AC Ref: 09TACD2020

APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The Appellant acquired Address Redacted in or around 1999 and made it available to the relevant health board and local authority under agreement for the provisions of emergency accommodation for refugees and asylum seekers.

2. In 2003 when the provision of emergency accommodation came under the remit of Dublin City Council (DCC), the Appellant commenced in the provision of emergency accommodation for indigenous homeless persons and non-nationals. This service was governed by a standard agreement with DCC as set out in paragraph 8 below.

Issue

3. The Appellant has sought to classify the income derived from DCC as rental Income and has claimed "section 23 relief" relief against that income for the tax years 2010 and 2011. The Respondent asserted that the income was derived from trading activities and has assessed the Appellant under the provisions of Schedule D Case I.

Background

Income Tax Assessments

4. The returns filed by the Appellant in the years 2001, 2002 and 2003, declared the income received from the Health Board for the provision of the emergency accommodation as income from a trade assessable under Schedule D Case I. Correspondingly for the later years 2003, 2004, 2005, 2006 and 2007, the income received from DCC was also returned under Schedule D Case I.

5. Thereafter the income received from DCC for the years 2008, 2009, 2010, 2011 and 2012, was returned as rental income.

6. The Appellant's tax returns for the years 2010 and 2011 were selected for audit. In the course of the audit, the Respondent formed the view that the income derived from the provision of emergency accommodation should be returned as income from a trade assessable under Schedule D Case I. The Respondent subsequently amended the assessments for the tax years 2010 and 2011 and the Appellant duly appealed**.**

7. The assessments raised on the Appellant record the following tax payable:

Year of Assessment	Tax
31st December 2010	€31,879.28
31st December 2011	€26,967.15

Nature of Arrangements with DCC

8. The terms and conditions for the provision of emergency accommodation are set out in a DCC Document, Reference Number 0356/20011GF as set out below:

Terms and conditions in respect of the provision of Emergency Accommodation for homeless persons

(a) Dublin City Council standard form must be completed and faxed every Monday to the Council's offices at (01) 703 6164. The form is supplied by the Council.

(b) The Landlord must have clear house rules, in writing for residents and staff.

(c) The Landlord must have a complaints procedure for residents in writing, inclusive of a complaints form.

(d) The Landlord must hold a legible register of occupants. This register should be made available in the event of an emergency.

(e) Dublin City Council reserves the right to place any persons who are deemed to be in emergency accommodation in these premises. Dublin City Council operates a late night service to 2.00am. if there are beds available in your premises, you may be required to fill these beds nightly.

(f) Residents must be permitted to remain in the house throughout the 24-hour cycle. The residents must have access to the kitchen throughout the day, 7.00am to 11pm and reasonable access throughout the night.

(g) Curfew for residents should be 11.00 pm Monday to Thursday and 1.00am Friday to Sunday or as defined by agreement.

(h) Residents should not bring so many personal belongings as to cause a health or fire hazard.

(i) The Landlord must inform either the Dublin City Council or Northern Area Health board when any person leaves or if they are not in occupation for more than 24 hours.

(j) The Landlord must make a room available for visiting staff, for example, doctor, nurse or social worker. This need not be a dedicated room, as it will not be used each day or all day.

(k) The Landlord will be responsible for providing staffing on a 24-hour basis. This is important to ensure that reasonable house rules are implemented, in the interest of the health and safety of the residents and to minimise annoyance and nuisance to neighbours.

(l) It is the policy of Dublin City Council that all staff, contract or otherwise, working directly with our client group, should be cleared by the Gardaí. It is the responsibility of the landlord to obtain Garda clearance for each member of staff and to verify same in Dublin City Council.

(m) The Landlord must allow any authorised officer inspect these premises. The Landlord will not be notified of inspections in advance. The result of the inspections will be notified to the Landlord.

(n) The Landlord will be responsible for lighting, heating, all furniture including television, bed linen, cutlery, washing machine and utilities. Bed linen must be changed at least once a week and every time a new resident is allocated a place.

(o) The Landlord will be responsible for <u>all</u> building insurance, contents insurance and public liability insurance.

(p) The Landlord will be responsible for <u>all maintenance</u> including the upkeep and periodic redecoration of the premises to maintain a standard that is deemed clean and lettable.

(q) <u>The Landlord must submit a current Tax Clearance Certificate</u> and comply with all the statutory requirements in relation to V.A.T., rates, planning. Etc.

(r) Section 18 (2) of the Fire Safety Act, 1981 places a duty on Landlords to take all reasonable measures to guard against the outbreak of fire on their premises, and to ensure as far as it is reasonably practicable the safety of persons on their premises in the event of an outbreak of fire.

(s) Under the Health, Safety and Welfare at Work Act 1989, all organisations are required to compile a Safety Statement. This is, in essence, the document containing the manner in which safety and health is managed at the place of work. Section 12 of the Act requires:

- The need for hazard identification and risk assessment; and
- The need for organisational measure to ensure risk control.

(t) If the Landlord fails to honour the above conditions Dublin City Council will have the right to terminate any existing agreement immediately without penalty.

9. Therefore, in accordance with such terms and conditions each provider of emergency accommodation is obliged to operate the accommodation in accordance with the prescribed terms.

Legislation - Taxes Consolidation Act 1997 (TCA)

10. Section 18(2)

Tax under Schedule D shall be charged under the following Cases:

Case I – Tax in respect of –

(a) any trade;

…..

Case V – Tax in respect of any rent in respect of any premises or any receipts in respect of any easement; and subject to and in accordance with the provisions of the Income Tax Acts applicable to those Cases respectively."

11. Section 75 Case V: basis of assessment

"(1) Without prejudice to any other provision of the Income Tax Acts, the profits or gains arising from -

(a) any rent in respect of any premises, and

(b) any receipts in respect of any easement,

shall, subject to and in accordance with the provisions of the Income Tax Acts, be deemed for the purposes of those Acts to be annual profits or gains within Schedule D, and the person entitled to such

profits or gains shall be chargeable in respect of such profits or gains under Case V of that Schedule; but such rent or such receipts shall not include any payments to which section 104 applies.

…..

(5) section 96 shall apply for the interpretation of this section as it applies for the interpretation of Chapter 8 of this Part."

12. Section 96(1)

"In this Chapter, except where the context otherwise requires –

……

"rent" includes -

(a) *any rentcharge, fee farm rent and any payment in the nature of rent, notwithstanding that the payment may relate partly to premises and partly to goods or services, and*

(b) *any payment made by the lessee to defray the cost of work of maintenance of or repairs to the premises, not being work required by the lease to be carried out by the lessee."*

"rented residential premises" means a residential premises in respect of which any person is entitled to a rent or receipts from any easements;

"residential premises" means any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant to or usually enjoyed with that building or part of a building."

Evidence

The Appellant gave the following evidence:

13. *Background*

(a) The previous owner of the property at Address Redacted was a B&B operator and the property was run as a B&B. The Appellant never ran the property as a B&B.

(b) He is not the only person renting beds to DCC and believes that the majority of those people have treated the income as rental income.

(c) He did not have a formal lease with DCC, and he invoiced on a monthly basis for the rent of the beds in the property. The same rate applied despite the occupancy of the beds.

(d) He outsourced the security. However, the provision of security was not part of the agreement with DCC.

14. *Overview Description of the Property*

(a) The property comprised of 14 bed spaces rather than 14 bedrooms suitable for two occupants per room, an office, and another self-contained unit at the rear of the building that had its own bathroom, shower and kitchen. To his recollection there were eight bedrooms and most were en-suite.

(b) There were toilets upstairs and downstairs, a common area and a communal kitchen that was self-catering.

(c) The property also contained washing and drying facilities. There was a large garden at the back of the property, and also a car park. All of the facilities contained in the property were shared.

15. *Lease of the Property to DCC from 2003*

(a) The property was rented out from 2003 to DCC and the occupants were foreign nationals with Irish passports, of no fixed abode.

(b) After an agreement was reached on the terms and conditions, the people who were due to occupy the property arrived within a month, accompanied by officials from the DCC.

(c) Some of the occupants were allowed to work, but most of them were in receipt of social welfare.

16. *Nature of the Contract/Agreement*

(a) The contract with DCC was a rolling contract. It was a verbal agreement and he received a rate negotiated between himself and the DCC.

(b) The document setting out the terms and conditions of the agreement was a DCC order of the Executive Manager for the Housing Residential Services.

(c) A contract was never signed with DCC and the Appellant was never given a copy of the "terms and conditions" from DCC. He only became aware of the conditions when a DCC official told him to do certain things.

(d) He believed that he was paid for the entire property and rent was calculated based on the bed spaces.

(e) He denied that he was involved in trading.

(f) It took a number of weeks to negotiate the agreement with DCC and the figures had been agreed. DCC would have assessed a fair rent, taking into consideration the additional services that were provided that were included in the rent, and that the offer would have been negotiated.

(g) The arrangement whereby the rent could be negotiated was not a "normal" situation.

(h) He sought a rent increase of 5% which was negotiated in the same manner as any landlord/tenant.

(i) As landlord, he was obligated to have a complaints procedure in place. He did not have to have a complaints procedure in writing, stating that the tenants always made a complaint to DCC.

(j) There was no curfew in operation and no obligation to have clear house rules. The house rules were actually provided by DCC and were affixed to the hallway on the main notice board.

(k) As part of the rent and ancillary services contained in the agreement, he cut the grass and he arranged refuse collection. The cleaning of the bedrooms was the responsibility of the occupants and he did not provide towels, toiletries or washing up liquids.

(l) There was 24-hour staffing on the premises but he did not stay on the property 24-hours a day. There was a college student who acted as caretaker who was provided with free lodgings at the back of the unit in lieu of salary.

(m) As part of the original agreement, the caretaker was required to report any incidents that had occurred on the property. The caretaker was not vetted by DCC. All of the occupants of the property were males aged between 40 to 50. No families or children lived in the property. The caretaker was not always on the property and could come and go as he wanted to e.g. if he wanted to go to the shops.

17. *Landlord/Tenant Arrangement*

(a) It was typical when dealing with a State body, that invoices were raised for rent. In 2010 and 2011, DCC was responsible for the upkeep of the property and to ensure he was managing the property correctly.

(b) Inspections were carried out by DCC and such inspections were unscheduled.

(c) The arrangement was not a normal situation as it was an emergency hostel.

(d) He was required to keep a log of people residing in the property. It was necessary to keep an eye on who was there to deal with incoming enquiries.

(e) The additional services that were provided by him were incorporated as part of his agreement with DCC.

(f) There was the standard landlord insurance policy in place and he was required to indemnify DCC. He also had public liability insurance.

18. *The Appellant's Access to the Property*

(a) He was only on the premises during business hours. His office was at the rear of the property with its own door. There was a door out of the office into the main hallway of the premises which was used if they needed to open the front door if the bell rang.

(b) He had 18 or 19 properties at the time, which he and his secretary managed. He confirmed that the secretary "came with the property". She carried out the administration and domestic aspects of the business. She also did the cleaning, linen and washing.

(c) The kitchen was cordoned off to one side of the building but remained as part of the overall structure of the property. As part of the agreement, he was

required to provide a room for a doctor and that his office was the room that was used for this purpose.

(d) He had full access to the dwelling with the exception of the bedrooms. However, in the case of an emergency, he could access the rooms. While he had a key to access the rooms he did not inspect the rooms to ensure that they were not being destroyed. The only time that he accessed the rooms would have been when somebody left the property.

19. *Dealing with Problem Tenants*

(a) Having regard to the location of the property within a housing estate he was mindful of issues that might arise with regard to drinking. He was required to report incidences to DCC. DCC was responsible for the tenants' behaviour on the property and he didn't have the authority to throw somebody out of the property.

(b) DCC visited the property two or three times a week and dealt with any issues regarding the payment of rent and any other general issues. He managed "the overall" property but he had no control over the occupants.

20. *Procedure to fill Empty Beds*

(a) If somebody was missing from the property for a period of time, he would notify the DCC in his weekly report. DCC decided whether to fill the space vacated in the property. There was never a requirement to fill the beds in the middle of the night because there was a shortage of accommodation. As a result of this there was never a spare bed.

(b) The people who lived in the property lived there for a number of years. He received a fixed payment irrespective of the occupation of the property because the building was rented rather than the beds.

(c) There was no housing available and that this was the reason why there were over 10,000 people in emergency accommodation.

21. *Address Redacted – Invoices*

(a) The property was not a guest house but was always referred to as such, or alternatively referred to as a B&B on rental invoices. The Appellant purchased the property as "Address Redacted" and kept the name.

(b) The term on the invoice referred to "accommodation at the above address". He said accommodation was just a term and stated that it was an emergency accommodation centre for the homeless people that was rented to DCC.

22. *The Filing of Tax Returns*

(a) He employed an accountant up until 2008, and that they parted ways as he was unable to pay for the accountant and thereafter he completed his own tax returns. In relation to the use of the words "trading address" in the agreement with DCC he said that was the format used with other landlords and the document was given to him by DCC as a format to receive rent.

(b) The income received from the relevant health board for the provision of accommodation for the years 2001, 2002 and 2003, was returned under Schedule D Case I as income from a trade. He confirmed the returns were filed when he had his accountant employed but he accepted that he was responsible for his accountant's actions.

(c) The Appellant confirmed that the income received for the years 2008, 2009, 2010, 2011 and 2012, was returned as Case V rental income.

23. *Section 23*

(a) The Appellant purchased two Section 23 properties, one in Address Redacted in 2000 and the other in Address Redacted in 2006.

(b) He did not believe that he was trading as he did not believe that there was sufficient activity in the property.

Appellant's Submissions

The Appellant made the following submissions:

24. *Grounds of Appeal*

The rental income was taxable under Schedule D Case V as it related to the letting of a residential property. This is in line with the relevant case law in the area and with Revenue commentary in the CAT Manual Business Relief. The income arising from the services associated with the letting of the property is nominal and ancillary to the letting only.

Revenue Manual – 'Tax Treatment of Income'

Reference was made to the Revenue's Manual on the *"Tax Treatment of Income"* and the determination of whether income was directly taxable under Case I or Case V, was fact specific to the actual circumstances. As such extensive reference was made by the Appellant to that document.

The Appellant submitted that the activity of trading would entail booking on websites, dealing with accommodation bookings, dealing with enquiries, reservations and payments. He stated that in his particular case such activities did not take place. The property was rented to one particular individual. There was one client, and he had clients who stayed for a number of years. The beds were not available frequently, nor did he actively trade it or advertise for bed spaces.

The Appellant thereafter made reference to Revenue's Tax Manual *"Value Added Tax (Short Term Guest Sector or Holiday Sector)",*

The Appellant relied such documentation to demonstrate that the Respondent did differentiate between the VAT treatment of lettings of emergency accommodation and other types of lettings, albeit in a VAT context.

Relevant Case Law

25. *Twomey Case*

The Appellant sought to distinguish the facts *J. Twomey (Inspector of Taxes) v. Bernard Hennessy* [2007No.491R from the circumstances of his appeal on the following grounds that in *Twomey*:

(a) the case concerned the entitlement to capital allowances whereas in this appeal the matter under consideration was the entitlement to section 23 relief;

(b) the Respondent sought to treat the income as rental income whereas in his circumstances, the Respondent is seeking to tax his income as trading income;

(c) there is a high level of activity required for that activity to be classified trading. In contrast with the high level of advertising activity present in *Twomey,* he did not advertise the property.

(d) he only had 14 occupants at any given time in contrast to the *Twomey* where there was a turnover of 350 occupants on a yearly-basis;

(e) there was a lease in place unlike his arrangement with DCC where it was impossible for a lease to be in existence.

(f) *Twomey* related to self-catering accommodation which the Appellant disputes was in existence in his circumstances.

26. *Webb Case*

Reference was made to case of *Webb v Conelee Properties Ltd* [1982] STC 913 which is authority for the proposition that a trade cannot exist where the activity in question is the management of property. His evidence was that he did not trade as he was managing the property.

27. *Sywell Case*

He distinguished *Sywell Aerodrome V Croft* 24 TC 126 as there was only one agreement between himself and the DCC.

28. *Noddy Case*

In *Noddy Subsidiary Rights v IRC* 43 TC 458, it was held that the relevant indicators of trade included the frequency of transactions, the degree of activity and organisation involved (e.g. in seeking out customers, negotiating agreements, etc.) the presence of elements of risk and speculation and the prospect of earning profits through sound management or the exercise of judgement in the marketplace, etc. In his case there was infrequent transactions, no customers were sought, he negotiated the original agreement, not multiple agreements. He was not trading, actively seeking out or advertising the property, or looking for multiple customers.

29. *Gittos & Griffith & Case*

In the *Gittos c*ase the taxpayer in that case also argued that the activities undertaken in relation to the villas were of a trading nature. It was argued that the intention to trade was demonstrated by the fact villas were run under registered name. However, this was not held to be a determinative factor when assessing the overall level of activity on the property. The Appellant said the invoices were raised in the name of '**Address Redacted** and stated that the *Gittos* above case shows the fact a property that it has a registered business name or not is no of relevance in classifying it for tax purposes.

In *Griffiths (Inspector of Taxes) v. Jackson/Pearman* (1983] STC 184 was cited as authority for the proposition that in the UK the letting of furnished residential accommodation is generally treated as an investment activity.

30. *Ransom Case*

In *Ransom v Higgs* [1974] STC 539 Lord Wilberforce made reference to the bi-lateral nature of a trade which presupposes the existence of the customer. This case detailed the level of activity required in order to constitute trade and which of necessity was more than the exploitation of property.

The Appellant concluded that services he provided were not sufficiently substantial to convert the income therefrom into trading income.

31. *Fly Case*

Thereafter reference was made case *Fly v Salisbury House Estate* 15 TC 266 (followed in *Pairceir v EM* II ITR 596) in relation to which the Appellant argued that the services provided by him were part of the agreement which did not exist in writing and which were ancillary to the operation of the property and were part of the rent.

32. *Nott Case*

The Appellant opened *Nott v Revenue and Customs Commissioners* [2016] UKFTT 0106 and claimed he was not in occupation of the property, and the services he provided are not substantial. He also submitted that his income should not be taxed as trading income, but as rental income. He said the services he provided were part of the rent and were part of ancillary services within the definition of under rent in tax law.

33. *Revenue Guidelines re Trading Activity*

The Appellant relied on the Respondent's guidelines which indicate that the question of whether a trade is being carried on is determined by an examination of the facts of the particular case, in the context of the badges of trade and of case law.

34. *Badges of Trade*

In support of his argument**,** the Appellant also relied on the Badges of Trade. In his evidence, he said that he was unaware how his historic returns were treated, as they were completed by an accountant. He always believed the property came under a landlord investment rental or buy to let. The Appellant stated that the returns he made from 2008 to 2012 are the correct returns.

The property was rented to the DCC and the Appellant rented the whole property at an agreed rent, this was a fixed payment, as would be the case in any buy to let property.

The Appellant pointed out that in most multi-lets in General Location Redacted or the surrounding areas, there is always a caretaker who would deal with complaints from people who are living in those rooms and those houses. Hence, the supervisory services provided by the Appellant and the caretaker were not indicative of trading activity.

Appellants' Conclusions

35. DCC never block-booked the beds at the property but rented the entire property as there was no rolling contract. He never took any bookings for the property as it was always rented as a full property.

36. He asserted that he never agreed or saw sight of any agreement or terms and conditions and never signed any contract or was aware of one.

37. As in a normal accommodation, people could come and go as they please. There was no curfew.

38. When the Appellant purchased the Address Redacted, no VAT was charged on the acquisition and no VAT was charged on the basis that it was a transfer of business.

39. Notwithstanding the Respondent's assertions that he was responsible for providing staffing on a 24-hour basis, he had outsourced the security and was of the view that this was not part of any contract agreement.

Respondent's Submissions

The Respondent made the following Submissions

40. The services provided by the Appellant are to an authority, obligated under section 10 of the Housing Act 1988, to provide emergency accommodation for homeless persons and that the Appellant was arranging lodgings pursuant to that provision. Subsection 1 provides:

> *"A housing authority may, subject to such regulations as may be made by the Minister under this section—*
>
> *(a) make arrangements, including financial arrangements, with a body approved of by the Minister for the purposes of section 5 for the provision by that body of accommodation for a homeless person,*
>
> *(b) provide a homeless person with such assistance, including financial assistance, as the authority consider appropriate, or*
>
> *(c) rent accommodation, arrange lodgings [emphasis added] or contribute to the cost of such accommodation or lodgings for a homeless person.*

Nature of the Arrangement with DCC

41. The Orders of DCC in relation to the use of the Appellant's property to provide housing and residential services made specific reference to section 10 of the Housing Act 1988. The Orders provided for payments per bed per night and made reference to the payments continuing until such time as "the service" was withdrawn or was no longer needed.

42. The nature of the arrangement between the Appellant and DCC was that DCC approved the accommodation as emergency accommodation on the basis of an annual fee, payable in monthly instalments. Payment was made in respect of the number of beds available and it made no difference whether or not all of the beds were occupied on any particular nights. The Appellant issued invoices to DCC on a monthly basis in relation to the provision of the accommodation. The invoices made no reference whatsoever to the payment of "rent".

43. Homeless persons were referred to the Appellant by the Department of Social Protection (the "Department") and not by DCC itself. DCC's role was to secure lodging for homeless persons. Indigenous homeless persons presented to the Department, and were supplied with a list of suitable approved accommodation by DCC. The Department contacted accommodation providers to check if there was availability and to arrange the lodgings.

44. DCC sought details of persons residing at the accommodation on a weekly basis so that they could be made aware of who was assigned to each property. This was reflected in the agreement between the parties which stated that the Appellant was committed to submitting weekly occupancy returns. DCC then regularly compared this return with the Department's records to ensure the return was accurate and not overstated.

45. In the present case, DCC procured the use of the beds in the property in order to arrange for lodgings for homeless persons as required by section 10(1) of the Housing Act 1988. The property remained at all times under the total control of the Appellant and he occupied part of it.

Relevant Case Law

46. In J. *Twomey (Inspector of Taxes) and Bernard Hennessy* [2007 No.491 R.] the Court considered the distinction between trading income and rental income. In that case, the Respondent sought to tax the Appellant under Case V when, in fact, it was found the income received was Case I income.

47. In her decision at paragraphs 62 and 63 of page 38 of the judgement, Laffoy J. considered, whether profits or gains from units arose from rent said*:*

" 62. having regard to the provenance of the material part for present purposes of The definition of "rent", in my view, "any payment in the nature of rent" means a payment by a lessee or tenant to a lessor or landlord in the context of a landlord and tenant relationship. That is both its ordinary or colloquial meaning and what lawyers and property experts would understand it to mean. I can see no basis whatever for giving any broader meaning to the word 'rent'. The addition of the words 'notwithstanding that the payment will be rent even though it covers the provision of furnishings and services in addition to the use of the premises. However, in my view, the additional words do not impact on the proper meaning of 'a payment in the nature of rent…

63 …Specifically, I reject the contention of the Appellant that the learned Circuit Court Judge misled himself in placing too much emphasis on whether the relationship of landlord and tenant existed between the Partnership and a user, and in failing to identify that the income received by the Partnership constituted rent. In my view, the existence of such a relationship was the crucial ingredient to justify a conclusion that the payment received by the Partnership came within the material portion of the definition of "rent". The learned Circuit Court Judge, in my view, correctly concluded that the crucial ingredient was missing, because the terms of the contract between the Partnership and the user of a unit, which expressly excluded the creation of the relationship of the landlord and tenant."

48. Reference was made to paragraph 68 where Laffoy J. held:

"In my view, the fundamental flaw in the Appellants [that is Revenues] argument on the first issue, is the assumption that the exploitation of a property owners rights in premises invariably gives rise to income which is within the ambit of Case V of Schedule D and does not constitute trading…

49. In applying the test laid down by Laffoy J in *Twomey* to the facts in this appeal, the nature of the relationship between the Appellant and DCC must be considered. In this instant case DCC block-booked all the rooms and beds available on a rolling monthly basis irrespective of whether or not all the rooms and beds were fully occupied.

50. The terms and conditions were set out in the document agreement between the parties such that no Landlord and Tenant relationship existed between DCC and the Appellant. The agreement between the parties was purely for the purposes of providing accommodation for homeless persons. There was the request for a person to be present on the premises 24 hours for health, safety and security reasons. There was a condition that bed linen was to be provided. There was an arrangement that the Appellant would set a curfew for the residents and would inform DCC if any person left

was not in occupation for more than 24 hours. The said conditions did not constitute a Landlord and Tenant relationship.

51. Laffoy J. at paragraph 58 of her judgement made the following reference to *Gittos v. Barclay (Inspector of Taxes)* [1982] STC 390 to that extent that that case:

> *"proceeded on the assumption that the arrangement was a sub-letting. Secondly, the analysis of the authorities which I have conducted clearly illustrates, the English authorities were, as counsel for the respondent put it 'infected 'with the Schedule A principle, which was that, once the income arising from rental activities came into the charge of Schedule A, this charge would exhaust any tax liability and no charge on the basis of a trade being carried out would arise under Schedule D. Because of these facts and the abolition of Schedule A tax in 1969, the expansion of said Schedule D regime to plug the gap…those authorities are rendered of very little relevance, if any, for present purposes."*

52. The Respondent opened *Webb v Conelee Properties Ltd [1982] STC 913* where it was held that a company in occupation of the property was not trading in circumstances where no services were provided and stated that case involved a totally different factual matrix from the facts in this appeal.

53. Reference was thereafter made to *Sywell Aerodrome V Croft* 24 TC 126 where in that case there was a lease and the services supplied were very limited. Furthermore, the Respondent argued that the Appellant had acknowledged that the arrangement with DCC was not "normal".

54. The case of *Noddy Subsidiary Rights Co Ltd v Commissioners of Inland Revenue* 43 TC 458 was distinguished as not being on all fours with the facts in this appeal, as the *Noddy* case related to the exploitation of the character *Noddy* rather than the exploitation of property.

55. *Griffith (Inspector of Taxes) v Jackson; Griffith (Inspector of Taxes* [1983] STC 184 was also distinguished as that case related to the provision of student accommodation rather the provision of services to a local authority.

56. Some time was devoted to a consideration of *Nott v Revenue and Customs Commissioners* [2016] UK FTT 010, also cited by the Appellant. In that case the FTT was concerned with whether letting from holiday cottages was property or trading income. In that case, the HMRC determined that the income from the taxpayer's holiday cottage was property income as opposed to income from a trade. The taxpayer appealed on the basis that he was of the view that his holiday accommodation operation was income from a trade and not property income from furnished holiday lettings.

57. In *Nott*, there were a number of holiday cottages (or units) on a farming estate which the taxpayer provided as holiday accommodation for periods typically of two weeks at a time and they were run as part of a trade. Units were made available with the option of a daily breakfast and/or cleaning service. The FTT made reference to HMRC's Business Income Manual states as follows at BIM22001…

> *"Income from furnished lettings is rarely trading income, even when the landlord works full time running the rental business. It is only treated as a trade when the landlord remains in occupation of the property and provides services substantially beyond those normally provided by a landlord. This will be the case, for example, where the activity consists of providing bed and breakfast, or running a hotel or guesthouse."*

58. The FTT took the view that letting activity would only constitute a trade if the owner remained in occupation of the property and provided services substantially beyond those that would be provided by a landlord. While the taxpayer argued that occupation was a key factor as he was in occupation of the farm and therefore in his opinion, he was effectively in occupation of the holiday cottage units, the FTT disagreed and held that the taxpayer did not occupy each unit of accommodation and to treat the farming estate as a single parcel of land was unduly artificial.

59. The FTT did not regard the legal basis on which customers occupied a property or the length of their occupation to be material factors in determining whether there was a trade. It decided that the services provided by the taxpayer were not sufficiently substantial because they were largely consistent with those usually provided by a landlord. While the taxpayer provided some recreational facilities on the estate, including a pool house and guided tours, the FTT found that these were features intended to increase the attractiveness of the Units for letting rather than additional services. The FTT considered that the provision of breakfast and daily cleaning for an extra charge enhanced the main profit generating activity of letting out the units and were also found to be insufficient to change the income into trading income. It was considered that the breakfasts and cleaning services were merely incidental to the main profit generating activity of letting the units.

60. As such the FTT Tribunal concluded as follows:

> *"Having considered the additional services provided by Mr Nott, we consider that, while extensive, they are not such as to "change the whole picture" in the words of Lord Greene in Sywell Aerodrome. They are in large part consistent with the services normally provided by a landlord of furnished holiday accommodation. We agree with HMRC that the recreational facilities offered are in substance features intended to increase the attractiveness of the Units for letting, rather than additional services. The breakfasts and daily cleaning which are offered for an additional fee are*

insufficient to change the profit derivation from the exploitation of property to a package of services comprising a trade."

61. The Respondent dealt with the importance of occupancy of the property as emphasised as follows in the *Nott* case…

"the decision in Rotunda and Griffiths V Jackson can best be regarded as demonstrating that a property owner who gives up occupation of his property in return for payment is very likely to be generating property income…He is monetising his property asset in the most straightforward way, by in effect, selling the right to occupy it…in other words, letting it…Conversely, a property owner who remains in occupation is, all else being equal, more likely to be able to show that, if additional services are being provided, it is (in HMRC's formulation) a package of services forming part of a trade from which his income derives."

62. The Respondent stated that the labels that parties put on transactions are of no relevance in determining whether a landlord and tenant relationship exists. Furthermore, *Nott* can be wholly distinguished from the facts in the present case. The Appellant was not renting the dwelling to DCC rather he was facilitating DCC to fulfil its role under section 10(1)(c) of the Housing Act 1988 which included, *inter alia*, an obligation to arrange lodgings for homeless persons.

63. It was submitted that, in contrast with the facts in the *Nott* case, the Appellant remained in occupation of the property and provided services substantially beyond those normally provided by a landlord.

Legal Distinction between Tenants and Lodgers

64. The position of "lodgers" is dealt with at paragraph 3.17 of Wylie's "Irish Landlord and Tenant Law" as follows:

"It has long been established that the position of a lodger should be distinguished from that of a tenant. The following statement of the law was given by Perrin J in Waucob v Reynolds (1850) 1 ICLR 142*:*

> *"It has been long since decided that the occupation of lodgers is the occupation of the householder, and that the letting of lodgings does not render the householder less an occupier … The holder of apartments or lodgings is under the control of the owner of the house, especially if he occupies any part of it. The rules with respect to the tenure of lands and houses do not apply to lodgings. The terms under which lodgings are held are determined by the contract, and there is no necessity for a notice to quit; and further, during the continuance of the interest, the parties holding the lodgings are under the control of the owner of the house, who, to a certain*

extent, is answerable for their conduct; if he permits immoral conduct in those apartments, he loses the right to the rent, and that is inconsistent with the notice [sic] of an independent occupation and separate interest."

65. It is the retention of control by the owner over the premises occupied by the lodger and the lodger's lack of possession independent of the owner which distinguishes a lodger from a tenant. The same applies to similar occupiers such as hotel residents and guests.

66. As Henchy J. noted in *Carroll v Mayo County Council* [1967] IR 364:

"*In the case of a lodger or hotel guest, the occupier of the room may have the exclusive use of it as far as third parties are concerned, but the landlord or hotelier concurrently occupies and uses the premises for the purposes of his business and is therefore the rateable occupier."*

67. The arrangements in the present case involve a number of parties i.e. the Appellant (as owner of the property); DCC which has an obligation to provide lodgings for homeless persons; the Department which refers homeless persons to the Appellant and the homeless persons themselves who occupy the dwelling on a short-term basis.

68. The concept of "possession" is dealt with at paragraph 2.38 of Wylie's "Irish Landlord and Tenant Law" where he stated the following:

"Furthermore the occupation in question may be exclusive, in the sense that the owner of the land has agreed that sole occupation is to be given to the occupier, but this again does not necessarily amount to possession, still less to exclusive possession. Thus lodgers, hotel residents, servants and the like, whatever their contractual rights as against the landowner, do not have tenancies. What appears to be missing in cases such as these is the right of the occupier "to call the place his own" – the land occupied remains under the "control" of the grantor of the occupational rights. A tenant, on the other hand, has exclusive possession in the sense that he is in control of the demised premises and can keep the landlord out so long as the tenancy lasts."

69. In the present case, DCC was clearly not in exclusive possession and control of the property and neither were the occupants in exclusive of the property. The property remained under the exclusive control of the Appellant and therefore there was no landlord/tenant relationship present in this case.

70. Reference was made to the meaning of "rent" as dealt with at paragraph 2.40 of *Wylie's "Landlord and Tenant Law"* where it is stated as follows:

"It seems clear that whether or not rent or payment in the nature of rent has been reserved is a matter of substance. The mere fact that an agreement refers to "rent" does not turn the agreement into a tenancy agreement if the other terms of the agreement or other circumstances of the case point to a different relation between the parties. Thus in Whipp v Mackey [1927] IR 372 the Supreme Court refused to construe the agreement conferring liberty to moor or anchor eel tanks as a tenancy agreement despite the reservation of a yearly "rent". The true position seems to be that, while absence of rent appears, in the view of the Supreme Court, to rule out a tenancy, presence of payments alleged to be rent at most raises a presumption of a tenancy which the other circumstances of the case may rebut."

71. It was submitted that the foregoing arrangements clearly indicated that the Appellant was carrying on business in the nature of a trade which is defined in section 3(1) TCA 1997 as including "*every trade, manufacture, adventure or concern in the nature of trade".*

72. It is evident that the draftsman did not see fit to define the precise nature of rent which has thus fallen to the judiciary to determine on a case by case basis. The Oireachtas envisaged that it is permissible to provide an element of goods and services associated with the rent but the legislation is silent as to the extent of such goods or services which remain taxable as rental income.

73. It was submitted that the payments made by DCC in this case were made to the Appellant for the provision of a service to DCC and are therefore not payments in the nature of rent. On the contrary, the payments were made for the provision of a service which constitutes a trade which is taxable under Case 1 of Schedule D.

74. The Orders of DCC in relation to the use of the Appellant's property made reference to payments for the provision of emergency accommodation and contained no references to "rent".

75. The payments made by the DCC to the Appellant did not come within the definition of "rent" as set out above. In this regard, the first and most important point to note is that it was DCC itself which set the amount of payment to be made for each available bed. The payment per bed had been increased by DCC from time to time since 2003 when the property was first made available for the provision of emergency accommodation. In addition, DCC could also decrease any payments.

76. The Appellant's situation was totally inconsistent with a payment in the nature of rent, because rent is generally set by the landlord and not by the tenant. The payment made was in the nature of a capitation fee and was based on the Appellant having 14 beds available as lodgings for homeless persons. This was effectively the provision of a funded service by DCC to homeless persons. DCC was clearly not renting the property

from the Appellant. If it was doing so, DCC would have been in full control of the premises.

Respondents' Conclusions

77. DCC, by agreement, housed those who were homeless in the Appellant's property. This arrangement was governed by way of a document which also included strict rules regarding, *inter alia*, the security, curfew arrangement and the provision of bed linen together with rules regarding the changing of same. The Appellant had agreed to keep a register of all those who are on the property and supplied this register to DCC.

78. DCC carried out unscheduled inspections of the property and where issues arose the Appellant attended to them. DCC had no function in the day to day running of the property.

79. The Appellant had his own office on the premises for the purposes of complying with the terms and conditions of the agreement. He was at time familiar with the persons in occupation. He was contacted directly regarding bookings. He essentially ran the property under strict rules agreed between himself and DCC.

80. In light of the above, the crucial ingredient for the existence of a landlord and tenant was not present in this instant case. The monies received by the Appellant was not wholly rent because of the services provided by the Appellant on foot of the agreement.

81. Therefore, and by virtue of the agreement between the Appellant and DCC the income received was not income derived from the rental of a property pursuant to a Landlord and Tenant agreement but income received on foot of an agreement to provide, *inter alia,* accommodation, security, bed linen and to keep a register of all occupants. It was therefore income that should be taxed under Schedule D Case I.

82. In summary, the Respondent submits that:

    (a) There was no landlord/tenant relationship in the present case;
    (b) DCC was not in exclusive occupation of the property;
    (c) The Appellant remained in occupation of the property;
    (d) The Appellant provided services substantially beyond those normally provided by a landlord;
    (e) The payments made by DCC to the Appellant were not in the nature of rent;
    (f) There was no lease between DCC and the Appellant, rather the Appellant provided lodgings for homeless persons who were referred to him by the Department.
    (g) The arrangements were governed by Terms and Conditions set out in document 0356/20011GF, which arrangements in no way constituted a lease.

Analysis

83. The issue in this appeal is to determine whether the income derived from the provision of emergency accommodation to certain homeless individuals was rental income falling within the charge to tax pursuant to TCA, section 18(2) as Case V rental income.

84. The basis of assessment to Case V rental income is set out at TCA, section 75(1) and provides:

> *"Without prejudice to any other provision of the Income Tax Acts, the profits or gains arising from –*
>
> *(a) any rent in respect of any premises, and*
> *(b) any receipts in respect of any easement,*
>
> *shall, subject to and in accordance with the provisions of the Income Tax Acts, be deemed for the purposes of those Acts to be annual profits or gains within Schedule D, and the person entitled to such profits or gains shall be chargeable in respect of such profits or gains under Case V of that Schedule; but such rent or such receipts shall not include any payments to which section 104 applies.*

85. The following definitions of '*easement', 'premises'* and *'rent'* are contained in TCA, section 96(1) as set out below:

> *"easement" includes any right, privilege or benefit in, over or derived from premises;*
>
> *"premises" means any lands, tenements or hereditaments in the State;*
>
> *"rent" includes -*
>
> *(a) any rentcharge, fee farm rent and any payment in the nature of rent, notwithstanding that the payment may relate partly to premises and partly to goods or services, and*
>
> *(b) any payment made by the lessee to defray the cost of work of maintenance of or repairs to the premises, not being work required by the lease to be carried out by the lessee.*

86. As observed by the Respondent, the precise nature of rent was not defined by the Oireachtas and therefore recourse must be made to judicial assistance for clarification. As such, in *Twomey v Hennessy* [2011] 4 I.R. 395, Laffoy J. determined that in order to categorise a payment as rent, there must be a landlord and tenant relationship. In general terms, a landlord/tenant relationship is created when a landlord grants to a tenant exclusive use of land or a part of a building in exchange for rent or valuable

consideration. Furthermore, as noted at paragraph 63 of that judgment, such a relationship:

> "*was the crucial ingredient to justify a conclusion that the payment received by the Partnership came within the material portion of the definition of "rent". The learned Circuit Court Judge, in my view, correctly concluded that the crucial ingredient was missing, because the terms of the contract between the Partnership and the user of a unit, which expressly excluded the creation of the relationship of the landlord and tenant*."

87. Furthermore, in relation to an '*easement*', Laffoy J. held at paragraph 64:

> *"The definition of "easement" requires that the person making the payment should have a "right, privilege or benefit in relation to the premises". The whole purpose of putting in place a licence arrangement in relation to use of accommodation is to avoid conferring any right, privilege or benefit in relation to the premises on the licensee."*

88. In addressing the distinction between the carrying on of a trade and the use of a building as a dwelling, Laffoy J., at paragraph 62, made the following observation:

> *"On the question whether the profits or gains from the units arose from rent in respect of the units, having regard to the provenance of the material part for present purposes of the definition of "rent", in my view, "any payment in the nature of a rent" means a payment by a lessee or tenant to a lessor or landlord in the context of a landlord and tenant relationship. That is both its ordinary or colloquial meaning and what lawyers and property experts would understand it to mean. I can see no basis whatever for giving any broader meaning to the word "rent". The addition of the words "notwithstanding that the payment may relate partly to premises and partly to goods or services" in the definition makes it clear that payment will be rent even though it covers the provision of furnishings and services in addition to the use of the premises. However, in my view, the additional words do not impact on the proper meaning of "a payment in the nature of rent".*

89. In this regard, the contractual arrangements between DCC and the Appellant was recorded by Order of the Assistant City Manager dated 7th July 2003 (the Agreement) whereby the Appellant undertook to provide accommodation and bed occupancy for 14 indigenous homeless persons for a monthly fee of €10,220. The Agreement acknowledged the Appellant's commitment to provide the accommodation in accordance with DCC's terms and conditions document, reference no. 0356/20011GF (T&C's) that included *inter alia*, the following obligations:

(a) the provision of clear house rules, in writing for residents and staff;

(b) the provision of a complaint's procedure for residents in writing, inclusive of a complaints form.

(c) in the event that there are beds available in the Appellant's premises, to provide accommodation up to 2:00 am when notified by DCC;

(d) to impose a curfew for residents up to 11.00 pm Monday to Thursday and 1.00am Friday to Sunday;

(e) to notify DCC when any person leaves or is not in occupation for more than 24 hours;

(f) to make a room available for visiting staff, for example, doctor, nurse or social worker. This need not be a dedicated room, as it will not be used each day or all day;

(g) the provision of staffing on a 24-hour basis to ensure that reasonable house rules are implemented, in the interest of the health and safety of the residents and to minimise annoyance and nuisance to neighbours;

(h) to ensure that all of the Appellant's staff have Garda clearance

(i) to allow any authorised officer inspect these premises;

(j) the provision of lighting, heating, all furniture including television, bed linen, cutlery, washing machine and utilities. Bed linen must be changed at least once a week and every time a new resident is allocated a place.

(k) to ensure as far as it is reasonably practicable the safety of persons on their premises in the event of an outbreak of fire.

90. In the event that there was a failure to honour the above conditions, DCC reserved the right to terminate the Agreement immediately and without penalty.

91. Notwithstanding the explicit reference in the Agreement to the T&C's, the Appellant denied having been furnished with "*a formal copy*" of that document. As such he was not obliged to comply with such conditions. However, in his evidence, the Appellant confirmed that DCC officials had informed him of the terms and conditions and that he had complied with most of them other than imposing a curfew.

92. The Appellant was also present on the premises during the working day, had a secretary and engaged a *"caretaker"* to provide supervisory night time and weekend services. Furthermore, he retained control of the common areas and the visiting rooms for nurses and the kitchen. He had access to all rooms in the event of an emergency and

maintained control of the premises subject to a degree of oversight by the DCC in terms of routine inspections and reporting functions.

93. He also provided heating and lighting in relation to the entire property. In addition, he provided cleaning services for communal areas and arranged refuse collection. He employed a housekeeper who washed and dried the bed-linen.

94. Therefore, while the definition of rent in TCA, section 96(2) includes any payment that relates "*partly to premises and partly to goods or services",* that definition could not extend to include the additional substantial services provided by the Appellant as falling within the definition of "rent". Furthermore, in commenting on the same statutory provision in *Twomey*, Laffoy J. at paragraph 62 observed that that definition made "*clear that payment will be rent even though it covers the provision of furnishings and services in addition to the use of the premises. However, in my view, the additional words do not impact on the proper meaning of "a payment in the nature of rent".*

95. As such, I also agree with the Respondent that a well-established feature of a lease is the exclusive possession of the property by the tenant for the duration of the lease. It is clear that in the facts of this appeal that DCC never went into possession of the property nor did the occupants have exclusive occupation of the property.

96. I therefore find that the Appellant was engaged in a trading activity as the level of services that the Appellant was contractually obligated and actually did perform were significantly more extensive than the type of services required to be performed by a landlord under a landlord and tenant relationship.

Determination

97. The Appellant is an intelligent businessman who was not only engaged in the provision of emergency accommodation but had also acquired and was managing 18 investment properties. In representing himself at the hearing and with no legal background, he demonstrated a good knowledge of relevant statutory provisions and relevant jurisprudence. As such, I find it highly unlikely that the Appellant would enter into an agreement with DCC without establishing the specific obligations required of him specifically in light of the fact that the contract with DCC was worth €122,640 per annum.

98. I am also of the view that DCC had no function in the day to day running of the property. The Appellant had his office on the premises for the purposes of complying with the terms and conditions of the Agreement. He was, at times, familiar with the persons in occupation. He was contacted directly regarding bookings. He ran the property under strict rules agreed between him and DCC. In that regard, the crucial ingredient for the existence of a landlord and tenant was not present.

99. Therefore, and by virtue of the Agreement with DCC and the actual services performed by the Appellant, the income received from DCC was not income derived from the rental of a property pursuant to a Landlord and Tenant agreement but income received on foot of an agreement to provide, *inter alia*, accommodation, supervision, security, bed linen, cleaning, the keeping of a register of all occupants and the associated reporting obligations to DCC when necessitated by circumstances. In this regard, the income derived by the Appellant in the performance of such services could only be considered to be within the charge to tax as trading income under Schedule D Case I.

100. Therefore, based on a review of the written and oral submissions, the evidence and a review of the relevant jurisprudence, I have found that:

(a) a landlord/tenant relationship did not exist between the Appellant, DDC or indeed with the homeless persons staying in the property;

(b) the Appellant remained in occupation of the property;

(c) the Appellant provided services substantially beyond those normally provided by a landlord;

(d) the payments made by DCC to the Appellant were not in the nature of rent;

(e) there was no lease between DCC and the Appellant, rather the Appellant agreed to provide lodgings and other substantial services for homeless persons who are referred to him by the Department.

101. Therefore, in light of the above, I have determined that the Appellant was not involved in a rental activity taxable under Schedule D Case V but the carrying on of a trade pursuant to the contract with DCC. As such the income tax assessments made in the amount of €31,879.28 and €26,967.15 for the years 2010 and 2011 respectively stand.

102. This appeal is therefore determined in accordance with Section 949AK.

Conor Kennedy
Appeal Commissioner
5th December 2019

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 6of Part 40A of the Taxes Consolidation Act 1997.