12TACD2019

Between/

NAME REDACTED

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeals Commission by way of appeal pursuant to section 119 of the Value-Added Tax Consolidation Act, 2010, as amended (or, as contended for by the Respondent for the reasons set forth below, pursuant to section 25 of the Value Added Tax Act, 1972, as amended) against a decision of the Respondent made on the 22nd of December 2014 refusing the Appellant's claim for repayment of VAT in the sum of €74,322 in respect of the period May/June 2012.

B. Facts relevant to the Appeal

2. The Appellant registered for VAT with effect from 1 January 2006.

3. In the course of 2006, the Appellant entered into three related contracts relating to the acquisition of an investment property at **[ADDRESS REDACTED]**.

4. The first such contract was with a **Mr. A** and was for the purchase of the site on which the investment property was to be constructed. The consideration was €50,000 plus VAT. The second two contracts were with **Company B** and were respectively for the construction of the investment property, for a consideration of €470,000 plus VAT, and for the fit-out of the investment property, for a consideration of €30,000 plus VAT.

5. The investment property was duly constructed and fitted out and the net consideration payable by the Appellant was paid to the other parties to the contracts in late 2006 or early 2007; the Respondent's Stamp Duty records indicate that the investment property was conveyed to the Appellant on the 5th of January 2007. However, the VAT payable by the Appellant pursuant to the three contracts, amounting in total to €76,500, was neither sought by **Mr. A** or by **Company B**, nor was it paid at that time by the Appellant.

6. On the 27th of May 2011, the Appellant wrote by e-mail to the Respondent stating *inter alia* that:-

> *"I made a contract with an individual/company in 2006. At the time I paid him 550,000euro plus vat for a completed property. He now rents this property back from me.*
>
> *The Vat was to be dealth* [sic] *with by way of form 4a 4b. It came to my attention yesterday that this form was never lodged by our legal time* [sic] *at the time. My Tenant is now billing me for 76,000euro vat that he did not collect in 2006 from me. He states that Revenue are billing him for the same amount in full and will not forgive our oversee* [sic] *and allow the relevant forms to be filled out and backdated and allow the case be VAT NEUTRAL??? (as would have been in 2006 between us)"*

7. On the 2nd of June 2011, **Mr. A** sent an e-mail to the Appellant, stating:-

> *"Please find copy of invoices for purchases of Residences for your mother and you attached."*

8. The VAT invoices sent to the Appellant were dated 5 January 2007. The VAT invoices were not in compliance with Regulation 9(2) of the Value-Added Tax Regulations 2006 because they did not include (a) a sequential identifying number or (b) the date on which the goods or services were supplied to the Appellant.

9. A contemporaneous, handwritten note made by an official of the Respondent on the 8th of June 2011 on a copy of the aforesaid e-mail of the 27th of May 2011 recorded that the Appellant had advised the Revenue official in a phone call that "*… only recently has a Vat Invoice been sent to* **[NAME OF APPELLANT REDACTED]***, On foot of a Revenue audit of other company."*

10. On or about the 10th of June 2011, the Appellant submitted a supplementary VAT3 return for the period January/February 2007. The supplementary return recorded nil VAT on sales, €76,500 VAT on purchases and claimed a repayment of €76,000; this was presumably an error, and a repayment claim of €76,500 ought to have been sought.

11. This first claim for repayment of VAT was refused by the Respondent on the grounds that the claim for repayment was made outside the four-year time limit imposed by the legislation.

12. By letter dated the 1st of August 2011, the Appellant requested that the Respondent review the decision to refuse his claim for repayment. The letter requesting that review stated *inter alia* that:-

> *"… it would seem that our selling/managing agent, selected solicitor and/or seller/builder/now tenant have managed to only allow this VAT problem come to our attention at approximately April/May 2011."*

13. By letter dated the 30th of August 2011, the Respondent advised the Appellant that his claim for repayment of VAT for the period January/February 2007 could not be granted because of the four-year time limit imposed by section 99(4) of the Value-Added Tax Consolidation Act, 2010. I would observe in passing that the relevant statutory provision was not section 99(4) of the 2010 Consolidation Act, but was instead section 20(4) of the 1972 Act; however, the consequences for the Appellant were identical.

14. The letter of the 30th of August 2011 also advised the Appellant of his right to appeal against the decision of the Respondent; however, the Respondent did not exercise his right of appeal.

15. On the 17th of July 2012, the Appellant submitted a VAT3 return in respect of the period May/June 2012. The return recorded VAT on sales of €2,278, €76,600 VAT on purchases and claimed a repayment of €74,322.

16. Following queries from the Respondent in relation to this second claim for repayment, the Appellant furnished to the Respondent three amended VAT invoices. These invoices were dated the 7th of June 2012 and were now numbered from 004 to 006 inclusive. A further difference was that invoice number 005 incorrectly bore the VAT registration number of **Mr. A** rather than the VAT registration number of **Company B**. The invoices were in all other respects identical to the invoices dated January 2007.

17. There followed a series of exchanges between the Appellant and the Respondent in relation to his repayment claim. In the course of these exchanges, the Appellant advised the Respondent that he had been advised that he was entitled to receive replacement invoices from **Mr. A** and from **Company B** because the lack of sequential identifying numbers had rendered the original invoices invalid.

18. It is worth noting that in the course of these exchanges, the Appellant stated in a letter dated the 8th of October 2012 that "*I would like to confirm that at the time of purchase I did not receive any VAT invoice (I did however receive Vat invoices years later).*" In a later letter from the Appellant to the Respondent dated the 10th of January 2013, he stated that:-

> "*I feel I was only provided by the third party with a valid invoice in 2012. You have copies of these three invoices. I therefore feel my vat reclaim is Valid. As per our conversation I have not paid this Vat figure of €76,400 in full. I was not invoiced at the time of the transaction and the solicitor acting for me insisted I provide my vat number as the transaction was vat neutral.*"

19. By letter dated the 8th of February 2013, the Respondent advised the Appellant that his claim for a refund of VAT in respect of the period May/June 2012 was being disallowed on the basis that it was made outside the 4-year claim limit provided for in section 99(4) of the 2010 Act.

20. The letter of the 8th of February 2013 advised the Appellant of his right to appeal against the Respondent's decision to disallow his claim for repayment. The Appellant did not exercise this right of appeal.

21. The Appellant's mother had also purchased an investment property in the same development and had equally made a claim for repayment of VAT in respect of the May/June 2012 period. That application had also been refused by the Respondent but the Appellant's mother appealed the refusal to the Office of the Appeal Commissioners. The appeal came on for hearing before the Appeal Commissioners on the 17th of September 2014 but was adjourned to allow the Respondent an opportunity to furnish legal submissions and to allow the Appellant's mother an opportunity to submit further documentation and materials.

22. Before the adjourned hearing was resumed before the Appeal Commissioners, the Respondent wrote to the Appellant's mother on the 11th of November 2014 and stated:-

> *"I am writing to inform you that we will not be furnishing a further legal submission to the Office of the Appeal Commissioners.*
>
> *After consulting with the VAT Interpretation Branch and given the unique circumstances of this case, we are willing to refund you the VAT amount under appeal, without prejudice.*
>
> *The Office of the Appeal Commissioners has been notified of our decision.*
>
> *The VAT May/June 2012 repayment of €76,300 you* [sic] *issue to you in due course."*

23. The Appellant was understandably encouraged by the decision taken by the Respondent in his mother's appeal and so sought to revive his own claim for a VAT repayment by letter to the Respondent dated the 27th of November 2014.

24. By letter dated the 22nd of December 2014, the Respondent again refused the Appellant's claim for repayment, stating as follows:-

> *"I refer to your recent correspondence and amended VAT return previously submitted for the VAT period January/February 2007 which resulted in a VAT repayment for that period.*
>
> *Your claim was supported by invoices dated 05/01/2007 arising from a property purchase.*
>
> *The Value Added Tax Consolidation (VAT) Act 2010, Section 99 (4), limits the right to repayments of VAT to 4 years after the end of the taxable period to which it relates. The period to which the claim relates is in this case Jan/Feb 2007, by virtue of the date on the invoice.*
>
> *As your claim was not received within the prescribed time limit, i.e. by the end of February 2011, I am in accordance with the relevant legislation refusing to make this repayment. This is based on the facts of this case as presented and their interaction with Section 99(4) of the VAT Act.*
>
> *You have a right of appeal against my refusal to make the repayment."*

25. It is unclear why the Respondent's refusal made reference to the original repayment claim made in respect of January/February 2007 rather than to the subsequent repayment claim in respect of the period May/June 2012.

26. By letter dated the 12th of January 2015, the Appellant advised the Respondent that he wished to exercise his right of appeal and that letter gave rise to the appeal now before me for determination.

27. There appears to have been no response from the Respondent to the Appellant's letter advising them that he wished to appeal their decision. He sent a further letter to the

Respondent on the 1st of August 2015 and on the 26th of August 2015 the Respondent replied, stating:-

> "*I refer to previous correspondence relating to your VAT repayment claim. Your claim is based on VAT charged on 3 invoices.*
>
> *However, I am unable to entertain your claim as Invoice no.005 (copy enclosed) is an invalid invoice. The VAT registration number quoted on the invoice is not proper to* ***Company B****."*

28. It is not clear to me why the letter made no reference to the Appellant having exercised his right of appeal against the Respondent's refusal of his repayment claim, but instead appeared to be a reconsideration of the Appellant's second repayment claim in respect of the May/June 2012 VAT period. By further letter dated the 15th of September 2015, the Respondent advised the Appellant that they would revert shortly in relation to the Appellant's appeal to the Appeal Commissioners.

29. On the 23rd of October 2015, the Appellant sent the Respondent a "*corrected invoice*", which was a new version of invoice number 005, now bearing the correct VAT registration number for **Company B**. On the same date, the Appellant wrote to the Office of the Appeal Commissioners and requested that they progress his appeal.

30. On the 4th of December 2015, the Respondent advised the Appellant and other parties that the Appellant's appeal was with the Respondent's Appeals Committee for consideration. On the 27th of April 2016, the Respondent advised the Tax Appeals Commission that the Respondent's Appeals Committee had decided that the Appellant's appeal could be sent for hearing by the Appeal Commissioners, but that the parties were first going to engage in the transitional procedures provided for by the Finance (Tax Appeals) Act, 2015.

31. Thereafter, the appeal proceeded in the normal manner.

C. Submissions of the Parties

32. The submissions made by the Appellant at the hearing of the appeal can be summarised as follows. Firstly, he says that because the factual basis for his repayment claim is in all material respects identical to the factual basis for his mother's repayment claim, and because the Respondent conceded that the Appellant's mother was entitled to repayment of the VAT in question, the Respondent is obliged to treat the Appellant in the same manner and allow him his refund claim. The Appellant argues that the decision of the Respondent in relation to his mother's appeal has created a precedent, and the Respondent is not now entitled to depart from that precedent and refuse his repayment claim.

33. Secondly, the Appellant further argues that he submitted a claim for repayment of the VAT within 4 years of the period to which the claim relates, and he is therefore entitled to repayment of the VAT.

34. The Respondent's position can be summarised as follows. Firstly, they say that the decision to allow the Appellant's mother the VAT refund she had claimed was made entirely without prejudice, and was expressly stated to be made on that basis. Accordingly, the Respondent submits that I cannot have regard to the fact that the Appellant's mother ultimately succeeded in obtaining a repayment of VAT, notwithstanding that the facts underlying her repayment claim were in all material respects identical to the Appellant's position. The Respondent further argued in this regard that even if I could have regard to the Respondent's decision in relation to the Appellant's mother, that decision could at most give rise to a legitimate expectation claim on the part of the Appellant, and submitted that the Tax Appeals Commission lacks the jurisdiction to hear and determine such a claim.

35. Secondly, the Respondent submitted that the Appellant's claim was out of time. Counsel for the Respondent submitted that on the evidence before me, and having regard to the fact that the VAT Regulations require a VAT invoice to be provided within 15 days of the end of the month in which the supply of goods or services occurs, I should find that the Respondent had received the VAT invoices dated the 5th of January 2007 during the January/February 2007 VAT period. The Respondent further submitted that the right to a deduction for VAT purposes

arises when a chargeable person has received the goods or services and has received the VAT invoice in relation to same, citing in support of this proposition the European Court of Justice decision in ***Terra Baubedarf-Handel GmbH*** **(Case C-152/02)**. The Respondent argued that the Appellant had received both the goods and services contracted for and the VAT invoices relating to same during the January/February 2007 VAT period, and therefore any claim for repayment of VAT relating to that period had to be made by the 28th of February 2011 at the latest.

36. The Respondent further submitted that the fact that the VAT invoices dated the 5th of January 2007 were not in compliance with the VAT Regulations, because they did not bear sequential identifying numbers and did not specify the date of supply, did not alter the Appellant's entitlement to make a repayment claim, and cited in support of this position the decision of the European Court of Justice in ***Pannon Gep Centrum Kft*** **(Case C-368/09)**, which decision was applied by the Tax Appeals Commission in its determination reported at **11TACD2016**.

37. The Respondent further submitted that the amended invoices furnished to and submitted by the Appellant in 2012, and the further-amended invoice submitted by the Appellant in October 2015, operated retroactively to correct the invoices dated 2007, but did not alter the date on which the right to claim a deduction for VAT purposes accrued to the Appellant. In support of this proposition, the Respondent cited the decision of the European Court of Justice in ***Senatex GmbH*** **(Case C-518/14**).

38. In response to my query, Counsel for the Respondent indicated that in the event that I was to conclude that the Appellant had first received the invoices dated the 5th of January 2007 in May or June of 2011, the Appellant would still fail in his appeal because the appeal before me was in respect of the period May/June 2012. Counsel for the Respondent pointed out that the previous claim for repayment of the VAT was made in respect of the period January/February 2007; this previous claim had been refused by the Respondent on the 30th of August 2011 and the refusal was not appealed by the Appellant. Counsel for the Respondent emphasised that no repayment claim had ever been made by the Appellant in respect of the period May/June 2011.

D. Relevant Legislation

39. As of the date of the Appellant's claims for repayment of VAT in June 2011 and July 2012, section 20(4) of the Value Added Tax Act, 1972 as amended provided that:-

> *"A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates."*

40. Section 99(4) of the Value-Added Tax Consolidation Act, 2010 contains identical wording.

41. Section 125 of the 2010 Act provides that:-

> *"This Act shall be deemed to have come into force and apply as respects any taxable period commencing on or after 1 November 2010."*

E. Analysis and Findings

42. The first issue to be considered is the Appellant's argument that the fact that his mother received a refund from the Respondent means that he was equally entitled to a refund and should therefore succeed in his appeal.

43. I find that the Appellant cannot succeed on this ground. The Respondent is correct in submitting that the decision made by the Respondent in relation to the appeal brought by the Appellant's mother was, and was expressly stated to be, without prejudice. It would therefore be improper for me to have regard to same in determining the instant appeal.

44. Furthermore, I note and respectfully agree with the decision of Donnelly J in ***Coleman –v- Revenue Commissioners*** **[2014] IEHC 662**, where she stated:-

> *"Undoubtedly the Revenue Commissioners should apply the law in a fair, reasonable and consistent manner. That will be the result of applying the relevant statutory provisions as to tax due or exemption applicable. In my opinion, a commitment to fair, reasonable and consistent application of the law does not permit the clear provisions*

of a statute to be disregarded in favour of perceived consistency. Thus, the focus must always be on the implementation of the statutory code rather than a comparative analysis of cases. Otherwise, the result is endless comparison of cases in a heedless pursuit of supposed consistency and reasonableness to the exclusion of the actual implementation of the statutory code. Taxpayers' rights will be fully protected in a decision-making system which applies the law regarding the duty to pay tax or the right to avail of exemptions as set out in the statutory code."

45. Over and above the foregoing considerations, I also accept the Respondent's contention that the Respondent's decision not to contest the Appellant's mother's appeal could at most, taken at its height, give rise to a possible cause of action on the part of the Appellant on the grounds of legitimate expectation. However, the Tax Appeals Commission has no jurisdiction to consider or determine an appeal advanced on these grounds (see ***Kenny Lee –v- Revenue Commissioners*** **[2018] IEHC 46**).

46. I therefore find that I cannot have regard to the outcome of the Appellant's mother's appeal to the Office of the Appeal Commissioners in determining the appeal now before me.

47. Accordingly, the next issue which requires to be determined is whether the Appellant made a claim for repayment of VAT within 4 years of the end of the taxable period to which the VAT repayment claim relates. In order to determine this, it is obviously necessary to determine the VAT period to which the repayment claim relates.

48. I accept as correct the argument advanced by the Respondent that a right to a deduction for VAT purposes arises when the chargeable person has received the goods to be supplied or the services to be performed and has received a VAT invoice relating to that supply or performance. I believe this is confirmed by the ***Terra Baubedarf-Handel*** decision at paragraph 38, where the Court stated:-

"The answer to the national court's question must therefore be that for the deduction referred to in Article 17(2)(a) of the Sixth Directive, the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct

must be exercised in respect of the tax period in which the two conditions required by that condition are satisfied, namely that the goods have been delivered or the services performed and that the taxable person holds the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice."

49. In the instant appeal, it does not appear to be in issue that the Appellant took ownership of the investment property in late 2006 or early 2007; the Respondent's Stamp Duty records indicate that the property was conveyed to him on the 5th of January 2007. Accordingly, the key issue is when the Appellant received VAT invoices from **Mr. A** and **Company B**.

50. The Respondent has urged me to find that the Appellant received these invoices in or around January of 2007. They are dated the 5th of January and the Respondent argues that the VAT Regulations give rise to a presumption that the invoices were furnished to the Appellant within the 15-day statutory period. They further argued that the oral evidence of the Appellant was contradictory and did not satisfactorily rebut that presumption.

51. I do not accept the submissions of the Respondent in this regard. While it is correct that the Appellant initially said that he could not remember when he had received the invoices dated the 5th of January 2007, and that he stated in correspondence that he received the invoices during 2012, he subsequently gave evidence that he had received the invoices in May or June of 2011, in or around the time that he contacted the Respondent in relation to the VAT issue for the first time. I found the Appellant's evidence on this point to be sincere and honest and I accept same as being accurate. I believe that any inconsistencies or contradictions in the evidence he gave can be satisfactorily explained by the passage of time between the events in issue and his giving evidence before me.

52. I also believe that the e-mail to the Appellant dated the 2nd of June 2011 and the handwritten notes of the Respondent's official made on the 8th of June 2011 constitute strong and compelling contemporary evidence in support of the Appellant's assertion that he received VAT invoices for the first time in late May or early June 2011.

53. Accordingly, I am satisfied and find as a material fact that the Appellant first received the three VAT invoices dated the 5th of January 2007 during the May/June 2011 VAT period.

54. I accept as correct the argument made by the Respondent to the effect that the fact that the three VAT invoices did not comply with the VAT Regulations, in that they did not bear sequential identifying numbers and did not specify the date of supply of goods or performance of services, should not prevent the right to claim a VAT deduction from arising. In this regard, I note and apply the ECJ decision in ***Pannon***.

55. I further accept that the correction of the three VAT invoices in 2012 and 2015 operated retroactively, and could not and did not give rise to a new right to claim a VAT deduction. I am bound in this regard by the decision of the ECJ in ***Senatex***, where it stated at paragraph 38:-

> *"… Article 167, Article 178(a), Article 179 and Article 226(3) of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the correction of an invoice in relation to a detail which must be mentioned, namely the VAT identification number, does not have retroactive effect, so that the right to deduct VAT exercised on the basis of the corrected invoice relates not to the year in which the invoice was originally drawn up but to the year in which it was corrected."*

56. Accordingly, I find that the Appellant's right to deduct VAT on foot of the 3 invoices dated the 5th of January 2007 arose during the May/June 2011 VAT period and consequently his claim for the repayment of VAT relates to that period. The fact that the 3 invoices in question did not fully comply with the VAT Regulations and the fact that amended VAT invoices were subsequently issued as a corrective measure does not alter that finding.

57. The instant appeal concerns and is confined to the VAT repayment claim in respect of the May/June 2012 VAT period, which repayment claim was made by the Appellant on the 17th of July 2012 and which was ultimately refused by the Respondent on the 22nd of December 2014.

For the reasons set forth above, although a right to deduct VAT did accrue to the Appellant in respect of the May/June 2011 VAT period, no such right accrued to the Appellant in respect of the May/June 2012 VAT period.

58. The Appellant has never claimed a repayment from the Respondent based on a right to deduct VAT arising in May/June 2011. Instead, he initially claimed that such a right arose in January/February 2007 and claimed a VAT repayment on that basis. The Respondent refused that repayment claim and the Appellant did not appeal that decision. The Appellant subsequently claimed repayment of the VAT on the basis that a right to deduct VAT arose in May/June 2012. The Respondent refused that repayment claim also, and it is the Appellant's appeal against that refusal which now falls to be determined.

59. For the reasons detailed above, I find that although a right for the Appellant to deduct VAT arose in May/June 2011, a right to deduct VAT did not accrue to the Appellant in May/June 2012 and I therefore find that the Respondent was correct to refuse the Appellant's claim for a repayment of VAT in respect of that period, although the basis on which the Respondent disallowed the repayment claim was incorrect.

F. Determination

60. For the reasons outlined above, I find that the decision made by the Respondent on the 22nd of December 2014 to refuse the Appellant's claim for the repayment of VAT in respect of the May/June 2012 VAT period was correct.

61. I therefore refuse the Appellant's appeal and determine in accordance with section 949AL(1) of the Taxes Consolidation Act, 1997, as amended, that the decision of the Respondent made on the 22nd of December 2014 should stand.

Dated the 21st day of December 2018

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MARK O'MAHONY
Appeal Commissioner