



**Dublin**Waterworld Ltd.

**PAC-R-291**

**Correspondence 3.13  
Meeting – 09/02/2012**

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Mr John McGuinness  
Chairman  
Public Accounts Committee  
Dail Eireann



25/1/12

**Re: National Aquatic Centre, incorrect VAT charge.**

Dear Chairman

I refer to the 21<sup>st</sup> December 2011 note from Mr Tom O Mahony, Secretary General of the Department of Transport, Tourism and Sport (DTTS), following the PAC meeting of 8<sup>th</sup> November 2011 and my further correspondence.

While Mr O Mahony was not involved in these matters before 2011, Mr O Mahony did state that he had read the files, and was very specific in his assertions to the PAC.

Based on a detailed examination and review of Mr O Mahony's evidence and the available correspondence, it is our view that:

**The actual advices of the Attorney General, the Department of Finance and the Revenue Commissioners do not concur with Mr O Mahony's evidence to the PAC.**

**When proceedings commenced in March 2005, CSID was still requesting confirmations and formal responses from its three shareholders. There is no evidence that these were issued or received.**

**CSID commenced legal proceedings and used the invalid €10m VAT charge to further its position and gain admission to the Commercial Court representing to the Court that Revenue had assessed the VAT.**

At the same time CSID's tax advisor was attempting to negotiate the cancellation of the VAT charge with Revenue and actually proposed that CSID would fail the economic value test (EVT). Revenue advised that VAT is a self assessment tax.

The Revenue Commissioners confirmed in writing that they were not aware of the legal proceedings until they read about it in the newspapers in June 2005.

CSID and its €8m executive services team did not have any independent support for this flawed strategy. The taxpayer now faces undetermined costs from 2002 to 2011.

I also wish to bring to the attention of the Committee that I have made a number of Freedom of Information requests to CSID/NSCDA and the DTTS. These requests are being frustrated because, in my view there is a concerted effort being made to conceal the background to CSID's original request to the Valuation Office as well as the advice that CSID received from Revenue, the Department of Finance and its professional advisors PwC in relation to VAT.

#### **The Evidence Given To The Committee On 8<sup>th</sup> November 2011**

The following are direct quotes from Mr O Mahony's evidence to the PAC.

- *"The legal advice of both the advisers of Campus and Stadium Ireland Development Company, CSID, and of the Attorney General, the financial advice of the CSID's advisers, of the Department of Finance and of the Revenue Commissioners all stated exactly the same thing, namely the VAT claim must be included". [ page 21]*
- *"Their advice [ Revenue and the Department of Finance, page 22] was that legally we could not do what the Attorney General had stated we should do"*
- *"That advice [The AG's advice that the EVT had failed, page 22] in 2004 was superceded by subsequent advice"*
- *"There was a 2004 letter from the Attorney General which was superceded by 2005 advice which said otherwise" [page 25]*
- *"Strong as the wording of the 2004 letter from the Attorney General may be, it overturned its position on the issue in 2005" [page 29].*
- *"In 2005, as I stated, the campus authority was told by the Office Of The Attorney General, Revenue and the Department of Finance that it was required to pursue the VAT" [page 37].*



#### The Actual Advice Available to CSID

- *"January 2001...The VAT inspector claimed... CSID ..could not be a taxable person..and was not entitled to VAT registration"* – CSID reflection paper 21<sup>st</sup> October 2004.
- *"we have differing views on the tax point"* - PwC letter to Revenue, 27<sup>th</sup> November 2002.
- *"Revenue disputed the recoverability of this VAT"*- CSID audited accounts 31<sup>st</sup> December 2002.
- *"subject to the economic value test"* – Revenue fax to PwC 1<sup>st</sup> May 2003
- *"CSID is not entitled to benefit from the provisions of Section 4A"* – Revenue fax to PwC 30<sup>th</sup> April 2003 & 1<sup>st</sup> May 2003.
- *"please confirm that the proposed lessee, Dublin Waterworld Ltd has accepted the valuation of the unencumbered rent as determined by the Valuation Office."* Revenue fax to PwC 30<sup>th</sup> April 2003. CSID and PwC knew that DWW had rejected the rental estimate and did not answer the question.
- *"I am not aware that Dublin Waterworld Ltd has accepted the valuation of the unencumbered rent as determined by the Valuation Office"* – Revenue fax 1<sup>st</sup> May 2003, PwC did not reply.

CSID issued an invalid VAT invoice for €10,254,600 based on the Valuation Office rental estimate on 15<sup>th</sup> May 2003.

- VAT is a self assessment tax and not one that the Revenue Commissioners assess or agree – Revenue meeting with Mr Donagh Morgan 1<sup>st</sup> June 2004
- *"the next issue to address is whether we can effectively "backtrack" and turn the CSID VAT position completely around without incurring any penalties or interest for CSID in a manner which will be acceptable to Revenue."* PwC to CSID 10<sup>th</sup> November 2004
- *"I am instructing PwC to open informal discussions with the Revenue Commissioners"* – Mr Donagh Morgan 10<sup>th</sup> November 2004
- *"a matter for CSID..a further meeting at this point will not serve any purpose"* – Revenue email to CSID 7<sup>th</sup> January 2005
- *"we are not having any success in securing a meeting with the Office of the Revenue Commissioners to even discuss a possible resolution of the matter."* 14<sup>th</sup> February 2005 letter from Mr Donagh Morgan to the DAST.

- *Further, in any communication with DWW the issue of unpaid VAT liability should be raised and the advice of the legal advisors sought on including this in any legal action against Dublin Waterworld"- DAST to CSID 23<sup>rd</sup> February 2005*
- *"The revised approach would now result in CSID failing the economic value test (EVT) requiring it to 1) issue a VAT credit note to Dublin Waterworld..we would appreciate if you would confirm that the above suggestion is acceptable to you" - PwC to Revenue 25<sup>th</sup> February 2005, Revenue did not reply.*

#### CSID issued Legal Proceedings on 18<sup>th</sup> March 2005

- In the statement of claim to the High Court on 29<sup>th</sup> April 2005 CSID stated that DWW *"has failed, refused and neglected to discharge the VAT due and assessed by the Revenue Commissioners in the amount of €10,254,600".*
- *"have you had a chance to consider the contents of our submission"- PwC to Revenue 10<sup>th</sup> May 2005. The submission was dated 25<sup>th</sup> February 2005 (above) and PwC wanted to know what it "would mean for the company as a consequence of failing the EVT (ie the clawback of VAT previously claimed and how practically, this would be dealt with)".*
- *"The Revenue Commissioners understand from newspaper reports of legal proceedings .... are concerned to establish the range of issues referred to the arbitrator"- letter to CSID solicitors from Revenue Solicitors 15<sup>th</sup> June 2005*

As you will see from the above quotations, any interpretation of this advice would lead a reasonable person to conclude that there was a significant element of doubt about the validity of the VAT charge among CSID and its advisors.

In my view, Mr O Mahony in his evidence to the Committee has significantly misrepresented the position of the Revenue Commissioners, the Department of Finance and the Office of the Attorney General. These authorities did not, as Mr O Mahony claims state that the VAT *"must be included"* in the proceedings or indeed that the VAT charge was correct. In fact Revenue were unaware of the planned proceedings.

A thorough review of the correspondence, demonstrates that PwC were, on CSID's instructions, attempting to extract CSID from the VAT dispute after the proceedings had commenced. At the same time CSID stated before and represented to the High Court that they had a definitive and unambiguous position on the VAT charge as well as a Revenue assessment, which does not exist.

A selection of other contemporaneous advices available to CSID were as follows



The C & AG advice 28<sup>th</sup> September 2004 was that the VAT dispute

*"confers no benefit on the exchequer... and asked...what steps might be taken to minimize or avoid further costs".*

The AG advice of 17<sup>th</sup> November 2004 was

*"the VAT rules on leases ...must be followed strictly...as they derive from ...the European Community...I note that the valuers estimate does not pass the economic value test.....CSID ..and its highly paid advisors did not display the lateral thinking of the CAG. Incurring further legal costs would be even more wasteful....it seems prudent and appropriate to accept the suggestion of the C&AG."*

The AG letter 20<sup>th</sup> December 2004 does not reverse the advice given on 17<sup>th</sup> November 2004 and the letter specifically states.

*"The [legal] advice does not make mention of a substantial payment of VAT" and "the process is likely to be protracted if a listing in the Commercial Court cannot be secured". The AG letter finishes by saying "a more independent view of the lease and its terms might be opportune"*

CSID's financial adviser PwC emailed Revenue on 25<sup>th</sup> February 2005, following their *"backtrack"* suggestion of 10<sup>th</sup> November 2004, and stated that CSID

*"is now proposing to use the valuation of the lease..provided by the Valuation Office (ie €35m)..This revised approach would now result in CSID failing the economic value test (EVT)".*

CSID's legal adviser McCann Fitzgerald (according to their letter to CSID of 10<sup>th</sup> March 2005) specifically asked CSID to obtain *"confirmation"* :

*"that they are to include for the VAT in any proceedings" because "the case would not otherwise fit within any of the express categories of cases suitable for that [Commercial] Court."*

According to Mr Donagh Morgan's letter of 10<sup>th</sup> March 2005 to the DAST

*"we do not have a formal response from the Department of Finance" and "I would be glad to have the confirmation requested in the letter from McCann Fitzgerald".*

There is no evidence to suggest that CSID received either confirmation. Furthermore there is no evidence that CSID obtained confirmation from the Department of the Taoiseach who was also a shareholder in CSID.

CSID's legal adviser McCann Fitzgerald on 10<sup>th</sup> March 2005 stated *"The circumstances of Dublin Waterworlds failure to execute the appropriate Form 4A at the time of the signing of the lease, and its approach to the VAT matter generally provides a useful context within which to then outline subsequent breaches of the lease"*.

CSID had clearly disregarded the **Revenue Instruction** of 31<sup>st</sup> March 2003, 29<sup>th</sup> April 2003 and 1<sup>st</sup> May 2003 that *"as already stated CSID is not entitled to benefit from the provisions of Section 4A"*.

In his sworn affidavit of 25<sup>th</sup> May 2005 Mr Donagh Morgan stated *"VAT need not have been a problem for DWW...I can confirm that DWW were asked to complete the appropriate form VAT 4A prior to the execution of the lease..but it failed to do so"*.

Our analysis demonstrates that CSID's advisors had little faith in its position. However CSID used the VAT dispute to further its position and gain admission to the Commercial Court. CSID then used DWW's vulnerable VAT position to colour the Court's view of DWW.

**The Attorney General did not in 2005, as Mr O Mahony claimed before the PAC, reverse its 2004 position that CSID had failed the EVT.**

At the same time as CSID was claiming before the High Court that Revenue had assessed the VAT at €10,254,600, in an act of duplicity CSID's advisors were still attempting to negotiate a cancellation of the VAT with Revenue.

The evidence in our possession indicates that CSID did not have external support for its decision to litigate the VAT dispute and that consequently Mr O Mahony misled the Committee.

### **CSID's Reliance on Revenue Guidelines**

The Supreme Court Judgment states on page 12 *"the Revenue document carries the disclaimer, in a prominent place at the end of the introduction: "Nothing in this guide should be taken as overriding the legal provisions or requirements of the Value Added Tax Act 1972 (as amended)."*

It should be remembered that the 2001 Revenue Guidelines never had any legal status and were not updated to take account of the 2002 VAT legislation. Consequently guidelines were obsolete and should not have been relied upon.

This was not a matter of complex legislation. In the words of the Supreme Court any person who supported CSID's approach *"gravely misled himself on the law"*.

In the 2002 /2003/2004/2005 correspondence, numerous meetings, its invoice, the various "The CSID Reflection Paper" (21<sup>st</sup> October 2004), the 2002/2003/2004/2005



annual audited accounts of CSID or indeed in its submission to the Supreme Court, CSID did not mention that it was relying on guidelines.

In fact CSID accepted the correct legal position in its submission to the Supreme Court (item 1.4) and made no mention of having a choice of valuation methodologies.

The guidelines state in Section 2.2.2 that where the rent is related to profits (as it was at the NAC) then the valuation must be determined by a valuation by a competent valuer.

CSID had a valuation, (€35m) but they chose to ignore it. In its extensive correspondence with DWW during 2002 and 2003 CSID refused to provide a copy of the valuation and failed to mention the existence of the €35m. This was done on written instructions.

If a rent formula (such as the one used by CSID) was permissible and used, the guidelines (Section 2.2.1) specifically required the use of the lesser figure. The lesser figure (€65,445,133) notified by PwC to Revenue on both 27<sup>th</sup> November 2002 and 6<sup>th</sup> February 2003 was less than the development cost of €67,950,000 and it too failed the EVT.

The reference to guidelines is an argument of recent origin, lacks credibility and is wholly unsustainable.

Surely a state company (CSID), undertaking a €1bn project, with an experienced board of directors, advised by an €8.2m executive services team and a "big four" accountancy firm can do better than now claim that it followed outdated guidelines and ignored what Mr O Mahony referred to as the *"direct interpretation of the Regulations"* and never bothered to tell anyone at the time?

The position that CSID adopted was both unique and incorrect and there is no professional tax advisor that we are aware of who supports CSID's position.

#### **The Role of CSID's tax advisor**

Mr O Mahony confirmed that PwC did not take part in the Supreme Court case or in CSID's attempt to reignite the dispute between April and August of 2010.

At the meeting of the PAC, when asked by the Chairman *"who acted as VAT adviser with the Supreme Court?"* Mr Donagh Morgan stated *"as far as I can recall the VAT adviser was from PricewaterhouseCoopers, which was the financial adviser all the way through"*.

Mr Morgan was CEO of CSID (2002- 2007), attended the Supreme Court hearing and knew or ought to have known that his statement was factually incorrect and misleading.

In fact PwC was the only major VAT advisor in Ireland not present in the Court.

The fact is that PwC resigned in 2009 around the time when the disclosures concerning the valuation and valuer were made to CSID.

**CSID had no VAT adviser when it went to the Supreme Court and no professional support whatsoever for its position. In fact CSID's legal team advised in writing in late 2009 that CSID's had little prospect of succeeding in the Supreme Court.**

Information in our possession indicates that PwC was aware in 2002 that the EVT had failed but nonetheless PwC continued to act.

On the 20<sup>th</sup> December 2002 PwC advised CSID *"The correspondence from the Valuation Office detailing the valuation should not be given to DWW/KPMG...The correspondence shows..a valuation of the lease of circa €35m which does not suit our requirements (ie it is not in excess of the build cost).*

The relevance of this critical instruction is that DWW and its advisors KPMG (as did four other VAT advisers), would have immediately recognized that this transaction failed the EVT and therefore there was no VAT on the transaction.

#### **Other Significant Matters**

- CSID procured a Financial Profile which indicated profits of up to €2.7m on the NAC. These profits have never materialized and CSID has not made the authors accountable.
- CSID procured a valuation from the Valuation Office using incomplete documents.
- The executive services team was paid €8.2m between 2000 and 2005 and not the €3m as stated. These services were procured without a public tender.
- €45m was spent on masterplanning. This is an extraordinary and material amount, moreover as it was spent when CSID had not determined the VAT position of the project.
- In a letter to PwC dated 8<sup>th</sup> July 2010 Revenue stated *"if CSID withdraw from the arbitration process it is accepting the finding of the Supreme Court ...that the lease was VAT exempt ab initio"*. CSID should explain on what basis it rejected the Judgment and applied to Supreme Court for a new arbitration on 11<sup>th</sup> May 2011 until it withdrew on 26<sup>th</sup> July 2010. CSID went as far as nominating three arbitrators on 30<sup>th</sup> June 2010. Unsurprisingly the costs of that misadventure will be met by the taxpayer.



## Conclusion

In my view the Committee cannot only rely on oral evidence and piecemeal correspondence taken out of context. I believe that Mr O Mahony should now make the following disclosures to the PAC and these documents should be published.

1. Copies of the VAT advice received by CSID from PwC between 26<sup>th</sup> July 2002 and 15<sup>th</sup> May 2003.
2. Copies of all the advices received by CSID/DTTS in relation to VAT.
3. CSID board meetings and Finance and Audit Committee meetings in relation to VAT.
4. Copies of legal and taxation advice that CSID/NSCDA received in 2009 and 2010. This is of particular interest as will demonstrate the conduct of CSID/NSCDA following the qualification and valuation disclosures of October 2009 and CSID's attempt to relitigate the case following the Supreme Court decision.
5. An itemized account of the €8.2m spent on executive services as well as the €45m spent on masterplanning. In addition a full disclosure of the procurement process for these services should be provided.

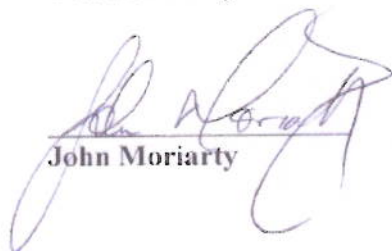
I do not believe that the Committee can begin to understand the motivation behind this needless waste of taxpayer's money until these documents are provided.

In my view it is clear that the Committee has been openly misled by Mr O Mahony, as were the Courts in 2005 by CSID.

I would remind the Committee that CSID was a limited company with an experienced board of directors who had legal obligations and were paid to manage this company.

I look forward to assisting the Committee with this important work.

Yours sincerely



John Moriarty