



Between

10TACD2024



Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This appeal to the Tax Appeals Commission (“the Commission”) concerns the operation of the exemption from income tax of certain earnings of writers, composers and artists (“the artist’s exemption”), which is provided for under section 195 of the Taxes Consolidation Act 1997 (“the TCA 1997”).
2. In particular, this appeal concerns the decision of the Revenue Commissioners (“the Respondent”) of 24 February 2022 to refuse to determine pursuant to section 195(5) of the TCA 1997 that the Appellant was entitled to avail of the artist’s exemption in respect of earnings arising from the sale of certain handcrafted works, primarily constituting representations of figures, items and scenes made from Irish ██████ Where hereafter referred to collectively these are described as “the works”.
3. The two main issues that arise in this appeal are whether the works giving rise to her claim for artist’s exemption meet the mandatory requirements that they be “*original and creative*” and of “*cultural or artistic merit*”.

4. This appeal is determined, with the agreement of both parties, without a hearing pursuant to section 949U the TCA 1997.

Background

5. The Appellant submitted an artist's exemption claim to the Respondent on 19 January 2022. On 24 February 2022 the Respondent issued a decision in which it refused to make a determination that the Appellant was entitled to claim relief from income tax in respect of her earnings from the works. Before so doing, the Respondent canvassed the views of the Arts Council as to whether the works which she submitted to them, which are described in greater detail in subsequent paragraphs herein, could be defined as being "*original and creative*" and of "*cultural or artistic merit*". The Arts Council was of the view that the works supplied did not meet these criteria. This consultation by the Respondent was carried out in accordance with section 195(2)(a)(ii) of the TCA 1997.
6. The Appellant appealed the refusal of the Respondent to make a determination regarding her entitlement to the artist's exemption to the Commission. In so doing the Appellant provided images of the works to the Commission along with her Notice of Appeal. The works comprised five sculptures made from [REDACTED] entitled: "[REDACTED] with [REDACTED] made from Irish [REDACTED]", "[REDACTED] with a [REDACTED] "Irish [REDACTED] made with Irish [REDACTED]", "[REDACTED] made with Irish [REDACTED]" and "[REDACTED] moulded on a [REDACTED] made with Irish [REDACTED]". The images of works submitted also included a clay sculpture entitled "[REDACTED] with [REDACTED]" and a [REDACTED] "*made with pins, fabric and styrofoam*".

Legislation and Guidelines

7. The primary legislation and guidelines applicable to this appeal are set out in full in Appendices 1 and 2 to this Determination. What follows hereunder is a summary of the parts therein that are of particular relevance to this appeal.
8. Section 195 of the TCA 1997 exempts from income tax certain earnings of writers, composers and artists that would otherwise be chargeable to tax under Case II of Schedule D. The exemption relates to types of works, including "*sculptures*" and "*paintings or other like pictures*", by such persons that are both "*original and creative*" and of "*cultural or artistic merit*".
9. Section 195(12) of the TCA 1997 prescribes that the Arts Council and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media of Ireland shall together draw up guidelines ("the Guidelines") so as to determine what constitutes a work that is original and creative and of cultural or artistic merit.

10. The Guidelines drawn up provide that a work shall be classed 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.”

11. The Guidelines provide that a work shall be classed 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.”

12. The Guidelines further provide that 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.”

13. Lastly for the purposes of this determination, the Guidelines provide that the following shall not be regarded as being original and creative and of cultural or artistic merit:-

“[...] types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes”

Submissions

Appellant

14. The following is a summary of the Appellant’s arguments contained in her Notice of Appeal and Statement of Case.

15. The Appellant submitted that her works were both original and creative, being the product of her own imagination. In relation to their cultural or artistic merit, she emphasised that they were in great part made from Irish ██████ which was a material of high quality that was held in high regard in Ireland and internationally. She said that her work was attractive to a wide range of purchasers but, in particular, to persons from the United States. Cultural and artistic merit she submitted was in the eye of the purchaser of her works. She challenged the view that she might be refused the artist’s exemption on the grounds that her works could be seen as “decorative” in nature. In her Notice of Appeal she posed the rhetorical question as to whether all art is, in one way or another, decorative. This being so it was unfair to refuse her the right to avail of the artist’s exemption in respect of earnings from the sale of the works. The Appellant submitted that she was using her best endeavours to bring money into the State and she should not be penalised for this by way of the refusal of her claim.

Respondent

16. The Respondent submitted that the works of the Appellant were not original and creative and of cultural or artistic merit.
17. With particular regard to cultural merit, the Respondent argued that the Guidelines created by the Minister in conjunction with the Arts Council, which pursuant to section 195(13) of the TCA 1997 it and the Commissioner were bound to follow, made clear that a work could only be defined as having such merit *“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.”* It was submitted that the Appellant’s works did not mark a significant enhancement of national or international culture.
18. Likewise, the Appellant’s work could not be defined as having artistic merit as it did not *“enhance to a significant degree the canon of work in the relevant category”* [i.e. works of sculpture and/or paintings or other like pictures].

Material Facts

19. The facts material to this appeal were as follows:-

- the Appellant is a person who creates works, primarily out of [REDACTED] but also out of other materials, including clay;
- as part of her appeal documents the Appellant submitted images of her works. These images showed works entitled “[REDACTED] with [REDACTED] made from Irish [REDACTED]”, “[REDACTED] with a [REDACTED] “Irish [REDACTED] made with Irish [REDACTED]”, “[REDACTED] made with Irish [REDACTED]”, “[REDACTED] moulded on a [REDACTED] made with Irish [REDACTED]” “[REDACTED] with [REDACTED] and a “[REDACTED] made with pins, fabric and styrofoam”.
- the Appellant submitted an artist’s exemption claim to the Respondent on 19 January 2022;
- on 24 February 2022 the Respondent issued a decision in which it refused to make a determination that the Appellant was entitled to avail of the artist’s exemption;
- the Appellant appealed the Respondent’s refusal to the Commission.

Analysis

20. The question that arises in this appeal is whether the works that the Appellant has exhibited as part of her appeal are original and creative and have cultural or artistic merit, such that the earnings made therefrom can be exempted from income tax under the artist's exemption scheme.
21. At the outset of this part of the determination the Commissioner wishes to stress that this decision is not a comment on the inherent quality of the Appellant's work or the skill needed to produce it. All that must be assessed is whether the work falls within the parameters of the legislation.
22. The Respondent, in consultation with the Arts Council, based its decision primarily on two grounds. First it decided that the works provided were not "original and creative". The Commissioner is satisfied on balance that this conclusion was in error. To his eye the works were unique, possessed of a creative quality and born out of the Appellant's own imagination.
23. Were originality and creativity the only requirements that had to be met to avail of the exemption, the Commissioner would find in her favour. However, the legislation, which he is bound to follow, requires that a second condition be met. This is that the works have either cultural or artistic merit. It must also be repeated that section 195(13) of the TCA 1997 requires the Commissioner to adhere to the Guidelines drawn up by the Minister and the Arts Council, which elaborate on what is meant by "*cultural merit*" and "*artistic merit*".
24. With regard to what is to be held to have cultural merit, the Guidelines prescribe that a work must enhance "*to a significant degree*" one or more aspects of national or international culture. In the Commissioner's view the aforementioned images of the works produced in accompaniment to this appeal do not suggest that they have such an enhancing effect. The fact alone that they are made from Irish █████ is not sufficient in this respect. On the evidence of the work proffered in support of the Appellant's appeal, the Commissioner finds himself in agreement with the view expressed by the Arts Council in this context.
25. With regard to whether they are of artistic merit, the Guidelines prescribe, in similar fashion, that the works must only be so defined if they enhance "*to a significant degree the canon of work in the relevant category*". The works produced to the Commissioner for consideration are, for the most part, sculptures, although in her grounds of appeal in the Notice of Appeal, the Appellant suggested they fall within the meaning of a "*painting or*

other like works". However they might be defined, the Commissioner again finds himself in agreement with the view expressed by the Arts Council that the Appellant's work does not enhance the canon of either painting (or similar works) or sculpture. This definition of artistic merit would exclude many a work done by a capable and skilled person. It is no criticism of the Appellant whatever to find, as the Commissioner does as a fact material to the determination of this appeal, that the works exhibited as part of the Notice of Appeal do not enhance the broad canons of painting and sculpture to the "*significant degree*" necessary to avail of the exemption.

26. Finally, with particular regard to the image of the [REDACTED] submitted by the Appellant, this is in the Commissioner's view a work that may be described as decorative in nature. The Guidelines prescribe that earnings from works that can be so defined must fall outside the scope of the exemption. As such, it is a further reason why the Appellant's appeal must fail and the Respondent's decision to refuse to make a determination pursuant to the powers conferred on it by section 195(5) of the TCA 1997 must stand affirmed.

Determination

27. The Commissioner determines that the decision of the Respondent to refuse to make a determination that the Appellant is entitled to avail of the artist's exemption on the taxation of earnings from the works submitted as part of this appeal must stand affirmed. The Commissioner appreciates that this determination is likely to be disappointing to the Appellant. He wishes only to repeat again that the reasons given in no way reflect on the quality of the Appellant's work or the skills of craftsmanship which it is evident she has mastered to a high level.
28. 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

29. 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

30. 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.



Conor O'Higgins
Appeal Commissioner
27 October 2023

APPENDIX 1

The provisions of Section 195 of TCA 1997, as they were as of the date of the application for exemption, provided as follows:-

“(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, and not resident elsewhere, or

(II) ordinarily resident and domiciled in one or more Member States, or in another EEA state, 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 €40,000 for the year of assessment 2011 and each subsequent year of assessment.

(b) The exemption authorised by this section shall not apply for any year of assessment before the year of assessment in which the individual concerned makes a claim under clause (I) or (II) of subsection (2)(a)(ii) in respect of which the Revenue Commissioners make a determination referred to in clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(c) The relief provided by this section may be given by repayment or otherwise.

(4)(a) Where an individual makes a claim to which subsection (2)(a)(ii)(I) relates, the Revenue Commissioners may serve on the individual a notice or notices in writing requesting the individual to furnish to them within such period as may be specified in the notice or notices such information, books, documents or other evidence as may appear to them to be necessary for the purposes of a determination under subsection (2)(a)(ii)(I).

(b) Where an individual makes a claim to which subsection (2)(a)(ii)(II) relates, the individual shall –

(i) in the case of a book or other writing or a play or musical composition, if the Revenue Commissioners so request, furnish to them 3 copies, and

(ii) in the case of a painting or other like picture or a sculpture, if the Revenue Commissioners so request, provide, or arrange for the provision of, such facilities as the Revenue Commissioners may consider necessary for the purposes of a determination under subsection (2)(a)(ii)(II) (including any requisite permissions or consents of the person who owns or possesses the painting, picture or sculpture).

(5) The Revenue Commissioners may serve on an individual who makes a claim under subsection (3) a notice or notices in writing requiring the individual to make available within such time as may be specified in the notice all such books, accounts and documents in the individual's possession or power as may be requested, being books, accounts and documents relating to the publication, production or sale, as the case may be, of the work in respect of the profits or gains of which exemption is claimed.

(6)(a) In this subsection, "relevant period" means, as respects a claim in relation to a work or works or a particular work, the period of 6 months commencing on the date on which a claim is first made in respect of that work or those works or the particular work, as the case may be.

(b) Where –

(i) an individual –

(I) has made due claim (in this subsection referred to as a "claim") to the Revenue Commissioners for a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works or a particular work, as the case may be, that the individual has written, composed or executed, as the case may be, solely or jointly with another individual, and

(II) as respects the claim, has complied with any request made to the individual under subsection (4) or (5) in the relevant period, and

(ii) the Revenue Commissioners fail to make a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to the claim in the relevant period, the individual may [appeal to the Appeal Commissioners, in accordance with section 949], within the period of 30 days after the end of the relevant period] on the grounds that –

(a) the work or works is or are generally recognised as having cultural or artistic merit, or

(b) the particular work has cultural or artistic merit, as the case may be.

(7) The Appeal Commissioners shall hear and determine an appeal made to them under subsection (6) as if it were an appeal against an assessment to income tax and, subject to subsection (8), the provisions of the Income Tax Acts relating to such appeals and to the rehearing of such an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications.

(8)(a) On the hearing of an appeal made under subsection (6), the Appeal Commissioners may

(i) after consideration of –

(I) any evidence in relation to the matter submitted to them by or on behalf of the individual concerned and by or on behalf of the Revenue Commissioners, and

(II) in relation to a work or works or a particular work, the work or works or the particular work, and

(ii) 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 that the individual concerned has written, composed or executed, as the case may be, either solely or jointly with another individual –

(A) a work or works generally recognised as having cultural or artistic merit, or

(B) a particular work which has cultural or artistic merit,

and, where the Appeal Commissioners so determine, the individual shall be entitled to relief under subsection (3)(a) as if the determination had been made

by the Revenue Commissioners under clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(9) For the purposes of the hearing or rehearing of an appeal made under subsection (6), the Revenue Commissioners may nominate any of their officers to act on their behalf.

(10) For the purposes of determining the amount of the profits or gains to be disregarded under this section for the purposes of the Income Tax Acts, the Revenue Commissioners may make such apportionment of receipts and expenses as may be necessary.

(11) Notwithstanding any exemption provided by this section, the provisions of the Income Tax Acts regarding the making by the individual of a return of his or her total income shall apply as if the exemption had not been authorised.

(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.

(b) Without prejudice to the generality of paragraph (a), a guideline under that paragraph may

–

(i) consist of a specification of types or kinds of works that are not original and creative or that have not, or are not generally recognised as having, cultural or artistic merit, including a specification of works that are published, produced or sold for a specified purpose, and

(ii) specify criteria by reference to which the questions whether works are original or creative and whether they have, or are generally recognised as having, cultural or artistic merit are to be determined.

(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), and

(ii) a rehearing by a judge of the Circuit Court of an appeal mentioned in subparagraph (i) and, to the extent necessary, to the determination by the High Court of any question of law arising on such an appeal or rehearing and specified in the statement of a case for the opinion of the High Court, by the Appeal Commissioners or, as the case may be, a judge of the Circuit Court.

(14) Where a determination has been or is made under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works of a person, subsection (3)(a) shall not apply to any other work of that person that is in the same category as such work or works and is or was first published, produced or sold on or after the 3rd day of May, 1994, unless that other work is one that complies with the guidelines under subsection (12) for the time being in force and would qualify to be determined by the Revenue Commissioners as an original or creative work and as having, or being generally recognised as having, cultural or artistic merit.

(15) On application to the Revenue Commissioners in that behalf by any person, the Revenue Commissioners shall supply the person free of charge with a copy of any guidelines under subsection (12) for the time being in force.

(16) (a) The Revenue Commissioners may publish, or cause to be published, the name of an individual who is the subject of a determination under subsection (2).

(b) Publication under paragraph (a) may, as appropriate, include the title or category of the work of an individual.”

APPENDIX 2

“Guidelines drawn up under Section 195(2) of the Taxes Consolidation Act 1997 for the Artists Exemption Scheme by An Comhairle Ealaion and the Minister for Arts, Heritage and the Gaeltacht.

Introduction

These Guidelines have been drawn up under the provisions of Section 195 of the Taxes Consolidation Act 1997 for the purposes of determining 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.

General

1. Section 195(1) provides that a “work” for the purposes of the Section must be both an original and creative work in one of the following categories, namely:

- (a) a book or other writing,*
- (b) a play,*
- (c) a musical composition,*
- (d) a painting or other like picture,*
- (e) a sculpture.*

2. To secure exemption under Section 195, a work must be determined by the Revenue Commissioners to be a work which is both original and creative and a work which has, or is generally recognised as having, either cultural or artistic merit.

3. In making a determination under Section 195, the Revenue Commissioners may, as provided for in that Section, consult with such person or body of persons as may, in their opinion, be of assistance to them.

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.

Criteria for Non-fiction Work

7. (1) This paragraph specifies criteria, in accordance with subsection (12)(b)(ii) of Section 195, by reference to which the questions whether a work, being a nonfiction book or other nonfiction writing, is original and creative and whether it has, or is generally recognised as having, cultural or artistic merit are to be determined.

(2) The criteria are:

(a) that the work, in the opinion of the Revenue Commissioners, following consultation with the Arts Council, is a work in one or more of the following categories:

(i) arts criticism,

(ii) arts history,

(iii) arts subject work, being a work the subject matter of which is, or is any combination of, visual arts, theatre, literature, music, dance, opera, film, circus or architecture,

(iv) artists' diaries,

(v) belles-lettres essays,

(vi) literary translation,

(vii) literary criticism,

(viii) literary history,

(ix) literary diaries,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(b) that the work, in the opinion of the Revenue Commissioners, is a work in one of the following categories:

(i) a biography,

(ii) an autobiography,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on the person or by changing the generally accepted understanding of the person, or

(c) that the work, in the opinion of the Revenue Commissioners following consultation with the Heritage Council,

(i) is a work related to a function or functions of the Heritage Council as described in the Heritage Act 1995, and

(ii) incorporates the author's unique insight into the subject matter and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(d) that the work, in the opinion of the Revenue Commissioners, relates to archives which are more than 30 years old relating to Ireland or Irish people, is based largely on research from such archives, incorporates the author's unique insight into the subject matter, and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it, or

(e) any combination of (a), (b), (c) or (d) above.

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 subparagraphs (i) to (vi) below –

(i) a book or other writing published primarily for, or which is or will be used primarily by-

(I) students pursuing a course of study, or

(II) persons engaged in any trade, business, profession, vocation or branch of learning as an aid to trade or business-related practice, or to professional, vocational or other practise in connection with a trade, business, profession, vocation or branch of learning,

(ii) any work of journalism, published in a newspaper, journal, magazine, or other similar medium or published on the internet or on any other similar medium,

(iii) any writing, visual or musical work, or other like work, created for advertising or publicity purposes,

(iv) any arrangement, adaptation or version of musical composition, or other like work, which is not of such musical significance as to amount to an original composition,

(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes,

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