous advisors in relation to their appeals before the Commission.

29. Therefore, in her consideration of the issues in this appeal the Commissioner will set out the background to these appeals, including the Respondent's correspondence pre and post the raising of the assessments, the relevant legislation, the evidence and submissions of the parties and the Commissioner's material findings of fact. The Commissioner will then proceed to set out the well-established principles relating to statutory interpretation, before proceeding to consider the arguments raised in the document, dated 8 October 2024. The Commissioner intends to consider these arguments prior to embarking on her consideration of the substantive issue, if appropriate, namely the provisions of section 99(10) FA 2001. The Commissioner will then set out her conclusion and her determination of the matters under appeal.

Background

30. The Appellants are [redacted] and are mineral oil traders. The Appellants trade is conducted from a Haulage Yard, next to a residential dwelling named [redacted]

31. On 29 April 2013, the Respondent commenced an investigation into the Appellants' tax affairs for all periods from 1 January 2009 onwards.

Engagement between the parties pre and post the raising of assessments

32. On **7 July 2011**, Authorised Officers of the Respondent called to the premises of the Appellants. The Respondent's Meeting Notes[1], dated 7 July 2011, reflect the exchange of information that took place between the parties on that date. The Meeting Notes stated that the intention of the visit was to verify copies of invoices which appeared to have been issued by the Appellants to "[redacted] *Service Station dated 11/5/11, 30/04/11*"[2]

33. On **29 April 2013**, the Respondent wrote to the Appellants to notify them that it had commenced an investigation into the Appellants' tax affairs for all periods from 1 January 2009 onwards.

34. On **15 July 2013**, the Respondent wrote to the Appellants requesting that the Appellants furnish all records relating to their mineral oil trade, including bank records.

35. On **15 November 2013**, Authorised Officers of the Respondent called to the Appellants' premises. The Respondent's Meeting Notes,[3] dated 15 November 2013, reflect the exchange of information that took place between the parties present on that date. The Meeting Notes stated that the intention of the visit was for the purpose of examining the

[1] Respondent's Book of Documents – Meeting Notes, page 1
[2] Respondent's Book of Documents – Meeting Notes, page 6
[3] Respondent's Book of Documents – Meeting Notes, page 1

records of the partnership and "*to enquire as to the validity of certain invoices and supposed transactions with other traders*".

36. On **2 December 2013**, the Respondent wrote to the Appellants referencing a visit by the Respondent's Authorised Officers to the Appellants premises that took place on **15 November 2013**. The correspondence referred to questions raised by the Authorised Officers in relation to supplies of MMO to an entity called [the third party] and it requested a full written response from the Appellants. The correspondence stated that based on investigations carried out that:

    "According to the records of [the Appellants], the VAT content of supplies of Marked Mineral Oil to [the Appellants] between, April 2010 and December 2010, was approximately €562,000.00 (supplies €4.7mn, including VAT €562,000)

    The total VAT on purchases (T2) included in the 2010 VAT returns of [the Appellants] (VAT registration number [redacted] was €50,069.

    From the above it is apparat that either;

        (a) The 2010 of [the Appellants] are incorrect, or

        (b) That [the Appellants] did not purchase marked Mineral Oil from [the third party] in 2010, to a value of €4.7mn."

37. On **20 April 2015**, the Respondent wrote to the Appellants referencing the notification of a revenue investigation dated 29 April 2013 and subsequent correspondence on **15 July 2014** requesting records, which the correspondence stated had not been replied to by the Appellants. The correspondence stated that based on the Respondent's ongoing investigations the Appellants purchased MMO, as set out in the following table:

Period	Supplier	litres
1/1/2009 -31/12/2009	[company 3]	3,000,000
1/1/2010-31/12/2010	[company 3]	1,500,000
1/6/2010-30/6/2011	[company 4]	4,100,000
1/1/2011-31/12/11	[company 1]	720,000
1/1/2012-31/12/12	[company 1]	680,000

Total		10,000,000

38. The correspondence dated **20 April 2015** went on to state that the above table is in addition to the records of [the third party] that show supplies of MMO made to the Appellants between 27 April 2010 and 9 December 2010 in the amount of €4.7 million.

39. The correspondence referenced meetings and stated that the Appellants admitted to purchasing fuel from [the third party]. Furthermore, the correspondence referenced certain cheque payments to the Appellants from "[redacted]" in connection with MMO and it set out at page 2 of the correspondence that the Respondent's investigations show that "*invoices bearing [the Appellants] name/VAT registered number, were issued to a number of retailers, in respect of the fuel supply (mainly DERV)*" and the Respondent set out the following table:

Retailer	Invoices and/or payments €- approx.
[the third party]	4,000,000
[redacted]	620,000
[redacted]	260,000
[redacted]	1,200,000
Total – approximate	€6,080,000

40. The correspondence then stated that information available to the Respondent "i*ndicated that you may be involved in the supply of DERV to* [redacted]*, in 2010*". The Appellants were requested to submit an itemised list of records, accounts, linking papers and information within three weeks of the date of correspondence and the correspondence specified a written response in relation to five "[the Appellants] Loading Authority Documents" and six delivery/movement documents recoding "Gas Oil" being delivered to the Appellants' premises during the period 5 May 2010 to 18 September 2010 which the Respondent furnished to the Appellants with the correspondence under the

headings supplies of road diesel to [the third party] and purchases of MMO from [the third party].

41. On **28 January 2016**, the Respondent wrote to the Appellants referencing previous correspondence dated 29 April 2013, 15 July 2014 and 20 April 2015 and noting that there had been no response by the Appellants to the Respondent's correspondence and requests for the accounts and records of the Appellants. The correspondence made reference to "*Purchases of Marked Mineral Oil from [company 3], [the third party], and [company 4].*" and stated as follows:

    "*Based on Revenue Investigations, the records of [company 3, [the third party], and [company 4] show supplies of approximately 10.7mn litres of Marked Mineral Oil to you in the period April 2010 to June 2011, summarised as follows*:

Supplier	Period	Litres (Approximate).
[company 3]	April 2010-July 2010	750,000
[the third party]	May 2010-June 2010	5,820,000
[company 4]	January 2011-June 2011	4,145,000
Total		10,715,000

    You have disputed the quantum of the purchases from [the third party], stating that the amount supplied to you was much less than the above mentioned 5.82 million litres. However, you have failed to produce records of the transactions. The records of [company 3] show that some of the fuel in question was collected from the premises of [company 3] by vehicle registration number [redacted]*. This was a* [redacted] *truck, which has been registered in the ownership of [the first named Appellant] since January 2009*.

    You are now required to submit all of your records of your mineral oil trade for the period April 2010 to June 2011, as detailed further below, within 21 days of today's date."

42. On **28 January 2016**, a second letter issued to the Appellants again referencing previous correspondence dated 29 April 2013, 15 July 2014 and 20 April 2015 and noting that there has been no response by the Appellants to the Respondent's correspondence and requests for the accounts and records. The correspondence referred to "*purchases of*

Marked Mineral Oil from [company 2] – October 2014 – January 2015". The correspondence further stated that:

"*The records of [company 2] show supplies of approximately 284,000 litres of Ultra Low Sulphur Marked Gas Oil and 6,400 litres of Kerosene to you in the period October 2014 to January 2015. According to my records, you did not hold either an Auto Fuel Trader's Licence or a marked Fuel Trader's Licence in the period in question.*

…….

You are now required to submit all of your records of your mineral oil trade for the period October 2014 to January 2015, as detailed further below, within 21 days of today's date."

……..

You are now required to submit all records of your mineral oil trade for the period from 1 April 2014 to 31st January 2015 including all records relating to the purchases of fuel from [company 2] and the subsequent supplies".

43. On **22 February 2016**, the Respondent wrote to the Appellants, again referring to the correspondence dated 29 April 2013, 15 July 2014 and 20 April 2015 and noting that there had been no response by the Appellants to the Respondent's correspondence and requests for the accounts and records. The correspondence made reference to "*Purchases of Marked Mineral oil from [company 1]*" and further stated that:

"*Based on Revenue Investigations, the records of [company 1] show that you purchased approximately one million litres of marked mineral oil from this supplier, in the period January 2011 to September 2012.*

You are now required to submit all records of your mineral oil trade for the period from April 2011 to September 2012, as detailed further below, within 21 days from today's date."

44. There was no response to the Respondent's correspondence dated 28 January 2016 and 22 February 2016 by the Appellants, save a letter from the Appellants dated **8 March 2016**, which referenced a telephone call and stated that they had met with their agent who had been instructed to contact the Respondent in relation to this matter. On **16 March 2016**, the Respondent reissued the correspondence dated 28 January 2016 and 22 February 2016 to the Appellants' agent.

45. On **7 April 2016**, the Respondent wrote to the Appellants again referring to the correspondence dated 29 April 2013, 15 July 2014, 20 April 2015, 28 January 2016 and

22 February 2016 and noting that there has been no response by the Appellants to the Respondent's correspondence and requests for the accounts and records of the Appellants. The correspondence enclosed six cheques and made reference to "*Payments received from [person 1]*" and stated that:

> "*I attach six cheques totalling €45,835.00 payable to [the Appellants], dated variously between 15th July 2014 and 20th November 2014. Investigations indicate that these transactions relate to the supply of marked mineral oil.*
>
> *You are now required to submit all records relating to these transactions (purchase and sale invoices, receipts and payments records, related movement documents and stock records, as required under the Mineral Oil Tax Regulations 2012), within 14 days from today's date."*

46. Of note, both correspondence dated **28 January 2016,** correspondence dated **22 February 2016** and correspondence dated **7 April 2016** notified the Appellants that:

> "*If it is more convenient for you, the records requested in this letter may be submitted by delivering them to my colleague…Office of the Revenue Commissioners, Government Offices, Millennium Building, Dundalk, Co Louth. (Telephone….)*
>
> *In the event of failure to submit all of the records requested above within 21 days from the date of this letter:*
>
> *a) I will proceed to raise an excise assessment under Sections 99(10)/99A Finance Act 2001, as referred to earlier."*

47. On **19 May 2016 and 30 May 2016**, the Respondents made assessments on the Appellants on the basis of Section 99(10) FA 2001, in circumstances where the Appellants had failed to respond to the Respondent's numerous written requests for records. The correspondence from the Respondent enclosing the assessments set out the basis upon which the assessments were raised and made reference to the contents of the previous correspondence set out in this section of the Determination.

48. In its Amended Outline of Arguments,[4] the Respondent submitted that:

> *"[i]n spite of repeated written requests, the Appellants have not furnished any books and records to the Respondent save for the following:*
>
> *(i) Purchase Invoices from [company 4];*

[4] Amended Outline of Arguments of the Respondent, Booklet of Pleadings, page 385

(ii) Purchase Invoices from [company 1];

(iii) A list of cheques received for the periods 1 January 2011 to 31 December 2012.

(iv) Incomplete statements of three bank accounts, in the name of [the first named Appellant], [redacted] *for periods in the years 2009 to 2013 inclusive;*

- [redacted] *for periods in the years 2012 and 2013; -* [redacted] *for periods in the years 2010 to 2012 inclusive.*

(v) Sales invoices of the Appellant's business for the period 10 March 2010 to 13 April 2010, submitted to the Respondent by the Appellants' then agent, [redacted]*, Accountants, on 26 September 2016.*

(vi) A Schedule referred to (in the Appellants' Outline of Arguments) as "a table of workings for VAT3 submissions which are currently outstanding"

(vii) Lists of sales of the Appellants' business for the months January, February, and March 2010.

(The items referred to at (vi) and (vii), were submitted with the Appellant's Outline of Arguments of 7 March 2022".

49. On **6 September 2016,** a number of letters issued from the Respondent to the Appellants seeking information and explanations in respect of a number of the bank accounts and Credit Union accounts. However, the Appellants failed to reply to the correspondence. Under the provisions of Section 906A TCA 1997, the Respondent obtained the statements and other records of bank accounts that were operated in connection with the trade of the Appellants. This disclosed some 23 bank accounts that were in use during the periods at issue.

50. In relation to the Appellants' liability to excise duty, the Respondent submitted that the application of the reduced rate was conditional on the Appellants' compliance with the Regulations and the provisions of section 99(10) FA 2001. The Respondent submitted that pursuant to Chapter 1 of Part 2 FA 2001, the charge to excise duty applies at the standard rate, unless the conditions for the application of a reduced rate are satisfied.

Legislation and Guidelines

51. The legislation relevant to this appeal is as follows:-

52. Recital 18 of Council Directive 2003/96/EC, restructuring the Community framework for the taxation of energy products and electricity, ("the 2003 Directive"), provides that:

> *Energy products used as motor fuel for certain industrial and commercial purposes and those used as heating fuel are normally taxed at lower levels than those applicable to energy products used as a propellant*.

53. Article 21(4) of the 2003 Directive provides that:

> *Member States may also provide that taxation on energy products and electricity shall become due when it is established that a final use condition laid down in national rules for the purpose of a reduced level of taxation or exemption is not, or is no longer, fulfilled*.

54. Article 1 of Council Directive 2008/118/EC, concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, ("the 2008 Directive"), provides that:

> *This article lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods').*
>
> *(a) energy products and electricity covered by Directive 2003/96/EC;*
>
> *……*

55. Article 7(1) of the 2008 Directive provides that:

> *Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.*

56. Section 95 Finance Act 1999 (No. 2), Charge of Tax, provides *inter alia* that:

> *(1) Subject to the provisions of this Chapter, and any regulations made under it, a duty of excise, to be known as mineral oil tax, shall be charged, levied and paid –*
>
> *(a) on all mineral oil –*
>
> *(i) released for consumption in the State, or*
>
> *(ii) released for consumption in another Member State and brought into the State, and*
>
> *(b) on all coal that is brought into, or produced in, the State*

(2) Liability to mineral oil tax on mineral oil shall arise at the time when that mineral oil is –

(a) Released for consumption in the State, or

(b) Following release for consumption in another Member State, brought into the State.

57. Section 96 Finance Act 1999 (No. 2), Rates, *inter alia* provides that:

(1) Mineral oil tax shall be charged at the rates specified in Schedule 2.

……..

58. Schedule 2 (section 96), Rates of Mineral Oil Tax (With effect as on and from 8 December 2010), provides that:

Description of Mineral Oil	*Rate of Tax*
……...	*……...*
Heavy Oil:	
Used as a propellant	*€465.70 per 1,000 litres*
Used for air navigation	*€465.70 per 1,000 litres*
Used for private pleasure navigation	*€465.70 per 1,000 litres*
Kerosene used other than as a propellant	*€38.02 per 1,000 litres*
Fuel oil	*€60.73 per 1,000 litres*
Other heavy oil	*€88.66 per 1,000 litres*

59. Section 97 Finance Act 1999 (No. 2), Rates lower than standard rates, provides *inter alia* that:

……...

(2) The standard rate in relation to light oils means the appropriate rate for petrol and in relation to any other mineral oil product means the rate for that product when it is used as propellant.

(3) The application of a rate lower than the standard rate concerned may be subject to the satisfaction of the Commissioners as to the use or intended use of the mineral oil concerned, and they may, accordingly, prescribe or otherwise impose conditions for –

(a) the keeping for sale or selling, or

(b) the delivery or keeping for delivery, of such mineral oil.

60. Section 104 Finance Act 1999 (No. 2), Regulations, *inter alia* provides that:

(1) The Commissioners may, for the purposes of managing, securing and collecting mineral oil tax or for the protection of the revenue derived from that tax, make regulations.

(1A) Without prejudice to the generality of subsection (1), regulations made under this section may contain such incidental, supplementary and consequential provisions as appear to the Commissioners to be necessary for the purposes of giving full effect to the Directive, Council Directive NO. 95/60/EC of 27 November 1995 and Commission Decision No. 2001/574/EC of 13 July 2001.

(2) In particular, but without prejudice to the generality of subsection (1), regulations made under this section may—

(a) govern the production, movement, importation, treatment, sale, delivery, warehousing, keeping, storage, removal to and from storage, exportation and use of mineral oil;

(b) provide for securing, paying, collecting, remitting and repaying mineral oil tax;

(c) regulate the issue of licences granted under section 101 ;

(d) require a person who produces, imports, treats, sells, delivers, keeps, stores, deals in, exports or uses mineral oil to keep in a specified manner, and to preserve for a specified period, such accounts and records relating to such mineral oil as may be specified and any other books, documents, accounts or other records (including records in a machine readable form) relating to the production, importation, treatment, purchase, receipt, sale, delivery, keeping, storage, removal to or from storage, disposal, exportation or use of mineral oil and to allow any officer to inspect and take copies of, or extracts from, such books, documents, accounts and other records (including, in the case of records in a machine readable form, copies in a readable form);

(e) require any person mentioned in paragraph (d) to notify the proper officer of all places and premises and of all vessels, storage tanks and

pipelines intended to be used by him or her in the carrying on of his or her business and provide for the method of such notification;

(f) *require any person mentioned in paragraph (d) to furnish, at such times and in such form as may be specified, such information and returns in relation to mineral oils as may be specified;*

(g) *require a person who is an owner of or who is for the time being in charge of any motor vehicle constructed or adapted to use liquefied petroleum gas or substitute fuel as a propellant in that vehicle to give such information in relation to the supply or use of such mineral oil as may be specified;*

(h) *require as a condition of allowing in respect of any mineral oil the application of a rate lower than the appropriate standard rate for the mineral oil concerned or any exemption or relief from mineral oil tax, subject to such exceptions as the Commissioners may allow, that there shall have been added to that mineral oil at such time and in such manner and in such proportions as may be prescribed, one or more prescribed markers and that a declaration to that effect is furnished;*

(i) *specify the substances which are to constitute a prescribed marker for the purposes of paragraph (h) and specify the procedures for the approval of such markers;*

(j) *prohibit the addition to any mineral oil of any prescribed marker except in such circumstances as may be prescribed;*

(k) *prohibit the addition to or mixing with any mineral oil of any substance, not being a prescribed marker, including any substance which is calculated to impede the identification of a prescribed marker;*

(l) *prohibit the importation, keeping for sale, transportation or delivery of any mineral oil to which has been added any substance, not being a prescribed marker, including any substance which is calculated to impede the identification of a prescribed marker;*

(m) *prohibit the importation, sale or delivery of any mineral oil in which a prescribed marker is present unless it is present in the proportions prescribed and unless such mineral oil is intended for use for a purpose*

other than combustion in the engine of a motor vehicle and a declaration to that effect is furnished;

(n) require containers for the storage or transportation of mineral oil to be marked in such a manner as may be prescribed;

(o) require that aviation gasoline shall be deposited in a tax warehouse prior to its delivery for home use;

(p) prohibit the use of aviation gasoline otherwise than as a fuel for aircraft;

(q) prohibit the taking of aviation gasoline into a fuel tank in or on a motor vehicle;

(r) provide that aviation gasoline shall not be mixed with any other substance, save with the permission of the Commissioners.

(3) Regulations made under this section may make different provisions for persons, premises or products of different classes or descriptions, for different circumstances and for different cases.

61. Section 99 (10) of the Finance Act 2001, as amended, Liability of persons, provides inter alia that:

(10) *where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where –*

(a) Such requirement has not been satisfied, or

(b) any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Commissioners, that the excisable products have been used, or are held for use, for such purpose or in such manner,

then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief, rebate, repayment or lower rate.

(11) Where under subsections (1) to (10) more than one person is, in a particular case, liable for payment of an excise duty liability, such persons are jointly and severally liable.

62. Section 886 TCA 1997, Obligation to keep certain records, provides *inter alia* that:

"*linking documents" means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;*

"records" includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to –

(a) all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,

(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,

…….

63. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 3, Interpretation, provides *inter alia* that:

"mineral oil trader" means any person who produces, manufactures, processes, imports, exports, purchases for the purpose of resale or dealing in, sells or otherwise deals in mineral oils or who stores mineral oils for any of these purposes;

"reduced rate" means a rate of mineral oil tax lower than the standard rate, and, where applicable, includes the exemption from, and full or partial remission or repayment of, the tax;

"tax" means mineral oil tax imposed by section 95 of the Act of 1999;

64. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 5, Oil trader's licence, provides that:

5. A licence granted or deemed to be granted under section 101 of the Act of 1999—

(a) shall be known as a mineral oil trader's licence,

(b) shall be in such form as the Commissioners may approve,

(c) shall be displayed on the premises to which it relates by the person to whom it was granted,

(d) shall expire each year on 30 June, and

(e) may, subject to compliance by the applicant with the requirements of subsections (3) and (4) of that section, be granted by an officer on payment of the proper licence duty.

65. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 23, Records to be kept by mineral oil traders, provides that:

23. (1) Every mineral oil trader shall keep all records of any description specified in Schedule 3, including documents received by him or her and copies of all documents that are issued by him or her.

……..

66. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 24, Details in records kept by mineral oil traders, provides that:

24. (1) Every mineral oil trader shall keep, in a form acceptable to the Commissioners, a record, in respect of each specified description of mineral oil, of—

(a) any production, buying, selling, importation, exportation, dealing in or handling of any mineral oils carried on by him or her,

(b) any financing or facilitation by him or her of any such transactions or activities (whether or not those transactions or activities are carried on by him or her), and

(c) any supplies of goods or services received by him or her to enable the undertaking of such transactions or activities or in connection with such transactions or activities.

(2) In respect of each purchase, sale, receipt or delivery of each specified description of mineral oil by a mineral oil trader, his or her records shall include the following particulars:

(a) the name and address of the seller, purchaser, consignor or consignee, as the case may be;

(b) the address of the premises or place from where the mineral oil was received or to which it was delivered;

(c) the date of the transaction;

(d) the nature of the transaction;

(e) the quantity of mineral oil involved in the transaction;

(f) whether tax has been paid, remitted, suspended or repaid on the mineral oil involved in the transaction and, if paid, whether at the standard or a reduced rate;

(g) a record of any payment for the mineral oil, containing such a reference to the transaction that it may be readily identified.

(3) The records required to be kept by this Regulation—

(a) shall be legible, or in the case of a record held in a non-legible form (including information held in a computer or other electronic medium) shall be produced in a legible form or reproduced in a permanent legible form where so required by an officer,

(b) shall be contemporaneous, and

(c) shall be sufficiently comprehensive so that the particulars specified in Schedule 4 may be readily ascertained.

……..

67. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 25, Stock accounts, provides that:

25. (1) A mineral oil trader shall keep, in such form and in such manner as the Commissioners may from time to time direct, a stock account of each specified description of mineral oil produced or processed in, received into, held in and delivered from, his or her premises.

(2) An entry in the stock account specified in paragraph (1) shall—

(a) be made not later than 12 o'clock midday on the next working day following the date the transaction occurred, and

(b) be balanced by the mineral oil trader at the end of each month or such other period as may be required by the proper officer.

68. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 26, Mineral oil tax account, provides that:

26. Every mineral oil trader who is liable to pay any amount of tax shall keep a mineral oil tax account showing the amount, date and method of payment of

any tax paid by him or her in respect of each tax accounting transaction or period.

69. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 30, Mixing of mineral oils, provides that:

30. Without the approval of the Commissioners and subject to compliance with such conditions as they may impose, a person shall not—

(a) mix mineral oil of different specified descriptions,

(b) mix mineral oil of a specified description on which tax has been paid at the standard rate with mineral oil of the same specified description on which tax at a reduced rate has been paid or on which a relief from tax, either by remission or repayment, has been granted,

(c) mix mineral oil of a specified description on which tax has been paid at a reduced rate with mineral oil of the same specified description on which tax at a different reduced rate has been paid or with mineral oil on which a relief from tax, either by remission or repayment, has been granted, or

(d) mix or blend marked gas oil or marked kerosene with fuel oil unless—

(a) such operations take place in a tax warehouse, and

(b) the mineral oil produced by such blending or mixing is fuel oil.

70. Mineral Oil Tax Regulations 2001, S.I. 442/2001, Regulation 31, Movement document, provides that:

(1) Any person selling or delivering mineral oil (including recycled mineral oil) other than in the course of fuelling the fuel tank of any vehicle, shall at the time of each such sale or delivery give to the purchaser or the person taking delivery of such oil an invoice or other document, numbered in a consecutive series and referred to in these Regulations as a "movement document", showing the particulars specified in paragraph (4).

(2) A person referred to in paragraph (1) of this Regulation shall keep at his or her place of business a true copy of each movement document issued by him or her under this Regulation.

(3) A person in charge of any vehicle which is transporting mineral oil otherwise than in the standard fuel tank of the vehicle—

(a) shall have in his or her possession or custody at all times during the course of such transportation a movement document showing the particulars specified in paragraph (4) relating to the mineral oil being transported, and

(b) shall produce the movement document, or a true copy thereof, on demand to an officer.

(4) The movement document referred to in this Regulation shall include:

(a) the name and address of the consignor of the mineral oil and the address of the premises or place from which such oil was removed;

(b) the name and address of the person to whom the mineral oil was sold or delivered and the address of the premises or place to which such oil was delivered;

(c) the date of such sale or delivery;

(d) the full quantity of each specified description of mineral oil so removed;

(e) the registration number, or other identification number, of the vehicle being used for the purpose of such movement;

(f) in the case of mineral oil supplied at a reduced rate of tax, the following statement indelibly written or printed on the movement document:- "This mineral oil product is delivered at a reduced rate of tax and must not be used as a propellant or kept in the fuel tank of a motor vehicle." and

(g) such other particulars as may be required by any other Regulation in relation to any specified description of mineral oil.

71. Schedule 3 (Regulation 23) Mineral Oil Tax Regulations 2001, S.I. 442/2001, Specified records, provides that:

1. Invoices, credit notes and debit notes.

2. Records relating to importations, exportations, storage, movement, purchases and sales.

3. Statements of account.

4. Records of payments or receipts.

5. Journals and ledgers.

6. Profit and loss, trading, and management accounts and reports, balance sheets and trading forecasts.

7. Internal and external auditor's reports.

8. Records relating to any remission, repayment or reimbursement of tax.

9. Any other record relating to mineral oils which is kept for a business purpose.

72. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 2, Commencement, provides that:

2. (1) Subject to paragraph (2), these Regulations shall come into operation on 1 July 2012.

(2) Regulations 23 to 27 shall come into operation on 1 January 2013.

73. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 4, Interpretation, provides that:

"mineral oil trader" means any person who produces, sells or deals in, keeps for sale or delivery, or delivers, any mineral oil;

"mineral oil trader's licence" means an auto-fuel trader's licence or a marked fuel trader's licence granted under section 101 of the Act of 1999;

"mineral oil trader's premises" means any premises or other place where mineral oil is produced, sold or dealt in, or kept for sale or delivery, by a mineral oil trader;

"reduced rate" means an effective rate of tax lower than the appropriate standard rate, and includes the net rate applicable after full or partial relief from tax under any provision of the Act of 1999;

"tax" means mineral oil tax;

74. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 18, Records to be kept by mineral oil traders, provides that:

18. (1) A mineral oil trader shall for mineral oil tax purposes, in addition to any other records required under section 886 of the Taxes Consolidation Act 1997 and section 84 of the Value-Added Tax Consolidation Act 2010 , keep in respect of each specified description of mineral oil a record of—

(a) the selling or dealing in, receiving, keeping for sale or delivery, or delivery,

(b) the financing or facilitation of any transactions or activities (whether or not those transactions or activities are carried on by the mineral oil trader), and

(c) any supplies of goods or services received, to enable the undertaking of such transactions or activities or in connection with such transactions or activities, by that mineral oil trader.

(2) The records required under paragraph (1) shall be kept in such form as the Commissioners may require, and, subject to paragraph (3)(b), shall show for each purchase, sale, supply and delivery of mineral oil—

(a) the nature and date of such purchase, sale, delivery or supply, and the quantity of mineral oil concerned,

(b) for purchases and sales, the name and address of the person from whom the mineral oil was purchased or to whom it was sold,

(c) for all supplies and deliveries made by the mineral oil trader, the name and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned,

(d) for deliveries of mineral oil received by the mineral oil trader, the name, and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of the person from whom the delivery was received, and the address of the premises or place from which that delivery was dispatched,

(e) a record of every payment made or received, with a clear reference to the transaction concerned.

(3) Any mineral oil trader who is not an authorised warehousekeeper shall keep a record of—

(a) daily measurements or meter readings of the volume of mineral oil of each specified description held by that mineral oil trader in a storage tank or other vessel, and

(b) the aggregate quantities of each specified description of mineral oil supplied on each day in the course of fuelling the fuel tanks of vehicles, and paragraph (2) shall not apply to such supplies.

(4) A mineral oil trader shall keep separate records for each premises or place at which mineral oil is sold, dealt in or kept for sale or delivery.

75. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 23, Delivery document and procedure provides that:

23. (1) In this Regulation "consigning mineral oil trader" means a mineral oil trader who supplies mineral oil and who consigns it for delivery from a premises or place in the State, whether that delivery is carried out by that mineral oil trader or by another person on that mineral oil trader's behalf.

(2) Subject to paragraphs (3) and (7), a consigning mineral oil trader shall, for each delivery of mineral oil and before the mineral oil concerned is consigned for delivery from the premises or place concerned, complete an approved document (referred to in these Regulations as a "delivery document") in three copies (referred to in this Regulation as "copy one", "copy two" and "copy three") and numbered in a consecutive series.

(3) Paragraph (2) does not apply to mineral oil that is—

(a) not subject to tax under section 95 of the Act of 1999,

(b) supplied in the course of fuelling the fuel tank of a vehicle,

(c) delivered to another Member State in accordance with the requirements of Chapter 2A or 2B, as the case may be, of Part 2 of the Act of 2001, or exported under a customs procedure,

(d) marked gas oil and marked kerosene to which Regulation 24(1) applies.

(4) A delivery document shall include—

(a) the name, address, Value-Added Tax registration number and the mineral oil trader's licence number of the consigning mineral oil trader,

(b) the address of the premises or place from which the mineral oil is to be consigned for delivery,

(c) *the name, address and, where applicable, the Value-Added Tax registration number and mineral oil trader's licence number of each person to whom the mineral oil is to be delivered,*

(d) *the address of every premises or place to which a delivery is to be made,*

(e) *the date on which the delivery is dispatched,*

(f) *the quantity and specified description of mineral oil to be delivered,*

(g) *the registration number of the vehicle used for the delivery,*

(h) *in the case of deliveries of marked gas oil or marked kerosene, or any other mineral oil supplied at a reduced rate of tax or subject to a relief from tax, the following statement, "This mineral oil product is delivered at a reduced rate of tax and must not be used as a propellant or kept in the fuel tank of a motor vehicle" and*

(i) *such other particulars as may be required by any Regulation in Part 8 in relation to any specified description of mineral oil.*

(5) *The consigning mineral oil trader shall retain copy one and, before the mineral oil concerned is consigned for delivery, give copy two and copy three to the person in charge of the delivery vehicle.*

(6) *The person in charge of the delivery vehicle shall—*

(a) *retain copies two and three during the course of the delivery and, except where paragraph (7)(a) applies, give copy three to the person receiving the delivery,*

(b) *following the delivery, endorse copy two with details of—*

(i) *the quantity actually delivered, and*

(ii) *the date and time when that delivery was made, and return that copy so endorsed to the consigning mineral oil trader.*

(7) *For deliveries not exceeding 2,000 litres of marked gas oil or marked kerosene, to a person other than a mineral oil trader—*

(a) *a single delivery document may be used where several such deliveries are made in the course of a single journey by the delivery vehicle,*

(b) the person in charge of the delivery vehicle may, instead of a copy of the delivery document, provide the person concerned with any other record that includes the information set out in paragraph (4) that is relevant to that person,

(c) an additional delivery that is not included in the delivery document at the time the marked gas oil or marked kerosene is consigned for delivery may be made where—

(i) the details of the delivery are not known at the time the marked gas oil or marked kerosene is removed for delivery, and

(ii) those details are entered on the copy of the delivery document to be returned to the consigning mineral oil trader under paragraph (6)(b).

(8) Without prejudice to any other requirement under these Regulations for the keeping of records—

(a) any mineral oil trader who is required by paragraph (5) to retain copy one, or to whom, in accordance with paragraph (6)(b), copy two is returned, and

(b) any person to whom, in accordance with paragraph (6)(a), copy three is given, shall keep such copy as a record.

76. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 25, Return of oil movements by mineral oil traders, provides that:

25. (1) A mineral oil trader who—

(a) is required, under section 101 of the Act of 1999, to hold an auto-fuel trader's licence or a marked fuel trader's licence, or

(b) produces, sells or deals in, keeps for sale or delivery, or delivers liquefied petroleum gas, or heavy oil for use for air navigation, shall furnish to a proper officer, in such form as the Commissioners may require, a return (referred to in these Regulations as a "return of oil movements") of the mineral oil of each specified description produced, sold, dealt in, kept for sale or delivery, supplied or delivered by that mineral oil trader during a month or such other period as the Commissioners may require.

(2) A mineral oil trader shall, for a return of oil movements—

(a) complete a return form issued by the Commissioners for that purpose,

(b) sign a declaration on that form to the effect that the particulars shown are correct, and

(c) furnish the return by the 25th day following the last day of the month or other period referred to in paragraph (1).

(3) A return of oil movements shall be made by electronic means and in accordance with Chapter 6 of Part 38 of the Taxes Consolidation Act 1997 (No. 39 of 1997).

(4)(a) A return of oil movements that is specified for the purposes of Chapter 6 of Part 38 of the Taxes Consolidation Act 1997, by order made by the Commissioners under section 917E of that Act, is specified as a specified return for the purposes of section 917EA of that Act.

(b) A mineral oil trader who is required, under paragraph (1), to make a return of oil movements is specified as a specified person for the purposes of section 917EA of the Taxes Consolidation Act 1997.

77. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 28, Application of a reduced rate, provides that:

28. (1) The application of a reduced rate to gas oil or kerosene shall only be allowed where the Commissioners are satisfied that such gas oil or kerosene—

(a) is intended for use other than as a propellant,

(b) has been marked in accordance with Regulation 29,

(c) is at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of these Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of marked gas oil and marked kerosene,

(d) where it has been consigned to the State from another Member State or from outside the territory of the European Union, has been declared in writing to a proper officer as being for use other than as a propellant, and marked in accordance with Regulation 29.

(2) Without prejudice to the generality of paragraph (1)(b), the Commissioners may permit the use of unmarked gas oil or kerosene at a reduced rate, by a person authorised by them in writing to receive such gas oil or kerosene for such use, subject to such conditions, including the giving of security, as the Commissioners may require in any particular case.

78. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 41, Keeping and furnishing of records, provides that:

41. (1) In this Part, "record" means any record that is required to be kept under these Regulations.

(2) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept for a period of not less than six years from the date of the last entry in that record.

(3) Except where the Commissioners may otherwise allow or require in any particular case, a record shall be kept—

(a) in the case of a record to be kept by an authorised warehousekeeper who is the proprietor of a mineral oil tax warehouse, at the mineral oil tax warehouse concerned,

(b) in the case of a record to be kept by an authorised warehousekeeper who is a tenant in a mineral oil tax warehouse, either at that mineral oil tax warehouse or at the registered place of business of that authorised warehousekeeper,

(c) in the case of a record to be kept by any other mineral oil trader, or by a coal trader, at the premises or place where, as the case may be, mineral oil or coal is sold or dealt in, or kept for sale or delivery, by that mineral oil trader or coal trader,

(d) in the case of a record to be kept by a liable coal user, at the place where Value-Added Tax records are required to be kept by that liable coal user.

(4) In the case of any record that is kept by a mineral oil trader or coal trader in accordance with paragraph (3), at a premises or place outside the State, that mineral oil trader or coal trader shall, where required to do so by a proper officer, produce that record for examination by a proper officer—

(a) in the case of a record that is kept in an electronic form, immediately on notification of that requirement by a proper officer, and

(b) in any other case, at a Revenue office or such other place as the proper officer may allow, within ten working days of a notification.

(5) Except where the Commissioners may otherwise require, a record may be kept by any electronic or other process that—

(a) ensures the integrity of that record, and

(b) allows that record to be produced in a legible form, or reproduced in a permanent legible form when so required by a proper officer.

79. Mineral Oil Tax Regulations 2012, S.I. 231/2012, Regulation 42, Alteration to records, provides that:

42. (1) A person shall not in any record—

(a) obliterate any entry,

(b) make any entry that is untrue in any particular, or

(c) amend or cancel any entry, except to provide additional information or to correct an error.

(2) Any amendment or cancellation under paragraph (1)(c) shall be made in a manner that does not obscure, in whole or in part, the original entry.

80. Section 959I(1) TCA 1997, Obligation to make a return, *inter alia* provides that:

(1) Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form.

81. Section 949I TCA 1997, Notice of Appeal, provides inter alia that:

……

(6) A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice.

82. Section 949H TCA 1997, Flexible proceedings, provides *inter alia* that:

(*1) The Appeal Commissioners shall, subject to the provisions of this Part, endeavour to the best of their ability to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public (and in particular tax payers) with regard to—*

(a) undue formality being avoided, and

(b) a flexible approach being adopted by the Commissioners in respect of procedural matters.

……..

83. Section 949AC TCA 1997, Evidence, provides that:

The Appeal Commissioners may—

(a) allow evidence to be given orally or in writing,

(b) admit evidence whether or not the evidence would be admissible in proceedings in a court in the State, or

(c) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction,

(ii) the evidence was provided in a manner that did not comply with a direction, or

(iii) they consider that it would be unfair to admit the evidence.

Evidence and Submissions

Appellant's evidence

84. [redacted] ("the Appellants' witness") gave evidence on behalf of the Appellants, over nine days, of the twelve days of the hearing of the appeals. Before proceeding to relay a summary of the evidence adduced hereunder, the Commissioner considered the credibility of the Appellants' witness in his own cause to be in doubt, in circumstances where the evidence adduced was vague, inconsistent and unreliable. Moreover, the evidence was at variance in terms of what was alleged in the Appellants' Notice of Appeal, Statements of Case, Outline of Arguments and further Outline of Arguments in 2022, the Appellants VAT returns and the Appellants "Schedule of Oil Sales".

85. At its most basic, credibility involves the matter of whether the witness appears to be telling the truth as he now believes it to be. A number of considerations are important such as:

consistency of the witness's evidence with what is agreed or clearly shown by other evidence, including documentary evidence, to have occurred; consistency with what the witness has said on other occasions; and the credibility of the witness in relation to matters not germane to the proceedings. The Appellants' witness gave inconsistent accounts on the issues raised in these appeals and rationales proffered by the Appellants' witness were unsound and often lacking any reliability. Thus, such was the inconsistencies in the evidence adduced, that the Commissioner finds that the Appellants' witness was not a credible witness in this appeal and little evidential value can be attributed to the testimony given by the Appellants' witness in support of these appeals.

86. Nevertheless, the Commissioner will proceed to set out hereunder, a summary of the evidence given by the Appellants' witness, as follows:

    86.1. The witness testified that he was made a bankrupt and that he would cycle to mass because he did not have the money to buy the diesel for the car. The witness testified that only for his spouse, they would have gone hungry.

    86.2. The witness testified that prior to the partnership coming into being, there was trade through a corporate entity. The witness confirmed that consequent to a court order on 18 February 2012, he was restricted as a director for a period of five years arising from the liquidation of [redacted]

    86.3. The witness was cross examined by counsel for the Respondent in relation to his returns for the relevant periods, wherein it was put to him that there was no reference to him being part of a partnership, no partnership returns or anything of that nature, and that the totality of his earnings globally was from a directorship where he received the amount of €28,392, but no reference to his earnings from the partnership. The witness stated that he would not have filed this information and that he would have answered the questions honestly that were asked of him.

    86.4. The witness testified that the Appellants had two rigid trucks. One with a capacity for in or around 11,000/12,000 litres of fuel and another with a capacity for in or around 5,000/6,000 litres of fuel. In addition, the Appellants had an articulated truck that would pull other trailers as well as tanks, with a capacity for in or around 40,000 litres of fuel.

    86.5. The witness gave evidence that the fuel left a bonded warehouse and was delivered to the Appellants, so the excise duty was already charged at the point it left the port. The Appellants were not warehouse keepers. Therefore, the Appellants cannot be assessed on an excise basis. The witness stated that as a result they made no excise duty returns. The witness testified that he understood

the nature of self-assessment and that books and records can exonerate a taxpayer, but the Appellants have no set of books that account for excise duty, so how could the Appellants dislodge the Respondent's assessments with their books and records.

86.6. The witness relayed that the Appellants were not sufficiently resourced to purchase the amount of litres as set out in the assessments and that the product that was delivered in, was for a storage arrangement with company 1 and company 4. The witness gave evidence that they were not big buyers of MMO and that they did sometimes have the opportunity to dip into the storage tanks. The witness testified that they operated on the basis that company 1 and company 4 would issue an invoice and then they would issue a credit note, but they would add on three cents per litre in payment in respect of the storage of the fuel.

86.7. In relation to person 1, the witness stated that they never sold MMO to that person and that the cheques were a favour to the signatory. The witness said that every penny was paid back.

86.8. During cross examination by counsel for the Respondent, it was put to the witness that it was denied to officials when they visited the Appellant that they stored oil and that there was no logic for what was contended. The witness accepted that the credit notes were not contemporaneous documents and the evidence was that they were issued in or around 4 years ago, at a time when company 4 ceased to exist, since 2013. It was put to the witness by counsel for the Respondent that there was contradictory evidence in terms of how and from whom the witness got the credit notes. It was put to the witness by counsel for the Respondent that the assessments for company 1 and company 4 were the invoices furnished to the Respondent and that it was not credible, that if they had purchased the fuel and fuel was returned, that there was no contemporaneous credit notes. It was put to the witness by counsel for the Respondent that there were no credit notes for company 1.

86.9. The witness was asked by counsel for the Respondent why for the period January 2011 to 30 June of 2011, when VAT returns were filed by the Appellants for that period, that the Appellants significantly adjusted the "T2" VAT amounts in 2022 in their Outline of Arguments, such as to reduce the taxable purchases from €554,606 to €77,822. The witness stated that he could not explain that. It was put to the witness by counsel for the Respondent that the explanation was that he came up with the credit notes for the period, but when the VAT returns were

prepared back in March 2012, it was from contemporaneous records. The witness stated that it was not a fair statement. The witness agreed that he had, however, no explanation for a reduction in turnover i.e. sales or "T1"/VAT from €571,030 down to €144,810.

86.10. It was put to the witness by counsel for the Respondent that the only thing that was furnished to the Respondent was the invoices from company 1 and company 4 and that there were no details of movements, cash books, accounts, despite repeated requests being made. The witness testified that a good business relationship existed between the owner of company 1 and company 4 and credit was provided as a consequence of the limited finances available to the Appellants. It was put to the witness by counsel for the Respondent that "the modus operandi" that the Appellants had with company 1 and company 4 was completely at odds with the normal operations and payment methodology that the Appellants had with legitimate suppliers. The witness stated that the only difference would be that the stock was in the yard and the Appellants were able to dip into it or use some of it from time to time.

86.11. In relation to company 1, it was put to the witness by counsel for the Respondent that the purchase invoices that were furnished by the Appellants showed there was 1.4 million litres purchased from company 1 for the period, but the assessments were only based upon 447,411 litres, which was a fraction of the total amount of MMO purchased by the Appellants from company 1. The witness stated that he could not explain the Respondent's benevolence in that regard.

86.12. The witness gave evidence that company 3 was a legitimate player and the purchase of MMO was carried out by bank draft payment. It was put to the witness by counsel for the Respondent that when dealing with legitimate entities payment was by bank draft as opposed to company 1 and 4 which payment took place by third party cheques. The witness testified that the fuel that the Appellants purchased from company 3 was sold through the Appellants' normal customer base which was made up of domestic customers, agricultural customers and to a lesser extent, commercial customers in terms of quarries.

86.13. The witness stated that in relation to company 1 and company 4, he would provide cheques to the owner, but leave the payee blank at his request. The Appellant stated that was how the cheques ended up in the bank account of company 2. The witness stated that he was unaware of the existence of company 2. The witness testified that the Respondent, in reaching their assumption in terms of the

assessment, relied on a number of cheques that ended up going through company 2, which gave some grounds for suspecting that trade took place, but it did not give absolute grounds. The witness said that it was his view that the records of company 2 could not be relied upon. The witness confirmed that the Appellants did not purchase fuel from company 2.

86.14. Counsel for the Respondent questioned the witness in relation to cheques lodged to the bank account of his spouse and his two sons. The witness testified that it was because of his limited banking facilities due to his bankruptcy. It was put to the witness by counsel for the Respondent that normally, if it was a legitimate business, amounts received in respect of the business would be lodged into the business bank account. The witness stated that he did not have a business bank account.

86.15. Counsel for the Respondent put it to the witness that his evidence was completely contradictory to the information furnished when questioned by the Respondent's officers at the meetings at his premises in 2011 and 2013. The witness testified that the Appellants had several tanks, about six or seven tanks and two in particular that were assigned to storage, with one holding about 100,000 litres or so, being for their own product that the Appellants had bought and sold. The witness stated that he bought the two large tanks from the old Carroll's factory.

86.16. In relation to person 1, the witness testified that the Appellants did receive the cheques, but that the Appellants did not supply MMO to person 1. The cheques were for the purpose of assisting person 1 with subprime lenders that were pursuing him and person 1 wanted to make it appear as if there were amounts going through his bank account. The witness was asked by counsel for the Respondent to identify where from the bank accounts of the Appellants it appeared that the money was returned to person 1. The witness said that the reason why the amounts going back to person 1 were not shown, was that the Appellants had allowed the money to build up before repaying person 1. The witness testified that he met person 1, 15 or 20 years ago, and he fixed two gear boxes for him. The witness stated that the proof that the Appellants repaid person 1 was in the correspondence dated 20 September 2016, submitted by person 1 to the Respondent, which stated that fuel was not purchased and that the money was repaid in full to person 1.

86.17. The witness gave evidence that his biggest grievance was that the Respondent did not allow the Appellants to be heard. The witness testified that he made

numerous attempts to engage with the Respondent by telephone, but he was denied the opportunity to be listened to. It was put to the witness by counsel for the Respondent that the Appellant had a tax agent who had been instructed to engage with the Respondent on the Appellants' behalf and the Appellants were under investigation and being asked to provide books and records which were not forthcoming.

86.18. The witness was asked by counsel for the Respondent why he had been operating three [redacted] bank accounts with an address in [redacted] The witness stated that his account was closed by [redacted] in Drogheda, because of difficult trading and he made several attempts to try to achieve a level footing, which was very difficult after his bankruptcy. Counsel for the Respondent asked the witness where the finances came from to rent an apartment in [redacted], in 2009. The witness stated that he had only to rent it for a number of months at a cost of in or around €800 per month. It was further put to the witness that he had bank accounts with an address in [redacted]

86.19. It was put to the witness by counsel for the Respondent that in addition he was putting very significant lodgements into his spouse's bank account and into the bank accounts of his two sons. The witness stated that he was not denying that and that they helped him out.

86.20. The witness was asked by counsel for the Respondent to explain why he needed two [redacted] bank accounts. The witness stated that they had a different system to the other banks and that "it would be no different than having a coat with maybe three pockets or five pockets, it was all the one account because they were all linked together". It was put to the witness by counsel for the Respondent that there was an analysis done by the Respondent of lodgements greater than €500, to the bank account of the Appellants' spouse, during the period from May 2011 to June 2012 and the total of the lodgements came to the amount of €222,974. The witness stated that it would have been connected with either some transport service that the Appellants provided or home heating oil or oil deliveries, but that there would most likely be an element of it for oil sales.

86.21. It was put to the witness by counsel for the Respondent that between January 2010 and April 2012, the witness lodged €845,000 into his spouse's bank account as opposed to putting it into the Appellants' other different accounts. The witness stated that he was not denying that the money was lodged, but that it was not money from laundered fuel.

86.22. It was put to the witness by counsel for the Respondent that all that was furnished by the Appellants to the Respondent was some limited bank statements, limited invoices, limited purported customer listings, and an alleged stock system that was created only last year and that to date, the Appellants have never furnished any trading, profit and loss accounts or balance sheets of the purported partnership, any form of nominal ledger or any form of recorded system, which reconciled the vast sum of lodgements into accounts. The witness stated that was incorrect.

86.23. The witness testified that the Appellants did not hold a mineral oil licence. It was put to the witness by counsel for the Respondent that the Appellants did not comply with their obligations under the Regulations. The witness stated that he disagreed and that the Appellants had filed their VAT returns.

86.24. Counsel for the Respondent put it to the witness that in the context of all 23 accounts combined, the transactions within those accounts, show that between August 2008 to February 2014 the amount of €11.285 million was in the accounts and that at the time, the witness was putting money through his spouse's account from January 2010 to May 2012 while the witness had an operational bank account.

86.25. Counsel for the Respondent asked the witness why he had made payments through his sons' bank accounts to an oil supplier. The witness stated that he was not trying to hide anything. The witness stated that he would give his son three or four cheques and that he would have been permitted to keep €50.00 from them for his efforts. Counsel for the Respondent asked the witness why he used his other son's third level student account for his oil business. The witness stated that he helped him out and that there was nothing illegal about it. The witness was asked in particular about a cheque for the sale of DERV and the witness stated that the cheques were in relation to his transport business, such that his son would be able to negotiate the cheques on his behalf, so as he could acquire a draft to pay company 3 or someone else that he bought oil from. The witness stated that this was during the time that he was a bankrupt, in 2011.

86.26. It was put to the witness by counsel for the Respondent that in order to comply with the Regulations, what was required was an account, that was a business account, which would link to the recorded bookkeeping in terms of linking papers, ledgers, listings where it could be seen exactly what the composition of each lodgement was and how that tied back to a transaction through to the primary

records. The witness stated that the tax liabilities in relation to VAT are all filed and discharged and given that it had already been identified that the Appellants were trading without a licence, after that, the rest of the rules were not of any significance.

86.27. In relation to company 3, the witness stated that during 2010, the Appellants were purchasing from Company 3, but the Respondent had come to the wrong conclusion as to how the MMO was disposed of. Counsel for the Respondent directed the witness to the Appellants VAT return for 2010, for the period 1 January 2010 to 30 June of 2010, for VAT on purchases. The witness stated that it was the case that the Appellants were purchasing MMO from other companies at this time. In addition, the witness testified that during that period, there were VAT inputs in respect of the logistics and transport services business.

86.28. It was put to the witness by counsel for the Respondent that from January to June 2010, the VAT element alone in respect of the 749,000 litres that was purchased from company 3 was €214,482.98. The witness was asked by counsel for the Respondent if he could explain why the Appellants had understated the VAT on purchases by a minimum of €180,169. The witness stated that the Appellants would equate that to stock sold or services provided, such that they worked their VAT on the basis of money received and then would match what was sold to that.

86.29. It was put to the witness by counsel for the Respondent that the Appellant was obviously selling fuel to other parties with the intention of making a profit, so the VAT that the Appellants would have charged would have been a slightly higher amount of VAT than the amount of €230,228, accounting for the margin that was made on that fuel. The witness stated that it was his understanding that when the Appellants purchased fuel from company 3, the VAT was on the basis of what was sold and what was bought to make those sales. The witness stated that he was accepting that his tax situation was not in a good place at that time.

86.30. It was put to the witness by counsel for the Respondent that based on the 749,000 litres that was purchased from company 3, what was being suggested was that at a time of distraught financial circumstances, the Appellants were effectively paying company 3 for vast quantities of fuel, such that by the end of the year the Appellants had a stockpile of half a million litres or more. Further, counsel for the Respondent suggested that the VAT element on purchases from company 3 of MMO was €230,228, yet for all of the Appellants business for that year, VAT on

purchases “T2”/VAT was a figure of €50,059, such that this does not account for the Appellants purchases. The witness stated that was incorrect.

86.31. The witness was directed by counsel for the Respondent to the “Schedule of Oil Sales” and the breakdown of the Appellants’ sales prepared in 2022 for “DERV”, “MMO”, Kerosene” and “Home Heat”. The witness testified that there was no law against mixing Kerosene and MMO, because they are both effectively used for combustion purposes, but that MMO cannot be mixed with DERV without running the risk of being prosecuted.

86.32. It was put to the witness by counsel for the Respondent that the figures for Home Heat and Kerosene together were 1,022,164 litres, which means that on the Appellants own records 96% of all of the Appellants’ sales in respect of heating purposes were Kerosene and Home Heat and MMO only accounted for 4% of the Appellants’ sales. The witness stated that this schedule was prepared after the event, because the Appellants records were destroyed in a fire that took place on the Appellants premises in 2018. The witness stated that Home Heat and Kerosene are all the one and MMO sales are accounted for either in Home Heat or Kerosene, because they are sold as both and they can be used for either purpose. The witness stated that if you sold to a domestic household, and it was described as MMO, Home Heat or Kerosene it was of no real significance.

86.33. It was put to the witness by counsel for the Respondent that despite this schedule having been prepared by the witness and his agent in preparation for these appeals, disclosing the categorisation of the Appellants’ product, that really the Commissioner should ignore the schedule, as it does not really reflect the categorisation that has been done within the schedule. The witness stated that this was not a schedule of oil sales or a stock control, but was prepared for VAT purposes.

86.34. It was put to the witness by counsel for the Respondent that 81% of the purchase of MMO from company 3 had not been accounted for in terms of the Schedule of Oil Sales. The witness stated that he had explained how Kerosene, Home Heat and MMO had been accounted for in terms of going into home heating boilers.

86.35. It was put to the witness that on his own records, in relation to company 3, there was 471,179 litres of a balance in August 2010. The witness stated that he could not explain that.

Appellant's submissions

87. The Commissioner sets out hereunder a summary of the submissions made by the Appellants both at the hearing of the appeal and the documents submitted in support of this appeal:

87.1. The burden of proof and the evidential burden were incorrectly placed on the Appellants and they were required to go into evidence, whereas the burden of proof should have been placed on the Respondent who ought to have presented its evidence first. The Respondent in the course of cross-examination of the Appellants' witness has explicitly put forward the claim that the Appellants were guilty of being "*involved in facilitating or assisting effectively the criminal activity of the defrauding of both excise duty and vat in respect of marked mineral oil*"[5] and that the credit notes were "*effectively a fiction created for the purposes of this appeal*".[6] Therefore, the burden of proof is on the Respondent in making such claims.

87.2. The entire tenor of the Respondent's case was that the Appellants have been deliberately involved in avoiding tax and one of deliberate collusion with fraud which is evident from the transcript. Reference was made to the decision in *Michael Quigley v The Revenue Commissioners and The Tax Appeals Commission* [2023] IEHC 244 ("*Quigley*").

87.3. Section 99AB FA 2001 provides for time limits for raising assessments. The Respondent is not entitled to look past 4 years of a taxpayer's excise assessments, save for where there are reasonable grounds for believing there was fraud or neglect. The assessments in relation to company 3 and company 4 are out of time.

87.4. It is settled law in the UK and Canada that it is for the Respondent to demonstrate that fraud or neglect exists in relation to an assessment raised outside of the statutory time limit. Reference was made to the following decisions: *Amis v Colls* 39 TC 148, *Nicholson v Morris* [1977] 51 TC 95, *Jonas v Bamford* [1973] STC 519, *Johnson v Scott* (1978) 52 TC 383, *IR Comrs v White Bros Ltd* (1956) 36 TC 587, *Hurley v Taylor* [1999] STC 1, *Hawkins v Fuller* (1982) 56 TC 49, *Rowland v Boyle* [2003] STC 855, *Sharifee v Wood* [2004] STC (SCD) 446, *McEwan v O'Donoghue* [2005] STC (SCD) 437, *Keighley v Revenue and Customs Commissioners* [2024] UKFTT 30 (TC), *Mostafa Abbass v His Majesty The King*

[5] Transcript, Day 2, page 66
[6] Transcript Day 2, page 193

2023 TCC 169 and *Burke -v- The King*. Reference was made to the determination in 64TACD2021, where the Appeal Commissioner noted that the Respondent accepted that it bore the burden of proof where income tax assessments were raised outside the four-year time pursuant to section 955 TCA 1997. The position was also confirmed in determination 60TACD2023.

87.5. Section 99(10) FA 2001 requires positive action by the Respondent in forming the view to their satisfaction of an error of the taxpayer. In doing so, this creates an obligation on the Respondent to support such a view. Reference was made to the Supreme Court decision in *Revenue Commissioners -v- O'Flynn Construction Company Limited and Others* [2011] IESC 47 ("*O'Flynn*"). It must be the position that if the assessment is challenged the normal rule of evidence of "he who asserts must prove" must apply. This point was not raised in the Notice of Appeal furnished in respect of the assessments. The Appellant only had the benefit of legal advice from June 2024 and the Appellant was not aware that they would be accused of fraud and involvement in a criminal enterprise until the commencement of the proceedings and therefore, were unable to appreciate the case that was being made against them. The burden of proving the liability in relation to the assessments fell on the Respondent.

87.6. A large amount of material that was provided by the Respondent originated without proof, from third party sources and from meeting notes that were allegedly representative of meetings that took place between the Respondent's Officials and the Appellants. The documentation is contested hearsay evidence, unproven and uncorroborated and should not be admitted.

87.7. There is an inherent obligation on the Commission, in the exercise of its statutory function, and in compliance with the statutory provisions governing its operation, to manage its hearings in a manner that ensures fairness. Reference was made to the decision of the Court of Appeal in *Lee v The Revenue Commissioners* [2021] IECA 18 ("*Lee*"). The Court of Appeal recognised that the Commission must exercise their statutory jurisdiction in a manner that complied with relevant constitutional principles of fair procedures.

87.8. The Commissioner has broad powers to admit evidence pursuant to section 949AC TCA 1997. It is further evident from the language of section 949AC TCA 1997 that the issue of fairness is vital and the section allows for evidence that would otherwise be admissible, to be excluded where it would be unfair to admit

the evidence. The hearing before the Commissioner and its findings must also be seen in the context of constitutional fairness.

87.9. A major difficulty in these appeals was the reliance of the Respondent on controverted hearsay evidence to advance its contentions. Reference was made to the Supreme Court decision in *Louisa Kiely v Minister for Social Welfare* [1977] IESC 2 ("*Kiely*") where the Court stated that:

> "*It would be contrary to natural justice if one side were allowed to shelter behind his controverted documentary evidence while the other side had to bring his witnesses to the hearing, where they might be required to give their evidence on oath and to be subject to cross-examination. The lack of mutuality and the potential for an unjust determination inherent in such a procedure would put it in conflict with the rule of audi alteram partem*."

87.10. Reference was also made to the decision of Mr Justice Cregan in *Diesel Spa v The Controller of Patents, Designs and Trademarks and Another* [2023] IEHC 757 and *RAS Medical Limited v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63 in relation to hearsay evidence. The evaluation of evidence before the Commissioner, must be done in a fair manner where the rights of the Appellants are at stake. The evidence proffered by the Respondent *inter alia* documents and schedules of documents compiled from other third party sources means that the Appellants have no opportunity to interrogate or cross examine that evidence, where the matter was put forward as proof of what they contained despite being contested, should not be admitted before the Commission.

87.11. Reference was made to the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. Any argument that issues in respect of hearsay in the contested documents may be overcome by these provisions, which deal with the admissibility of business records in civil proceedings, is incorrect. Section 14(3)(c) expressly excludes *inter alia* any "*investigation or inquiry carried out pursuant to or under any enactment*"

87.12. Section 95(1) FA 1999 provides that excise duty is charged on mineral oil when it is released for consumption in the State. If any of the taxpayers that the Respondent asserted derived the MMO from the Appellants and were assessed by the Respondent on the release for consumption in the State, there can be no excise duty exposure for the Appellants. The Respondents have failed to adduce any evidence in respect of this issue.

87.13. Reference was made to section 99(10) FA 2001. A party who is storing MMO cannot be said to be trading in the product or to have taken delivery of the product or be holding it for sale or delivery, in the sense that delivery or any of the other purposes referenced was for the purpose of use. It was submitted that any ambiguity should be resolved in favour of the taxpayer pursuant to the contra proferentem approach to statutory interpretation in *McGarry v Revenue Commissioners* [2009] ITR 133.

87.14. National rules which are intended to transpose the provisions of a Directive into the domestic legal order of the Member State, must be consistent with the principle of proportionality. Reference was made to the decision in *ROZ-ŚWIT Zakład Produkcyjno and ors* Case C-418/14. There has been no evidence submitted by the Respondent to demonstrate that it has not recovered the excise duty from the other parties in the chain of supply.

87.15. The Respondent is bound by the Charter of Fundamental Rights of the European Union, in particular Articles 41, 47 and 51. The Commissioner has jurisdiction to apply EU law as appropriate and this was confirmed in the decision of *31TACD2023*. Reference was made to the decisions in *Kamino International Logistics and Datema Hellmann Worldwide Logistics v Staatssecretaris van Financiën Joined Cases* C-129/13 and C-130/13 ("Kamino"), *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság Case* C-419/14 ("WebMindLicenses") and *Advocate General Bobek in Glencore Agriculture Hungary Kft. v Nezeti Adó-es Vámhivatal Fellebbviteli Igazagatósága, Case C-189/18* ("*Glencore*"). These cases clearly establish that material on which the assessments are based, must be made available prior to the assessments being raised. It was clear that the Respondent did not provide the documents it sought to rely on, prior to the assessments being issued.

87.16. The Respondents have been delinquent in not providing all of the evidence and materials relevant to the assessments in advance of those assessments. It is submitted that equality of arms has not been preserved in these appeals. The documents on which these assessments were based were clearly in the hands of the Respondents in 2016, but contrary to the provisions of *Glencore* they were not forthcoming.

87.17. Reference was made to the decision in *31TACD2023*, where the appellants applied to have the assessment reduced to zero on the grounds that the Respondent breached the appellants' right to a defence under EU law.

87.18. The delay in furnishing the materials on which the assessments were based until 2023, has resulted in serious injustice to the Appellants, in circumstances where the principal witness [redacted] has died and where the other witness's memory was impaired by delay. The relevant jurisdiction to strike out claims for a lapse of time, rather than delay derives from the line of case law beginning with the decision of the Supreme Court in *O Domhnaill v Merrick* [1984] IR 151. In *Manning v Benson & Hedges* [2004] 3 IR 556 Finlay Geoghegan J considered the line of case law commencing with O *Domhnaill* and continuing with such cases as *Toal v Duignan (No 1*) [1991] ILRM 135*, Toal v Duignan (No 2)* [1991] ILRM 140, *JOC v Director of Public Prosecutions* [2000] 3 IR 478 and *Kelly v O'Leary* [2001] 2 IR 526. Reference was also made to the *dictum* of Hardiman J. in *JOC v Director of Public Prosecutions* [2000] 3 IR 478, Hogan J. in *II v JJ* [2012] IEHC 327 and Clarke J. in *Comcast International Holdings Inc & Ors v Min for Public Enterprise & Ors* [2012] IESC 50. The delay herein has caused serious prejudice to the Appellants in defending their case due to the passing of time and the deleterious effect on memory occasioned by same, in the important recollection by witnesses of meetings central to the issues between the parties.

Respondent's evidence

88. [redacted] ("the Respondent's witness") gave evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by the Respondent's witness.

88.1. The witness testified that he had been employed with the Respondent since 1978, and he retired in February 2021. During the years in question namely 2010 to 2015, the witness stated that he worked in the area specifically looking at the oil trade.

88.2. The witness gave evidence in relation to Respondent's Book of Documents - Meeting Notes. The witness confirmed that he attended the premises of the Appellants on 7 July 2011 and spoke to the Appellants. The witness said that he kept a written note of the conversations that took place and that the notes in the Respondent's meeting motes reflected what was discussed and accurately recorded same.

88.3. The witness referred to the meeting that took place on 15 November 2013 at the premises of the Appellants with him and another Officer of the Respondent. The witness testified that it would have been a pre-arranged visit, at a pre-arranged

time, such that they would have phoned ahead to the Appellants to inform them that they were calling out on a particular day to look at their books and records. The witness confirmed that the meeting notes were an accurate reflection of what was discussed and what they were told on the day of the visit, by the Appellants.

88.4. The witness was cross examined on his evidence by counsel for the Appellants. The witness confirmed that he had a notebook and pen at the meetings to enable him to take notes. The witness was asked if the notes were kept on file and he stated that he did not know. It was put to the witness that the Appellants' witness does not recall any notes being taken at the meetings. The witness said that it would be hard to remember a visit offhand without some sort of prompt, hence why the notes were important.

88.5. The witness was asked were the notes written up and then altered subsequently. The witness testified that the notes were not altered, but that there was an additional note added the following day that addressed the issue of the Appellants' witness not being aware of the Regulations. The Appellants' employee had phoned the next day enquiring where she could get that information. The witness gave evidence that rather than write up a second note and attach it, the witness highlighted the note in bold type and put it in at the bottom of the note, so that if anyone was looking at that in relation to the issue on the Regulations, there was a note which stated that he was contacted by that particular person, the next day.

88.6. The witness was asked had he a series of questions in advance that would be put to the Appellants. The witness testified that there would have been a particular reason for calling. The witness was asked whether there was some inquiry or at least issue, prior to this meeting that had sparked the meeting. The witness stated that was correct and that would have been reflected in the documentation in the office. The witness said that they would have been aware that the Appellants' business was carrying on a fuel trade without a licence, which was required and that MMO and DERV were being sold. The witness stated that a licence was required for selling both products, so they called to see what was going on.

88.7. The witness was asked did he examine the records there or did he take records away and examine them subsequently. The witness stated that records were not really provided. The witness stated that there might have been an odd invoice, but there were no records, and that had been the ongoing issue with this case, such that he called looking for records, but he never got records from the Appellants.

88.8. The witness was asked about the conclusion he reached reflected in the meeting motes that there had been a breach of the Regulations. The witness stated that in order to get the benefit of the reduced rate of excise duty on MMO, compliance with the Regulations was required. The witness stated that first of all, a licence was required, but there was no licence in this particular case. The witness stated that in addition, there were a number of Regulations which must be complied with in relation to the product and the movement of that particular product, but there were no records there. So that conclusion was the summation of the situation that he found, for the benefit of his superiors reading the note.

88.9. Counsel for the Appellants asked the witness if the notes were ever sent to the Appellants for their observations in respect of them. The witness confirmed that the notes were not. The witness was asked did he recall the detail of the conversations, given it was so long ago or was it simply that he recognised the document. The witness stated that he remembered calling out at the times described and that he did remember some of the matters discussed. The witness testified that the Appellants would have known that they were calling out to enquire about a list of companies that they thought the Appellants were trading with and that it was not just an ad hoc, easy going meeting. The witness stated that the questioning showed that they were quite serious about what they were doing. The witness stated that there was mention of fuel laundering and that the Appellants were aware that the Respondent was taking a serious look at what was going on in 2013. The witness said it would have been a more serious meeting than what might have taken place, in 2011.

88.10. It was put to the witness by counsel for the Appellants that his instructions are that when showing cheques to the Appellants, the witness covered the name on the cheques. The witness confirmed that he did not do that. The witness testified that he showed the Appellants whatever paperwork they had on the day.

Respondent's submissions

89. The Commissioner sets out a summary hereunder of the submissions made by counsel for the Respondent, both at the hearing of the appeal and in the documents submitted in support of this appeal:

89.1. Council Directive 2003/96/EC sets out the framework for the taxation by Member States of energy products, including mineral oil. Under Article 21(4), Member States may provide that taxation on energy products "*shall become due when it*

is established that a final use condition laid down in national rules for the purpose of a reduced rate level of taxation or exemption is not, or is no longer fulfilled". The Appellants failed to comply with the final use condition and further failed to comply with their obligations as Mineral Oil Traders. Regulation 28 of the 2012 Regulations deals with the application of a reduced rate of excise duty. The 2001 Regulations deal similarly with the application of a reduced rate of excise duty.

89.2. Reference was made to section 99(10) FA 2001. The end-use requirement has not been satisfied here. The onus is on the Appellants in this appeal to satisfy the Commissioner that they complied with their obligations under the requirements of excise law and that they were in a position to satisfy the Commissioner that the end use of the MMO that they purchased was for a specified purpose. There was no evidence of either.

89.3. Reference was made to the decisions in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and *Hanrahan v the Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*") in relation to the principles to be applied to statutory interpretation.

89.4. The burden of proof to show that an appellant is entitled to the relief claimed falls on the taxpayer. Reference was made to the decision in *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49 ("*Menolly Homes*") and *TJ v the Criminal Assets Bureau* [2008] IEHC 168 ("*TJ*").

89.5. The Appellants are seeking to obtain a relief from the imposition of tax and so the Appellants must demonstrate that they meet all of the requirements to be so relieved of that imposition. Reference was made to the decision in *Revenue Commissioners v Doorley* [1933] I.R. 750 ("*Doorley*").

89.6. The Appellants never filed profit and loss accounts or a partnership returns. There were no contemporaneous records and the alleged stock listing referred to, was created in 2024. Moreover, the alleged credit notes were created a number of years ago and did not exist at the material time. There was no evidence of any movement documents and the Appellants had numerous bank accounts in use with in excess of €15,000,000 going through the accounts, during the relevant periods.

89.7. The Appellant, despite trading in mineral oil, failed to hold a mineral oil traders licence. The Appellants were in contravention of the 2012 Regulations as follows: Regulations 18(1), 18(2), 18(3), 19(1), 19(2) and 20 in respect of the failure on

the part of the Appellants to keep any or any appropriate records in respect of his mineral oil trading activities; Regulation 23 in that the Appellants did not issue or retain delivery documents in respect of its sales; Regulation 24 in relation to the requirement to keep records in respect of the supplies of MMO; Regulation 25 regarding the requirement to make 'return of oil movements' returns to the Respondent.

89.8. There were similar contraventions by the Appellants of the 2001 Regulations as follows: Regulation 23 in relation to the requirement to keep all records specified in Schedule 3 to the Regulations (including invoices; records of storage; movements; purchases and sales; statements of account; records of receipts and payments; trading profit & loss accounts; and balance sheets); Regulation 24 in relation to the requirement to keep records, including a record of each purchase, sale, receipt, or delivery of MMO; Regulation 25 in relation to the requirement to keep detailed records of stocks; Regulation 31 in relation to the requirement regarding preparation and keeping of movement documents and the details required to be included in these records.

89.9. Under the provisions of Section 906A TCA 1997, the Respondent obtained the Appellants' bank account statements and other records of bank accounts that were operated in connection with the trade of the Appellants. The Appellants failed to reply to a number of letters dated 6 September 2016, seeking information and explanations in respect of a number of the bank and Credit Union accounts in question, totalling 23 accounts. The Appellants had used 23 accounts and did not disclose those accounts to the Respondent when requested to do so. It was a requirement of the Regulations to have one business account and the evidence of the Appellants' witness was not accepted, that as there was a payment to the Collector General, the Respondent must have known about the account.

89.10. Reference was made to previous decisions of the Commission in *27TACD2020* and *59TACD2019* in support of the Respondent's position in terms of the breaches of the Regulations. In these appeals herein, there are repeated admissions and even if they are not accepted, there was no evidence of compliance with the Regulations. In addition, the evidence of the Respondent's witness supports the breaches and there has been nothing to controvert the meeting notes. There were no submissions made by counsel for the Appellants as to the intended use of the MMO purchased or held by the Appellants.

89.11. Reference was made to the previous decision of the Commission in *41TACD2019*. In this decision the burden of proof was dealt with at paragraphs 105 and 106 and the decisions in *Doorley* and *Menolly Homes* are relied on to find that the burden of proof was on the appellant.

89.12. The suggestion that the entirety of the documentation before the Commissioner was hearsay and any evidence adduced from it should be disregarded by the Commissioner was incorrect. The meeting notes should be accepted in accordance with section 949AC TCA 1997, in addition there was evidence adduced in respect of the meeting notes and the Respondent used its powers in accordance with section 906A TCA 1997 to acquire the records of the Appellants' bank accounts. Moreover, much of the documentation in relation to company 1 (with the exception of nine invoices) and company 4 (the entirety of the invoices were produced by the Appellants) was provided by the Appellants and the Appellants' witness praised the record keeping of company 3 and accepted that purchases were made from company 3.

89.13. Reference was made to the decision in *Glencore*. In terms of the right to defence, it is a right that any person who has been the subject of an administrative decision that they have the right to input into the decision. However, in these appeals there was a one way flow of information and the Respondent was consistently writing to the Appellants seeking information and books and records, but nothing was forthcoming.

89.14. The first request for information was made by the Appellants on 11 March 2021, some five years after the assessments were raised. This was in the form of an email produced at the hearing of the appeal by the Appellants. The right to defence simply does not come into play in these appeals, having regard to the circumstances. The Appellants did not engage with the correspondence, despite the Respondent setting out the information in clear and detailed terms. The right to defend arises between the period April 2013 to May 2016 before the assessments were raised, but the Appellants chose not to engage at all with the Respondent. Therefore, at this remove, it was not open to the Appellants to raise it. Moreover, it is not an unfettered right. It is clear from the *Glencore* decision that the right to defence is only engaged if a party seeks the information, otherwise it is not engaged.

89.15. Reference was made to the entirety of the Respondent's correspondence that issued to the Appellants prior to the Respondent raising the assessments and the

requested information in terms of specified records. No records, with the exception of a limited amount of invoices, were furnished to the Respondent. All of the information sought by the Respondent was information that the Appellants were obliged to keep and furnish when requested, pursuant to the Regulations. The correspondence made it clear that the Respondent required records pursuant to the Regulations and in the absence of the Appellants satisfying the Respondent in respect of that and the end use of the MMO, then assessments would be raised.

89.16. A picture, completely at odds and misleading, has been painted in respect of the Appellants' submissions regarding the alleged right to defence that arises here. Extremely detailed correspondence issued to the Appellants in respect of serious concerns that the Respondent had regarding their purchases of MMO, the Respondent identified the number of litres, the periods in time the litres were purchased and the parties from whom the purchases were made. The Respondent then requested compliance with the Regulations and confirmation, of compliance with section 99(10) FA 2001. The correspondence was ignored.

89.17. The Appellants' contention that they received the assessments and did not know what they related to was a misrepresentation of what occurred. The assessments were accompanied with correspondence that explained the basis upon which the assessments were raised. In technical terms, a Notice of Assessment is simply obliged to set out the type of tax, the tax heading and the period in respect of which the tax falls. The Notice of Assessment does not detail whether the tax arises under Section 99(10) FA 2001 or any other provision.

89.18. There was no reference to storage in terms of company 1 and company 4 at the meetings with the Respondent's officials. Later, the Appellants altered the grounds altogether and stated that it was all storage. Yet, no credit notes were referenced in the Statements of Case when the matter of storage was raised and there was reference to [redacted], not [redacted], being in a position to give evidence in that respect. There was no basis to this alleged prejudice that had been suffered by the Appellants. Both of the Outline of Arguments made no reference to storage at all, and in fact go further, such that the Appellants admitted the purchases and stated that the product was sold through their normal customer base. However, when the normal customer base is considered, that does not flow from the records appended or the schedule furnished in these appeals.

89.19. The Appellants declared on their "T2"/VAT on purchases that their purchases amounted to €554,606. It is a complete and utter contradiction to the suggestion

that the Appellants were involved in storage. It is inconceivable that the Appellants would claim VAT input credits in circumstances where, they are not purchasing the fuel, but rather, they were simply providing storage facilities. If there was any truth to the storage facilities, the only issue that would be vatable, would be the charge for the storage facilities. On 7 March 2022, the Appellants sought to amend the VAT figures and reduce the "T2"/VAT on purchases from €554,606 down to €77,822 to reflect this alleged storage arrangement.

89.20. There was no credible evidence adduced in terms of the end user requirement under section 99(10) FA 2001. The best the Appellant came up with, in terms of their last Outline of Arguments, was a listing of sales, but the listing of sales does not corroborate or does not support any contention that the purchase of MMO by the Appellants was sold in the appropriate manner, because the stock levels are not accounted for. 81% of the MMO purchased from company 3 was unaccounted for as only 4%, on their own schedule, was sold as MMO. The Appellants' witness claimed in response that kerosene and MMO are the same.

89.21. The suggestion that a third party would pay three cents per litre to store large amounts of their own fuel for a few hours, only to be sucked back out again by the same third party, does not make any logical sense. In any event, it was completely contradicted by the Appellants own pleadings in these appeals. In addition payments were made in cash and third party cheques which was not normal business activities and when questioned, the Appellants' witness stated that "*cash is a legitimate currency*." [7] The Appellants' witness gave evidence of the Appellants' trucks using fuel cards to purchase fuel, which was not credible either.

89.22. In relation to the records required to be kept under the Regulations, the Appellants' witness accepted that he had not furnished the records that the Respondent had requested. The Appellants' witness described movement documents as "rudimentary matters".[8]

89.23. In terms of fair procedures, the Appellants were being alerted to all the information that the Respondent had in its possession, without any cooperation on the part of the Appellants. The Respondent consistently asked for input, but none was forthcoming and never has been. The contention throughout this hearing was that there had been a breach of the Regulations and that the Appellants had a liability to excise duty pursuant to section 99(10) FA 2001.

[7] Transcript Day 11, page 176
[8] Transcript Day 6, pages 58-60

89.24. In relation to the assessments being out of time, in accordance with section 949I(6) TCA 1997, there was no basis to allow the argument be made, as the time limits were known at the material time in 2016, when the Notice of Appeal was filed. In any event the Respondent was in a position to show that there was neglect in terms of these appeals. But that is irrelevant, because there was no basis to admit in that ground of appeal. In the context of time limits, it was accepted that the burden would shift to the Respondent.

89.25. In relation to section 99(10) FA 2001, and the argument that an opinion had to be formed and that operates also to shift the burden of proof to the Respondent was incorrect. The decision in *O'Flynn* relates to section 811 TCA 1997 and has no relevance herein. The Appellants know their business and the end user. The suggestion that the Respondent would have to satisfy the Commissioner that, was not logical and cannot be done where the Respondent had not been furnished with the Appellants' books and records. In terms of section 949I(6) TCA 1997, there is absolutely no reason, that this ground of appeal could not have been raised at the time of the Notice of Appeal in 2016.

89.26. In terms of the absence of mutuality, this was addressed in the decisions in *T.J., Menolly Homes* and *Quigley*. In relation to the arguments on proportionality, there was no obligation on the Respondent to adduce evidence regarding recovery of tax from any other party and section 99(11) FA 2011 provides for this in terms of the taxpayer being joint and severally liable. In relation to the decision in *ROZ-SWIT*, the determination in *59TACD2019* considers this case and the decision made it clear that the situation in *ROZ-SWIT* can be entirely differentiated.

89.27. In relation to the delay point, the Appellants are seeking to effectively parcel delay, as if this was a notice of motion before the superior courts, seeking to dismiss a claim for want of prosecution on the grounds of inordinate delay on the basis of the inherent jurisdiction of the superior courts by reference to the case law. This is not an *inter partes* dispute, but an inquiry before the Commission as to the correct amount of tax due.

Material Facts

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

90.1. The Appellants are [redacted] who traded as a partnership.

90.2. Prior to this, the Appellants were Directors of [redacted] which was liquidated by the High Court in 2013 and the Appellants' witness was restricted from acting as a Director for a period of 5 years.

90.3. The Appellants also ran a business entitled [redacted] which was dissolved in 2005.

90.4. The Appellants are mineral oil traders. The trade was conducted from a Haulage Yard, next to a residential dwelling named [redacted]

90.5. The Appellants had a haulage business.

90.6. The Appellants estimated the turnover from their mineral oil business to be in the region of €2,000,000.[9]

90.7. On 29 April 2013, the Respondent commenced an investigation into the Appellants' tax affairs for all periods from 1 January 2009 onwards.

90.8. On 7 July 2011, Authorised Officers of the Respondent called to the premises of the Appellants.

90.9. On 15 November 2013, Authorised Officers of the Respondent called to the premises of the Appellants.

90.10. The Appellants did not hold a mineral oil licence required to be held by mineral oil traders for the relevant period.

90.11. For the years 2010 to 2017 inclusive, the Appellants did not make partnership returns, the requirement of which includes extracts to be filed from the annual trading, profit and loss accounts and balance sheets.

90.12. The Appellants did not keep all records, including invoices; records of storage; movement records; purchases and sales records; statements of account; records of receipts and payments; and trading, profit & loss accounts and balance sheets, as required.

90.13. The Appellants did not issue and/or keep and/or furnish movement documents or Returns of Monthly Oil Movements ("ROMs") to the Respondent, as required.

90.14. The Appellants did not maintain the records required to be kept by mineral oil traders pursuant to the Regulations. The Appellants' witness described the requirements as "rudimentary matters".

90.15. The Appellants did not issue or retain delivery documents in respect of its sales.

[9] Respondent's Bok of Documents – Meeting Notes, page 2

90.16. The Appellants did not keep accurate and detailed records in respect of its purchases of MMO, as required.

90.17. The Appellants did not keep accurate and detailed records in respect of the supplies of MMO to its customers, as required.

90.18. The Appellants did not keep contemporaneous records, as required.

90.19. The credit notes submitted in these appeals were not contemporaneous records/documentation.

90.20. The "Schedule of Oil Sales" submitted by the Appellants was not a contemporaneous record of the Appellants' sales of mineral oils nor was it a reliable record.

90.21. The "Stock Transaction Listings" submitted by the Appellants were not a contemporaneous record of the Appellants' purchases and sales of mineral oils nor were they reliable records.

90.22. The Appellants did not keep detailed records of its stocks of mineral oils.

90.23. The Appellants mixed kerosene and MMO.

90.24. The Appellants and their family members held in excess of 15 bank accounts which were used for the Appellants' mineral oil trade.[10]The Respondent submitted that 23 bank accounts were used for the Appellants' mineral oil trade.[11]

90.25. The Appellants furnished to the Respondent details of only three [redacted] bank accounts. The balance of the bank accounts had to be obtained by the Respondent pursuant to its powers under section 906A TCA 1997.

90.26. The Appellants' witness used the bank accounts of his spouse and two sons to lodge monies from the Appellants' mineral oil trade.

90.27. Between August 2008 and February 2014, the amount of €11.285 million was lodged through the Appellants' numerous bank accounts, including the bank accounts of the spouse and sons of the Appellants' witness. This is despite the evidence of the Appellants' witness stating that he had to cycle to mass, as he had no money to put fuel in his car.

[10] Respondent's Book of Documents – Accounts
[11] Transcript Day 2, page 47

90.28. The Appellants' witness held three bank accounts with [redacted], using an address in [redacted]. The Appellants also held bank accounts in [redacted]

90.29. The Appellants' witness rented an apartment in [redacted] to facilitate the opening of the bank account in [redacted].

90.30. The alleged fire in the Appellants' premises occurred in 2018, some two years after the assessments were raised by the Respondent. The Appellants had access to their books and records prior to 2018, and during the period relevant periods to 2018.

90.31. In November 2013, the Appellants furnished to the Respondent the invoices in relation to company 1, which form the basis of the assessment raised by the Respondent in relation to company 1 (with the exception of nine invoices).

90.32. In November 2013, the Appellants furnished to the Respondent the invoices in relation to company 4, which form the basis of the assessment raised by the Respondent in relation to company 4.

90.33. The credit notes were not furnished to the Respondent in 2013 with the invoices from company 1 and company 4. Rather, the credit notes were furnished to the Respondent in 2024. Company 1 was no longer in existence at that time and had not been trading since 2013 and company 4 had stopped supplying the Appellants since 2011.[12]

90.34. The credit notes were allegedly furnished to the Appellants' witness about two or three years ago, "by two or three fellas that left them out for him".[13]

90.35. The Appellants first raised the storage arrangement in their Statements of Case in these appeals. The Appellants told the Respondent's officials in 2011 and 2013 that they did not store mineral oil. The matter of storage in relation to company 1 and company 4 was not raised in the Appellants' Notices of Appeal or Outline of Arguments. The Appellants' contentions in relation to storage have not been consistent.

90.36. There was no reference to credit notes in relation to company 4 in any of the Appellants' pleadings in these appeals.

90.37. There were no credit notes relating to company 1.

[12] Respondent's Book of Documents, Meeting Notes, page 26
[13] Transcript, Day 1, page 217

90.38. The Appellants' VAT3 return for the year 2010 shows that VAT on purchases "T2" was in the sum of €50,059, despite the Appellants accepting that they purchased MMO from company 3 in the amount of 749,713 litres, for the period April 2010 to August 2010.

90.39. The Appellants sold mineral oil to anonymous cash buyers who would call to their premises.

90.40. There was no credible evidence adduced that the six cheques from person 1, lodged to the Appellants' bank account, were repaid in full to person 1.

90.41. The Appellants did not dispute purchasing MMO from company 3.

90.42. There were no credible records produced to show sales of the MMO purchased from company 3 for the relevant period.

90.43. The Appellants paid for fuel from company 1 and company 4 by cash and third party cheques, but paid for purchases of fuel from company 3 by bank draft.

90.44. The evidence that the Appellants used subprime lenders to fund its purchases of mineral oil was not credible and there was no documentary evidence submitted by the Appellants to support this contention.

90.45. The evidence of the Appellants' witness that the disparity between the higher purchase price of mineral oil and the lower sales price of mineral oil in the period April 2010 to August 2010 was due to the Appellants receiving rebates for fuel, was not credible. Nowhere did the Appellants mention receiving rebates for purchases of fuel, prior to the hearing of the appeals, and no credible documentary evidence was produced by the Appellants to support rebates being provided to the Appellants.

90.46. The Appellants used different addresses and VAT numbers on purchase invoices that were no longer in use.

Statutory Interpretation

91. The principles of statutory interpretation were referenced by the Appellants and Respondent in submissions. The Commissioner is satisfied that in circumstances where the Appellants are seeking to avail of an exemption from tax, the principle enunciated by the Supreme Court in *Doorley* must be considered. The Commissioner has had regard to the dictum of Kennedy C. J. at page 766, wherein he stated that:

"*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 applicable."

92. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the Judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

"*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.""*

93. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

94. Furthermore, the Commissioner is mindful of the recent decision in *Heather Hill* and that the approach to be taken to statutory interpretation must include consideration of the

overall context and purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he stated that:

> *"It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

95. To a certain degree it might be said that these cases suggest that the "literal" and "purposive" approaches to statutory interpretation are no longer hermetically sealed. To the extent that the line between what is now permissible has become blurred, Murray J. in *Heather Hill* sets out "*four basic propositions that must be borne in mind"* from paragraphs 113 to 116 as follows:-

> "*113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects*.
>
> *114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276)*.

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

96. The *dictum* of Murray J. in *Heather Hill* was considered and approved by the Court of Appeal in the decision in *Hanrahan*. The Court of Appeal noted that the trial judge had cited and relied on the approach to the interpretation of taxation legislation that Murray J. in the Court of Appeal identified in the decision of *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298. Murray J., when considering the provision at issue, at paragraph 162 of the Judgment stated that:

> "[it] falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute."

97. Moreover, the Court of Appeal in *Hanrahan* at paragraph 83 held that:

> *"Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant."*

98. Of note, the Court of Appeal in *Hanrahan* at paragraph 79, when referring to the *dictum* of Murray J. in *Heather Hill,* in relation to the analysis of context and purpose, stated that:

> "*Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken…..…He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown…"*

99. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words 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*".

100. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

101. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of the *dictum* of McKechnie J. in *Dunnes Stores* at paragraph 66, wherein he stated that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*."

102. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general

principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

Analysis

103. As set out in the "Introduction" section in this Determination, the Commissioner will first proceed to consider the legal arguments raised by the Appellants in the document entitled "Outline Legal Submissions" dated 8 October 2024, filed on day nine of the hearing of the appeals and the legal arguments in the context of section 949I(6) TCA 1997. The legal submissions and the entirety of the supporting case law submitted by the Appellants on day nine of the hearing, runs to 49 pages in terms of the legal submissions and two lever arch folders with 33 Tabs in the first folder and 21 Tabs in the second folder. None of the arguments were raised in the Appellants' Notices of Appeal or articulated in the pleadings filed by the Appellants thereafter in these appeals, such as the Statements of Case or both Outline of Arguments.

104. Section 99(10) FA 2001 provides for a reduced rate of excise duty applicable for MMO, once certain specified conditions are complied with. The focus in the appeals herein was on section 99(10) FA 2001 which provides that where any person has received excisable products on which excise duty has been charged at a rate lower than the appropriate standard rate, subject to the requirement that such excisable products are used for a specific purpose or in a specific manner, and where such requirement has not been satisfied, or any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Respondent, that the excisable products have been used, or are held for use, for such purpose or in such manner, then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of the lower rate. [Emphasis added] Hence, what the section does is that it gives a mineral oil trader, if they have failed in their duties pursuant to the Regulations, the opportunity of avoiding liability at the standard rate, if they can prove to the satisfaction of the Respondent that the mineral oil was used for rebated purposes and that there was no loss to the State.

105. Of note, the section uses the words, "*where any person has received*". The Commissioner consider that that the words are plain and the meaning self-evident, such that the section is drafted in broad terms encompassing any person who has received mineral oils, which

would include storage of fuel. Moreover, the section uses the words "*any requirement of excise law in relation to the holding or delivery of such excisable products*", which would suggest on a literal interpretation that the requirements of excise law applies to those who hold mineral oils and the words "*have been used*", or "*are held for use*" would suggest that it applies to any person who holds mineral oil.

106. Therefore, the Commissioner is satisfied that the provisions of section 99(10) FA 2001 are engaged in circumstances where a person is said to be storing fuel and the full panoply of the Regulations must be complied with in relation to any storage of mineral oil. It is in order to ensure traceability of MMO and to enable the Respondent to verify that the MMO was being used for a permitted purpose and in compliance with the statutory scheme that a mineral oil trader, dealing in mineral oils, is required to hold a licence issued by Respondent and keep detailed records, in accordance with the Regulations. Thus, it was in circumstances where the Appellants did not respond to the Respondent's many written requests for the Appellants books and records, that the Appellants were required to keep in accordance with the Regulations, that the Respondent made assessments on the Appellants, on the basis of section 99(10) FA 2001.

107. The assessment relating to the purchase of MMO from company 1 was calculated on the basis of a combination of purchase invoices furnished by the Appellants to the Respondent in 2013 and nine invoices which were from the records of company 1. The assessment relating to the supply of MMO to person 1 was calculated on the basis of six cheques issued by person 1 to the Appellants. The Respondent obtained copies of the cheques from records obtained under the provisions of section 906A TCA 1997. The assessment relating to the purchase of MMO from company 2 was based on ROMs filed by company 2 and cheques from the Appellants to company 2 found in the bank account records of company 2. The assessment relating to the MMO which the Appellants purchased from company 3 was calculated on the basis of purchases from company 3, that the Appellants do not dispute. The assessment relating to the purchase of MMO from company 4 was calculated on the basis of purchase invoices that the Appellants furnished to the Respondent, in 2013

108. The Commissioner is satisfied that in spite of repeated written requests, the Appellants did not furnish their books and records in accordance with the Regulations to the Respondents, save for the following documentation:-

    (i) Purchase invoices from company 4;
    (ii) Purchase invoices from company 1;

(iii) Incomplete statements of three bank accounts in the name of [the first named Appellant] at [redacted] comprising: [redacted] bank account number [redacted] for periods in the years 2009 to 2013 inclusive;

(iv) [redacted] for periods in the years 2012 and 2013; [redacted] bank account number [redacted] for periods in the years 2010 to 2012 inclusive;

(v) Sales invoices of the Appellants' business for the period 10 March 2010 to 13 April 2010, submitted on 26 September 2016, by the Appellants' then agent, [redacted], Accountants, to the Respondent;

(vi) A Schedule referred to in the Appellants' Outline of Arguments as "a table of workings for VAT3 submissions which are currently outstanding"; (**Submitted on the 7 March 2022, with the Appellants Outline of Arguments**)

(vii) Lists of sales of the Appellants' business for the months January, February, and March 2010. (**Submitted on the 7 March 2022, with the Appellants Outline of Arguments**)

The burden of proof

109. This ground of appeal and legal argument was not raised by the Appellants in their Notices of Appeal. Counsel for the Appellants submitted that it was not possible for the Appellants to include the ground that the burden of proof was on the Respondent in these appeals, in their Notices of Appeal, as the Appellants did not have access to the evidence to be relied on by the Respondent, until March 2023. The Commissioner does not accept that contention in relation to the evidence and the Commissioner will address why in more detail hereunder, when she addresses the arguments made in relation to the alleged breach of the Appellants' right to defence under EU law. It is clear from the correspondence that issued from the Respondent as set heretofore in this determination, that the Appellants were aware of the basis upon which the Respondent raised the assessments.

110. Counsel for the Appellants argued that *"it is notable that the entire tenor of the Respondents case which has now been revealed in the course of cross examination is that the Appellants have been deliberately involved in avoiding tax*". It was argued therefore, that it was not until the commencement of the hearing of these appeals that a decision should have been made that both the burden of proof and evidential burden lay on the Respondent, not the Appellants.

111. Counsel for the Appellants submitted that the Commissioner should exercise her discretion, in accordance with section 949I(6) TCA 1997 to permit the Appellants to raise this ground of appeal. The Commissioner is satisfied that the burden of proof and where it lies is not always apparent from the outset and may not necessarily be a "ground of appeal". However, it is usually a matter that is raised in an appellant's Outline of Arguments, legal submissions or dealt with as a preliminary issue via a case management conference, in accordance with section 949T TCA 1997. The Commissioner is satisfied that it is undoubtedly a matter that is raised by an appellant prior to the substantive hearing taking place. However, none of this occurred herein despite the Appellants having various representatives over the years. Moreover, the Commissioner does not accept that the correspondence entered into between the parties, where the Appellants' new representatives flagged their intention to make certain legal arguments, amounts to the matter being raised in any substantive way. Nevertheless, least the Commissioner be wrong that she should not permit this ground of appeal in accordance with section 949I(6) TCA 1997, she will proceed to address the arguments made by both parties in relation to the burden of proof in this appeal.

112. It appears to the Commissioner having regard to the Outline Legal Submissions filed by the Appellants on 8 October 2024, day nine of the hearing, that the arguments in relation to the burden of proof are threefold; firstly, that the Respondent bears the burden of proof when fraud is alleged by the Respondent; secondly, that section 99(10) FA 2001 required the Respondent to form an opinion that the legislation had not been complied with and thus, the burden of proving that opinion falls to the Respondent; and thirdly, the Respondent bears the burden of proof when an assessment is out of time. The Commissioner intends to address each point separately, hereunder.

Allegations of Fraud

113. In relation to the first point, counsel for the Appellants submitted that in circumstances where it was the Respondent's case that "*the Appellants have been deliberately involved in avoiding tax*", the burden of proof was incorrectly placed on the Appellants and they were required to go into evidence.

114. Counsel for the Appellants submitted that the Respondent has sought to introduce allegations of fraud and criminality into the proceedings and references were made to a number of questions that were put to the Appellants' witness in cross examination. Counsel for the Appellants stated that the questions were numerous and are reflected in the transcript of evidence, in particular days one to four. The Commissioner notes the example set out in the Appellants' Outline Legal Submissions as follows: "*in the course*

of their cross-examination of the First Named Appellant have now explicitly put forward the claim that the Appellants were guilty of being "involved in facilitating or assisting effectively the criminal activity of the defrauding of both excise duty and vat in respect of marked mineral oil" (Transcript Day 2 page 66) and that the credit notes were "effectively a fiction created for the purposes of this appeal" (Transcript Day 2 page 193) and in light of these allegations, the burden of proof in these proceedings is on the Revenue in making such claims".[14]

115. Counsel for the Appellants argued that the burden of proof and the evidential burden in these appeals, should have been placed on the Respondent at the outset of the hearing and the Respondent ought to have presented its evidence first. It was argued that this is in circumstances where the Respondent was presenting the case as one of "*deliberate collusion, with fraud*".[15]

116. The Commissioner has already set out in the "Appellants' submissions" section of her Determination, the case law in this jurisdiction, the United Kingdom and Canada that the Appellants relied on to support their argument in this regard. Moreover, the Appellants made reference to previous Determinations of the Commission and to the textbook "McGrath on Evidence", 3rd Edition, where at paragraph 2.161 the author stated that:

> "*The general rule in civil cases is that the party that bears the legal burden in respect of an issue will bear the evidential burden in respect of that issue. The standard which has to be met is to make out a prima facie case. A party will have made out a prima facie case when, on the evidence given, it would be open to the tribunal of fact, if no other evidence was given, or if it accepted that evidence even though contradicted in its material facts, to enter a verdict for that party".*

117. The Commissioner considers that the appropriate starting point is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is well established by case law. In the much quoted decision of *Menolly Homes,* at paragraph 21 and 22, Charleton J. stated that:

> *"The function of the Appeal Commissioners on the appeal is conveniently stated by Lord Heward L.C.J. in Sneath's case 17 T.C. 149 at 493:-*
>
> > *"I may note here at once that in making the assessment and dealing with the appeals, the commissioners are exercising statutory authority and a statutory*

[14] Outline Legal Submissions, dated 8 October 2024, page 4
[15] Outline Legal Submissions, dated 8 October 2024, page 6

duty which they are bound to carry out. They are in the position of judges deciding in issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter parties, they are assessing or estimating the amount on which in the interests of the country at large, the taxpayer ought to be taxed" [Emphasis added]

……

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. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in T.J. v Criminal Assets Bureau [2008] IEHC 168.".

118. More recently Donnelly J. and Butler J. clarified the approach to the burden of proof when an appeal relates to the interpretation of the law only in their joint judgment for the Court of Appeal in *Hanrahan.* At paragraphs 97 to 99, the Court of Appeal held that:

"97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..

In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation……."

119. The most recent decision from the Superior Courts in relation to the manner in which tax appeals are to proceed is the judgment in *Quigle*y, where Ms Justice Phelan sets out comprehensively the applicable case law at paragraphs 93 to 107. Whilst lengthy, the Commissioner considers it relevant and appropriate to set out *dictum* of Phelan J. as follows:

"*93. A particular approach to tax proceedings is warranted because of the structure of the self-assessment system and the fact that the onus of proof on an appeal against an assessment lies on the appellant. This is clear from decisions such as TJ -v-Criminal Assets Bureau [2008] IEHC 168; Menolly Homes Ltd -v-Appeal Commissioners [2010] IEHC 49 and Lee v. Revenue Commissioners [2021] IECA 18. It is fundamental to a proper understanding of this case-law and its application that the self-assessment system operates on the basis that tax-payers are subject to audit and are required to establish, primarily from their books and records, that they are compliant with their revenue obligations. Requiring a taxpayer to establish ompliance does not amount to imputing dishonesty or fraud against that taxpayer. It is simply a feature of how the system operates.*

94. The dicta of Gilligan J. at paras 50 and 51 of TJ v. Criminal Assets Bureau [2008] IEHC 168 is cited on behalf of the Respondents as providing a ready answer to the Applicant's complaint where he says:

> *"50. The whole basis of the Irish taxation system is developed on the premise of self- assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self-assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self- assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person[…]*
>
> *……..*
>
> *[….]There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event, it has to be borne in mind that since an assessment can only relate to the applicant's own income*

and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant.

51. I do not accept that the applicant has been put in an impossible situation and effectively cannot deal with bare and unexplained assessments. Furthermore, I do not accept there is any substance to the reference by [counsel] on the applicant's behalf to allegations of criminal wrongdoing being made against the applicant of which he will have no notice. The allegations being made against the applicant by way of the assessments as raised are that he earned income and made gains which he has not previously declared to the respondent pursuant to the basic self-assessment system that pertains in this country. Nobody is better placed to know what income he received or what gains were made than the applicant himself."

95. In TJ, Gilligan J. was concerned with an appeal against an assessment to income tax where the basis for the assessment to income tax was not identified. Gilligan J. pointed out that the applicant's tax appeal to the Appeal Commissioners was a civil matter and there was no question of the applicant facing any criminal charge that might require the constitutional protections that are afforded in criminal trials. He pointed out that the applicant has not laid out any grounds of prejudice other than the hypothetical proposition that he might suffer some form of prejudice at the hearing of his appeal before the Appeal Commissioners and that if, in such circumstances, an adjournment was necessary, he would incur additional legal costs. While the Respondents equally contend in this case that the Applicant is best placed to demonstrate an entitlement to tax rebate by reference to his own records and do not need further information, a difference between this case and the TJ case appears to me to be that in this case the Revenue have not relied exclusively on the records in raising assessments but have openly explained that assessments have been raised based on the denial of 33 of the 44 people interviewed that they were supplied with MGO by the Applicant as his records would otherwise suggest. Whereas in TJ, it appears that no particular rationale was advanced to justify the assessment raised, that is not the position in this case. The question which arises is as to whether this distinguishing feature affects the application of the principle established in T.J.

96. The dicta in TJ was revisited in Menolly Homes Ltd -v-Appeal Commissioners [2010] IEHC 49, a case involving a claimed right to cross-examine a tax inspector on a V.A.T appeal, with particular emphasis on the burden of proof in taxation appeals. The appellant in Menolly proposed to call the tax inspector who raised the assessment

in evidence on the appeal before the Appeal Commissioners and to cross-examine him as to his state of mind five years previously when he had raised the assessment. This was seemingly with a view to demonstrating a lack of good faith or that his view was not factually sustainable or that his view was unreasonable. The Revenue protested the calling of the tax inspector for the purpose of cross-examination by the applicant and would not tender him in evidence. They said there was no jurisdiction and, in any event, no issue requiring him to be heard arose. The Appeal Commissioners ruled in the favour of the Revenue. Charleton J. distinguished the taxation regime from other areas as follows (at para. 12 of his judgment):

> *"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure in that appeal and the remedies available to the appellate body. "*

97. Having reviewed the statutory appeal jurisdiction of the Appeal Commissioners, Charleton J. observed (para. 20) with regard to the burden of proof as follows:

> *"20. Under the Value Added Tax Act, 1972 the burden of proof "that the amount due is excessive" rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland. Powers are given to the inspector to be present, to produce evidence and to give reasons in support of the assessment. The Appeal Commissioners, if the taxpayer proves over-charging, must abate or reduce the assessment*

accordingly, but otherwise an order must be made that the assessment shall stand. "

98. Next, Charleton J. quoted from Lord Heward L.C.J. in Sneath 's case 17 T.C. 149 at 493 to the effect that the jurisdiction of the Appeal Commissioner in a tax appeal is not to decide a case inter partes, but rather to assess or estimate the amount on which in the interests of the country at large, the taxpayer ought to be taxed. Charleton J. then noted (at para. 22):

> *"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. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J in TJ v. Criminal Assets Bureau, [2008} IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue. "*

99. The Superior Courts have remained consistent in maintaining that the absence of discovery as to the basis for an assessment does not provide a defence against the enforcement of same. In Gladney v. Di Munro [2017] IEHC 100, Hunt J. observed in finding no arguable defence in respect of an application on behalf of the Revenue for summary judgment that (paras. 23 and 24):

> *"23. Likewise, the desire of the defendant to ascertain the precise basis of the assessment through use of the discovery process does not give rise to a permissible ground of defence in a case of this kind. The observations of Gilligan J in TJ v. The Criminal Assets Bureau [2008] IEHC 168 are relevant in this respect. He noted that the whole basis of the Irish taxation system is developed on the premise of self- assessment, and that the whole basis of self-assessment would be undermined if, having made a return which is not accepted by the Revenue, a taxpayer was entitled to access all relevant information that was available to the Revenue. He noted that the Revenue were only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. A person subject to such an assessment has the right of an appeal to the Appeal Commissioners, the right to a further appeal to the Circuit Court, the right to a further appeal on a point of law to the High Court, and from there to the Supreme Court. To this list may be added the availability of judicial review*

against any actions of the Revenue or the Appeal Commissioners which are capable of engaging that remedy, and he ability of the Appeal Commissioners to state a case to deal with any legal complexities that may arise.

24. The observation of Gilligan J to the effect that nobody is better placed than the taxpayer himself to know what income was received or what gains were made is particularly applicable to the position of the defendant in this case. I can see no practical reason why the defendant could not attempt to discharge the burden of proving that the assessed tax is not payable in a hearing before the Appeal Commissioners. I do not believe that a discovery order would be required to assist in that process. No doubt the Revenue or the Appeal Commissioners would have to give due consideration to any requests for information made by an appellant in the context of the appeal procedure. In this case, I can see nothing to displace the ordinary position that the taxpayer is best placed to marshal the facts and information relevant to the issue of his liability or otherwise to the tax claimed In this case, the defendant knew well why he was being pursued by the Revenue, and in my view singularly failed to engage with important matters of substance communicated to him by the Revenue prior to the assessment being raised As previously noted, he has also offered contradictory explanations at different times for the source of the funds held in his offshore account. In these circumstances, it is for him to adduce material to persuade the appropriate tribunal that the tax assessed is not payable. "

100. The nature the jurisdiction of the Tax Appeal Commission was given more recent consideration in several decisions of the Court of Appeal. In his judgment for the Court of Appeal in Lee v. Revenue Commissioners [2021] IECA 18 already referred to above, Murray J. stated (paras. 20-21):

"20. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation.

21. In defining the functions of the Appeal Commissioners in hearing an appeal brought pursuant to s. 933 TCA or the Circuit Court in hearing an appeal under s. 942, the scope of that jurisdiction is determined by four features of the Act -

the definition of the appellate jurisdiction of the Commissioners, the parameters of the permissible grounds of appeal, the orders the Appeal Commissioners may make at the conclusion of that process and the powers conferred upon those Commissioners to enable that appeal to be effectively heard. Each of these points to a jurisdiction directed to the assessments raised by Revenue and the charging provisions pursuant to which the liabilities reflected in those assessments are imposed. They strongly suggest that the function of the Appeal Commissioners at first instance and of the Circuit Court on appeal is to determine if an assessment to tax is properly made having regard to those charging provisions, and no more. "

101. Consistently therefore with the dicta of Charleton J. in Menolly, the Court of Appeal has endorsed the established position that in taking an appeal, the taxpayer undertakes the burden of appeal, within the relevant statutory formula, as to the relief which he might be granted if successful. It is for the tax payer to establish an entitlement to the relief and thereby upset the assessment raised by the Revenue. Murray J. restates this proposition throughout his judgment in Lee reiterating with regard to the jurisdiction of the Tax Appeals Commission to determine issues arising (at para. 39):

" ... they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount. That liability, and those questions, all arise from the assessment to tax which defines the appellate body's jurisdiction. "

102. Regarding the requirements of fair procedures in this context, Murray J. observed (at para. 75):

"75. For much the same reason, the reliance by the plaintiff on decisions confirming the obligations of the Commissioners to afford those before them fair procedures (CG v. The Appeal Commissioners [2005] IEHC 121, [2005] 2 IR 472) do not affect the matter. The Appeal Commissioners in conducting any proceeding are required to adhere to principles of procedural fairness. However, this is a requirement imposed upon them in connection with the discharge of their statutory remit. It does not change that remit. "

103. Murray J. concluded (para. 76):

"The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these

proceedings and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. "

104. In another recent decision of the Court of Appeal, Whelan J. delivered judgment for the Court (Ni Raifeartaigh and Power JJ. in agreement) in Gladney v. Coloe [2021] IECA 115, in the context of an appeal against the grant of summary judgment in circumstances where no appeal had been taken within time against the assessment to the Tax Appeals Commission. In her judgment Whelan J. reviewed the decision in TJ and identified factors relevant to the appeal before her from that decision as follows (at para. 38):

"I glean from that decision the following factors of relevance to this appeal:

i. the Irish taxation system is based on the premise of self-assessment;

ii. a taxpayer is best placed to prepare a computation required for self-assessment on the basis of any income and/or gains that arose in the relevant tax period;

iii. the basis of self-assessment would be undermined if, having made a return which was not accepted, a taxpayer was entitled to access all relevant information that was available to the Revenue Commissioners,·

iv. a taxpayer has the right of appeal to the Tax Appeals Commission;

v. judicial review or a constitutional challenge are available where it is asserted that a measure is ultra vires or a provision unconstitutional;

vi. this ensures that a taxpayer has adequate fair procedures and safeguards in position in the event of any prejudice arising; and,

vii. the Customer Service Charter of the Revenue Commissioners provides that a taxpayer will be given all necessary information and all reasonable assistance to enable him to understand his tax obligations.

The Charter does not require the tax authorities to advise a taxpayer of the entire nature and background information available to them. "

105. It seems to me that these authorities each in turn recognise that the taxpayer against whom an assessment has been raised is entitled to fair procedures during the revenue process but issues of law and fact arising in that process are matters for the Tax Appeals Commission in the first instance. The Tax Appeals Commission is entitled to have regard to the fact that the system is based on self-assessment and the obligation to demonstrate an entitlement to relief lies on the taxpayer, subject to the requirements of fair procedures which the Tax Appeal Commission is mandated to ensure are observed and the supervisory jurisdiction of the Superior Courts. In Lee, the Court of Appeal did not tease out what implications an application of EU principles might have for the applicability of decisions such as T J and Menolly but it clearly found that the Tax Appeals Commission has jurisdiction to apply EU law as appropriate in the discharge of prescribed statutory functions and may do so to preclude reliance on evidence or information in hearings where there has not been compliance with the requirements of fair procedures or constitutional justice to safeguard the fairness of the process before the Tax Appeals Commission.

106. In view of the authorities cited above and recalling that the question which frames the Commissioner's jurisdiction on appeal is whether the Tax Appeals Commission is satisfied that there has been compliance with the requirements of excise law in relation to the holding or delivery of MGO and it is shown that the product has been used or held for use for a rebated purpose, the Applicant is required to meet the s. 99(10) test with reference to his own books, records and customer base and any witness evidence he may wish to call. It is for the Applicant and his advisers to prepare and present that case and to the extent that the Applicant claims that his records do not contain deficiencies or omissions, the Tax Appeals Commissioner has confirmed through the terms of her ruling under challenge in these proceedings, that the Applicant will have an opportunity at hearing to fully make that case. The extent and manner in which this evidence is challenged is then a matter for Revenue, subject to ruling from the Tax Appeals Commissioner whose function it is, at least in the first instance, to ensure that the requirements of fairness are met in the process.

107. In the absence of the Applicant's evidence being challenged by the Revenue, it is the evidence of the sales themselves rather than evidence gleaned in the Revenue's verification investigations that are important. This is in circumstances where the Applicant knows his customer base and he and his former employees will be able to

speak to the names, addresses and general identities of the customers to whom MGO was sold. For so long as this is the case, then it seems to me that the ratio of the decision of Gilligan J. in TJ holds good as the matters for determination by the Tax Appeals Commissioner will depend on whether the Applicant can demonstrate compliance with regulatory conditions governing entitlement to rebate, an issue which turns on information which is within the Applicant's own knowledge unless and until that information and the evidence he offers is challenged."

120. It is important to restate that an appeal before the Commission is not a civil matter or *inter partes* proceedings. It is an inquiry by the Commissioner as to whether the taxpayer has shown the relevant tax is or is not payable. This particular approach is due to the structure of the self-assessment system in this jurisdiction and the fact that the onus of proof in an appeal against an assessment lies on an appellant. This is clear from decisions already referred to in this Determination, such as *T(J), Menolly Homes* and *Lee*. It is trite law to state that the self-assessment system operates on the basis that taxpayers are subject to audit and are required to establish, primarily from their books and records, that they are compliant with their revenue obligations. A requirement that a taxpayer establish compliance does not amount to imputing dishonesty or fraud against that taxpayer. It is also the position that in certain appeals the burden of proving certain matters shifts to the respondent, such as an appeal where the respondent alleges fraud.

121. The assessments at issue in these appeals and the charge to excise duty arises on the basis of a failure on the part of the Appellants to comply with the requirements of section 99(10) FA 2001. In cases involving tax reliefs or exemptions, the Commissioner is satisfied that it is incumbent on the taxpayer to demonstrate that the taxpayer falls within the relief (as per *Doorley)*. Therefore, the legal question which frames the Commissioner's jurisdiction herein is whether the Appellants can establish, on the balance of probabilities, compliance with the requirements of excise law in relation to the holding or delivery of excisable product and that the product has been used or held for use for a rebated purpose. The Commissioner is satisfied that the substantive issue in this appeal is a net issue and as set out in *Lee*, the Commissioner's role is to focus on the tax and the charge.

122. The Commissioner accepts the submissions of counsel for the Appellants that counsel for the Respondent put a number of questions to the Appellants' witness in cross examination in relation to the matters complained of. This is reflected in the transcript of

evidence. Nevertheless, the issue herein is not "*deliberate collusion, with fraud*"[16] it is compliance by the Appellants of the provisions of section 99(10) FA 2001.

123. The Commissioner considers relevant the *dictum* of Mr Justice Nolan in the recent High Court decision in *Cornelius O'Sullivan v The Revenue Commissioners* [2024] IEHC 611, where Nolan J., at paragraph 108, opined that *"……..submissions are not evidence, they are simply submissions. If it were otherwise, then each and every challenge to any determination of an administrative body or court, placing reliance upon submissions, so as to form the basis of an appeal, would give rise to legal chaos*."

124. Thus, the Commissioner is satisfied that the burden of proving that the Appellants are entitled to the lower rate of excise duty on the excisable products, rests on the Appellants. That is what the Commissioner must focus on in this appeal and the Appellants compliance with section 99(10) FA 2001. It is the Appellants who bear the burden of proving on the basis of their own books and records, compliance with section 99(10) FA 2001 and their entitlement to the reduced rate of excise duty. Should the Appellants persuade the Commissioner in this regard, then the Appellants will have shown that the Respondent was incorrect to raise the assessment(s).

Section 99(10) Opinion – burden of proof

125. Counsel for the Appellants argued that section 99(10) TCA 1997 "*requires the positive action by the Commissioners in forming the view to their satisfaction of the error of the taxpayer. It is submitted in doing so that this creates an obligation on the Revenue to support such a view*". This legal argument was introduced via the Appellants' Outline Legal Submissions dated 8 October 2024. At no time prior to those submissions was this argument raised by the Appellants in their Notices of Appeal, Statements of Case or Outline of Arguments. The Commissioner is not satisfied that the ground could not reasonably have been stated in the Notices of Appeal, in accordance with section 949I(6) TCA 1997. The Appellants' legal submissions stated that *"[t]he Appellant only had the benefit of legal advice from the Summer of 2024, following the commencement of the Appeal before the TAC, and the point was raised before the Commission as soon as possible thereafter*." The Commissioner has already set out that the Appellants had numerous advisors over the years, including a tax agent who completed the Notices of Appeal which were furnished to the Commission and a tax agent, who attended at the hearing of the appeals for the first 4 days of the hearing. Moreover, counsel for the Appellants proffered no good reason why this legal argument had not been raised at an earlier stage than Day nine of the proceedings. Counsel for the Respondent described it

[16] Outline Legal Submissions, dated 8 October 2024, page 6

as an attempt to ambush the Respondent and the Commissioner does not disagree. Nevertheless, least the Commissioner be wrong in her decision pursuant to section 949I(6) TCA 1997, the Commissioner will proceed to consider the Appellants' argument in this regard.

126. Counsel for the Appellants submitted that "*the tax liability requires the Commissioner to form an Opinion that the requirements of the legislation have not been complied with and that the products have been used or held for use outside the terms for which the rebate was granted. The burden of proving this and the consequences flowing therefrom, falls on the Respondent.*" Specifically, counsel referred to the words in subsection (b) "*to the satisfaction of the Commissioners*" which he submitted means that the Respondent bears the burden in this regard. The Appellants relied on the decisions in *O'Flynn* and *McNamee*. Counsel for the Respondent submitted that the case law relied on referred to tax avoidance provisions under section 811 TCA 1997 and a Notice of Opinion issued by the Respondent. Thus, it is not relevant or supportive of the legislative provisions herein, which are entirely different. It is not an opinion that is under appeal herein. Counsel for the Respondent submitted that on a plain and ordinary reading of section 99(10) FA 2001, the section does not import such an opinion on the Respondent's part.

127. The Commissioner is satisfied that having regard to the plain and ordinary meaning of section 99(10) FA 2001, in context, in accordance with the principles of statutory interpretation as set out heretofore under the heading "Statutory Interpretation", that the section does not import such an opinion on the part of the Respondent. The Commissioner is further satisfied that section 811 TCA 1997 is not comparable to section 99(10) FA 2001. Section 811 TCA 1997 required that if the Respondent, after enquiries, formed a view that there was a tax avoidance scheme pursuant to section 811, an authorised officer had to form a formal view namely, an Opinion, specifically in the context of section 811 and it was that Opinion that was capable of being appealed to the Commission. Moreover, the section specifically set out the details to be included in such an Opinion that issued to the taxpayer. There is no opinion under appeal herein. The Commissioner does not accept that the wording of section 99(10) FA 2001 can be interpreted as requiring "an opinion" to be formed akin to the Opinion in section 811 by the Respondent. Moreover, the words in section 99(10) FA 2011 are ""*to the satisfaction of Revenue*". As stated "an opinion" was not required herein, no opinion is under appeal herein and the decision in *O'Flynn* is not relevant to the matters at issue in these appeals.

128. What section 99(10) FA 2001 provides is that if a Mineral Oil Trader fails to comply with its obligations pursuant to the Regulations (which Regulations exist as measures to

prevent evasion of excise duties), then it is a matter for that Mineral Oil Trader to satisfy the Respondent that the final use condition was met, i.e. that there was no loss of excise duty arising from the breaches. There is no ambiguity in the requirement to satisfy the Respondent as to the ongoing entitlement to benefit from the reduced rate of excise duty paid in relation to the MMO in question, as is clear from section 99(10) FA 2001 and that absent such an entitlement being shown, the supply of MMO is chargeable at the standard rate. Hence, the Commissioner does not accept the Appellants' submission that the burden of proof is on the Respondent in relation to section 99(10) FA 2001.

Time limits for raising the assessments dated 30 May 2016

129. Counsel for the Appellants argued that the assessments dated 30 May 2016, were raised outside of the 4 year time limit provided for in section 99AB FA 2001 and that it was necessary for the Respondent "*to call evidence of reasonable grounds for believing that there was fraud or neglect on the part of the Applicant unless conceding that these assessments are statute barred*". The Respondent did not disagree with this position in terms of the burden of proof in such circumstances.

130. This ground of appeal and/or legal argument was introduced via the Appellants' Outline Legal Submissions dated 8 October 2024. The Commissioner does not accept that mention of this argument in correspondence that ensued between the parties during the interim period, between the commencement and the recommencement of the appeals, was suffice to suggest that the Respondent was on prior notice of the legal argument being made by the Appellants in this regard. Thus, the Commissioner is satisfied that the Appellants are not entitled to rely on this ground of appeal as the Commissioner is not satisfied that this ground of appeal could not reasonably have been stated in the Appellants' Notices of Appeal, as is required in accordance with section 949I(6) TCA 1997.

131. Counsel for the Appellants again raised the matter of the Appellants being unrepresented. At a risk of repeating herself, the Commissioner does not agree that this is the position and section 949AB TCA 1997 provides that "*an Appeal Commissioners shall hear any barrister or solicitor, or any person who is a member of a professional body (within the meaning of section 851A(l)), who appears on behalf of a party*." Counsel for the Respondent described the raising of this argument at this late stage, as an attempt to ambush the Respondent, and the Commissioner does not disagree with that assessment. This approach by the Appellants denied the Respondent the opportunity to address this argument at the outset by way of either case management conference or at the commencement of the hearing of the appeals in April 2024. The argument was first made

on day nine of the hearing by the Appellants, once the evidence had concluded by both parties to the appeals.

132. At this remove, there is no entitlement on the part of the Appellants to rely on this ground of appeal, because the time limits were known at the material time when the assessments were raised by the Respondent. Nevertheless, least the Commissioner be wrong in her decision pursuant to section 949I(6) TCA 1997, the Commissioner will proceed to consider the Appellants' ground of appeal in this regard, despite it not being raised previously or in the Notices of Appeal.

133. Section 99AB(2) FA 2001 provides that subject to subsection (4), an assessment under section 99A FA 2001 may be made at any time not later than 4 years from the date of the transaction giving rise to the liability concerned or where the liability is in respect of a taxable period, the last day of such period. Furthermore, section 99AB(4)(a) provides that subsection (2) shall not apply in any case where there are reasonable grounds to believe that any form of fraud or neglect has been committed by or on behalf of any person in connection with the liability concerned.

134. The Commissioner notes that "neglect" for the purposes of section 99AB(4)(a) is defined in section 99AB(4)(b) as meaning "*negligence or a failure to give any notice, information or record, or to make any return, required to be given or made under any provision of excise law, within such time limit as may be allowed under the provision concerned*". Of note, section 99AB(4)(b) is subject to section 99AB(4)(c) which provides that a person who fails, within the time limit referred to in section 99AB(4)(b), to satisfy any requirement referred to in that paragraph shall be deemed not to have neglected to do so where the person (i) satisfies the requirements within such further time as the Respondent may allow in any particular case, or (ii) shows to the satisfaction of the Respondent that there was sufficient excuse for such failure, and where such person satisfies the requirements as soon as possible thereafter.

135. The Commissioner is satisfied that having regard to the entirety of the evidence adduced in these appeals, that the section 99AB(4)(c) does not apply to the facts of these appeals. Moreover, the Commissioner is satisfied that the facts of these appeals, including the admissions of the Appellants' witness and the Respondent's correspondence established, without doubt, that there was neglect on the part of the Appellants, as defined by section 99AB(4)(b) FA 2001, so as to disapply section 99AB(2) FA 2001 and the time limit therein.

136. The Commissioner is satisfied that the facts of these appeals are such, that there was neglect on the part of the Appellants by their persistent "*failure to give any notice,*

information or record, or to make any return, required to be given or made under any provision of excise law". Having regard to the evidence of the Respondent's witness and the fulsome correspondence that emanated from the Respondent both pre and post the raising of the assessments, with no substantive response from the Appellants to that correspondence, the Commissioner finds that the Respondent has shown on balance that section 99AB(4)(a) FA 2001 is applicable. The Commissioner is satisfied that the Appellants by their own neglectful actions failed to comply with the Respondent's numerous ongoing requests for the Appellants' books and records that were required to be furnished to the Respondent, in accordance with the Regulations and thus, have satisfied the definition of neglect in accordance with section 99AB(4)(b) FA 2001. The result was to negate the four your time limit for the raising of assessments and section 99AB(2) FA 2001 does not apply. Therefore, the Commissioner does not accept the arguments made by counsel for the Appellants in relation to the applicable time limits.

Hearsay evidence

137. Counsel for the Appellants objected to the entirety of the Respondent's documentation being admitted as evidence in these appeals and furthermore, that any evidence arising during cross examination from those documents should be disregarded.[17] At this remove, the Commissioner intends to set out the relevant provisions which the Commissioner is required to have regard to in terms of admitting evidence in an appeal before the Commission. The Commissioner does not intend to get into the evidence in detail at this juncture. Rather, the Commissioner intends to address the acceptance or weight to be attached to any of the Respondent's documentation, when dealing with the substantive issues herein.

138. The Commissioner's powers in relation to evidence are set out in section 949AC TCA 1997 which permits the Commissioner to allow evidence to be given orally or in writing, to admit evidence whether or not the evidence would be admissible in proceedings in a court in the State, or to exclude evidence that would otherwise be admissible where; the evidence was not provided within the time allowed by a direction; the evidence was provided in a manner that did not comply with a direction; or that it would be unfair to admit the evidence. In addition, section 949AH TCA 1997 which deals with the mode of proceedings, provides that where the Commissioner adjudicates on a matter under appeal by way of a hearing, the Commissioner shall determine the matter by examination of the appellant or by hearing other evidence of the kind referred to in section 949AC TCA 1997.

[17] Transcript, Day 10, pages 130, 136 & 137

139. Thus, the Commissioner is satisfied that her powers to admit evidence are broad. This is important having regard to the Commissioner's role which was aptly set in *Sneath's case* 17 TC 149, wherein the court stated that a Commissioner is "*not deciding a case inter partes, they are assessing or estimating the amount on which in the interests of the country at large, the taxpayer ought to be taxed*". The role of an Appeal Commissioner was further confirmed in the *dictum* of Charleton J in *Menolly Homes* where he stated that "*it is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*". The Commissioner is satisfied that having regard to the applicable legislative provisions and case law referred to in this paragraph, it is open to the Commissioner to admit evidence in this appeal, whether or not the evidence would be admissible in proceedings in a court in the State, should it be relevant to the issue to be determined, namely the relevant tax payable.

140. Counsel for the Appellants argued that "*the evidence that's been adduced on behalf or put forward on behalf of the Respondent is largely challenged and disputed hearsay evidence*." Of note, counsel for the Appellants did not identify the documents that the Appellants were taking issue with and when asked by the Commissioner, counsel for the Appellants confirmed that it was all of the Respondent's documentation and evidence adduced therefrom. However, counsel for the Respondent was of assistance to the Commissioner in this regard, identifying the sources of the various booklets of documentation in these appeals. The Commissioner considers it important to set out the various Booklets of Documents and their source, be it the Appellants, Respondent or third parties, before proceeding further with her Determination, as follows:

    (i) "Respondent's Book of Documents - Meeting Notes". The Commissioner heard evidence from the Respondent's witness in relation to the meeting notes. The Respondent submitted that these are documents prepared by officers of the Respondent at the material time. The Respondent submitted that the suggestion that the meeting notes are hearsay and should be excluded was incorrect. Evidence was adduced by the Respondent's witness in relation to certain meeting notes and that in terms of the flexibility of section 949AC TCA 1997, the Meeting Notes should be admitted.

    (ii) "Respondent's Book of Documents – Company 1 Transactions." The Respondent submitted that the purchase invoices in this booklet, with the exception of nine invoices, were furnished by the Appellants to the Respondent in 2013 and it is on the basis of these purchase invoices that the assessment was raised in relation to company 1. The documents emanated from the

Appellants and nine from company 1. The Schedule within the folder was prepared by the Respondent from what is contained within the invoices and should be admitted in accordance with section 949AC TCA 1997.

(iii) "Respondent's Book of Documents – company 4 Transactions." The Respondent submitted that this booklet is comprised entirely of purchase invoices in relation to company 4, furnished to the Respondent by the Appellants in 2013. The Schedules within the folder were prepared by the Respondent from what was contained within the booklet (invoices and VAT return) and this and the invoices should be admitted in terms of section 949AC TCA 1997. The principal documents emanated from the Appellants.

(iv) “Respondent's Book of Documents – company 2 Transactions.” The Respondent submitted that the documents in this folder are documents that emanated from a third party namely, company 2 and bank account statements acquired by the Respondent pursuant to its powers under section 906A TCA 1997.

(v) “Respondent’s Book of Documents – person 1 Transactions.” The majority of the documents in this book emanated from third parties with the exception of bank account statements of the Appellants’ witness and person 1 that the Respondent sought in accordance with its powers prescribed under section 906A TCA 1997. This booklet also contained five cheques payable to the Appellants’ from person 1.

(vi) “Respondent's Book of Documents – company 3 Transactions." The Respondent submitted that the majority of the information within the booklet emanated from a third party, namely company 3 and relate to supplies of MMO from company 3 to the Appellants. Counsel for the Respondent submitted that the Appellants had no difficulty with the documentation and accepted the amount of MMO purchased from company 3 the basis of the assessments, describing company 3 as a legitimate player. Counsel for the Respondent submitted that must be taken into consideration when weighing up issues of hearsay. Moreover, the Appellants themselves introduced invoices from company 3, in support of their position in these appeals. Also included in this booklet are the VAT Returns of the Appellants for the period 1 January 2010 to 30 June 2010 and 1 July 2010 to 31 December 2010 and sales invoices that the Appellants furnished to the Respondent on 26 September 2016, for the period 10 March 2010 to 13 April 2010. The Schedule within the folder was

prepared by the Respondent from what is contained within the invoices and should be admitted in accordance with section 949AC TCA 1997

(vii) "Respondent's Book of Documents - DERV Invoices." The Respondent submitted that the majority of the information in this booklet emanated from third parties sources, with the exception of an internal email of the Respondent, located at Tab 12, dated 9 December 2010.

(viii) "Respondent's Book of Documents - Supplies to [redacted]" The Respondent submitted that the majority of the information in this book emanated from third parties. Counsel for the Respondent submitted that it was not straightforward, as some of the third party documentation included copies of cheques that were furnished to the Appellants, and so appeared in documents that the Appellants would have received.

(ix) "Respondent's Book of Documents – Returns." These are a book of returns made by the Appellants for the years 2018 to 2021 inclusive. These are the Appellants' returns.

(x) "Respondent's Book of Documents – Correspondence." This booklet consisted entirely of correspondence that issued from the Respondent to the Appellants and thus should be admissible in accordance with section 949AC TCA 1997.

(xi) "Respondent's Book of Documents – Accounts." Counsel for the Respondent stated that any bank account statements acquired pursuant to section 906A TCA 1997, should be accepted in accordance with section 949AC TCA 1997.

141. Despite the Appellants' argument, that all of the Respondent's documentation should be treated as hearsay, it appears to the Commissioner that there are a number of booklets emanating from the Appellants themselves. In addition, there was documentation that issued from the Respondent as part of its investigation, bank account documentation that was procured as a result of the Respondent invoking its powers under section 906A TCA 1997 and returns, including VAT returns, of the Appellants. Counsel for the Respondent submitted that the two largest assessments, are based on the Appellants' own documents and thus, the vast bulk of all the documents of relevance in this appeal, are documents that were the Appellants' own documents.

142. It is important to mention that part of the Appellants' argument in relation to hearsay was a fair procedures argument and counsel for the Appellants made reference to the principles enunciated in the jurisprudence of the superior courts, such as the principles in

Lee and *Menolly Homes*. Thus, the Commissioner felt it necessary to ask the obvious question, whether there was a dispute that the Commissioner is mandated to ensure that fair procedures are observed and the Commissioner made reference to the *Lee* decision. Counsel for both parties confirmed there was no dispute in terms of the Appellants being entitled to fair procedures.

143. Counsel for the Appellants made reference to the decision in *Kiely*, where the Supreme Court was concerned with the question of procedural fairness. Hence, the Commissioner clarified with counsel for the Appellants whether the arguments being made were that the Commissioner has denied the Appellants their entitlement to fair procedures.[18] The Commissioner suggested that an argument such as that should be made by the Appellants in another forum, namely the High Court in Judicial Review proceedings, in light of the Commissioner's jurisdiction, which was set out clearly in *Lee*. The Commissioner also considered it important to state that the Commission has no supervisory jurisdiction over the Respondent and does not have any jurisdiction in Irish law to consider allegations of unfairness or errors in procedure on the part of the Respondent in its investigations of taxpayers. In *Lee,* Murray J. stated that: "*The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment… That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry."* Thus, the Commissioner is satisfied that she cannot consider allegations of procedural errors or unfairness on the part of the Respondent. Any such allegations could only be addressed by way of judicial review proceedings in the High Court.

144. Counsel for the Appellants confirmed that the fair procedures argument that the Appellants were making related to the evidence being relied on by the Respondent and that section 949AC TCA 1997 allows for evidence that would otherwise be admissible to be excluded where it would be unfair to admit the evidence. Therefore, the documentary evidence tendered by the Respondent should not be taken into account by the Commissioner. Counsel for the Appellants submitted that *"[t]he major difficulty in this case is the reliance of the Respondent on controverted hearsay evidence or contended or*

[18] Transcript, Day 10, page 109

disputed hearsay evidence to advance its position". [19] Counsel for the Appellants submitted that the relevance of the decision in *Kiely* was in the context of *audi alterem partem* and procedural fairness, and that it would be extremely unfair to admit controverted hearsay evidence. The Commissioner notes that in fact in *Kiely*, Henchy J. stated that *"…..Audi alteram partem means that both sides must be fully heard…"* The Commissioner is satisfied that the Appellants were provided with ample opportunity to be heard as was illustrated by the correspondence set out in the preceding paragraphs in this determination. Yet, despite every opportunity being provided to the Appellants to be heard, the Appellants did not take those opportunities and failed to engage with the Respondent in any meaningful way.

145. The Commissioner is satisfied that there was no question, but that the Appellant is entitled to procedural fairness in his appeals before the Commission, but that there is an important procedural distinction in a taxpayers tax appeal, such that an appellant bears the burden of proving that the assessment raised or the decision made by the Respondent was incorrect. It is not a case of "he who asserts must prove". The Commissioner is mindful of the *dictum* of Charleton J. in *Menolly Homes* wherein he correctly stated that *"[t]he burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing…..the absence of mutuality in this form of appeal procedure is illustrated by the decision in Gilligan J. in T.J. v Criminal Assets Bureau, [2008] IEHC 168……..A taxpayer engages the burden of proving that tax is not due, on taking that appeal, but within a context of a hearing which is not hide-bound by regulation but rather looks to enquire into the truth of taxation liability. Within that context, where no tax is due, or where the amount would be reduced, the exercise undertaken by a taxpayer who complies with the rules in relation to record keeping could not be regarded as especially burdensome before a tribunal which has always should itself to be both expert and open-minded*." [Emphasis added]

146. As stated, the Commissioner has set out the overarching principles both in statute and case law that will guide her in her consideration of the evidence relating to the substantive issue for consideration in this appeal. The Commissioner does not accept that it is simply a case of disregarding the entirety of the Respondent's documentary evidence and evidence given during cross examination by the Appellants' witness, as suggested by counsel for the Appellants. The Commissioner considers that the *dictum* of Stack J. in *Quigley* is important herein, where at paragraph 11 of her decision, in relation to the Commissioner's powers to accept hearsay evidence, she stated that:

[19] Transcript Day 10, page 106

"*While the Applicant might reasonably be concerned as to the power of the Tax Appeal Commissioner to receive hearsay evidence, I am satisfied that such a power falls to be exercised in accordance with the requirements of fair procedures and constitutional justice as informed by submissions from the parties when the question of the exercise of such a power arises*"

147. The Commissioner will now proceed to examine a further argument raised by the Appellants in its Outline Legal Submissions, dated 8 October 2024, filed on day nine of the hearing.

Proportionality

148. The Appellants argued that there was no evidence submitted by the Respondent to demonstrate that it had not recovered excise duty from other parties in the supply chain and that "*it is well established that national rules which are intended to transpose the provisions of a Directive into the domestic legal order of the Member State concerned, must be consistent with the principle of proportionality*". This legal argument was introduced via the Appellants' Outline Legal Submissions, dated 8 October 2024.

149. Having regard to section 949I(6) TCA 1997, the Commissioner is not satisfied that this ground of appeal and/or legal argument could not reasonably have been stated in the Appellants' Notices of Appeal. Counsel for the Appellants proffered no good reason as to why this ground of appeal had not been raised at an earlier stage, than day nine of the proceedings. Again, counsel for the Respondent described it as an attempt to ambush the Respondent and the Commissioner does not disagree. Nevertheless, least the Commissioner be wrong in her decision pursuant to section 949I(6) TCA 1997, the Commissioner will proceed to consider the Appellants' argument on the matter of proportionality.

150. The Commissioner is satisfied that she is required to disapply national measures of whatever type, if inconsistent with European Union ("EU") principles and that the principle of primacy of EU law requires not only that the courts give full effect to EU rules, but all the bodies of the Member States (as per *An Garda Síochána v Workplace Relations Commission Case* C-378/17, *Lee, An Taisce v An Bord Pleanála* [2020] IESC 39, *08TACD2021* and *31TACD2023*). The Commissioner considers that these decisions are clear authority that the Commission has jurisdiction to apply EU law, as appropriate.

151. The Respondent submitted that section 99(10) FA 2001 does not infringe the principle of proportionality and that there was no basis advanced by the Appellants that would support the disapplication of section 99(10) FA 2001.

152. The Appellant cited the decision in *ROZ-ŚWIT Zakład Produkcyjno and ors, Case C-418/14* ("*ROZ-ŚWIT*") which involved proceedings between the company ROZ-ŚWIT and the Director of the Wroclaw Customs Chamber ('the Director') concerning the refusal of the Director to grant ROZ-ŚWIT the benefit of the rate of excise duty applicable to heating fuel because of its failure to submit within the specified period, a list of statements that the fuel purchased was for heating purposes. Under the Polish national legislation, sellers of heating fuel were required to submit, within a prescribed time limit, a monthly list of statements from purchasers that the products purchased were for heating purposes and where such a list was not submitted within the prescribed time limit, the excise duty rate laid down for motor fuel was applied to the heating fuel sold, even though the intended use of that product for heating purposes had been established and was not in doubt.

153. The decision in ROZ-ŚWIT dealt with a request for a preliminary ruling concerning Council Directive 2003/96/EC. At paragraph 23 of the judgment the Court found that:

> "*Since Directive 2003/96 does not specify any particular control mechanism for the use of heating fuel nor measures to combat tax evasion connected with the sale of heating fuel, it is for Member States to provide such mechanisms and such measures in their national legislation, in conformity with EU law. In that regard, it follows from recital 9 of that directive that the Member States have discretion in the definition and implementation of policies appropriate to their national circumstances*."

154. At paragraph 33 of the decision, the court stated that: "*it follows that both the general scheme and the purpose of Directive 2003/96 are based on the principle that energy products are taxed in accordance with their actual use*". Furthermore, paragraphs 34 and 35 of the decision provide that:

> "*Consequently, a provision of national law, such as Article 89(16) of the Law on excise duty, under which, in the event of failure to submit a list of statements from purchasers within the time limit, the excise duty applicable for motor fuels is automatically applied to heating fuels even if, as was found in the dispute in the main proceedings, those fuels are used as such, runs counter to the general scheme and purpose of Directive 2003/96. In the second place, such an automatic application of the excise duty applicable to motor fuels in the case of non-compliance with the requirement to submit such a list infringes the principle of proportionality*."

155. Furthermore, at paragraph 25 the Court stated:

> "*Having regard to the discretion which Member States have as to the measures and mechanisms to adopt in order to prevent tax avoidance and evasion connected with*

the sale of heating fuels and since a requirement to submit to the competent authorities a list of statements from purchasers is not manifestly disproportionate, it must be held that such a requirement is an appropriate measure to achieve such an objective and does not go beyond what is necessary to attain it."

156. In that case, the court found that there was an infringement of the proportionality principle. However, it was the automaticity of the higher rate (where there was default in furnishing purchaser statements within a specified time limit notwithstanding that the fuel was heating fuel) that the court held infringed the principle of proportionality. The Commissioner is satisfied that the Polish legislation is entirely different from section 99(10) FA 2001 and does not agree with the Appellants' submission that this distinction is not material. Section 99(10) FA 2001 permits the Respondent to form a view based on infringements and contraventions of the Regulations by the mineral oil trader that they are not satisfied that the use requirement of the fuel has been met.

157. Moreover, and of importance, the Respondent submitted that if section 99(10) FA 2001 bore the meaning contended for by the Appellants, subsection (11) would have no application, which provides that: "*Where under subsections (1) to (10) more than one person is, in a particular case, liable for payment of an excise duty liability, such persons are jointly and severally liable*." The Commissioner does not accept that it was for the Respondent to prove that the final use condition has not been met and Article 21(4) of Directive 2003/96 makes no such provision.

158. The Commissioner finds that there is no infringement of the principle of proportionality where section 99(10) FA 2001 provides that liability only attaches to a mineral oil trader if the mineral oil trader firstly, has not complied with the requirements of excise law in relation to the holding or delivery of the mineral oil and secondly, is not in a position to prove to the satisfaction of the Respondent that the mineral oil was used for a rebated purpose. The provision provides that "*where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate.*" then that is the person who may be liable to lose the reduced rate, where certain conditions have not been met.

159. The Commissioner has considered the previous determination in *59TACD2019* which deals with a similar argument in relation to the principle of proportionality being infringed in the context of an appeal against excise duty assessments. The Commissioner agrees with the Appeal Commissioner's findings in relation to the principle of proportionality and sees no reason to depart from that finding. Thus, the Commissioner does not accept the Appellants' arguments in relation to the principle of proportionality. The Commissioner is

satisfied that there was no infringement of the principle of proportionality where the Respondent has formed a view, based on a deficiency of documentation to indicate otherwise, that the use and purpose of the fuel (which has to be maintained in order for the reduced rate to continue to apply) was not maintained.

Charter of Fundamental Rights of the European Union (EU)

160. The Appellants raised this ground of appeal and/or legal argument in their Outline Legal Submissions dated 8 October 2024, on day nine of the hearing of the appeals. The Commissioner does not accept that mention of this ground of appeal in correspondence between the parties in the interim period, before the resumption of the appeal hearing on 2 October 2024, constitutes legal submissions. Moreover, there was no good reason proffered why this ground of appeal and/or legal argument had not been articulated at an earlier stage, than day nine of the proceedings. Having regard to section 949I(6) TCA 1997, the Commissioner is not satisfied that the ground of appeal could not reasonably have been stated in the Appellants' Notices of Appeal. This is not a new or novel point of law. Nevertheless, least the Commissioner be wrong in her decision pursuant to section 949I(6) TCA 1997, the Commissioner will proceed to consider the Appellants' arguments in this regard.

161. Counsel for the Appellants directed the Commissioner to the Charter of Fundamental Rights of the European Union ("the Charter") which provides *inter alia* the following:

> *"Article 41 – Right to good administration*
>
> *1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
>
> *2. This right includes:*
>
> *(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
>
> *(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
>
> *(c) the obligation of the administration to give reasons for its decisions… […]*
>
> *Article 47 – Right to an effective remedy and to a fair trial*
>
> *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article… […]*

Article 51 – Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties…"

162. Counsel for the Appellants argued that there was an evidential deficit in comparison to the Respondent and that the Appellants' right to defence under EU law had been breached. The Appellants relied primarily on the CJEU decision in *Glencore* to support their position, but also referenced other jurisprudence, such as *Kamino International Logistics and Datema Hellmann Worldwide Logistics v Staatssecretaris van Financiën Joined Cases C-129/13 and C-130/13* ("*Kamino*"), and WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság Case C-419/14 ("WebMindLicenses"). The Commissioner is of the view that it would be appropriate to set out the relevant passages of the decision in *Glencore,* where the CJEU held *inter alia* that:

"39. …. the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even though the EU law applicable does not expressly provide for such a procedural requirement…

40. That general principle thus applies in circumstances such as those at issue in the main proceedings, in which a Member State, in order to comply with the obligation arising from the application of EU law to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing fraud, submits a taxpayer to a tax inspection procedure…

52. As the addressee of a decision having an adverse effect must be put in a position to submit his observations before that decision is taken, so that, in particular, the competent authority will be able effectively to take account of all the relevant evidence and so that, where appropriate, the addressee will be able to correct an error and effectively rely on such evidence relating to his personal situation, access to the file must be authorised during the administrative procedure. Therefore a breach of the right of access to the file during the administrative procedure is not remedied by the mere

fact that access to the file was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought…

53. It follows that, in an administrative tax procedure such as that at issue in the main proceedings, the taxable person must be able to have access to all the evidence in the file on which the tax authorities intend to base their decision. Thus, when the tax authorities intend to base their decision on evidence obtained, as in the case in the main proceedings, in the context of related criminal procedures and administrative procedures initiated against his or her suppliers, that taxable person must be able to have access to that evidence.

54. Furthermore, as the Advocate General observed in points 59 and 60 of his Opinion, the taxable person must also be allowed access to documents which do not directly serve as a basis for the decision of the tax authorities, but may be helpful in the exercise of the rights of the defence, in particular to exculpatory evidence that may have been collected by those authorities…

55. However, in so far as, as was observed in paragraph 43 of this judgment, the principle of respect for the rights of the defence is not an absolute prerogative but may be subject to restrictions, it should be observed that, in a tax verification procedure, such restrictions, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality or business secrecy…and also, as the Hungarian Government has claimed, the private life of third parties, the personal data relating to them or the effectiveness of the criminal action, which access to certain information and certain documents is liable to harm.

56. The principle of respect for the rights of the defence, in an administrative procedure such as that at issue in the main proceedings, therefore does not impose on the tax authorities a general obligation to provide unrestricted access to the file which it holds, but requires that the taxable person is to have the opportunity to have communicated to him or her, at his or her request, the information and documents in the administrative file and taken into consideration by those authorities when they adopted their decision, unless objectives of public interest warrant restricting access to that information and those documents…" [Emphasis added]

163. The decision in *Glencore* was concerned with allegations of missing trader VAT fraud, as was the Commission's determination in *31TCAD2023*, which the Appellants also relied on in these appeals. The Commissioner is satisfied that the circumstances of these appeals are very different to that of VAT fraud. These appeals relate solely to the question of compliance with the requirements of section 99(10) FA 2001. Thus, the Commissioner

does not consider that the right to defence under EU law was engaged in these appeals in circumstances where the assessments relate to the Appellants own income and gains and any materially relevant matters would be or would have been in the knowledge and control of the Appellants. The Commissioner does not accept that the Appellants have been placed in an impossible situation and cannot deal effectively with unexplained assessments, as described by counsel for the Appellants.

164. The Commissioner is satisfied that the evidence procured by the Respondent, such as the Appellants' own bank account statements, invoices/receipts provided by the Appellants to purchasers and copy cheques drawn on the Appellants' bank accounts, were all items to which the Appellant himself had access. In this regard, the Commissioner notes the comments of Gilligan J in *TJ* (as quoted in *Menolly Homes*) that: "*it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant*." Least the Commissioner be wrong in her decision in that regard, the Commissioner intends to proceed to consider the application of the principles enunciated in *Glencore* to the facts of these appeals.

165. The Respondent submitted that the Appellants' right to defence under EU law was not engaged herein. But, even were it engaged, it was the case that the Respondent provided all of the information, in correspondence to the Appellants, that the Respondent relied upon to make its decision to raise the assessments. However, the Appellants failed to respond in any meaningful way to that correspondence. The Commissioner does not accept that the Appellants' attempts to contact and engage with the Respondent via telephone as outlined on numerous occasions by the Appellants' witness, was meaningful engagement, in circumstances where the Appellants had a tax agent at the time and the Appellants were under formal investigation by the Respondent. Moreover, the correspondence issued by the Respondent clearly articulates that the Respondent required a written response from the Appellants and certain detailed documentation in the form of books and records of their mineral oil trade. That documentation, being the Appellants' books and records, that the Appellants were required to prepare, keep and furnish to the Respondent, in accordance with the Regulations, was requested on numerous occasions by the Respondent before and after its decision to raise the assessments. The Commissioner has set out in detail in her Determination under the heading "Background", the correspondence that issued to the Appellants and/or the Appellants agent prior to and post the Respondent making its decision to raise the assessments.

166. The Commissioner is satisfied that in accordance with the principles enunciated in *Glencore*, the principle of the right to defence in EU law is engaged when a body such as the Respondent intends to make a decision that may adversely affect the addressee of the decision, then the addressee *"must be put in a position to submit observations before that decision is taken "so that, in particular, the competent authority will be able effectively to take account of all the relevant evidence and so that, where appropriate, the addressee will be able to correct an error and effectively rely on such evidence relating to his personal situation, access to the file must be authorised during the administrative procedure".* The purpose of this is so that the person can effectively make known their views, as regards the information on which the authorities intend to base their decision.

167. Furthermore, and of critical importance in this appeal, the right to defence under EU law does not impose on the Respondent a general obligation to provide unrestricted access to the file which it holds, but requires that the taxable person have the opportunity to have communicated to him or her, at his or her request, the information and documents in the administrative file, which were taken into consideration by those authorities when it adopted the decision. This was confirmed by the court in *Glencore*. The Commissioner notes from the evidence adduced in these appeals by the Appellants, that the Appellants first requested documents of the Respondent on 11 March 2021, some five years after the assessments were raised. The Respondent submitted that it made repeated requests of the Appellants to provide information or comment, to assure the Respondent that there had been compliance with the Regulations, but nothing was forthcoming. At the same time that the Respondent was writing seeking the information from the Appellants, it was also furnishing the information it had to the Appellants.

168. In light of the Appellants' non-cooperation with the Respondent's investigation, the Commissioner would not agree that the Appellants' right to defence had been breached. The Commissioner does not consider that the Appellants were at an "evidential deficit" as contended by the Appellants, in circumstances where they refused to engage with the Respondent in any meaningful way during the investigation and post the raising of the assessments by the Respondent, which resulted in the Respondent being obliged to utilise other methods of procuring the evidence to allow it to properly review and analyse the Appellant's tax affairs, such as procuring the Appellants bank account statements pursuant to section 906A TCA 1997. The Commissioner accepts the submission of the Respondent that it was obliged to carry out a wide-ranging investigation into the Appellants' tax affairs, because of the Appellants refusal to cooperate with the Respondent, including utilising its powers in accordance with section 906A TCA 1997. The Commissioner is of the view that the Respondent carried out an extremely thorough

and careful investigation into the affairs of the Appellants, during which it provided numerous opportunities to the Appellants to explain their position. The Commissioner is satisfied that the Respondent made repeated requests of the Appellants for documentation and in fact, provided the Appellants with the documentation from third parties, it was considering during its investigation.

169. The Commissioner is satisfied that the Appellants, in the context of the administrative procedure, had the opportunity of gaining access to that evidence (it was furnished to them) and of being heard concerning it. The Respondent suggested that it was a "*one way flow of information*" with nothing from the Appellants and there was no basis for the claim of a breach of the right to defence in EU law herein.

170. Also of note, the Appellants made no request of the Respondent for documentation until 11 March 2021, which was some five years after the assessments were raised. As stated and in accordance with the principles enunciated in *Glencore*, the Respondent was not under a general obligation to provide unrestricted access to the file which it held. There was a requirement that the taxable person have the opportunity to have communicated to him or her, at his or her request, the information and documents in the administrative file and taken into consideration by those authorities when they adopted their decision. There was no request made of the Respondent for such an opportunity prior to the Respondent making its decision to raise the assessments. The Appellants were provided with every opportunity to comment on the information and documentation. Thus, the Commissioner does not agree that the right to defence under EU law was engaged in these appeals and even if it was, the Commissioner does not accept that the right to defence under EU law has been breached for the reasons outlined.

Delay

171. The Appellants raised this ground of appeal and/or legal argument in their Outline Legal Submissions dated 8 October 2024, on day nine of the hearing of the appeals. There was no good reason proffered why this ground of appeal and/or legal argument had not been articulated at an earlier stage, than day nine of the proceedings. Having regard to section 949I(6) TCA 1997, the Commissioner is not satisfied that the ground of appeal could not reasonably have been stated in the Appellants' Notices of Appeal. Nevertheless, least the Commissioner be wrong in her decision, the Commissioner will proceed to consider the Appellants' arguments in this regard.

172. Counsel for the Appellants submitted that the delay in furnishing the materials on which the assessments were based until 2023, has resulted in serious injustice to the Appellants, in circumstances where the principal witness [redacted] has died and

where the other witness's memory was impaired by delay. Counsel for the Appellants opened jurisprudence from the superior courts in support of the arguments in relation to delay which the Commissioner has set out under the heading "Appellants' Submissions" in her Determination. Counsel for the Respondent submitted that the Commissioner does not have an inherent jurisdiction to strike out the proceedings for delay, akin to the superior courts, and reference was made to the Commissioner's jurisdiction and supporting case law.

173. The Commissioner is satisfied that the question of delay is a matter that is beyond the remit of the Commissioner's jurisdiction and the Commissioner does not have jurisdiction to make declaratory relief or reduce the assessments to nil on the basis of a finding that there has been delay on the part of the Respondent. As stated throughout this Determination, the Commissioner's jurisdiction is derived from statue. The Commissioner cannot consider allegations of procedural errors or unfairness on the part of the Respondent. Any such allegations could only be addressed by way of judicial review proceedings in the High Court (as per *Lee*).

174. Finally, counsel for the Appellants argued that there was a sort of deficiency of information on the face of the assessments and that the assessments did not contain information which would inform the Appellants, the basis upon which the assessments were raised. Again, the Commissioner must repeat that the Commissioner's jurisdiction is derived from statue. The Commissioner cannot consider allegations of procedural errors or unfairness on the part of the Respondent. Any such allegations could only be addressed by way of judicial review proceedings in the High Court. Therefore, if the Appellants took issue with any procedural irregularity in relation to the assessments, this was a matter for the High Court, not the Commission.

Substantive issue – compliance with section 99(10) FA 2001

175. Having dealt with the Appellants' legal arguments that arose on day nine of the hearing of these appeals, the Commissioner will now proceed to consider the substantive appeal. In order for the Appellants to succeed in this appeal, the Commissioner must be satisfied that the requirements of section 99(10) FA 2001 were met, namely that the Appellants complied with the Regulations and there was satisfactory evidence adduced by the Appellants that the specified purpose was complied with.

176. As aforementioned in this determination, this appeal does not relate to matters of fraud or criminality on the part of the Appellants and it is the Commissioner's role to focus solely on the evidence relating to the tax and the charge as articulated in *Lee*. In focusing on

the charge to tax, the Commissioner must consider the application of section 99(10) FA 2001.

Application of section 99(10) FA 2001

177. Section 99 FA 2001 deals with the liability of persons to excise duty. In these appeals, excise assessments have been raised pursuant to the Respondent's power to raise such assessments against a taxpayer pursuant to section 99A FA 2001. A charge to excise duty arises when mineral oil is released for consumption in the State and that charge will be at the standard rate, unless the conditions for the application of a reduced rate are satisfied.

178. Article 21(4) of the 2003 Directive requires that Member States enact appropriate monitoring procedures to ensure that certain energy products are used for purposes as prescribed by the Directive. It is the case that the Respondent has a general power to make regulations related to the holding and sale of mineral oil pursuant to section 104 of FA 1999, which states that the Respondent may, for the purposes of managing, securing and collecting mineral oil tax or for the protection of the revenue derived from that tax, make regulations. Central to this appeal is the question of compliance with the Regulations.

179. Where the requirements of section 99(10) FA 2001 are not satisfied, the standard rate of excise duty applies. Section 99(10) FA 2001 provides that where any person has received excisable products on which excise duty has been relieved, rebated, repaid, or charged at a rate lower than the appropriate standard rate subject to a requirement that such excisable products are used for a specific purpose or in a specific manner, and where such requirement has not been satisfied or any requirement of excise law in relation to the holding or delivery of such excisable products has not been complied with, and it is not shown, to the satisfaction of the Respondent, that the excisable products have been used, or are held for use, for such purpose or in such manner, then the person who has received such excisable products, or who holds them for sale or delivery, is liable for payment of the excise duty on such products at the rate appropriate to them, without the benefit of any such relief rebate, repayment or lower rate.

180. The Commissioner is satisfied that on a literal interpretation, the plain and ordinary meaning and import of the wording in the provision is clear and self-evident, such that any person who has received the excisable products at a reduced rate, are subject to a requirement that they be used for a specific purpose (i.e. as MMO), but if such a requirement of excise law in relation to the holding or delivery of such excisable products was not complied with and it was not shown that the excisable products have been used

or are held for use for such purpose or in such manner, then the person who has received the excisable products or who holds them for sale or delivery, is liable for the standard rate of excise duty.

181. Counsel for the Appellants argued that section 99(10) FA 2001 was ambiguous and that the ambiguity should be resolved in favour of the Appellants pursuant to the contra proferentem approach to statutory interpretation referenced by the High Court in *McGarry v Revenue Commissioners* [2009] ITR 133. The Commissioner finds no such ambiguity in the provision. As stated, on an ordinary literal interpretation, the meaning and import of the provision is clear. The subsection provides that if a taxpayer is in contravention of excise law requirements, the burden of proving the ultimate use to which the MMO was put, falls to the taxpayer under section 99(10)(b) FA 2001.

182. Regulation 28 of the 2012 Regulation deals with the application of a reduced rate of excise duty. The reduced rate shall only be allowed under Regulation 28(1) where the Respondent was satisfied that such fuel was intended for use other than as a propellant and was at all times kept for sale, sold, kept for delivery and delivered, in accordance with the requirements of these Regulations that apply to the keeping for sale, selling, keeping for delivery, supply or delivery of MMO.

183. The earlier 2001 Regulation similarly deals with the application of a reduced rate of excise duty. The reduced rate shall only be allowed under Regulation 33(1) where the Respondent is satisfied that such MMO was intended for use other than as a propellant.

184. It is important to note that section 99(10) uses the words "any person" and “received”. The import of this is that even if a person is not a mineral oil trader, if that person is involved in dealing, storing or keeping fuel, a liability to excise duty may arise. There was no dispute in this appeal that the Appellants were mineral oil traders or that they received excisable products.[20] The Appellants made admissions in relation to the receipt, storage and sale of various mineral oil products including Kerosene, MMO and DERV. The Appellants’ witness confirmed that they held stock.[21] It is clear that even the storage of fuel requires compliance with the Regulations.

Admissions of the Appellant

185. The Appellants’ witness made a number of admissions in respect of contraventions of the Regulations by the Appellants. It was admitted in these appeals that the Appellants *inter alia* did not hold a mineral oil licence; mixed fuels; did not keep movement documents;

[20] Transcript, Day 1, page 136
[21] Transcript Day 1, page 197

kept numerous bank accounts; did not keep records including linking documents; and did not keep specified records in contravention of the Regulations.

186. In relation to the documents entitled Respondent's Book of Documents - Meeting Notes, the Commissioner is satisfied that the testimony of the Respondent's witness in relation to the meetings that took place on 7 July 2011 and 15 November 2015 was clear, credible and reliable. The Commissioner accepts the evidence adduced in relation to the meeting notes. Of note, counsel for the Appellants did not engage with the substance of the meetings notes. Rather, he tried to discredit the Respondent's witness in terms of his recollection of the events and whether the notes of the meetings had been provided to the Appellants in the context of the right to defence in EU law. Consequently, the Commissioner considered the evidence adduced, in relation to the meeting notes of the meetings that took place on 7 July 2011 and 15 November 2015, to be uncontroverted evidence of the Respondent's witness.

187. The meeting notes document a number of regulatory breaches which were not contested. The meeting notes dated 7 July 2011 reflect *inter alia* that: the Appellants were mineral oil traders with a turnover of over €2,000,000, but held no mineral oil licence; the Appellants main suppliers were three entities, but there was no mention of company 1 or company 4; company 3 was a supplier to the Appellants, until recently; the Appellants mainly sell Kerosene and MMO to the home heating market and customers can contact them over the phone or via the internet; the Appellants sell onto trade, but do not have regular customers; the Appellants have sold Ultra Low Sulphur Gas Oil ("ULSGO") in bulk to anonymous cash customers where they have no details available; the Appellants have a truck with a capacity for 40,000 litres which has been off the road for six to seven months and two smaller trucks, each with a capacity of around 13,000 litres; the Appellants purchase invoices had various addresses including an address in [redacted] and [redacted].

188. In addition, on 7 July 2011, the Appellants confirmed that they held no stock, despite the storage arrangement that had been described subsequently in the Appellants' Statements of Case and the evidence of the Appellants' witness in relation to the storage arrangement with company 1 and company 4. In relation to bank accounts, the officers of the Respondent questioned the Appellants in relation to whether there had been bank accounts opened using any of the addresses referenced in the preceding paragraph. The Appellants confirmed that there was not. The Commissioner will address the Appellants' various bank accounts in due course.

189. The meeting notes dated 15 November 2013, reflected that officers of the Respondent called to the Appellants address with the intention of examining records of the Partnership and also to enquire as to the validity of certain invoices and supposed transactions with other traders. The meeting notes reflected *inter alia* that: in relation to company 4, the Appellants paid for fuel either by cash or third party cheques, for transactions that occurred between 2010 and 2011, in the amounts of 25,000-30,000 litres of MMO; the customers for this fuel were "small guys" who would call to the yard to fill up, that no records were kept and sales were done in cash, with 65%-70% of the product being sold in this manner; purchase and sales records for 2010-2013 were requested; that VAT3 returns had been filed for the period January 2009 to June 2011, in June 2012, and that the records should be available, however, nothing was forthcoming; the cash book was not available; a small folder of copies of purchase invoices from company 3 with payments of bank drafts was produced; copies of all the purchase invoices from company 1 and company 4 were provided; copies of cheques received for the period 01/01/2011 - 31/12/12 were produced; the Appellants purchased oil from an entity called [the third party], but it was over 2 years ago, as they needed a new supplier after the supplies from company 3 ceased; the Appellants records were with their accountant.

190. Moreover, in relation to company 1, the meeting notes reflected that the Appellants purchased mostly MMO and DERV; that no receipts were kept; the fuel was paid for in cash; the customer base were "*lads calling to the yard paying in cash but the odd time they would have gotten 3rd party cheques*". In addition, the notes reflected that the Appellants would collect the fuel in their own truck with a capacity of 20,000 litres and transfer it to a smaller truck for home delivers. The Appellants stated that it was never put into tanks.

191. The Commissioner notes that it was put to the Appellants' witness that there was no compliance with the Regulations, as the Appellants had no mineral oil licence nor any intention of informing the Respondent in relation to the activities of their mineral oil trade. The Commissioner further notes that when asked about whether the Appellants made ROMs, the Appellants' witness stated that he did keep records, but that they were now unavailable to him. The Commissioner notes that it was further put to the Appellants that the Regulations prohibit the alteration of records. This was put to the witness in the context of the credit notes in relation to company 4, furnished to the Respondent in 2024, and the recalculation of VAT in 2022, by the Appellants in the Outline of Arguments.

192. In relation to the evidence of the Appellants' witness, the admissions made *inter alia* were that:

(i) The Appellants did not hold a mineral oil licence.[22] The Appellants' witness confirmed the position and stated that "*after that, the rest of the rules aren't of any significance*".[23]

(ii) The Appellants did not maintain the records required to be kept by a mineral oil trader pursuant to the Regulations.[24] The Appellants' witness described movement documents as "*rudimentary matters*".[25]

(iii) The Appellants' mixed mineral oils and the testimony of the Appellants' witness was that MMO and Kerosene was mixed for home heat.[26] The Appellants' witness stated that "*Kerosene was mixed with gas oil, it was mixed with home heating oil*."[27]

(iv) The Appellants held numerous bank accounts for their mineral oil trade. The number of bank accounts the Appellants used were, according to the Respondent, in total 23 which included the bank accounts of the spouse of the Appellants' witness and his two sons.[28]

(v) The Appellants traded in cash and third party cheques. The Appellants' witness testified that "*lads calling to the yard paying in cash but the odd time they would have gotten 3rd party cheques*". The Appellants paid company 1 and company 4 with third party cheques, but company 3 by way of bank drafts.

(vi) The Appellants made no ROMs. The evidence of the Appellants' witness was that "*people buying ULSGO would order the product from* [redacted]*. The customer never gave their names or addresses. They also pay in cash. They also picked up the product*".

(vii) The Appellants submitted that they had a storage arrangement with company 1 and company 4, whereby they stored fuel for them and were permitted to "dip into" the MMO. The evidence of the Appellants' witness was that *"[w]e stored fuel for them over a period of time. One of the biggest benefits to us was we were able to dip into our stock without having to go out and buy it.* This was despite the Appellants informing the Respondent's officers on 7 July 2011, when they called to the Appellants premises that that the Appellants "*bought to*

[22] Transcript Day 5, page 170
[23] Transcript, Day 5, page 170
[24] Transcript Day 1, page 186, Day 2, pages 99-100
[25] Transcript Day 6, page 58-60
[26] Transcript, Day 7, page 43
[27] Transcript Day 8, page 8
[28] Transcript Day 3, pages 151 -154 & 163 - 165

order and held no stock". The "Stock Transaction Listing" dated 2024, is not a contemporaneous record of stocks held for the periods.

(viii) The purported credit notes in relation to company 4 are not contemporaneous records. The evidence of the Appellants' witness was when describing the "Stock Transaction Listing" dated 2024, that the document "*was reconstructed with the invoices that we got back from Revenue in relation to purchases from [company 4] and it shows the stock in and the stock out. And [company 1] and [company 4] are for all intents the one purposes".*[29]

(ix) The Appellants' submitted that they had storage facilities, despite informing the Respondent's officers, in 2011 that they did not. The evidence of the Appellants' witness was that "*we have two exceptionally big tanks which would hold between the two of them 400/500 litres, 1,000 litres each. They were bought from the old* [redacted]."[30] Later, the Appellants' witness stated in his evidence that "*we had six or seven tanks in total*".[31]

Regulatory contraventions

193. The contraventions of the Regulations by the Appellants were detailed in the Respondent's Statement of Case, its submissions and in the correspondence that was issued by the Respondent to the Appellants. In addition to the Appellants' failure to comply with their obligations in respect of the Regulations, the Appellants did not make partnership returns, which are required to include extracts from the annual trading, profit and loss accounts and balance sheets, as required by Section 880 TCA 1997.

194. Having regard to the submissions and the evidence adduced, including the uncontroverted evidence of the Respondent's witness and the evidence of the Appellants' witness, the Commissioner is satisfied that the Appellants affected multiple and repeated contraventions of the Regulations. In fact, the Commissioner finds that the regulatory breaches were both flagrant and egregious in nature. The Commissioner finds that for the relevant periods, the Appellants were in breach of the following Regulations, namely:

(i) Regulation 23 of the 2001 Regulations – the requirement to keep all records specified in Schedule 3 to the Regulations, including documents received and copies of all documents that are issued (including invoices; records of storage,

[29] Transcript Day 2, page 13
[30] Transcript Day 2, pages 138 & 139
[31] Transcript Day 4, page 82

movements, purchases, and sales; statements of account; records of receipts and payments, and trading, profit & loss accounts and balance sheets);

(ii) Regulation 24 of the 2001 Regulations - the requirement to keep records, including *inter alia*, the name and address of the seller and purchaser; the address of the premises or place from where the mineral oil was received or to which it was delivered; the date of the transaction; the nature of the transaction; the quantity of mineral oil involved in the transaction;

(iii) Regulation 25 of the 2001 Regulations - the requirement to keep a stock account of each specified description of mineral oil produced or processed in, received into, held in and delivered from, his or her premises;

(iv) Regulation 26 of the 2001 Regulations – the requirement to have a mineral oil tax account showing the amount, date and method of payment of any tax paid by him or her in respect of each tax accounting transaction or period;

(v) Regulation 30 of the 2001 Regulations – the requirement not to mix mineral oils and the requirement not to mix or blend marked gas oil or marked kerosene with fuel oil unless such operations take place in a tax warehouse, and the mineral oil produced by such blending or mixing is fuel oil;

(vi) Regulation 31 of the 2001 Regulations - the requirement regarding preparation and keeping of Movement Documents and at the time of each sale or delivery the purchaser or the person taking delivery of such oil is given an invoice or other document, numbered in a consecutive series and referred to in these Regulations as a “movement document”, showing the particulars the details required to be included in these records;

(vii) Regulation 18(1), (2) and (3) of the 2012 Regulations – the requirement to keep appropriate records in respect of his mineral oil trading activities, including *inter alia*, the nature and date of such purchase, sale, delivery or supply, and the quantity of mineral oil concerned; for purchases and sales, the name and address of the person from whom the mineral oil was purchased or to whom it was sold; for all supplies and deliveries made by the mineral oil trader, the name and, where applicable, the Value-Added Tax registration number and mineral oil trader’s licence number of the person to whom the mineral oil was supplied or delivered, and the address of every premises or place concerned; for deliveries of mineral oil received by the mineral oil trader, the name, and, where applicable, the Value-Added Tax registration number and mineral oil

trader's licence number of the person from whom the delivery was received, and the address of the premises or place from which that delivery was dispatched; a record of every payment made or received, with a clear reference to the transaction concerned;

(viii) Regulation 19(1) and (2) of the 2012 Regulations – the requirement to keep a stock account of each specified description of mineral oil received into, held in, or delivered or supplied from, that mineral oil trader's premises or place, not later than 12 noon on the next working day following that on which the mineral oil concerned was received into or delivered or supplied from the mineral oil trader's premises or place;

(ix) Regulation 20 of the 2012 Regulations – the requirement to keep a mineral oil tax account including the quantity of mineral oil of each specified description, the amount of tax due, and the date and method of payment, for each transaction giving rise to the liability concerned;

(x) Regulation 24 of the 2012 Regulations – the requirement that where a mineral oil trader supplies MMO at the premises or place of that mineral oil trader to another mineral oil trader for consignment by that other mineral oil trader, or to a person other than a mineral oil trader, in a quantity not exceeding 2,000 litres and not for delivery to any other person, the supplying mineral oil trader shall keep a record, showing all the information relevant to that supply that is required under Regulation 23(4);

(xi) Regulation 25 of the 2012 Regulations – the requirement to make a ROM to the Respondent comprising of the mineral oil of each specified description produced, sold, dealt in, kept for sale or delivery, supplied or delivered by that mineral oil trader during a month or such other period as the Commissioners may require;

(xii) Regulation 41 of the 2012 Regulations – the requirement to keep records for a period of not less than six years from the date of the last entry in that record;

(xiii) Regulation 44 of the 2012 Regulations – the requirement not to mix mineral oils of different specified descriptions.

195. Therefore, where the requirements of excise law in relation to the holding or delivery of such excisable products have not been complied with, and which the Commissioner has found to be the case, the Appellants must satisfy the Commissioner that they are entitled to the reduced rate of excise duty, because the MMO was used or held for use for a

specific purpose or in a specific manner in accordance with section 99(10) FA 2001, to successfully challenge the assessments raised. The requirements of the Regulations seek to deliver on behalf of the fuel trader, verification of each transaction. Section 99(10)(b) FA 2001 places the onus on the Appellant to show to the satisfaction of the Commissioner, that the excisable products have been used for the intended purpose, i.e. as MMO. The Commissioner will now proceed to consider those requirements.

Entitlement to the reduced rate of excise duty - used or held for use as MMO

196. As stated, Regulation 28 of the 2012 Regulations and Regulation 33(1) of the 2001 Regulations deal with the application of a reduced rate of excise duty. The Commissioner is satisfied that such requirements are established by a mineral oil trader, having regard to their books and records, kept in accordance with their obligations as outlined by the Regulations.

197. It is important to note at this juncture that the Appellants' witness made numerous references throughout his evidence to a fire occurring on the Appellants' premises and that the Appellants are at a disadvantage currently in "defending this appeal", in circumstances where the Appellants books and records were destroyed in the fire. [32] The Appellants submitted an invoice from the fire brigade in support of this position. It is the Commissioner's understanding that the fire occurred in 2018. There were repeated requests of the Appellants for their books and records as required by the Regulations, on numerous occasions prior to 2018. The Commissioner has set out the correspondence earlier in her Determination, illustrating the numerous and repeated requests of the Respondent for the Appellants' books and records relating to the Appellants' mineral oil trade, but none were forthcoming, save for the limited amount that the Commissioner has also set out in this Determination.

198. The Commissioner does not accept that the Appellants are in anyway disadvantaged by the alleged fire and were provided with numerous opportunities prior to that date, to engage with the Respondent with a view to explaining the assessments on the basis of their books and records, which were required to be kept pursuant to the Regulations. The Respondent was forced to use it statutory powers, such as section 906A TCA 1997 to procure documentation that the Appellants failed to provide to the Respondent. Counsel for the Respondent submitted that "*there were some 23 bank accounts and there was 15.3 million lodged through these bank accounts*". The Appellants were provided with numerous opportunities at the material time to explain their position and to furnish their books and records required by the Regulations, to the Respondent, but did not. The

[32] Transcript, Day 1, page 113 & 134

Regulations plainly provide that certain records be kept by mineral oil traders and the Commissioner has found that there were numerous breaches of the Regulations, in relation to the records which the Appellants were required to keep.

199. In short, the Commissioner finds that the Appellants have failed to demonstrate that the Respondent was incorrect to raise the assessments to excise duty. The Appellants have made admissions in relation to a number of breaches of the Regulations and the Commissioner is satisfied that the Appellants have not shown that the MMO at issue was used or was held for use in accordance with section 99(10) FA 2001. In the context of the applicable legislative provisions, the Commissioner is satisfied that there has been no compliance with the requirements of excise law in relation to the holding or delivery of MMO and it has not been shown by the Appellants that the MMO has been used or held for use for a rebated purpose, the test, in accordance with section 99(10) FA 2001, that the Applicant is required to meet with reference to the Appellants own books, records and customer base and any witness evidence that they wished to call. It is a consequence of the Appellants' decision not to comply with their obligations pursuant to the Regulations that the Commissioner must consider any liability on the part of the Appellants in terms of the additional excise duty arising.

200. The Commissioner makes this finding in circumstances where the Appellants have failed to establish on their own books, records and any witness evidence, that they have met the requirements to be entitled to the reduced rate of excise duty. Even the most basic requirements of the Regulations that a mineral oil trader hold a licence, was not complied with. This was not contested by the Appellants, that they did not hold a licence to trade in mineral oil, for the relevant years.[33]

Company 1 and Company 4

201. In relation to company 1, the assessment relates to the purchase of 447,411 litres of MMO from company 1, during the period **6 June 2012 to 1 October 2012,** which was calculated on the basis of a combination of records of sales received by the Respondent from company 1 (nine invoices in total) and the Appellants purchase invoices for company 1 that the Appellants furnished to the Respondent. The Appellants took issue with the nine additional purchase invoices the Respondent had based its assessment, in addition to the purchase invoices supplied by the Appellants.

202. The Commissioner has been presented with no credible evidence from the Appellants, why the Commissioner should not accept as evidence in these appeals, the nine

[33] Transcript Day 1, page 190

purchase invoices that did not emanate from the Appellants, but from company 1 which appear identical to the invoices furnished by the Appellants to the Respondent. There was no credible alternative evidence adduced by the Appellants as to the providence of these invoices, but that the arrangements in relation to company 1 were that of storage of fuel only, with some entitlement to dip into it. Moreover, the Appellants' witness testified that he had a good working relationship with the owner of company 1 and the Appellants did not deny dealing with company 1, during the relevant period at issue. Thus, the Commissioner has not been presented with any evidence why she should not accept the nine invoices, as evidence of purchases of MMO from company 1, in accordance with her powers under section 949AC TCA 1997. The Commissioner is satisfied that no unfairness arises by the admission of these nine invoices, having regard to the facts of these appeals and the Appellants alleged dealings with company 1. It appears to the Commissioner that the Appellants entire explanation of the purchase invoices relating to company 1, were that they were not purchases at all, but were records of a storage arrangement (which they were entitled to dip into) and that storage arrangement during the relevant period was not denied.

203. The Commissioner notes that in relation to company 1, the Appellants' Statements of Case dated 23 September 2016 and original Outline of Arguments dated 14 May 2021, submitted that they stored MMO on behalf of company 1, that 80% of this MMO was supplied back to company 1 and the Appellants purchased the remaining 20% of the MMO, which they sold to their customers. In their later Outline of Arguments submitted on 7 March 2022, the Appellants stated that they "*accept that a purchase of product from [company 1] had taken place*", and that "*all product purchased from [company 1] were purchased honestly and resold across our customer base consistently within our normal everyday sales of an oil distributor*." There is no mention of storage in the later Outline of Arguments. Thus, the Commissioner considers that the Appellants pleadings are inconsistent. But, there was an admission by the Appellants of purchasing product from company 1 and selling it to their customer base. However, there were no records submitted by the Appellants to support the alleged sales to this customer base and there were no records produced to show MMO being credited back to company 1, unlike the credit notes that were produced in terms of company 4.

204. In respect of company 1, the Commissioner observed from the meeting notes of the meeting on 15 November 2013, that the Appellants advised, *inter alia* that: they began purchasing from company 1 when supplies from company 4 ceased; they purchased mostly MMO and a bit of Derv; they paid for the fuel by third party cheques and cash; No receipts were ever issued; Regarding the sale of the fuel – "lads called to the yard and

paid in cash and third party cheques"; third party cheques were made out in spurious names, like "[redacted]" and the names were often in different handwriting than the paid amount, but they took them anyway as they were tradable pieces of paper; they collected the fuel in their own truck, it was never put into the tanks on site; they have not bought from company 1, since July 2013.

205. In relation to company 4, the assessment relates to the purchase of 4,145,616 litres of MMO, during the period from **7 January 2011 to 30 June 2011,** which was based on invoices provided by the Appellants. In the Appellants' Outline of Arguments submitted on 7 March 2022, the Appellants do not contest that the purchases occurred. However, in the Appellants' Statements of Case and original Outline of Arguments, the Appellants submitted that they were providing storage facilities to company 4, for a consideration of one cent per litre (the testimony of the Appellants' witness 1 at the hearing of the appeal was that it was three cents per litre), which was received by the Appellants in the form of MMO to the value of €40,000, which was then invoiced to their own customers.

206. The Commissioner has considered the meeting notes which reflect the meeting that took place between the Appellants and Officers of the Respondent on 15 November 2013. The Commissioner notes that the Appellants advised, in respect of purchases from company 4, that: all fuel purchased by them was paid for by cash or third party cheques; company 4 stopped supplying the Appellants as they went out of business, but company 1 commenced supply when company 4 ceased; they purchased 25,000-35,000 litres every other day; all fuel was collected by the Appellants from a storage tank in [redacted] yard where they would pay one [redacted] for the fuel; 65-70% of sales were cash sales; and no records were kept of the customers, to whom these sales were made.

207. The Commissioner observes that the Appellants stated in their most recent Outline of Arguments in 2022, that they had limited capacity to store fuel and the maximum capacity was 100,000 litres. Of note, the Appellants' Notices of Appeal made no reference to the provision of storage facilities. The Commissioner further notes that in contradiction to the earlier Statements of Case and Outline of Arguments, in the later Outline of Arguments, the Appellants make no reference to providing storage facilities to company 1 and company 4. Yet the evidence of the Appellants' witness in relation to the maximum capacity of storage being 100,000 litres was that *"[w]ell, there must be a zero missing because we have far in excess of that capacity….. we have two exceptionally big tanks which would hold between the two of them 400/500 litres, 1,000 litres each. They were bought from the* [redacted]."[34] In fact, later, the evidence was that

[34] Transcript Day 2, pages 138 & 139

"*we had six or seven tanks in total*".[35] The Appellants informed the Respondent's officers at the meeting on 7 July 2011, and which was reflected in the meeting notes, that they bought to order and held no stock. The Appellants Stock Transaction listing suggests that the Appellants held MMO in the amount of 766,988, on 10 May 2011. The Appellants submission as to stock levels and storage facilities was inconsistent and unreliable.

208. In light of all the contradictions, the Commissioner considers that the Appellants pleadings, which purport to articulate the Appellants' arguments in relation to these appeals and why the assessments were incorrect, are inconsistent, unreliable and carry little weight in terms of the Appellants' contentions.

209. The Commissioner noted further contradictions in terms of the Appellants' evidence and pleadings in these appeals in relation to company 1 and 4. As aforementioned, the Appellants requested the Commissioner to issue a witness summons for [redacted] to attend the hearing of the appeal on behalf of the Appellants. However, there was no appearance on foot of the summons that the Commissioner issued. The Commissioner assumes that [redacted] is the same person that the Appellants refer to in their Statements of Case and original Outline of Arguments where they advised of their intention to call oral evidence from a representative of company 1 and company 4, [redacted] regarding the existence of the alleged storage arrangements. The Commissioner notes this as a matter of fact and makes no finding in relation to the non-attendance of the witness. Yet, the Appellants told the Respondent's officials when they called to the premises on 15 November 2013 that they dealt with [redacted] Again, in contradiction the Appellants' witness denied any knowledge of [redacted] and stated that all of his dealings were with [redacted].[36]

210. In relation to the testimony of the Appellants' witness, in relation to the purchases from company 1 and company 4, the Appellants' witness gave evidence that he treated both company 1 and company 4 as the one, in circumstances where they were part of the same group. Moreover, the evidence was that the Appellants were permitted to "dip into" the product as required.[37] The witness testified that *"[w]e stored fuel for them over a period of time. One of the biggest benefits to us was we were able to dip into our stock without having to go out and buy it. Outside of that -- and then we sold that to our everyday customers. In my own submission there is a comprehensive list of our customer base*".[38]

[35] Transcript Day 4, page 82
[36] Transcript Day 1, page 181
[37] Transcript Day 1, page 116
[38] Transcript Day 2, page 145

211. The Commissioner was referred to the Appellants' "Stock Transaction Listing" dated 22 March 2024. The listing related to company 1 and company 4. In relation to company 4, the schedule purported to record the Appellants' purchase invoices in relation to company 4 of an amount of MMO "in" of 4,270,089 litres and quantities "out" totalling the amount of 3,744,000. The Commissioner notes that the amounts "in" all appear to be in quantities of in or around 35,000/36,000 litres. The evidence of the Appellants' witness was, that was a tanker size load, when he described the size of the Appellants' trucks.

212. In relation to company 1, it records the Appellants' purchase invoices in relation to company 1 of MMO of quantities "in" of 240,899 litres and with nil quantities of MMO out. Therefore, for that period, it was apparent from the document that it showed in relation to company 1 and company 4, the Appellants were in receipt of 4,510,988 litres of MMO "in" and 3,744,000 litres of MMO went "out", leaving a balance of 766,988 litres of MMO which remained with the Appellants.

213. This document relates to the period 7 January 2011 to 10 May 2011, but notably, the period this document relates to is not the period which the assessment was raised in relation to company 1, namely 6 June 2012 to 1 October 2012. This entire document relates to the period January to May 2011, which is part of the period covering the assessment in relation to company 4. It is clear this is not a contemporaneous document having regard to the use of the letters "p" and "c" which the Appellants' witness stated was "purchase" and "credit". The Commissioner notes that this was the period just prior to when officers of the Respondent called to the Appellants' premises on 7 July 2011 and were told that the Appellants "*bought to order and held no stock*". Yet this document supports the Appellants having a balance of 766,988 litres of MMO.

214. The evidence of the Appellants' witness was that these records were generated in 2024, to reflect how the stock movements occurred at the time, namely in 2011. The evidence of the Appellants' witness was that with respect to the storage relationship, the Appellants "*in the strict sense of the word they weren't a supplier, we just were able to have sort of a commingling existence with them*".[39]The evidence of the witness was that the Stock Transaction Listing "*reflects the number of litres that were taken out by [company 4] and it shows in date order or thereabouts how that took place. And it shows that the stock that came in from [company 4] went back to [company 4]. And any difference between what they got back and what came in would be what I would be responsible for, for what I would have sold through my own network of customers"*.[40]

[39] Transcript Day 1, page 183
[40] Transcript Day 2, pages 80-81

215. The witness stated that the Stock Transaction Listing was not a contemporaneous document, as the Respondent had the invoices. The evidence of the Appellants' witness was that the document "*was reconstructed with the invoices that we got back from Revenue in relation to purchases from [company 4] and it shows the stock in and the stock out. And [company 1] and [company 4] are for all intents the one purposes".*[41] Furthermore, the witness stated that he kept handwritten notes in terms of his business activities and that *"[it] wouldn't be unusual if you bought something and you would be invoiced for it the next day or the day after.*" Having considered the document, the Commissioner is satisfied that the document created in 2024 by the Appellants, has no evidential value in terms of what it purports to show or support in these appeals, in relation to company 1 and company 4. Furthermore, it has no relevance to the period of assessment in relation to company 1.

216. The evidence of the Appellants' witness was that despite the purchase invoices having issued and which were provided to the Respondent in 2013, after the meeting that took place with the Respondent's officials, the Appellants did not furnish credit notes to the Respondent. The evidence of the Appellants' witness was that he procured the credit notes two or three years ago, from company 4. The Commissioner notes that the Respondent suggested to the Appellants' witness that company 4 was no longer in existence in 2015, but the Appellants' witness stated that he pleaded to "*the better nature*"[42] of company 4 to provide him with their records, in this regard. From this evidence the Commissioner understands that the Appellants received the credit notes referred to not at the material time, as they were not furnished to the Respondent with the invoices, but in the last number of years from company 4, which was no longer in existence. In fact the meeting notes of the meeting that took place on 15 November 2013, reflected that in relation to company 4, the Appellants stated that "*in 2011 [company 4] stopped supplying [the Appellants] as they went out of business*".[43]

217. The Appellants' witness gave evidence that company 4 would take away in or around three truckloads or in or around 36,000 litres of MMO, totalling 108,000 litres every few days and that this was where the credit notes were relevant. The Commissioner understands from the evidence adduced by the Appellants' witness was that this system gave rise to the issuing of credit notes when fuel was supplied back and the Appellants received one cent (or three cents according to the evidence of the Appellants' witness for storage). The Commissioner considers that this is an illogical proposition.

[41] Transcript Day 2, page 13
[42] Transcript Day 2, page 78
[43] Respondent's Book of Documents Meeting Notes, page 26

218. Moreover, the Appellants' witness further testified that they had not paid for MMO the subject of the purchase invoices, rather they were issued as a means of stock control and that he could not explain why the box entitled "cash" for the purchase of MMO by the Appellants was ticked on the invoices from company 4. The witness stated that it was a question more appropriate for company 4, as the Appellants were not purchasing MMO, until they started "dipping into it". The Appellants' witness did testify that there were cheques exchanged. The witness testified that "*at that time we were in a very poor position financially and a cheque would get you, on average, three to maybe four days credit.……Like, it wasn't just selling oil we were, it was micromanaging our existence*".[44] Counsel for the Respondent put it to the witness that he furnished the invoices to the Respondent being representative of the Appellants' purchases from company 4.

219. The Commissioner is satisfied that the evidence adduced in relation to company 1 and company 4 illustrates noncompliance with the Regulations relating to *inter alia* keeping proper records, movement documents, recording any sales and movements, the date, the amount, the person to whom the mineral oil is supplied and the address of the purchaser. The Commissioner does not accept that the Stock Transaction Listing was of any evidential value in these appeals nor does it establish the Appellants' customer base for the purposes of the Regulations, given that it was not a contemporaneous document nor was it representative of the period(s) of the assessments relating to company 1 and company 4.

220. Having considered the limited documentation submitted by the Appellants in relation to the assessments raised in relation to company 1 and company 4 and the testimony of the Appellants' witness, the Commissioner is satisfied that the evidence adduced was unreliable, not credible and does not establish the Appellants entitlement to the reduced rate of excise duty in relation to the MMO it received from company 1 and company 4. The evidence adduced in relation to the MMO received from company 1 and company 4 and its specified use was inconsistent and changeable. The Commissioner is satisfied that the Stock Transaction Listing referred to was of no credible evidence as to the Appellants' dealings with company 1 and company 4 and further, the specified use of that MMO. The document was not created contemporaneously at the material times and was created only recently as per the evidence adduced. In relation to company 1, the Appellants submitted in their Outline of Arguments that "*All product purchased from* [redacted] *were purchased honestly and resold across our customer base consistently within our normal everyday sales of an oil distributor*". Yet, no evidence has

[44] Transcript Day 2, page 28

been adduced to support such a contention in respect of the MMO purchased from company 1. There was no evidence adduced in the form of records supportive of the MMO received from company 1 being used of being held for use by the Appellants.

221. Furthermore, in relation to company 4, the Commissioner considers that the credit notes are of no evidential value, having been purportedly created subsequent to the transaction and no *viva voce* evidence from the author of the documents was adduced. Additionally, there was no mention of these purported credit notes to the Respondent's officials in 2013, at the time the Appellants provided the purchase invoices relating to their purchases of MMO from company 4. The Commissioner is of the view that had the Appellants been receiving invoices for the purchase of MMO, it would have been critically important for them to concurrently have been provided with credit notes, if a significant part of that MMO purchased, was being returned to the vendor. Thus, the Commissioner does not consider the evidence in this regard, to be credible or logical. Moreover, the Commissioner notes that the Appellants posited that it was in receipt of three cents per litre for storage, but this was in relation to huge quantities of fuel, only to be taken back out a few hours/days later by the vendor. The Commissioner does not consider the evidence to be credible.

222. Also of relevance in relation to company 4, was that the assessment was for the period 7 January 2011 to 30 June 2011, which falls into the VAT Return period January 2011 to July 2011. A VAT return was filed by the Appellants for this period, which showed the amount of €554,606.00, in respect of "T2"/VAT on purchases. However, the VAT schedule submitted by the Appellants on 7 March 2022, with its Outline of Arguments shows a different figure in respect of "T2/VAT" for purchases for the same period, namely €77,822.00.

223. The Commissioner queries why the Appellants would file a VAT return for the higher amount of purchases at the relevant time and then seek to reduce it in 2022, if in fact the storage arrangements were in place. Counsel for the Respondent put it to the Appellants' witness that "*ten years later you reduced your turnover from €571,030 down to €144,810….. similarly, you have reduced your purchases from 554,606 to 77,822…..I have suggested to you that the large part of both of those adjustments is this alleged VAT or the credit notes that you contend for which the Respondent, and I have to put this to you, the Respondent says are effectively a fiction, something that you have created for the purposes of this appeal and are not genuine and are not documents that existed at the material time, and had they so existed, the VAT submission that you made on the 7th*

March 2012 would have been different?"[45] The Appellants' witness stated that he disagreed, yet no other explanation was forthcoming.

224. Of note in relation to company 1, the assessment was for the period 6 June 2012 to 1 October 2012. Within the Outline of Arguments submitted on 7 March 2022, the Appellants included a schedule referred to as "A table of workings for VAT3 submissions which are currently outstanding." The schedule in question shows "T2/VAT" on purchases in the sum of €54,829.00, for the period July 2012 to December 2012. The Respondent submitted that the "T2/VAT" on purchases by the Appellants from company 1 alone in that period, would have been in the amount €71,051.90. The Commissioner has been presented with no evidence that the MMO received by the Appellants from company 1, was returned to company 1 and the purported credit notes do not relate to purchases from company 1.

225. During this period, the Commissioner observes that the Appellants were operating numerous bank accounts for their mineral oil trade and at an address in [redacted] and [redacted]. The Commissioner notes the testimony of the Appellants' witness that he "*had limited banking facilities. I was a bankrupt during 2011, so I couldn't lodge money because I had no account to lodge it to. I had to cash cheques across the counter. So it was a very limited existence that we endured at that time, very limited in financial terms. So if I paid cash, that was because I had no choice other than pay it. But it's not to be seen as we just were driving up with a boot load of cash, because most of the product that [company 1] supplied ultimately went back to them."*[46] The Commissioner is satisfied that the testimony was unreliable, in circumstances where the Respondent, in accordance with section 906A TCA 1997, uncovered numerous bank accounts of the Appellants and members of their family, including the spouse and sons of the Appellants' witness, that had been used in the Appellants' mineral oil trade.

226. Consequently, the Commissioner is satisfied that the Appellants have not shown on balance that the Respondent was incorrect to raise the assessments in relation to company 1 and company 4. The Appellants have adduced no credible evidence to support their contention that the assessments are incorrect as to the rate of excise duty to be applied and thus, should be reduced. The evidence adduced by the Appellants' witness was in the Commissioner's view not credible, given the inordinate inconsistencies thought the hearing. The assessments are the very invoices that were furnished to the Respondent in November 2013 for company 1 and company 4 (with the exception of nine

[45] Transcript, Day 2, page 193
[46] Transcript Day , page 101

invoices for company 1). However, only in recent subsequent times has it been contended by the Appellants that credit notes existed in relation to company 4. Therefore, the Commissioner is satisfied that the Appellants have failed to adduce evidence that the MMO received from company 1 and company 4 was used or held for use for the specified purpose.

Person 1

227. The assessment in relation to person 1 was raised on the basis of six cheques lodged in the bank account of the Appellants. In relation to this assessment, the Appellants' witness testified that "*we never sold anything to [person 1]*".[47] The assessment relates to the period **15 July 2014 to 20 November 2014** and the supply of 52,000 litres of MMO to person 1.

228. A number of points are notable in relation to person 1. The Appellants' Notice of Appeal makes no reference to person 1 and the six cheques. The Appellants' witness sought to explain that the Appellants' agent completed the Notice of Appeal and must have been operating under a misapprehension as to the cheques. However, the Commissioner heard no evidence from the Appellants' agent as to this misapprehension, who was not called as a witness to support the Appellants' appeals. The Appellants' Statement of Case stated that they were attaching a "*copy letter dated 20th September 2016 from [person 1] explaining the nature of the dealings between him and [the Appellants]*". This copy letter was correspondence addressed to the Respondent dated 20 September 2016, purported to be from person 1 which stated *inter alia* that "*the Appellants did not supply me with marked gas oil" and that "the cheques that [the first names Appellant] received were for the purposes of increases my turn over with* [redacted] *to increase my chance of obtaining my mortgage and get away from the sub prime lender that was about to repossess my family home. The [first named Appellant] returned every penny to me in any way and did not make a profit…*" [sic].

229. However, the Appellants Outline of Arguments stated that the cheques related to what was known as "kiting." The Commissioner notes that the Oxford English Dictionary defines "kiting" as a noun meaning: "*The raising of money on credit; the passing of forged or unbacked cheques.*" This also enclosed the correspondence dated 20 September 2016. Yet, the Appellants' more recent Outline of Arguments dated 2022 stated that *"[the Appellants] cashed several cheques as a favour to [person 1] the benefit to [the Appellants] was the use of funds for approximately three weeks during a period when the business was suffering from lack of cash flow and working capital due to the legacy of the*

[47] Transcript Day 9, page 48

matter of [the Appellants' witness] bankruptcy". The Commissioner does not accept that this statement is credible having regard to the bank account statements of the Appellants for this period, obtained by the Respondent in accordance with its powers pursuant to section 906A TCA 1997.

230. Counsel for the Appellants argued that the third party documentation relating to person 1, in the form of bank accounts of person 1[48] and correspondence from the Respondent[49] to person 1, in response to the correspondence referred to, highlighting that what was posited by person 1 in the correspondence, was at odds with what the Respondent understood the position of person 1 to be, should be disregarded as hearsay evidence. This evidence of the bank accounts was obtained by the Respondent in accordance with section 906A TCA 1997. The Commissioner is satisfied that in accordance with section 949AC TCA 1997, it is within the Commissioner's power to admit the evidence of the bank account statements of the Appellants and the correspondence from the Respondent. The Appellants did not furnish their bank account statements, despite the requests of the Respondent that same be furnished. As a result the Respondent was forced to use its statutory powers to obtain the bank account statements. The bank account statements do not show that the monies were returned to person 1, despite what is contended by the Appellants. Notably, this was at a time when the Appellants suggested that they were in severe financial difficulties, yet the Appellants offered to cash cheques for a person who was having difficulties with subprime lenders. The Commissioner does not consider that this was credible and notes the absence of any evidence supporting the return of the monies to person 1.

231. The Commissioner issued a witness summons in respect of witness 1. However, witness 1 did not attend the hearing of these appeals to give evidence on behalf of the Appellants. In the absence of *viva voce* evidence from the author of the correspondence dated 20 September 2016, from person 1 to the Respondent, the Commissioner can attach minimal evidential weight to the correspondence from person 1.

232. The Commissioner is satisfied that the Appellants' explanation in relation to the six cheques was not reliable and no credible evidence has been adduced to support their position, be it evidence from person 1 or their own bank account statements from the relevant period. The Respondent obtained the Appellants' bank account statements for the period, and nowhere does it show a repayment of the monies, as alleged. Even if the Commissioner were to accept what is contended for in the correspondence from person

[48] Respondent's Book of Documents – person 1 transactions
[49] Respondent's Book of Documents – DERV Invoices, page 103

1, that the monies were returned, the Appellants could have been in a position to explain the true nature of these transactions on the basis of their books and records. The Appellants were not in a position to identify from their records, the repayment of the money from person 1. The Commissioner does not consider the testimony that the Appellants allowed the debt to build up before paying the monies back to person 1, as being credible. The burden of proof is on the Appellants to show that the tax as assessed is not payable. The Appellants have adduced no evidence to support this contention. Consequently, the Commissioner is satisfied that the Respondent was correct to raise this assessment in relation to person 1.

Company 2

233. In relation to company 2, the assessment relates to the purchase of MMO in the amount of 209,234 litres, for the period **1 October 2014 to 31 March 2015**. The Commissioner notes the evidence of the Appellants' witness that no fuel was purchased from company 2. The Respondent submitted that the assessment is based on the ROMs filed by company 2 and cheques from the Appellants to company 2 found in the banking records of company 2.

234. In the Appellants' Notice of Appeal it was posited that the Appellants never purchased MMO from company 2. In the Appellants' Statements of Case it was also contended that the Appellants never purchased MMO from company 2, but now in addition, the Appellant stated that the cheques issued by them were by way of "kiting" with the payee section blank. In contradiction, the Appellants' Outline of Arguments stated that the Appellants *"claim that these records are incorrect and fabricated and requests that [the Respondent] subpoena Directors of [company 2] to this tax appeal to personally verify and stand over their records*".

235. Yet, the Commissioner notes that in the Appellants' most recent Outline of Arguments in 2022, make no mention of "kiting" and stated that the cheques were "*not drawn with the intention that they be for the benefit of [company 2], but that they be for the benefit of [company 4] or [company 1]….. It is the opinion of [the Appellants] that [the Appellants] (or [the Appellants witness]) cheques may have been lodged to the bank account of [company 3] by way of [company 1] and/or [company 4] may have crossed the cheque or completed the payee details in favour of [company 3]. It is our opinion that the cheques were tendered as third-party cheques.…the cheques partially completed, with the value in words and numbers being completed by [the Appellants' witness] and the PAYEE sections was left blank or mark "Cash"…..These cheques were then presented to* [redacted] *…..It is not known who completed the PAYEE*

section, as the cheques appear to have been completed by a different hand to [the Appellants' witness]. This opinion can be further bolstered by the fact that the handwriting on the payee part of the cheque is not in the same hand or pen of [the Appellants' witness…during this time we were trading with very limited financial resources, [company 1] and [company 4] were the only companies that allowed us credit, as a bankrupt access to any form of credit, trade or personal was very limited…..We have never traded in road fuels, (say petrol or road diesel); we don't have customers that buy petrol from us, and our fleet is not equipped to carry/deliver petrol. As part of health and safety compliance, there is a genuine risk of cross contamination with heating oil which could end in fatal consequences; being another factor in why [the Appellants] do not deal in road fuels."

236. Counsel for the Respondent pointed out that the assessment in relation to company 2 related to the period 1 October 2014 to 31 March 2015, long after company 1 and company 4 ceased trading. Moreover, it was pointed out that the meeting notes dated November 2013, reflect that the Appellants told the Respondent's officials "*[i]n 2011 [company 4] stopped supplying [the Appellants] as they went out of business."* Nevertheless, during cross examination the Appellants' witness raised the matter of a historic debt with company 4.[50] This, the Appellants' witness testified, was the reason for the provision of the cheques to company 1 and 4. This was the first mention of a historic debt in relation to company 1 and company 4. The Commissioner considers this a further alternative and contradictory explanation offered by the Appellants in addition to the purported explanations above in their efforts to explain why the Respondent was incorrect to raise the assessment. The Commissioner does not consider this testimony in relation to a historic debt, which was first mentioned at the hearing of these appeals and which was unsupported by documentary evidence, to be credible evidence adduced, in terms of discharging the burden of proof herein.

237. The Commissioner notes that the Appellants have challenged the assessments raised by the Respondent in relation to company 2, on the basis that they never purchased MMO from company 2. As stated in this appeal, the burden of proof is on the Appellants to show that the tax was not due by them and should be reduced by the Commissioner. The Commissioner has been presented with no credible evidence to suggest that the assessment in relation to company 2 raised by the Respondent was incorrect.

238. The Commissioner heard conflicting evidence in terms of the explanation why the Appellants' cheques were lodged in the bank account of company 2. It appears that the Appellants' witness in his most recent explanation, accepted that the cheques were the

[50] Transcript Day 8, page 113

Appellants' cheques that appeared in the bank account statements of company 2 for the relevant period. Yet, there was no documentary evidence adduced to support the Appellants' contentions. Consequently, the Commissioner does not have credible evidence to support the Appellants' position that these cheques were not for the purchase of MMO to company 3. The Commissioner has been presented with conflicting explanations in pleadings and testimony citing allegations of historic debts, all of which the Commissioner considers to be inconsistent, unsubstantiated and not credible. Whilst the Appellants posited that these payments are not from the purchase of MMO in the course of their mineral oil trade, there was no credible evidence before the Commissioner supporting an alternative explanation, as to why the Appellants' cheques were lodged in the bank account statements of company 2.

239. In relation to the Appellants' dissatisfaction with the Respondent's evidence being controverted hearsay evidence, the Commissioner is satisfied that the bank account statements of the Appellants and the bank account statements of company 2, which show the movement of the monies and lodgements of the cheques, obtained by the Respondent pursuant to its powers in accordance with section 906A TCA 1997, as a result of the Appellants failure to cooperate with the Respondent in its investigation of the Appellants' mineral oil trade, are admissible evidence herein, in accordance with section 949AC TCA 1997. There was no prejudice to the Appellants by the admission of these banking documents, part being the records of the Appellants and records which tend to show payments from the Appellants' bank account to the bank account of company 2. Thus, the Commissioner is satisfied that there has been no credible evidence adduced to displace the assessment raised by the Respondent in relation to company 2.

Company 3

240. In relation to company 3, the assessment relates to purchases of MMO in the amount of 749,713 litres of MMO, for the period **9 April 2010 to 21 August 2010**. The Appellants' witness confirmed that he was not disputing that the amount of MMO as set out in the assessment was purchased from company 3.[51] The Appellants' witness took no issue with the records of company 3, describing company 3 as a "*legitimate player*".[52] It was also without doubt that the Appellants' Statement of Case and Outline of Arguments confirmed that MMO was purchased from company 3 and that "*all product purchased from [company 3] was sold in a responsible manner*".[53] Furthermore, the Appellants stated that the assessment was raised "*in the mistaken belief by the respondent that we*

[51] Transcript Day 1, page 137
[52] Transcript Day 3, page 53
[53] Book of pleadings, page 327

converted MGO to DERV…All the product purchased from [company 3] was sold in a responsible manner".[54]

241. The evidence of the Appellants' witness was that the MMO bought from company 3 was sold to the Appellants' normal customer base of domestic customers and agricultural customers. The witness stated that "*we never had hauliers or individuals or companies that would use large sums of road diesel… all the gas oil that we bought and kerosene that we bought, it was all sold to either farmers or domestic customers*". It was that very matter, namely that the Appellants must establish on the basis of their books and records, that the MMO purchased from company 3 in the amount of 749,713 litres, was entitled to the benefit of the reduced rate of excise duty.

242. The Commissioner notes that the Appellants' Statement of Case in respect of company 3 stated that *"[t]he product purchased from [company 3] was sold to customers of [the Appellant]……No additional liability therefore arises*." The Appellants' witness agreed that what this means is that the MMO purchased from company 3 was sold onto its customers. Furthermore, the Commissioner notes the Appellants' Outline of Arguments wherein it stated that *"[t]he above assessment was raised about our purchases from [company 3]. This assessment was raised in the mistaken belief by the respondent that we converted MGO to DERV*."

243. In seeking to establish the Appellants' sales, the Appellants submitted a document entitled "Schedule of Oil Sales". The Commissioner has considered the Appellants' document entitled "Schedule of Oil Sales" submitted in 2022, with its Outline of Arguments. The assessments relate to the period 9 April 2010 to 21 August 2010, whereas this schedule relates to an earlier period from 2 January 2010 to 24 March 2010. There is no correlation between the document submitted and the date of assessment. By way of explanation on that point, the Appellants' witness stated that he was illustrating the litres sold on a historic basis to the best of his ability.

244. The Commissioner notes the headings in the Schedule namely, DERV, KERO and MMO and H Heat. The Appellants' own schedule reflected for the period, sales being 96% kerosene and 4% MMO. The Appellants' witness testified that "*Home heat falls into the category of gas oil, if you sell gas oil to a dwelling house it can be home heat*."[55] The Commissioner notes that the Appellants' witness was seeking to classify part of the sales of MMO as kerosene, due to his system defaulting to Kerosene for Home Heat. It appeared to the Commissioner that the witness was attempting to undermine his own

[54] Book of pleadings, page 327
[55] Transcript Day 7, page 28

schedule of sales for the period. The Commissioner notes that the evidence of the Appellants' witness was that this was not "*contemporaneous paperwork…..So, there has to be a margin of error.*"[56]

245. Having considered the evidence in this regard and the fact that the Appellants' witness stated that he compiled this document in the absence of any records, the Commissioner does not consider that any weight can be attached to the document in terms of the Appellants' records for their mineral oil trade for that period. Moreover, it does not relate to the period at issue in the assessment and therefore, does not support the Appellants' appeal that the MMO purchased from company 3 was entitled to the reduced rate of excise duty. This document has no evidential value in support the Appellants' appeal of the assessment.

246. Furthermore, the Commissioner notes the evidence of the Appellants' witness about mixing fuels and that it was not illegal. The Commissioner notes the testimony of the Appellants' witness that "*Kerosene was mixed with gas oil, it was mixed with home heating oil*.[57] The Commissioner has already found this to be a breach of the Regulations.

247. In relation to the Stock Transaction Listing that the Appellants submitted in relation to purchases from company 3 and the records of supplies in relation to company 3 for the period, the Commissioner notes that the Appellants purchased 749,000 litres, at a time of distraught financial circumstances, yet by the end of the year the Appellants had a stock of half a million litres or more, according to the listing.

248. Additionally, the Commissioner observes that it appeared from the records that the Appellants were purchasing from company 3, MMO at 72 cents per litre. However, on the same day it is sold for 56 cents per litre, 16 cent less than it was purchased for. The Appellants' witness introduced testimony in relation to rebates that were received for bulk sales of 10 to 15 cent per litre, if a target was hit in terms of purchases. When asked where the rebate was in the records, the witness testified that it was a rebate in cash, but then said it was a cheque. The Appellants have not raised the matter of rebates, prior to the hearing of these appeals. The Commissioner does not consider the evidence adduced in relation to a rebate to be credible evidence. The Commissioner notes that the evidence of the Appellants' witness that "*in the construction of this we wouldn't have had the benefit of those sales dockets"*.

[56] Transcript Day 7, page 168
[57] Transcript Day 8, page 8

249. Furthermore, the Commissioner notes the Appellants' VAT returns filed for 2010. The Appellants' witness confirmed in evidence that it was the case that the Appellants were purchasing MMO from other companies at this time. In addition, the witness testified that during that period, there were VAT inputs in respect of their logistics and transport services business. The Commissioner notes that it was put to the witness that the VAT element on purchases from company 3 of MMO was €230,228, yet for the totality of the Appellants' business for that year, VAT on purchases "T2"/VAT was a figure of €50,059, such that this does not account for the Appellants' purchases.

250. Having had regard to the limited documents produced by the Appellants, including the Schedule of Sales and the Stock Transaction Listing, none of which are contemporaneous records required under the Regulations and which the Appellant appeared to call into question in terms of their accuracy as to stock levels, and in addition the testimony of the Appellants' witness which was contradictory *inter alia* in terms of storage, stock levels, use and unreliable *inter alia* in terms of rebates, subprime lenders, bank accounts and the widespread dearth of documentation that was required to be kept under the Regulations, it is not possible for the Commissioner to come to the conclusion that the Appellants have used or held for use the MMO purchased from company 3, for the specific purpose. The Appellants have not complied with their obligations pursuant to the Regulations in terms of record keeping. Hence, the Commissioner cannot conclude that there has been compliance with the specific use requirement in section 99(10) FA 2001, to entitle the Appellants to the reduced rate of excise duty. Accordingly, the Commissioner is satisfied that that Appellants have not shown that the Respondent was incorrect to raise the assessment in relation to company 3.

Conclusion

251. The Commissioner considered the objections raised by counsel for the Appellants in relation to the Respondent's reliance on third party documentation. The Appellants urged the Commissioner to disregard the entirety of the documentation of the Respondent and the entirety of the evidence adduced by the Appellants' witness on foot of those documents. The Commissioner notes that the Respondent maintained that this was an appeal which may be determined on the basis of the Applicants' own records and without the need for any third party witness evidence. The Commissioner agrees with that submission.

252. Even disregarding the third party documentation and considering only the Appellants' evidence, including documentary evidence, the pleadings, the correspondence of the Respondent, the bank accounts procured by the Respondent under section 906A TCA

1997 (admitted in accordance with section 949AC TCA 1997) and the documentation submitted by the Appellants to the Respondent, the Commissioner finds that the Appellants have not shown on balance that the Respondent was incorrect to raise the five assessments.

253. The Commissioner is satisfied that the question of the Appellants' entitlement to the reduced rate of excise duty stands or falls on the Applicants' evidence. This is not a case where the records ostensibly establish an entitlement to relief. Where a claim for relief is made by a taxpayer, an entitlement to the said relief is not assumed, but falls to be established by the taxpayer. The mineral oil trade is a highly regulated industry. Once the Appellants had purchased the MMO, they had the benefit of the reduced rate and were entitled to that benefit insofar as they complied with their obligations in respect of the Regulations and ensured that the fuel was only used for specified purposes. The Commissioner is satisfied that the way in which the Appellants proved compliance with those obligations was by means of their compliance with the Regulations, in terms of their books and records. But, the Appellants have submitted no credible evidence to confirm that the MMO was used or held for use in such a manner that entitled them to the benefit of the reduced rate of excise duty (company 1, company 3 and company 4). Where the Appellants suggested that no MMO was purchased or sold (company 2 and person 1), there was no credible evidence adduced by the Appellants, supportive of an alternative explanation.

254. The Commissioner is satisfied that in relation to company 1 and company 4, the assessments were raised on purchase records furnished by the Appellants themselves, with the exception of nine purchase invoices from company 1 which the Commissioner has admitted as evidence for the reasons aforementioned. In addition, in an effort to establish its mineral oil trade for the periods, the Appellants relied upon purported credit notes for purchases from company 4 which were produced only in recent years and not at the material time and a "Schedule of Oil Sales", which the Appellants' witness testified was not a contemporaneous document and was not entirely accurate. The Commissioner has already stated why these records are of no evidential value in these appeals. No credit notes were produced in relation to company 1. In fact, in relation to the purchase invoices submitted by the Appellants for company 1, no evidence was adduced as to the specified use of this product, as no documentation was submitted by the Appellants, in compliance with the Regulations to illustrate and support its customer base during the period at issue.

255. All that existed was the evidence of the Appellants' witness in relation to storage arrangements that lacked credibility. Moreover, the meeting notes confirmed that there were no records, as payments were made in cash and third party cheques and no receipts were ever issued. Aside from the Regulatory breaches, the Commissioner has been presented with no credible evidence to establish that the Appellants are entitled to the reduced rate of excise duty in respect of MMO received from company 1 and company 4. The Appellants have submitted no credible evidence to establish that this MMO was used or held for use in accordance with section 99(10) FA 2001, in order to avail of the reduced rate of excise duty.

256. In relation to company 3, the Appellant praised its record keeping and did not take issue with the basis of the assessment, such that it was not disputed that the amount of MMO was purchased from company 3. But, the Appellants have submitted no credible evidence to establish that this product was used or held for use in accordance with section 99(10) FA 2001 in order to avail of the reduced rate of excise duty. Moreover, the Appellants VAT returns filed during that period do not establish accurately its business activities in terms of the VAT on purchases. The Commissioner has been presented with no credible evidence to establish that the MMO was used or held for use, in a manner that would entitle the Appellants to the reduce rate of excise duty, in respect of their purchases from company 3. The Appellants have not established their compliance with section 99(10) FA 2011 as there are no records in existence to support the application of the reduced rate of excise duty in relation to company 3.

257. In relation to person 1, the evidence of the Appellants' witness was that he was assisting person 1 in relation to subprime lenders and that the six cheques lodged in the Appellants' bank accounts were not for the sale of MMO to person 1 and the money was paid back in full to person 1. Yet, the Appellants could not establish on their own records, namely their own bank account statements that the money was paid back. The Appellants' witness testified that the correspondence dated 20 September 2016, from person 1 submitted to the Respondent to explain the position was "the evidence". However, there was no evidence adduced from person 1 to corroborate the correspondence and the contents of same, such that the correspondence is hearsay evidence and little weight can be attached to it. Consequently, in the absence of any evidence from person 1 or any documentary evidence supporting the Appellants' contentions in relation to the repayments, the Commissioner has no credible evidence that she can consider in order to conclude that the Respondent was on balance incorrect to raise the assessment in relation to person 1.

258. In relation to company 2, the Appellants have submitted no contemporaneous books or records for this period. The Commissioner is therefore faced only with the evidence of the Appellants' witness. The Commissioner has already stated that the Appellants' witness called into question his own credibility on numerous occasions throughout the hearing as a result of the inconsistent evidence adduced. One of the explanations that the Appellants posited for the cheques that appeared in the bank account of company 2, were as a result of them being used by the owner of company 1 and company 4. There has been no evidence presented to the Commissioner to support such a contention and no evidence was adduced from company 2 to corroborate this contention. The Commissioner considers that the Appellants' evidence in relation to company 2 was inconsistent and unreliable in terms of the reasons why cheques were drawn on their account for the benefit of company 2. Moreover, the Commissioner does not accept as credible the evidence of the Appellants' witness that cheques dated in 2014 were used by a company that the Appellants had no dealings with since 2011 (company 4) and 2013 (company 1).[58] This was reflected in the meeting notes.

259. The Commissioner has set out why the bank account statements of the Appellant and company 2, obtained by the Respondent in accordance with its powers under section 906A TCA 1997, were admissible evidence in these appeals in accordance with section 949AC TCA 1997. Consequently, in relation to company 2, the Commissioner has been presented with no credible evidence to support a conclusion that on balance the Respondent was incorrect to raise the assessment in relation to person 1.

260. Thus, the evidence adduced by the Appellants as to why the assessments should be reduced is limited. Had the Appellants complied with the Regulations in terms of their books and records, those records would have been readily available to the Appellants to support its position in these appeals. Those very same records, had the Appellants kept them in accordance with the Regulations, could have demonstrated to the Commissioner, the Appellants' compliance with their statutory obligations in terms of the MMO being used or being held for use in accordance with section 99(10) FA 2001. Based on the deficiencies of information and on the meeting notes, the Respondent had reason to believe that excise duty was due and raised assessments on the basis that the reduced rate of excise duty was withdrawn. The Commissioner is satisfied that the Appellants did not comply with the Regulations and were unable to satisfy the Commissioner that they had complied with the conditions applicable to the reduced rate, given the deficit in record keeping by the Appellants.

[58] Respondent's Book of Documents - Meeting Notes, pages 2 & 3

261. The Commissioner noted that counsel for the Appellants did not address the Regulations and the end use of the MMO in his submissions, focusing largely on technical legal arguments. Section 99(10)(b) FA 2001 is clear and its meaning self-evident, such that if the Appellants were in contravention of excise law requirements, then the burden of proving that the excisable products were used or were held for use as MMO, fell to the Appellants. The Commissioner is satisfied that the Appellants were best placed to assemble the facts and information relevant to the issue of their liability or otherwise to excise duty, the tax the subject matter of these assessments. The Appellants were well aware the basis upon which they were under investigation. However, the Appellants failed to engage with important matters of substance communicated to them by the Respondent prior to and post the assessments being raised. The Appellants have offered only contradictory explanations throughout.

262. Having regard to the evidence adduced by the Appellants in this appeal, the Commissioner is satisfied that the Appellants have not complied with the requirements of section 99(10) FA 2001. In cases involving tax reliefs or exemptions, it is incumbent on the taxpayer to demonstrate that the taxpayer falls within the relief (as per *Doorley*). Consequently, the Commissioner is satisfied that the Appellants have not shown on balance that they are entitled to the reduced rate of excise duty and thus, loose the benefit of the reduced rate, the result of which is liability to pay excise duty at the standard rate. The Commissioner is satisfied that there were no records to support an alternative conclusion. The Commissioner finds that the Appellants were properly assessed pursuant to section 99(10) FA 2001 and in all of the circumstances, the excise assessments, the subject matters of these appeals, should be upheld.

Determination

263. As such and for all the reasons set out above, the Commissioner determines that the Appellants have not succeeded in their appeals and have not shown that the tax, as set out in the five Notices of Amended Assessment dated 17 May 2016 and 30 May 2016, is not payable.

264. The Commissioner is satisfied that the Appellants have failed to show on balance that they have complied with the requirements of section 99(10) FA 2001 to entitle them to the reduced rate of excise duty. Hence, the Commissioner finds that the Appellants are liable to pay excise duty at the standard rate. Therefore, the Commissioner determines that the five Notices of Amended Assessment as follows, **shall stand:**

(i) Assessment dated 17 May 2016, in respect of the period 6 June 2012 to 1 October 2012 in the amount of €168,588 (company 1);

(ii) Assessment dated 17 May 2016 in respect of the period 15 July 2014 to 20 November 2014 in the amount of €19,950 (person 1);

(iii) Assessment dated 17th May 2016 in respect of the period 1 October 2014 to 31 March 2015 in the amount of €78,827 (company 2);

(vi) Assessment dated 30 May 2016 in respect of the period 9 April 2010 to 21 August 2010 for €288,373 (company 3);

(v) Assessment dated 30 May 2016 in respect of the period 7 January 2011 to 30 June 2011 in the amount of €1,563,063 (company 4).

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

Notification

266. This determination complies with the notification requirements set out in section 949AJ 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.

267. 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

268. 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 TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Claire Millrine
Appeal Commissioner
15 January 2025

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997