AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

160TACD2023

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against an Amended Notice of Assessment to income tax dated 20th April 2022 raised by the Revenue Commissioners (hereinafter "the Respondent"), in respect of the tax year 2020 (hereinafter "2020"). The amount of income tax sought on that assessment is €3,429.

2. The Appellant appealed the Notice of Amended Assessment to the Commission on 19th May 2022 in accordance with the provisions of section 933 Taxes Consolidation Act 1997, as amended (hereinafter "TCA 1997"). The oral hearing of the appeal took place remotely on 4th April 2023. The Appellant self represented and the Respondent was represented by a staff official.

Background

3. The Appellant filed his income tax return ("Form 11") for 2020 on a joint assessment basis (meaning that his spouse's income was jointly assessed with his income) through the Revenue Online System ("ROS") on 17th November 2021. ROS is the Respondent's electronic filing system which provides a facility to taxpayers to allow them to avail of

certain services which include the filing of taxation returns, the payment of taxation liabilities and it also provides the taxpayer with the ability to view their taxation affairs. The Appellant's filed Form 11 showed that a balance of tax in the sum of €910.83 was refundable to him in respect of 2020.

4. The Respondent issued its first Notice of Amended Assessment for 2020 on 9th December 2021. This assessment included payments received by the Appellant's spouse in 2020 received from the Department of Social Protection ("DSP"), which the Appellant had failed to include in his submitted Form 11. The effect of the inclusion of the DSP payments was that the refund due to the Appellant was reduced to €897.63.

5. As the Appellant also failed to include deemed employment income received from [redacted] on his submitted Form 11, the Respondent issued a further Notice of Amended Assessment for 2020 to the Appellant on 13th January 2022 to include that omitted income. The effect of including the omitted employment income was that the Appellant owed the Respondent the sum of €2,149. This sum included a surcharge under section 1084 TCA 1997, which arose as the Appellant had failed to comply with Local Property Tax ("LPT") requirements.

6. On 14th January 2022, the Appellant contacted the Respondent by telephone to state that he was not an employee of [redacted], but rather had provided self-employed services to it and, as such, the Respondent had wrongly classified the income in issuing its amended Notice of Assessment the day prior. The Respondent explained on the telephone call that [redacted] had made tax returns confirming that the Appellant was an employee and was paid a salary from it in 2020. The Respondent further advised if this was an error, it would need evidence of same from [redacted].

7. Thereafter, on 15th January 2022, the Respondent issued a further Notice of Amended Assessment for 2020 which showed the sum of €2,319.07 payable by the Appellant. This increase in liability arose as a result of over-claimed "Stay and Spend Tax Credit" which the Appellant had originally claimed on his 2020 Form 11. The Stay and Spend Tax Credit Scheme allowed taxpayers to claim a certain amount of tax back on accommodation, food and non-alcoholic drink bought between 1 October 2020 and 30 April 2021 provided certain criteria was fulfilled.

8. On 2nd February 2022, the Appellant submitted a query via the ROSs MyEnquiries online portal (this facility allows the Appellant and the Respondent to communicate with one another electronically in a secure email format). This query stated that the Appellant was of the belief that the Notice of Assessment received for 2020 on 15th January 2022 was incorrect. The Appellant referred to his telephone call of 14th January 2022 with the

Respondent and reiterated that the Appellant was of the view that he was not an employee of [redacted] in 2020, but rather self-employed, and as he had returned the income received from it in 2020 on the "self-employed section" of his 2020 Form 11, he was effectively being taxed on the same income twice. The Appellant requested that the latest Notice of Amended Assessment for 2020 be corrected by removing the alleged employment income received from [redacted] in 2020.

9. The Respondent issued its response to the Appellant on 19th April 2022. It stated that the Appellant's 2020 Form 11 had been originally amended to match the pay and tax figures submitted to it from [redacted] and advised if this was an error on [redacted] behalf, then [redacted] would need to resubmit the correct figures.

10. Finally, the Respondent issued a further Notice of Amended Assessment for 2020 to the Appellant on 20th April 2022 to reflect updated PAYE tax deducted figures per the P35 submission received from [redacted]. The effect of this correction was that the Appellant was deemed to owe the sum of €3,429.74 to the Respondent for 2020.

11. The Appellant who was not in agreement with the Respondent's Notice of Amended Assessment dated 20th April 2022, appealed that assessment to the Commission on 19th May 2022.

Legislation

12. The legislation relevant to this appeal is as follows:

Section 195 TCA 1997 – Exemption of certain earnings of writers, composers and artists.

(1) In this section—

…

"work" means an original and creative work which is within one of the following categories:

(a) a book or other writing;

(b) a play;

(c) a musical composition;

(d) a painting or other like picture;

(e) a sculpture.

(2) (a) This section shall apply to an individual—

(i) who is—

(I) resident in one or more Member States, or in another EEA state, or in the United Kingdom, and not resident elsewhere, or

(II) ordinarily resident and domiciled in one or more Member States, or in another EEA state, or in the United Kingdom, and not resident elsewhere, and

(ii) (I) who is determined by the Revenue Commissioners, after consideration of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, to have written, composed or executed, as the case may be, either solely or jointly with another individual, a work or works generally recognised as having cultural or artistic merit, or

(II) who has written, composed or executed, as the case may be, either solely or jointly with another individual, a particular work which the Revenue Commissioners, after consideration of the work and of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, determine to be a work having cultural or artistic merit.

(b) The Revenue Commissioners shall not make a determination under this subsection unless—

(i) the individual concerned duly makes a claim to the Revenue Commissioners for the determination, being (where the determination is sought under paragraph (a)(ii)(II)) a claim made after the publication, production or sale, as the case may be, of the work in relation to which the determination is sought, and

(ii) the individual complies with any request to him or her under subsection (4).

(3) (a) An individual to whom this section applies and who duly makes a claim to the Revenue Commissioners in that behalf shall, subject to paragraphs (aa) and (b), be entitled to have the profits or gains arising to him or her from the publication, production or sale, as the case may be, of a work or works in relation to which the Revenue Commissioners have made a determination under clause (I) or (II) of subsection (2)(a)(ii), or of a work of the individual in the same category as that work, and which apart from this section would be included in an assessment made on him or her under Case II of Schedule D, disregarded for the purposes of the Income Tax Acts.

(aa) The amount of the profits or gains for a year of assessment which an individual shall be entitled to have disregarded for the purposes of the Income Tax Acts by virtue of paragraph (a) shall not exceed €50,000 for the year of assessment 2015 and each subsequent year of assessment.

…

Section 933 TCA 1997 – Appeals against assessment.

(1) (a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.

…

Section 1084 TCA 1997 – Surcharge for late returns.

(1) (a) In this section—

"chargeable person", in relation to a year of assessment or an accounting period, means a person who is a chargeable person for the purposes of Part 41A;

"return of income" means a return, statement, declaration or list which a person is required to deliver to the inspector by reason of a notice given by the inspector under any one or more of the specified provisions, and includes a return which a chargeable person is required to deliver under Chapter 3 of Part 41A;

"specified return date for the chargeable period" has the same meaning as in section 959A;

"specified provisions" means sections 877 to 881 and 884, paragraphs (a) and (d) of section 888(2), and section 1023;

"tax" means income tax, corporation tax or capital gains tax, as may be appropriate.

(b) For the purposes of this section—

(i) (I) subject to clause (II), where a person deliberately delivers an incorrect return of income as set out in section 1077E(2) or carelessly delivers an incorrect return of income as set out in section 1077E(5) or deliberately or carelessly delivers an incorrect return of income as set out in section 1077F(2), as appropriate, on or before the specified return date for the chargeable period, the person shall be deemed to have failed to deliver the return of income on or before that date unless the error in the return of income is remedied on or before that date,

(II) clause (I) shall not apply where a person—

(A) deliberately delivers an incorrect return of income as set out in section 1077E(2) or carelessly delivers an incorrect return of income as set out in section 1077E(5) or deliberately or carelessly delivers an incorrect return of income as set out in section 1077F(2), as appropriate, on or before the specified return date for the chargeable period, and

(B) pays the full amount of any penalty referred to in any of the provisions referred to in subclause (A) to which the person is liable,

…

(2) (a) Subject to paragraph (b), where in relation to a year of assessment or accounting period a chargeable person fails to deliver a return of income on or before the specified return date for the chargeable period, any amount of tax for that year of assessment or accounting period which apart from this section is or would be contained in an assessment to tax made or to be made on the chargeable person shall be increased by an amount (in this subsection referred to as "the surcharge") equal to—

(i) 5 per cent of that amount of tax, subject to a maximum increased amount of €12,695, where the return of income is delivered before the

expiry of 2 months from the specified return date for the chargeable period, and

(ii) 10 per cent of that amount of tax, subject to a maximum increased amount of €63,485, where the return of income is not delivered before the expiry of 2 months from the specified return date for the chargeable period,

and, except where the surcharge arises by virtue of subparagraph (ib) of subsection (1)(b), if the tax contained in the assessment is not the amount of tax as so increased, then, the provisions of the Tax Acts and the Capital Gains Tax Acts (apart from this section), including in particular those provisions relating to the collection and recovery of tax and the payment of interest on unpaid tax, shall apply as if the tax contained in the assessment to tax were the amount of tax as so increased.

(b) In determining the amount of the surcharge, the tax contained in the assessment to tax shall be deemed to be reduced by the aggregate of—

(i) any tax deducted by virtue of any of the provisions of the Tax Acts or the Capital Gains Tax Acts from any income, profits or chargeable gains charged in the assessment to tax in so far as that tax has not been repaid or is not repayable to the chargeable person and in so far as the tax so deducted may be set off against the tax and contained in the assessment to tax,

(iii) any other amounts which are set off in the assessment to tax against the tax contained in that assessment.

…

Documentation Presented to the Commission

13. Included within the documentation presented to the Commission from the Respondent was the following:

13.1 Copy of a payslip from [redacted] dated 30th January 2020. This payslip showed under the "employee name", the name of the Appellant. The payslip further detailed the Appellant's pay and deductions for that period which included deductions for PAYE, PRSI and USC.

13.2 A further payslip in the name of the Appellant from [redacted] dated 27th February 2020. This payslip recorded identical information as that of the previous payslip.

13.3 A further payslip in the name of the Appellant from [redacted] dated 31st December 2020. This payslip recorded identical information as that of the previous payslips.

13.4 An extract from the Respondent's manual entitled "The Employers' Guide to PAYE with effect from January 2019[1]". At paragraph 1.7, on page 11 of the manual it states:

> "*Determining the employment status of an individual.*
>
> *The law makes a distinction between a contract of employment (sometimes referred to as a 'contract of service') and a contract for service. Basically, a contract of employment applies to an employee-employer relationship, while a contract for service applies in the case of an independent – that is, self-employed - contractor. A worker's employment status, that is whether they are employed or self-employed, is not a matter of choice. Whether someone is employed or self-employed depends upon the terms and conditions of the relevant engagement. In most cases it will be clear whether an individual is employed or self-employed. However, it may not always be so obvious. The criteria below should help in reaching a conclusion. It is important that the job as a whole is looked at including working conditions and the reality of the relationship, when considering the guidelines. The overriding consideration or test will always be whether the person performing the work does so 'as a person in business on their own account'. Is the person a free agent with an economic independence of the person engaging the service?"*

13.5 Also included within that manual is the criteria to be used to determine if an individual is an employee[2] or whether an individual is self-employed[3].

[1] Part 42-04-35A. Available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-42/42-04-35a-20190115140827.pdf
[2] *Ibid*. Page 11.
[3] *Ibid*. Page 12

Submissions

Appellant

14. The Appellant submitted that there was confusion over the income he received from [redacted] He stated that he was engaged by [redacted] as a [redacted] on a freelance basis and submitted invoices for research and writing works upon completion. He advised that those works involved creating [redacted] and he had been previously granted "Artist's Exemption" in respect of such works as they were based on archives over 30 years old. Artists' Exemption relates to certain income earned by writers, composers, visual artists and sculptors from the sale of their work and is exempt from tax in Ireland in certain circumstances. Artistic works can qualify if they are original and creative and are generally recognised as having cultural or artistic merit. Earnings from these works are exempt from income tax, starting from the year in which the claim is made.

15. The Appellant submitted that as the Respondent had classified the income he received from [redacted] as PAYE income, then this prohibited him from claiming Artist's Exemption, as the exemption only applies to non-PAYE income. The Appellant further submitted that as he had only ever worked for [redacted] on a freelance basis and was not, and never was an employee of [redacted] then the Respondent had erred in issuing its Notice of Amended Assessment to Income Tax for 2020 on 20th April 2022 by wrongly including the income received from [redacted] as employment income rather than self-employed income.

16. The Appellant stated that he was at a loss to understand why [redacted] had processed part of his income received in 2020 as PAYE income. He explained that he had a [redacted] and had completed multiple previous projects for [redacted] all of which were on a self-employed basis. The Appellant stated that he secured Artist's Exemption in 2019 and within that tax year, all of the income which he received from [redacted] was exempt from tax as he was eligible to claim Artist's Exemption against that income.

17. The Appellant stated that he was employed by the [redacted] on a permanent basis and was eligible for benefits associated with being an employee which included paid holiday leave. The Appellant submitted unlike his main employment, his role with [redacted] did not entitle him to "employee benefits" such as paid holiday leave and such like. As such, the Appellant submitted that this was evidence that he was not an employee of [redacted].

18. The Appellant stated that he had made contact with [redacted] payroll department and requested it to remove him as an employee and as in previous years, classify the income he received from it in 2020 as self-employed income. The Appellant submitted that while this request was not successful, as he had no control over [redacted] processing of invoices, he such not be penalised on what he considered was a misclassification of income received from it in 2020.

19. In those circumstances, the Appellant requested the Commission to issue a Determination which classified the income he received from [redacted] in 2020 as being exempt from income tax and to uphold the Notice of Amended Assessment which issued on 9th December 2021 as reflecting his correct taxation status for 2020.

Respondent

20. The Respondent submitted that the central issue to be resolved in the Appellant's appeal is whether the income received by the Appellant from [redacted] in 2020 was employment income or otherwise. The Respondent submitted that as [redacted] had included the Appellant as an employee on its payroll submissions for 2020, then it was required to include those details when calculating the Appellant's income tax liability for 2020.

21. The Respondent submitted in the event of the Appellant disputing [redacted] decision to classify him as an employee for 2020 that was a matter for the Appellant and [redacted] to resolve. The Respondent further submitted that it had given the Appellant opportunity to obtain evidence from [redacted] that it had erred in including the Appellant on its payroll returns, but to date, the Appellant had failed to produce such evidence.

22. The Respondent concluded its submissions by stating that as the Appellant had failed to demonstrate that he was not an employee of [redacted], it was required to include the disputed income as employment income when calculating the Appellant's income tax liability for 2020. As Artist's Exemption was unavailable against employment income, the Respondent submitted that its Notice of Amended Assessment was correct, and as such, the Commission should refuse the Appellant's appeal.

Material Facts

23. The Commissioner finds the following material facts:-

    23.1 The Appellant filed his income tax return for 2020 on 17th November 2021.

23.2 Included within that return was an amount of income received from [redacted] The Appellant included this income in the Schedule D, Case II (self-employed) section of the return.

23.3 The Appellant was entitled to an exemption from income tax known as "Artist's Exemption" in 2020.

23.4 That exemption is only available to offset against Schedule D, Case II income. It cannot be offset against Schedule E (employment) income.

23.5 After the Appellant submitted his 2020 Income Tax Return, the Respondent became aware that the income the Appellant received from [redacted] in 2020 was returned on the Appellant's behalf as Schedule E income.

23.6 The Appellant received, or was eligible to receive, payslips for various periods throughout 2020 from [redacted]. Those payslips described him as an employee of [redacted] and showed deductions for "PAYE".

23.7 "PAYE" is a tax system which is operated by employers.

23.8 The amount of payment the Appellant received from [redacted] in 2020 was after the deduction of PAYE. As such, there was a difference between the amount the Appellant earned from [redacted] and the amount it paid him.

23.9 No contract for services or employment contract was provided by the Appellant to the Commission.

23.10 The Appellant did not provide any evidence of self-employment to the Commission such as sales invoices or adequate correspondence from [redacted]

Analysis

24. The appropriate starting point for analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in *Menolly Homes v The Appeal Commissioners and Anor* [2010] IEHC 49 where Charleton J held at paragraph 22:-

> "*The burden of proof in this appeal process is … on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."*

25. This burden of proof was reiterated in the recent High Court case of *O'Sullivan v Revenue Commissioners* [2021] IEHC 118, where Sanfey J. held at paragraph 90:

> "*…The burden of proof is on the taxpayer to prove his case, and for good reason. Knowledge of the facts relevant to the assessment, and retention of appropriate documentation to corroborate the taxpayer's position, are solely matters for the taxpayer. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position...*"

26. The hearing of the Appellant's appeal was originally scheduled by the Commission to take place on 11th January 2023. In advance of that date, the Appellant acknowledged the importance of obtaining documentation from [redacted] to establish that he was not in employment with it during 2020 for his appeal to succeed, and as such requested an adjournment to that hearing date.

27. The Commission acceded to that request and re-scheduled the Appellant's appeal for hearing on 4th April 2023. The purpose of that adjournment was to facilitate the Appellant time in which to seek the requisite information from [redacted].

28. At the hearing of the appeal, the Appellant informed the Commission that he was unsuccessful in obtaining any documentation from [redacted] that would assist him in his appeal and requested a further 14 days from the hearing of the appeal to produce such documentation. With the consent of the Respondent, the Commission further allowed this extension for the Appellant to produce any additional documentation which could assist him in his appeal.

29. On 12th April 2023, the Appellant emailed the Commission with a copy letter from [redacted]. This document which was on official letterhead, and signed by a senior staff officer was dated 5th April 2023. It stated:

> "*…Under Revenue Commissioner's instruction,* [redacted]*, was contracted as an Occasional Service Provider and paid through* [redacted] *Payroll system, which deducted Income Tax, USC and PRSI during the period 2020-2021.*
>
> *He has never been an employee of* [redacted]".

30. In accordance with fair procedures, a copy of that correspondence was sent to the Respondent for comment. It replied on 19th April 2023 by email and stated:

> "*We wish to acknowledge receipt of a copy of the letter from* [redacted] *on 12/04/2023 and our comments are below:*

While we note that the letter from [redacted] *states that the Appellant is not an employee, it goes on to state that he is an 'Occasional Service Provider' and that income tax, USC and PRSI were collected on the income paid to* [redacted] *through the* [redacted] *payroll system.*

It would appear that [redacted] *have made the informed decision that the payments are Schedule E and PAYE should be applied.* [redacted] *are best placed to make that decision and will, I expect, have had regard to the Code of Practice for Determining Employment Status -*

https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-status.pdf ..."

31. That letter from [redacted], while containing the contradictory statement that the Appellant was not an employee of [redacted] for the years 2020-2021, confirms that the Appellant was liable to income tax, USC and PRSI and that such deductions were made on his behalf through its payroll system.

32. As the income received by the Appellant from [redacted] in 2020 was liable to tax under Schedule E, it follows that the Appellant wrongly classified that income as Schedule D, Case II income when he submitted his 2020 Tax Return.

33. As section 195 (3) (a) TCA 1997 only allows Artists' Exemption to be claimed against Schedule D, Case II income and as the Appellant had no such income for 2020, it follows that his claim for this relief must be refused.

34. Furthermore, as the Appellant produced no evidence that the income he received from [redacted] was not employment income, it follows that the Respondent's Notice of Amended Assessment dated 20th April 2022 in the sum of €3,429 must be upheld by the Commission subject to the quantum being correct.

35. In examining that Notice of Assessment, the Commissioner notes that the income the Appellant received from [redacted] is included twice within the assessment. That is, in the first instance, the income is included under Schedule E, and secondly, it is also included in the Schedule D, Case II panel of the assessment.

36. While, the income included in the Schedule D, Case II panel is exempt from income tax (by virtue of the Appellant claiming Artist's Exemption against it), the Commissioner notes that the Appellant is being charged PRSI and USC on the amount of that income (as Artists' Exemption is only available against income tax and not PRSI and USC).

37. The Commissioner finds that the burden of proof has not been discharged by the Appellant to satisfy the Commissioner that the Notice of Assessment issued by the Respondent on 20th April 2022 in the sum of €3,429 should be vacated.

38. However, as the income received from [redacted] in 2020 has been assessed on the Appellant twice, the Commission finds that the Notice of Assessment be varied to allow a reduction in respect of the USC and PRSI wrongly charged to the Appellant on the amount of the double assessment.

Determination

39. For the reasons set out above, the Commissioner determines that the within appeal has failed and that it has not been shown that the relevant tax is not payable. However, for the reasons provided, the Commissioner finds that the Respondent's Notice of Assessment dated 20th April 2022, in the sum of €3,429 should be upheld with the variation that it is to be reduced by the amount of PRSI and USC charged on the Schedule D, Case II income in error.

40. The Commissioner appreciates that the Appellant will be disappointed with this determination but he was correct to seek legal clarity on his appeal. It is unfortunate that the Appellant received numerous Notices of Amended Assessment, which confused matters, but the Commissioner notes that these amended assessments primarily arose owing to omissions from the Appellant's original submitted Income Tax Return for 2020.

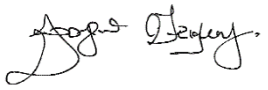
41. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) of the TCA 1997.

Notification

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

Appeal

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



Andrew Feighery
Appeal Commissioner
4th October 2023