



Between

08TACD2024

████████████████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by ██████████ ██████████ (“the Appellant”) against the failure by the Revenue Commissioners (“the Respondent”) to make a determination, under section 195 of the Taxes Consolidation Act 1997 as amended (“TCA 1997”), that the Appellant’s soft sculpture entitled ██████████ (“the work”) qualifies for artists’ exemption. The Respondent refused to make a determination on the basis that the work was a sculpture which primarily served a utilitarian function.
2. The appeal proceeded by way of a hearing on 18 October 2023.

Background

3. Section 195 of the TCA 1997 provides for the exemption from income tax of certain earnings of writers, composers and artists, and is commonly known as “artists’ exemption”. The maximum amount of income that can be exempt from income tax is €50,000 per annum.

4. On 28 December 2022, the Appellant claimed artists' exemption in respect of the work. Following provision by the Appellant of additional photographs of the work, on 16 January 2023 the Respondent notified her that it was unable to make a determination that the work qualified for artists' exemption, on the ground that it was excluded by virtue of paragraph 8(vi) of the guidelines drawn up pursuant to section 195(12) of the TCA 1997 by the Arts Council and the Minister for Arts, Heritage and the Gaeltacht ("the Guidelines").
5. On 17 January 2023, the Appellant appealed the Respondent's failure to make a determination pursuant to section 195(6) of the TCA 1997. The appeal proceeded by way of a remote hearing on 18 October 2023. The Appellant appeared in person. The Respondent was represented by [REDACTED], Assistant Principal.

Legislation and Guidelines

6. Section 195 of the TCA 1997 provides inter alia as follows:

"(1) ... 'work' means an original and creative work which is within one of the following categories:...(e) a sculpture.

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

(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.

[...]

(12) (a) An Comhairle Ealaíon and the Minister for Arts, Heritage, Gaeltacht and the Islands shall, with the consent of the Minister for Finance, draw up guidelines for determining for the purposes of this section whether a work within a category

specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having, cultural or artistic merit.

[...]

(13) (a) Where a claim for a determination under subsection (2) is made to the Revenue Commissioners, the Revenue Commissioners shall not determine that the work concerned is original and creative or has, or is generally recognised as having, cultural or artistic merit unless it complies with the guidelines under subsection (12) for the time being in force.

(b) Paragraph (a) shall, with any necessary modifications, apply to (i) a determination by the Appeal Commissioners under subsection (8) on an appeal to them under subsection (6) in relation to a claim mentioned in paragraph (a)...

7. The Guidelines provide inter alia as follows:

“Original and Creative

4. A work shall be regarded as original and creative only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.

Cultural Merit

5. A work shall be regarded as having cultural merit only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.

Artistic Merit

6. A work shall be regarded as having artistic merit only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.

[...]

Types of Works Excluded from the Artists Exemption Scheme

8. Notwithstanding anything else in these Guidelines, a work -

(a) shall not be an original and creative work, and

(b) shall not have, or shall not be generally recognised as having, cultural or artistic merit,

if, in the opinion of the Revenue Commissioners following, where appropriate, consultation with the Arts Council, it is a work of any of the types or a combination of the types, specified in paragraphs (i) to (vi) below...

(vi) types or kinds of works of sculpture which primarily serve a utilitarian function."

Submissions

Appellant

8. In written submissions, the Appellant stated as follows:

"I submitted an application for artist's exemptions in Categories (d) and (e) in December 2022 and received the exemption for my artwork (d) but not for sculpture, category (e). As part of this application I submitted a photograph of a textile artwork I made in █████ which is a three-dimensional █████ (a soft sculpture) entitled █████ █████ a full-size contemporary reinterpretation of a traditional █████, purchased by █████.

My application for category (e) was turned down on the basis of the █████ being considered to be "primarily serving a utilitarian function". However I made it as a creative artwork, a contemporary reinterpretation of a traditional █████ As it refers to Irish traditions in its designs I consider it as having cultural as well as artistic value. It is exhibited on a specially constructed stand with a rope-rail on the floor around it to prevent viewers from touching it, and thus is displayed as a sculptural piece. It can also be worn on occasions for the purposes of Performance Art at organised events.

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The █████ was purchased by █████ and is displayed intermittently in the █████ and kept in storage when other events taking place in that space. It is a very delicately decorated textile piece and has to be handled with great care and not touched except by an artist or assigned persons. When not in use it is stored under conditions agreed between myself and the purchaser.

The █████ is made of reused table-linen cloths, painted with procion dyes and decorated with brusho painted onto bondaweb and finally stitched with free-machine embroidery and hand painted with textile paints. It is an Artwork but as it was not made

to be hung on a wall it does not fit into category (d) for which I have already received a tax exemption. I believe it falls into the category of "Soft Sculpture" and therefore eligible for category (e) tax exemption."

9. In additional evidence submitted by the Appellant, she stated that the work was made from linen tablecloths [REDACTED], [REDACTED]
[REDACTED]
10. At the hearing, she reiterated the above submission. She stated that she created the work as part of a diploma. She stated that the work was hand-made. It is very delicate and was made for the purposes of the diploma and future exhibition. She stated that she would not have sold the work if she was not satisfied that it would be kept safely. A stand was constructed to support the [REDACTED] of the [REDACTED]
11. The work can be worn occasionally, but only by an artist and for the purpose of performance. It is not a functional piece of clothing. [REDACTED]
[REDACTED]. It is necessary to wear gloves when touching the work, and it cannot be washed. It was made as an artwork and must be treated as such.
12. In response to the Respondent, the Appellant stated that the work had been worn on [REDACTED] occasions by her as an artist, and that it was worn for the purpose of performance art. The Appellant does not make functional clothing for sale.

Respondent

13. In written submissions, the Respondent stated that

"On examination of the appellant's application under category (e), "a sculpture" and regarding the piece "[REDACTED]" it is Revenues opinion that this work does not come within the categories of works eligible for a determination under section 195.

Paragraph 8 of the guidelines states that a work shall not be regarded as original and creative and shall not be recognised as generally having cultural and artistic merit if the works come within a range of criteria set out within subparagraphs (i) to (vi).

Paragraph 8 (vi) refers to "types or kinds of works of sculpture which primarily serve a utilitarian function".

It was determined that the appellants work [REDACTED] primarily served a utilitarian function and therefore could not qualify for a determination by virtue of paragraph 8 (vi) of the guidelines."

14. At the hearing, ██████ provided a general outline of the scope of section 195 and the Guidelines. She stated that sculptures were included in the scope of the exemption, as long as they were original, creative and of cultural or artistic merit. However, paragraph 8 of the Guidelines provide a list of works that shall be excluded from the scope of the exemption.
15. The Appellant had submitted photographs of the work. The Respondent was of the view that, as the work was a piece of clothing, it was made to be worn and was therefore utilitarian. Consequently, it was excluded from the exemption under paragraph 8(vi). In her evidence, the Appellant had stated that the work could be worn, which showed that it had a utilitarian function. While the Appellant had stated that the work was worn for the purposes of performance art, performance was not covered by section 195.

Material Facts

16. Having read the documentation submitted, and having listened to the submissions at the hearing, the Commissioner makes the following findings of material fact:
 - 16.1. The work is a ██████ entitled ██████. The work was created by the Appellant for the purposes of a diploma and was subsequently sold to ██████
██████
 - 16.2. The Appellant claimed for artists' exemption for the work on 28 December 2022, on the ground that it was a soft sculpture. The Respondent failed to make a determination that the work qualified for artists' exemption, on the ground that it primarily served a utilitarian function.
 - 16.3. The work is a delicate piece of art that was created for artistic purposes, primarily for the purpose of a diploma and subsequently for display in a gallery. The work was created by the Appellant; it was hand-painted and hand-dyed onto linen tablecloths ██████, and was both hand- and machine-stitched.
 - 16.4. The work was first displayed on a stand in an art exhibition ██████
██████. The work was purchased by ██████
█████ and is displayed intermittently in the ██████ and is kept in storage when other events are taking place in that space.
 - 16.5. The work is not a piece of clothing that primarily serves a utilitarian function.

Analysis

17. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent's failure to determine that the work qualified for artists' exemption was incorrect. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"
18. Section 195 of the TCA 1997 provides for the exemption from income tax of certain earnings of writers, composers and artists. Section 195(12) provides for the drawing up of the Guidelines, and section 195(13) provides that the Respondent, and on appeal, the Appeal Commissioners, shall not determine that the work concerned qualifies for artists' exemption unless it complies with the Guidelines. The current Guidelines have been in force since 30 November 2013.
19. This appeal concerns a piece of work, [REDACTED] which was created by the Appellant for the purposes of a diploma and subsequently sold to [REDACTED]. The Respondent accepts that the work can be classified as a sculpture. However, it failed to make a determination that the work qualifies for artists' exemption on the ground that it primarily served a utilitarian function, and was therefore excluded by virtue of paragraph 8(vi) of the Guidelines.
20. At the hearing, [REDACTED] on behalf of the Respondent stated that the Respondent did not consider that the work was original and creative, and had cultural or artistic merit, because it was excluded under paragraph 8(vi). However, she accepted that, if the Commissioner found that paragraph 8(vi) does not apply, the work would satisfy paragraphs 4 (original and creative) and 5/6 (cultural/artistic merit) of the Guidelines and would therefore qualify for exemption. Therefore, the net question to be determined is whether the work primarily serves a utilitarian function.
21. The Commissioner has considered the photographs of the work supplied by the Appellant, as well as her written and oral evidence, and is satisfied that the work is not excluded from the exemption by virtue of paragraph 8(vi). He considers that the work is clearly a piece of art that was created for an artistic purpose, and was not created to be used as a piece of clothing to be worn in a utilitarian way. The work was created by the Appellant; it was hand-painted and hand-dyed onto linen tablecloths [REDACTED] [REDACTED], and was both hand- and machine-stitched.

22. The Commissioner understands “utilitarian function” to mean a practical function. A [REDACTED] that has a utilitarian function would be designed to be worn on a regular basis, in order to keep the wearer warm and dry. He accepts that the work under appeal was not created for such a purpose, nor could it be used as such.
23. The Commissioner accepts the Appellant’s evidence that the work is delicate and has to be handled and stored carefully in order to ensure it is not damaged. He notes that it was first displayed [REDACTED]. It is now displayed intermittently in [REDACTED], and when not on display it is stored. It is not worn as an ordinary piece of clothing. The Respondent sought to rely on the evidence of the Appellant that it had been worn on occasion for performance purposes to show that it had a utilitarian function. However, the Commissioner does not agree that the wearing of a [REDACTED] for performance by an artist constitutes a utilitarian use of that [REDACTED]. In any event, even if it did, paragraph 8(vi) refers to works that “primarily” serve a utilitarian function, and the Commissioner is satisfied that the very occasional wearing of the work could not be stated to constitute its primary function.
24. In her submissions, [REDACTED] stated that the Respondent considered that the work was a piece of clothing, and therefore had to come within the provisions of paragraph 8(vi). However, the Commissioner considers that it is incumbent on the Respondent to consider a work on its own merits, and not to take a general approach that any piece of clothing must necessarily fall within paragraph 8(vi). In the circumstances, and for the reasons set out herein, the Commissioner is satisfied that paragraph 8(vi) of the Guidelines does not apply to the work, and therefore that it qualifies for artists’ exemption under section 195 of the TCA 1995.

Determination

25. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was incorrect in failing to determine that the work that is the subject of this appeal qualifies for artists’ exemption under section 195 of the TCA 1997, and he determines that it does so qualify. Therefore, the Respondent’s failure to determine that the work qualifies for artists’ exemption does not stand.
26. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular 949AL thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

27. 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

28. 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.



Simon Noone
Appeal Commissioner
25th October 2023