AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

47TACD2024

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is a consolidated appeal to the Tax Appeals Commission (hereinafter the "Commission") pursuant to and in accordance with the provisions of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997") brought on behalf of [redacted] (hereinafter the "the Appellant") against Notices of Amended Assessment to Corporation Tax issued by the Revenue Commissioners (hereinafter the "Respondent") in respect of the accounting periods ending [redacted] 2010 to [redacted] 2016 inclusive (hereinafter the "Relevant Periods").

2. In calculating its adjusted taxable trading income for the Relevant Periods, the Appellant treated as a deductible expense certain foreign Royalty Withholding Tax (hereinafter "RWHT") incurred in the course of business conducted in certain jurisdictions. The Respondent does not agree with the manner in which the Appellant treated the RWHT incurred.

3. As a result, the Respondent raised Notices of Amended Assessment for the Relevant Periods which disallowed the RWHT incurred by the Appellant during the Relevant Periods as a deductible expense.

4. The total amount of RWHT which was disallowed by the Respondent is €27,824,379.

5. The amount of tax in dispute is €4,984,363.

6. The oral hearing of this appeal took place over two days commencing on 23 January 2023.

7. The Appellant was represented by Senior Counsel and the Respondent was represented by Senior Counsel and Junior Counsel.

Background

8. The Appellant is an Irish registered and tax resident company whose principal activity consists of the [redacted]. The Appellant's revenue stream from its principal activity comprises of a number of different elements which include [redacted].

9. In carrying out its principal activity, the Appellant [redacted] (hereinafter "Licensees") which are tax resident in foreign jurisdictions. Licensees in a number of those foreign jurisdictions deduct RWHT at source in accordance with local withholding tax rules.

10. Where a Licensee deducts RWHT in accordance with local tax rules, they provide the Appellant with a deduction certificate which evidences the payment of the RWHT to the foreign tax authority.

11. During the Relevant Periods, the Appellant licenced its technology solutions to Licensees which were resident in various overseas territories outside of North America and Mexico. The Appellant does not have a branch or permanent establishment for the purposes of Corporation Tax in any of the overseas territories where the Licensees who withhold RWHT are tax resident.

12. In each of the Relevant Periods, the Appellant was in receipt of foreign source royalties in respect of the licenced technology solutions from (i) customers in countries with which Ireland is a party to a Double Taxation Treaty (hereinafter "treaty countries) and also from (ii) customers in countries with which Ireland is not a party to a Double Taxation Treaty (hereinafter "non-treaty countries").

13. Table A below sets out the total amount of RWHT incurred by the Appellant during the Relevant Periods and the amount, if any, of deduction for an element of the RWHT incurred which has been allowed by the Respondent. Table A also shows the net withholding tax incurred in the Relevant Periods for which the Respondent has disallowed a tax deduction. This is the subject of this appeal:

Table A				
Accounting Period ending	RWHT claimed by Appellant ($)	RWHT Allowed by Respondent ($)	Net RWHT disallowed by Respondent ($)	Net RWHT disallowed by Respondent (€)
[redacted] (FY2010)	$4,934,406	$114,267	$4,820,139	€3,554,937
[redacted] (FY2011)	$4,481,194	$143,196	$4,337,998	€3,111,460
[redacted] (FY2012)	$6,707,445	$0	$6,707,445	€5,168,718
[redacted] (FY2013)	$2,397,389	$0	$2,397,389	€1,827,278

[redacted] (FY2014)	$6,803,597	$0	$6,803,597	€5,015,922
[redacted] (FY2015)	$5,973,976	$287,578	$5,686,398	€4,951,583
[redacted] (FY2016)	$4,659,648	$0	$4,659,648	€4,194,480
Total	$35,957,655	$545,041	$35,412,614	€27,824,379

14. Table B below sets out the division of RWHT received by the Appellant during the Relevant Periods into receipts from treaty countries and from non-treaty countries:

Table B			
Accounting Period ending	RWHT withheld in treaty countries €	RWHT withheld in non-treaty countries €	Total €
[redacted] (FY2010)	332,677	3,222,260	3,554,937
[redacted] (FY2011)	293,209	2,818,251	3,111,460
[redacted] (FY2012)	153,940	5,014,778	5,168,718
[redacted] (FY2013)	339,493	1,487,785	1,827,278
[redacted] (FY2014)	595,725	4,420,197	5,015,922
[redacted] (FY2015)	835,715	4,115,868	4,951,583
[redacted] (FY2016)	640,735	3,553,745	4,194,480
Total	3,191,494	24,632,884	27,824,378

15. The Appellant was not in a Corporation Tax payable position for the Relevant Periods. This was due to the Appellant's Corporation Tax liability for the accounting periods ending [redacted] 2010 and [redacted] 2011 being fully offset by Research and Development (hereinafter "R&D") tax credits and the Appellant's taxable profits arising in the other accounting periods being fully sheltered by relevant trade charges and or R&D tax credits.

16. In calculating its adjusted taxable trading income for the Relevant Periods, the Appellant claimed a tax deduction for the RWHT incurred as set out in Table A.

17. The Respondent have denied a tax deduction for the RWHT incurred by the Appellant as set out in Table A and as a result raised the following Notices of Amended Assessment to Corporation Tax. The Notices of Amended Assessment reflected the disallowed deduction of RWHT claimed by the Appellant in its annual returns to the Respondent for the Relevant Periods:

Accounting Period ending	Amount Disallowed €
[redacted] (FY2010)	3,554,937
[redacted] (FY2011)	3,111,460
[redacted] (FY2012)	5,168,278
[redacted] (FY2013)	1,827,278
[redacted] (FY2014)	5,015,922
[redacted] (FY2015)	4,951,583
[redacted] (FY2016)	4,194,480
Total	27,824,378

18. The Appellant has appealed the Notices of Amended Assessment for the Relevant Periods issued by the Respondent.

Legislation and Guidelines

19. The legislation relevant to the within appeal is as follows:

Section 76A of the TCA1997:

> *"Computation of profits or gains of a company – accounting standards.*
>
> *(1)For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.*
>
> *(2)Schedule 17A shall apply to a company as respects any matter related to the computation of income of the company where as respects that matter—*
>
> > *(a)for an accounting period profits or gains of a trade or profession carried on by the company are computed in accordance with relevant accounting standards (within the meaning of that Schedule), and*
> >
> > *(b)for preceding accounting periods profits or gains of a trade or profession carried on by the company are computed in accordance with standards other than relevant accounting standards (within the meaning of that Schedule).*
>
> *(3)(a)In this subsection—*
>
> > *(i)'accounting policy', 'a change in accounting policy', 'accounting standard', 'retrospective' and 'opening reserves' shall be construed in accordance with generally accepted accounting practice;*
> >
> > *(ii)"relevant period" means the accounting period beginning on the first day of the period of account in which the change in accounting policy, referred to in paragraph (b), is adopted for the first time.*
>
> *(b)This subsection shall apply to a change in accounting policy other than on the adoption of—*
>
> > *(i)an accounting standard for the first time, or*
> >
> > *(ii)an amendment of an accounting standard for the first time.*

(c)Subject to the Tax Acts, an amount representing the retrospective effect of a change in accounting policy which is recognised in opening reserves (howsoever designated) for a period of account in accordance with generally accepted accounting practice shall be taxable or deductible, as the case may be, in computing the profits or gains of a company for the relevant period for the purposes of Case I or II of Schedule D.

(d)An amount shall not be regarded by virtue of paragraph (c) as deductible in computing the profits or gains of a company for the relevant period for the purposes of Case I or II of Schedule D to the extent that—

(i)a deduction has been made in respect of that amount in computing such profits or gains for a previous accounting period, or

(ii)the company has benefited from a tax relief under any provision in respect of that amount for a previous accounting period.

(e)An amount shall not be regarded by virtue of paragraph (c) as taxable in computing the profits or gains of a company for the relevant period for the purposes of Case I or II of Schedule D to the extent that the amount was treated as taxable in computing such profits or gains for a previous accounting period.

(f)References to profits or gains in paragraphs (c), (d) and (e) include references to losses.

…"

Section 77 of the TCA1997:

"*Miscellaneous Special Rules for the Computation of income*

…

(6B) (a) In this subsection—

*"*amount of the income referable to the relevant royalties*" shall be construed in accordance with paragraph 9DB(1)(b)(ii) of Schedule 24;*

*"*relevant foreign tax*" and "*relevant royalties*" have the same meanings, respectively, as in paragraph 9DB(1)(a) of Schedule 24.*

(b)Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties, the amount of the income referable to the relevant royalties shall be treated as

reduced (where such a deduction cannot be made under, and is not forbidden by, any provision of the Income Tax Acts applied by the Corporation Tax Acts) by so much of the relevant foreign tax in relation to the relevant royalties as does not exceed that amount of the income referable to the relevant royalties."

Section 81 of the TCA1997:

"*General rule as to deductions*

(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts

(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—

(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;

…"

Section 826 of the TCA1997:

"*Agreements for relief from double taxation, inter alia provides:-*

Where the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to affording relief from double taxation in respect of –

(a) income tax;

(b) corporation tax in respect of income and chargeable gains;

(c) any taxes of a similar character imposed by the laws of the State or by the laws of that territory; and that it is expedient that those arrangements should have the force of law, then, subject to this section and sections 168 and 833 to 835 , the arrangements shall, notwithstanding any enactment other than section 168 , have the force of law

Schedule 24 shall apply where arrangements which have the force of law by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the State."

Schedule 24 of the TCA1997 - Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, Paragraph 2, General:

"*(1) Subject to this schedule, where under the arrangements credit is to be allowed against any of the Irish taxes chargeable in respect of any income, the amount of the Irish taxes so chargeable shall be reduced by the amount of the credit.*

(2) In the case of any income within the charge to corporation tax, the credit shall be applied in reducing the corporation tax chargeable in respect of that income.

(2A)In the case of any income within the charge to income tax, the credit shall be applied first in reducing the income tax chargeable in respect of that income.

(3)Nothing in this paragraph shall authorise the allowance of credit against any Irish tax against which credit is not allowable under the arrangements."

Schedule 24 of the TCA1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, Paragraph 4, Limit on total credit— Corporation Tax:

"*(1) The amount of the credit to be allowed against corporation tax for foreign tax in respect of any income shall not exceed the corporation tax attributable to that income.*

(2) For the purposes of this paragraph, the corporation tax attributable to any income or gain (in this subparagraph referred to as "that income" or "that gain", as the case may be) of a company shall, subject to subparagraphs (4) and (5), be the corporation tax attributable to so much (in this paragraph referred to as "the relevant income" or "the relevant gain", as the case may be) of the income or chargeable gains of the company computed in accordance with the Tax Acts and the Capital Gains Tax Acts, as is attributable to that income or that gain, as the case may be.

(2A) For the purposes of subparagraph (2), where credit is to be allowed against corporation tax for foreign tax in respect of any income of a company (in this subparagraph referred to as 'that income'), being income (other than income from a trade carried on by the company through a branch or agency in a territory other than the State) which is taken into account in computing the profits or gains of a trade carried on by the company in an accounting period, the relevant

income shall be so much of the profits or gains of the trade for that accounting period as is determined by the formula—

P x I/R

where—

P is the amount of the profits or gains of the trade for the accounting period before deducting any amount under paragraph 7(3)(c),

I is the amount of that income for the accounting period before deducting any disbursements or expenses of the trade, and

R is the total amount receivable by the company in the carrying on of the trade in the accounting period."

Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, Paragraph 7, Effect on computation of income of allowance of credit:

"(1) Where credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income, this paragraph shall apply in relation to the computation for the purposes of income tax or corporation tax of the amount of that income.

(2) Where the income tax or corporation tax payable depends on the amount received in the State, that amount shall be treated as increased by the amount of the credit allowable against income tax or corporation tax, as the case may be.

Where subparagraph (2) does not apply –

(a) no deduction shall be made for foreign tax (whether in respect of the same or any other income), and

(b) where the income includes a dividend and under the arrangements foreign tax not chargeable directly or by deduction in respect of the dividend is to be taken into account in considering whether any, and if so what, credit is to be allowed against the Irish taxes in respect of the dividend, the amount of the income shall be treated as increased by the amount of the foreign tax not so chargeable which is to be taken into account in computing the amount of the credit, but

(c) *notwithstanding anything in clauses (a) and (b), where any part of the foreign tax in respect of the income (including any foreign tax which under clause (b) is to be treated as increasing the amount of the income) cannot be allowed as a credit against either income tax or corporation tax, the amount of the income shall be treated as reduced by that part of that foreign tax, but, for the purposes of corporation tax, the amount by which the income is treated as reduced by that part of the foreign tax shall not exceed the amount of income which would be the amount referred to in paragraph 4 as "the relevant income", taking account of the provisions of subparagraphs (2) and (2A) of that paragraph.*

(4)In relation to the computation of the total income or the adjusted income, as the case may be, of a person for the purpose of determining the rate mentioned in paragraph 5, subparagraphs (1) to (3) shall apply subject to the following modifications:

(a) for the reference in subparagraph (2) to the amount of the credit allowable against income tax there shall be substituted a reference to the amount of the foreign tax in respect of the income (in the case of a dividend, foreign tax not chargeable directly or by deduction in respect of the dividend being disregarded), and

(b) clauses (b) and (c) of subparagraph (3) shall not apply,

and, subject to those modifications, shall apply in relation to all income in the case of which credit is to be allowed for foreign tax under any arrangements."

Schedule 24 of the TCA1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 9DB, Unilateral Relief (royalty income):

"*(1) (a) In this paragraph-*

"relevant foreign tax", in relation to royalties receivable by a company, means tax—

(i) which under the laws of any foreign territory has been deducted from the amount of the royalty,

(ii) which corresponds to income tax or corporation tax,

(iii) which has not been repaid to the company,

(iv) for which credit is not allowable under arrangements, and

(v) which, apart from this paragraph, is not treated under this Schedule as reducing the amount of income.

"relevant royalties" means royalties receivable by a company-

(i) which fall to be taken into account in computing the trading income of a trade carried on by the company, and

(ii) from which relevant foreign tax is deducted.

"royalties" means payments of any kind as consideration for-

(i) the use of, or the right to use-

(I) any copyright of literary, artistic, or scientific work, including cinematograph films and software,

(II) any patent, trade mark, design or model, plan, secret formula or process,

or

(ii) information concerning industrial, commercial or scientific experience.

(b) For the purposes of this paragraph—

(i) the amount of corporation tax which apart from this paragraph would be payable by a company for an accounting period and which is attributable to an amount of relevant royalties shall be an amount equal to 12.5 per cent of the amount by which the amount of the income of the company referable to the amount of the relevant royalties exceeds the relevant foreign tax, and

(ii) the amount of any income of a company referable to an amount of relevant royalties in an accounting period shall, subject to paragraph 4(5), be taken to be such sum as bears to the total amount of the trading income of the company for the accounting period before deducting any relevant foreign tax the same proportion as the amount of relevant royalties in the accounting period bears to the total amount receivable by the company in the course of the trade in the accounting period.

(2)Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties,

the amount of corporation tax which, apart from this paragraph, would be payable by the company for the accounting period shall be reduced by so much of 87.5 per cent of any relevant foreign tax borne by the company in respect of relevant royalties in that period as does not exceed the corporation tax which would be so payable and which is attributable to the amount of the relevant royalties.

(4) Where, as respects any relevant royalties received in an accounting period by a company, any part of the foreign tax cannot, due to an insufficiency of income, be treated as reducing income under paragraph 7(3)(c) or under section 77(6B), then the amount which cannot be so treated shall, for the purposes of this paragraph, be unrelieved foreign tax.

(5) Where, as respects an accounting period, a company is in receipt of royalties from persons not resident in the State and such royalties are taken into account in computing the trading income of a trade carried on by the company, the company may—

(a) reduce the income (in this subparagraph referred to as "royalty income") referable to any unrelieved foreign tax and

(b) allocate such reductions in such amounts and to such of its royalty income for that accounting period as it sees fit.

(6) The aggregate amount of reductions under subparagraph (5) in an accounting period cannot exceed the aggregate of the unrelieved foreign tax in respect of all relevant royalties for that accounting period."

Submissions and Evidence

Appellant's Witness Evidence

20. The following is a summary of the witness evidence adduced by both Parties at the oral hearing.

Witness Evidence 1 – [redacted]

21. The following is a summary of the direct evidence adduced to the Commissioner by [redacted] (hereinafter "Witness 1") who is a Chartered Accountant and is the Finance Director of the Appellant having joined the Appellant in [redacted].

22. Witness 1 stated that the Appellant sells [redacted]. He stated that the Appellant sells its products through channel partners. This, he stated, involves the Appellant selling its products to distributors, of which there are less than 100 internationally, and then onwards to a network of resellers which are based in various countries. He stated that the Appellant sells its products internationally to a wide range of countries in Europe and the Asia-Pacific region. He stated that historically, the Appellant also sold products in the Caribbean and Latin America (hereinafter "CALA").

23. Witness 1 stated that RWHT is levied on sales into Asia-Pacific and CALA countries, RWHT. He stated that RWHT is calculated on the gross invoice price. He stated that the Appellant has no choice but to incur the cost of RWHT in the countries where it is levied. He stated that there is no scope in the Appellant's pricing system to make allowances for RWHT as the prices which are charged are retail prices and are subject to significant competition. He stated that RWHT is ultimately a cost of doing business in those jurisdictions.

24. He stated that, in the contracts which the Appellant enters into with resellers and others, there is provision for RWHT and this ultimately reduces the amount of income which the Appellant receives for such sales.

25. He stated that, when a sale which is subject to RWHT is made, the customer will have credit terms of 90 days within which time they must pay the Appellant. In addition, customers must produce a RWHT certificate to the Appellant which confirms the amount of RWHT which has been paid to the relevant tax jurisdiction. He stated that the gross sale amount is booked as a receivable to the Profit & Loss account and the RWHT certificate amount, when received, is booked to the Profit & Loss account as a tax expense.

26. Witness 1 stated that this mechanism of booking the gross sale amount and the RWHT amount is utilised by the Appellant on a worldwide basis. He stated that there are approximately [redacted] trading companies within the Appellant's company group which all operate off the same system and, therefore, a standardised approach in booking entries onto the Appellant's system is used. He stated that the inclusion of the RWHT amount in the tax line on the Profit & Loss account facilitates the preparation of accounts and comparison of accounts across the world-wide company and facilitates the preparation of consolidated accounts. In addition, he stated that the Appellant's accounts are prepared in accordance with the Generally Accepted Accounting Principle (hereinafter "GAAP") and

the Financial Reporting Standard Applicable in the UK and Ireland: FRS102 (hereinafter "FRS102").

Expert Evidence 1 – [redacted]

27. The following is a summary of the direct evidence adduced to the Commissioner by [redacted] (hereinafter "Expert 1") who is a Chartered Accountant, a partner in the firm of [redacted] and [redacted]. Expert 1 was retained by the Appellant to give expert evidence to the Commissioner.

28. Expert 1 stated that he had prepared a report following a review of the Appellant's business and activities at a high level and that report was submitted to the Commissioner.

29. Expert 1 gave the Commissioner a broad overview of the applicability of Generally Accepted Accounting Practice (hereinafter "Irish GAAP") standards and Financial Reporting Standards (hereinafter "FRS") to the completion of financial statements by companies, pointing out that since 2015 FRS102 has been applied in Ireland by accounting bodies and that prior to 2015 GAAP was the applicable accounting standard in Ireland. He stated that the reporting requirements under Irish company law differ from the requirements set out in both GAAP and/or FRS102.

30. He stated that, in relation to their interpretation, both GAAP and FRS102 accounting standards are written for the generality of companies and, in addition, both frameworks are considered to provide for principles rather than constituting a rules-based framework. He stated that where a transaction in a financial statement falls into the scope of a particular standard, then the prescriptive guidance in the applicable accounting standard (GAAP until 31 December 2014 and FRS102 from 1 January 2015) should be followed when preparing financial statements.

31. In his report, Expert 1 gave examples in relation to the application of guidance contained in accounting standards. In particular, he gave the example of a company incurring a significant amount of expenditure on a development project which meets the criteria in section 18 of FRS102. He stated that in such a situation, the expenditure amount incurred should be recognised as an asset in accordance with the guidance contained in section 18 of FRS102.

32. Similarly, Expert 1 stated, the guidance in section 21 of FRS102, relating to "provisions and contingencies", indicates whether a provision should be recognised in the financial

statements. If this is the case, he stated, then any judgement applied by the person completing the financial statements will be with respect to the measurement of the amount.

33. This, he stated, means that companies and auditors must bring an element of judgement to bear when preparing financial accounts / statements. He stated that the judgement required to be applied will extend to disclosures, in addition to determining the correct measurement of the amounts to be included in the financial statements.

34. Expert 1 stated that, in the financial statements which the Appellant prepared in accordance with FRS102 the Appellant recorded RWHT in the tax line of its financial statements.

35. He stated that current tax is considered to be the amount of tax payable in respect of taxable profit for the current or past reporting periods. Deferred tax, he stated, is the amount of tax payable in respect of taxable profit for future reporting periods as a result of past transactions or events.

36. He stated that section 29 of FRS102, which is entitled "*Income Tax*", provides the accounting requirements for income tax in financial statements. Specifically, he stated, section 29 of FRS102 provides guidance on how an entity should record current and deferred tax in financial statements.

37. In particular, Expert 1 pointed to the provisions of section 29.18 and section 29.19 of FRS102 which are collectively entitled "*Withholding tax on dividends*" and which state:

> "*29.18 When an entity pays dividends to its shareholders, it may be required to pay a portion of the dividends to taxation authorities on behalf of shareholders. Outgoing dividends and similar amounts payable shall be recognised at an amount that includes any withholding tax but excludes other taxes, such as attributable tax credits.*
>
> *29.19 Incoming dividends and similar income receivable shall be recognised at an amount that includes any withholding tax but excludes other taxes, such as attributable tax credits. Any withholding tax suffered shall be shown as part of the tax charge.*"

38. Expert 1 stated that section 29.18 of FRS102 provides guidance on withholding tax on dividends. He stated that it indicates that where an entity pays dividends to its shareholder and is required to withhold a portion of the dividend to be paid to the tax authorities on behalf of the shareholder, then the amount of such dividends should include the withholding tax when recognised in the financial statements. Expert 1 stated that section

29.19 of FRS102 contains guidance in relation to "similar income" which is called to be treated in the same manner as contained in section 29.18

39. He stated that sections 29.18 and 29.19 of FRS102 provide, for example, that the receipt of a dividend of €100 which has been the subject of a 20% withholding tax should be reported in a financial statement as being a receipt of €100 in addition to €20 being reported in the tax line / tax charge of the financial statement.

40. Expert 1 stated that, in his view, the use of the words "*similar income*" in section 29.19 of FRS102 refers to income which is passive in nature and akin to dividend income. He stated that section 29 of FRS102 does not deal with non-passive or trading income of a company.

41. Expert 1 stated that, in his opinion, income in the form of licence fees does not fall under the category of "similar income" as set out in sections 29.18 and 29.19 of FRS102. He stated that principles based accounting standards require that the standards are applied to the facts and circumstances of specific transactions of a particular entity. He stated that, given that the Appellant's trade was the provision of goods and related services and not the collection of passive royalty income, in his opinion, a reasonable approach would be that any deductions or adjustments which are related to a sales transaction should be considered in the context of the revenue recognition guidance in FRS102.

42. Section 23 of FRS102 is entitled "*Revenue*". Expert 1 stated that section 23.10 of FRS102 provides the criteria to be met in order to recognise revenue from the sale of goods. These criteria, he stated, include the requirement that the amount of revenue can be measured reliably and that it is probable that the benefits of the transaction (sales proceeds) flow to the entity. He stated that where it is known that an entity is selling goods to a third party at a list price and it is understood that they cannot recover the full amount of the list price, then it is reasonable (1) that the net amount should be recorded as revenue or (2) that the deduction should be recognised as an expense.

43. He stated that, in his opinion, if RWHT is recorded above the tax line in a financial statement, the question then becomes where in the profit and loss account it should be recorded. He stated that the two main headings for consideration for the inclusion of RWHT would either be Costs of Sales or Operating Expenses.

44. He stated that Costs of Sales is not a defined term in current accounting standards. He stated that in his experience, it is taken to be the calculation of opening stock, plus the cost of goods purchased, less closing stock. He stated that, regardless of the exact

definition of Costs of Sales, in his opinion Costs of Sales are considered to be the costs directly relating to the sale of a product as opposed to other expenses which might be related to the running of the business.

45. He stated that in his experience, deductions from the sales price of a transaction would not be included in Costs of Sales. Rather, he stated, such amounts would typically be recorded as another form of expense. As an example, Expert 1 stated that, if a sale later resulted in a bad debt, then that amount would be recorded as an Operating Expense. Similarly, he stated that, where a sale occurred in a foreign currency, a difference in exchange rates that would arise between the date of recognising the sale and date of the discharge of the debt by the debtor would be recorded as an Operating Expense.

46. He stated that it is his view that, given the nature of the principal activity of the Appellant, RWHT suffered by the Appellant appears economically to be a cost of doing business in a particular jurisdiction where the amount is not recoverable, as opposed to a tax which arises on taxable profits.

47. He stated that, his view that RWHT is a cost of doing business, is analogous to a commonly accepted treatment of the Research & Development tax credit in a set of financial statements prepared in accordance with FRS102. He stated that, as the Research & Development tax credit is not calculated by reference to taxable profits, it is not considered to be current tax. Economically, he stated, it is considered similar to a government grant or a refund related to the expenditure to which it relates. Accordingly, he stated, many companies record the credit, not in the tax line of their financial statements, but as a reduction in operating expenses.

48. As a result, he stated that the placing of RWHT in financial statements is a matter of judgement and that auditors and accountants will come to differing conclusions as to where it should rest. He stated that, given that RWHT is not expressly covered in FRS102, it is his opinion that RWHT is an expense and therefore has to be in the Profit & Loss account.

49. Expert 2 also give evidence to the Commissioner in relation to accounting treatment pursuant to GAAP in Ireland. Prior to the adoption of FRS102, guidance for current tax was contained in FRS16 "*Current Tax*".

50. He stated that the primary objective of FRS16 was to ensure that accounting for current tax arose in a consistent and transparent manner. He stated that paragraph 9 of FRS16 requires that incoming dividends, interest and other income receivable should be

recognised at an amount which is inclusive of withholding tax, with the corresponding debit side of the entry being recognised as part of the tax charge.

51. He further stated that, FRS16 provides a definition of withholding tax as well as one for a tax credit. This is to draw a distinction in the accounting for both items. He stated that the development of the accounting standard would indicate that the application of the guidance for withholding tax and tax credits arises in the context of incomes which may arise from the use of the entities underlying assets. He stated that the term "other income", whilst not formally defined, is taken to mean income other than that arising from an entity's turnover.

52. He stated that whilst the guidance contained in paragraph 9 of FRS16 ought to be applied to dividends, interest and other income, in his view it ought not be applied to income arising from sales or turnover. Similar to his view on FRS102, he stated that it may be more appropriate to apply the revenue recognition guidance to such transactions and any related deductions.

Expert Evidence 2 – [redacted]

53. The following is a summary of the direct evidence adduced to the Commissioner by [redacted] (hereinafter "Expert 2") who is [redacted]. Expert 2 was retained by the Respondent to give expert evidence to the Commissioner.

54. He stated that he had prepared a report following a review of the Appellant's business and activities at a high level and that report was submitted to the Commissioner. The question which he had been asked to consider in his report was whether the accounting treatment adopted by the Appellant in treating RWHT as a tax expense below the "*(Loss)/Profit on ordinary activities before taxation*" line in its financial statements is in accordance with GAAP and, in addition, whether it could also be treated as a Cost of Sale in terms of GAAP.

55. Expert 2 outlined an overview of GAAP and FRS102 which was in line with the overview outlined by Expert 1. Expert 2 stated that for the tax years up to 31 December 2014, GAAP was the relevant accounting standard which applied in Ireland with FRS102 applying from 1 January 2015. These, he stated, were the standards which the Appellant utilised in preparing its financial statements.

56. He stated that he agreed with Expert 1 that the only reference to withholding tax in FRS102 is set out in section 29.18 and 29.19. He stated that, in his opinion, these sections of FRS102 make it very clear that withholding tax is a tax. He stated that in many situations taxes can be recovered through Double Taxation Treaties but that sometimes it is not possible to recover taxes and they become irrecoverable. He stated that he does not see RWHT as being other than a tax charge.

57. He stated that definitions of income and expenses are provided in the Appendix Glossary to FRS102 which defines expenses as:

> "*Decreases in economic benefits during the reporting period in the form of outflows or depletions of assets or incurrences of liabilities that result in decreases in equity, other than those relating to distributions to equity investors.*"

58. Expert 2 stated that section 29.19 of FRS102 makes it very clear that withholding tax is a tax.

59. He stated that there is no mention of the words "passive" or "non-passive" in FRS102. In relation to phrase "similar income" contained in section 29.19 of FRS102, Expert 2 stated that there is no definition of "similar income" in FRS102. He stated that it is very hard to state exactly what would be outside "other similar income" and that "*To my view, it includes all income more or less. I can't see what it would mean outside the definition of 'other similar income'".*[1]

60. When asked by Senior Counsel for the Respondent whether he considered that the Appellant's financial statements are accurate and in compliance with FRS102, Expert 2 replied "*You can't say accurate, there's no such thing in accounting. But I'd certainly say they gave a true and fair view.*"[2]

61. In relation to section 23 of FRS102, Expert 2 stated that it deals with the recognition of revenue created and that is doe not relate to tax. He stated that the issue which arises is how to measure revenue. He stated that section 23.12 of FRS102 sets out examples of where revenue would not be recorded in full where a company has not performed satisfactorily; where sales were made contingent on further sales to a third party which have not yet taken place; where the sale of a product could be subject to installation or where a right to rescind a contract exists.

[1] Hearing transcript day 1, page 227, lines 21 to 23.
[2] Hearing transcript day 1, page 228, lines 5 to 7.

62. In relation to the recognition of royalties, he stated that in his opinion the correct method of recording an amount of €100 of invoiced royalties would be to record it as follows: €100 as a debtor and €100 as a sale. In circumstances where RWHT applies, he stated that the recording of the RWHT comes at a later stage by cancelling the debtor by €20 and writing the €20 off as a tax charge.

63. When asked by Senior Counsel for the Respondent, Expert 2 agreed that RWHT appears economically to be a cost of doing business in a particular jurisdiction where the amount is not recoverable, as opposed to a tax arising on taxable profits.

64. He stated that he very clearly sees RWHT as being required to be recorded in financial statements as a tax charge and that he does not agree that RWHT can be treated as an operating expense in financial statements.

Appellant's Submissions

65. The following is a summary of the submissions made to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

66. The Appellant submitted that RWHT is an expense incurred by it in earning income from its customers as part of its trade. The Appellant submitted that it could not have earned royalty income in the countries in question without incurring RWHT and permitting customers to deduct such sums from the license fees paid.

67. It was submitted that RWHT is levied by foreign Revenue Authorities on gross receipts (turnover) and takes no account of the actual profits earned to the extent that no consideration is given to the level of expenses incurred by the Appellant.

68. It was further submitted that RWHT is required to be deducted in order to be in conformity with the statutory obligations imposed by the foreign jurisdiction of the licensee and, as such, is an unavoidable expense.

69. It was submitted that RWHT represents a form of sales tax as it reduces the Appellant's income in a matter consistent with all the other costs which it incurs and therefore represents a necessary component of its trading cost base.

70. The Appellant submitted that RWHT incurred on royalty receipts earned in foreign countries is an expense incurred in selling its products in those countries. As RWHT is applied to gross receipts, the Appellant submitted, RWHT cannot be a tax on the profits of the trade. Instead, the Appellant submitted that RWHT is an unavoidable cost incurred

wholly and exclusively in carrying out its trade in such foreign jurisdictions. Economically, the Appellant compared RWHT as being similar to a payment processing fee incurred by a shopkeeper when a customer makes a payment using a credit card, which said fee is treated as a cost incurred wholly and exclusively in a business carrying out its trade.

71. The Appellant submitted that it is an established principle that a tax on the profits of a trade is not an expense of that trade, but that a tax incurred in carrying out a trade would usually be deductible. In this regard, the Commissioner was referred to the decision in *Harrods (Buenos Aires) v Taylor-Gooby* 41 TC 450 (hereinafter "*Harrods*"), wherein the Court held that *"it was an expense necessarily incurred by it in order to carry on its trade and was wholly and exclusively laid out for the purpose of the trade of the company*".

72. In *Harrods*, Diplock L.J. referred to the judgment of Lord Davey in *Strong & Co of Romsey Limited v Woodifield (Surveyor of Taxes)* 5 TC 215 (hereinafter "*Strong & Co.")* when he stated that "… '*for the purposes of the trade' … means for the purpose of enabling a person to carry on and earn profits in the trade… it is not enough that the disbursement is made out of profits of the trade*".

73. The Commissioner was further referred to the judgment of Budd J. in *MacAonghusa v Ringmahon* [2001] 2 IR 507 (hereinafter "*MacAonghusa*") wherein the decision in *Strong & Co.* was cited and endorsed.

74. The decision of *Smith v Lion Brewery Co. Ltd* [1911] AC 10 (hereinafter "*Smith v Lion*") was also referred to by the Appellant along with the decision in *Smith's Potato Estates v Bolland* 30 TC 267 (hereinafter "*Smith's Potato Estates Limited")*.

75. Reference was made to the decision of the *Hong Kong Inland Board of Review D43/91* [1991] 1 HKRC 80-154 (hereinafter the "*Hong Kong decision*") and to the determination of a former Appeal Commissioner in *08TACD2019* (hereinafter the "*2019 Determination*").

76. The Appellant submitted that the former Appeal Commissioner accepted in the *2019 Determination* that "…*it would be contrary to commercial and indeed tax provisions to artificially remove the element of that cost on the basis that part of that cost represented income tax*".

77. Reference was also made to the determination of a former Appeal Commissioner in *02TACD2018* (hereinafter the "*2018 Determination*"), which deals with the question of whether foreign withholding taxes on royalty income in a source state bears the nature of a tax on income. The Appellant in that appeal had argued that the withholding tax was not a tax on income, as it was levied on gross income rather than on profit. However, the

former Appeal Commissioner concluded that RWHT was in the nature of tax on income, as this was the basis upon which double tax relief was available under Ireland's Double Taxation Agreements and therefore, was not deductible under section 81 of the TCA1997. The former Appeal Commissioner in the *2018 Determination* agreed with the Revenue Commissioners that "…*it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts"*.

78. The *2019 Determination* follows the *Hong Kong decision*. In the *2019 Determination*, the former Appeal Commissioner accepted that "*…it would be contrary to commercial and indeed tax provisions to artificially remove the element of that cost on the basis that part of that cost represented income tax*". The former Appeal Commissioner concluded that while the parties agreed that dividend withholding tax was a tax on income, it was possible for a deduction to be permitted under section 81 TCA 1997, so long as the taxes were calculated prior to the ascertainment of profit.

79. The Appellant submitted that, in light of the jurisprudence, it must follow that the RWHT incurred on gross royalty receipts from foreign countries, is a deductible expense pursuant to section 81 of the TCA1997. The *Hong Kong decision* was not considered in the *2018 Determination*.

80. The Appellant submitted that Schedule 24 of the TCA1997, which is entitled "*Relief from Income Tax and Corporation Tax and is a means of credit in respect of Foreign Tax*", only becomes relevant if the Commissioner finds that the Appellant is not entitled to a deduction under Section 81 TCA 1997.

81. Reference was made to the Respondent's Tax and Duty Manual of September 2022 entitled "*Section 81: Deduction for Digital Services Taxes*", wherein it states that if a digital services tax is "*incurred wholly and exclusively for the purpose of a trade, Revenue is prepared to accept that they are deductible expenses in computing the income of that trade".*

Respondent's Submissions

82. [redacted].

83. The following is a summary of the submissions made to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

84. The Respondent submitted that foreign taxes paid by reference to royalty income received during the course of a trade are not monies "*laid out or expended for the purposes of the trade*". The Respondent submitted that taxes deducted in foreign jurisdictions in relation to sums received by way of royalties are in the nature of taxes on income profits and, therefore, are not monies laid out or expended for the purposes of the trade.

85. The Respondent disagreed with the Appellant's position that RWHT is universally imposed on gross royalty receipts. In particular, the Respondent referred in oral submissions to the situation in Argentina where the Respondent submitted that RWHT is calculated as being 35% on an assumed profit of 60%.

86. The Respondent submitted that, RWHT cannot be deducted as an expense for the purpose of Case 1 under section 81 of the TCA1997 as is not "*money wholly and exclusively laid out or expended for the purposes of the trade*".

87. The Respondent submitted that the decision in *Harrods* is authority for a charge incurred as a pre-condition to enter a market being a deductible expense. However, the Respondent submitted that, if a charge levied on a business or sale in any way fluctuates on the basis of an economic activity carried on, then it becomes a tax and is therefore not deductible.

88. In relation to the relevant case law the Respondent submitted the following:

89. The Respondent submitted that it relies on the *2018 Determination* and in particular paragraph 30 thereof where the former Appeal Commission stated:

> "*…[s]equence is an important aspect of this analysis. Expenses deductible for the purposes of s.81(2) are incurred in the course of a trade* ***prior*** *to the generation of income in the form of sales.*" [Emphasis added]

90. The Respondent also pointed to paragraph 31 of the *2018 Determination* where the former Appeal Commissioner referred to the oral submission by Senior Counsel for the Respondent as follows:

> "*…it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts. … So, when looked at in this light, and this is how Irish law says profits must be calculated, it is quite impossible*

to regard a tax on receipts as being expenditure laid out to earn those receipts. And the Revenue case is really that simple. I mean, this is a straightforward, logical impossibility."

91. The Respondent further pointed to paragraph 32 of the *2018 Determination*, where the former Appeal Commissioner went on to find that:

"*The fact that withholding tax is levied on a gross income figure in the foreign territories does not transform the tax into an expense or a tax deductible expense. The character of the foreign withholding tax is that it is in the nature of a tax on income. It is not a deductible expense. This finding is supported by an analysis of the case law below.*"

92. The Respondent relied on the decision of Scott J. in *Yates (Inspector of Taxes) v CGA International Limited* [1991] STC 157 (hereinafter "*Yates*") which is a decision of the Chancery division of the England and Wales High Court. *Yates* concerned the question as to whether a turnover tax levied under Venezuelan law was entitled to relief under the UK provisions relating to double tax relief. The Respondent submitted the *Yates* decision is of potential significance, in that it is an important recognition that a withholding tax may correspond to tax on income profits, even in circumstances where the authorities in the withholding country do not go about attempting to calculate the actual profits of the recipient.

93. The Respondent submitted that it is important point to note in relation to the *Harrods* case that the tax at issue in that case was charged, not on the basis of profits, or on the basis of income, but was charged entirely on the basis of certain capital of the company that was employed in the trade, and it was payable whether or not the company generated any income or made any profit at all.

94. In addition, the Respondent stated that it is of importance that in *Harrods*, non-payment of tax could result in different sanctions under Argentine law, one of which could result in the company being precluded from trading at all.

95. The Respondent referred to the case of *IRC v Dowdall O'Mahony* & Co. 33 TC 259 (hereinafter "*IRC v Dowdall*"), where the House of Lords determined that Irish taxes were not wholly and exclusively laid out for the purposes of the company's trade in the UK and

that no part of such taxes comprised an admissible deduction in computing its trading profits.

96. In *IRC v Dowdall* that case, both Lord Reid and Lord Radcliffe referred to the judgement of Lord Davey in *Strong & Co.* who considered the meaning of the words "for the purpose of the trade" as set out in the Income Tax Act, 1984, stating, in relation to the words “for the purpose of the trade”:

> "*… appears to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade.* ***It must be made for the purpose of earning the profits***." [Emphasis added]

97. The Respondent also referred to the decision of Finlay J in *Allen v Farquharson Bros & Co* 17 T.C. 59 (hereinafter “*Farquharson*”) where he considered that an expense of the trade:

> "*…means something or other which the trader pays out; I think some sort of volition is indicated. He chooses to pay out some disbursement; it is an expense….*"

98. The Respondent submitted that, the former Appeal Commissioner in the *2018 Determination* found that "*the unavoidable nature of the withholding tax renders it less likely to comprise a deductible expense due to the absence of the element of volition*"

99. The Respondent submitted that it fundamentally disagrees with the proposition that RWHT deducted in the source State from royalty income is an expense laid out wholly and exclusively for the purposes of the trade.

100. In summary, the Respondent submitted that it contends:

i. foreign withholding taxes on royalties are by their nature taxes on income;
ii. the fact that foreign withholding tax on royalties may be calculated as a percentage of the gross royalty does not mean that the tax is not in the nature of a tax on income profits; and

iii. withholding tax deducted from royalties is not an expense *'made for the purpose of earning the profits'* and so is not deductible in accordance with section 81 of the TCA1997.

101. The Respondent submitted that all RWHTs deducted by a source State, regardless of whether that State is one with which Ireland does or does not have a double tax treaty, are taxes on income.

102. The Respondent submitted that, as a matter of principle, RWHT is imposed because the income stream is taxable in the source State and the withholding tax mechanism is a means of discharging the relevant tax liability. The Respondent submitted that it is not relevant to know on what basis, or against what procedural background, RWHT is levied. The Respondent further submitted that it does not matter whether the source State concerned permits RWHT to be treated as a payment on account, or whether sums withheld can or cannot be reclaimed in particular circumstances.

103. The Respondent submitted that paragraph 7(3)(c) of Schedule 24 of the TCA1997 refers to income being "reduced by" non-creditable foreign tax rather than non-creditable foreign tax being deducted from income. The Respondent submitted that income cannot be reduced below zero and to allow otherwise would go beyond double tax relief into the realms of the Irish exchequer providing compensation for foreign tax. The Respondent submitted that this is the case regardless of whether income is to be construed as the Irish measure of the foreign income computed in accordance with the formula in paragraph 4(2A) of Schedule 24 of the TCA1997 or income as computed in accordance with normal tax principles, being income net of expenses and reliefs.

104. The Respondent further contended that, even if the quantum of reduction available under paragraph 7(3)(c) of Schedule 24 of the TCA1997 is not limited by reference to the Irish measure of the foreign income, it is limited to net income as calculated in accordance with the Taxes Acts, by virtue of Section 76 of the TCA1997.

Material Facts

Accepted material facts

105. The following material facts are not at issue in the within appeal and the Commissioner accepts same as material facts:

a) The Appellant is an Irish registered and tax resident company whose principal activity consists of [redacted].

b) The Appellant's revenue stream from its principal activity comprises of a number of different elements which include [redacted].

c) In carrying out its principal activity, the Appellant [redacted] to both Licensees which are tax resident in foreign jurisdictions.

d) Licensees in a number of those foreign jurisdictions deduct RWHT at source in accordance with local withholding tax rules.

e) Where Licensees deduct RWHT in accordance with local tax rules, they provide the Appellant with a deduction certificate which evidences the payment of the RWHT to the foreign tax authority.

f) During the Relevant Periods the Appellant licenced its technology solutions to Licensees which were resident in various overseas territories outside of North America and Mexico.

g) The Appellant does not have a branch or permanent establishment for Corporation Tax purposes in any of the overseas territories where the Licensees who withhold RWHT are tax resident.

h) In each of the Relevant Periods, the Appellant was in receipt of foreign source royalties in respect of the licenced technology solutions from customers in treaty countries and also from customers in non-treaty countries.

i) Table A below sets out the total amount of RWHT incurred by the Appellant during the Relevant Periods and where the Respondent has allowed a deduction for an element of the RWHT incurred. Table A also shows the net withholding tax incurred in the Relevant Periods for which the Respondent have disallowed a tax deduction which is the subject of this appeal:

Table A				
Accounting Period ending	RWHT claimed by Appellant ($)	RWHT Allowed by Respondent ($)	Net RWHT disallowed by Respondent ($)	Net RWHT disallowed by Respondent (€)
[redacted] (FY2010)	$4,934,406	$114,267	$4,820,139	€3,554,937
[redacted] (FY2011)	$4,481,194	$143,196	$4,337,998	€3,111,460
[redacted] (FY2012)	$6,707,445	$0	$6,707,445	€5,168,718
[redacted] (FY2013)	$2,397,389	$0	$2,397,389	€1,827,278
[redacted] (FY2014)	$6,803,597	$0	$6,803,597	€5,015,922
[redacted] (FY2015)	$5,973,976	$287,578	$5,686,398	€4,951,583
[redacted] (FY2016)	$4,659,648	$0	$4,659,648	€4,194,480
Total	$35,957,655	$545,041	$35,412,614	€27,824,378

j) Table B below sets out the division of RWHT received by the Appellant during the Relevant Periods into receipts from treaty countries and from non-treaty countries:

Table B			
Accounting Period ending	RWHT withheld in treaty countries €	RWHT withheld in non-treaty countries €	Total €
[redacted] (FY2010)	332,677	3,222,260	3,554,937

[redacted] (FY2011)	293,209	2,818,251	3,111,460
[redacted] (FY2012)	153,940	5,014,778	5,168,278
[redacted] (FY2013)	339,493	1,487,785	1,827,278
[redacted] (FY2014)	595,725	4,420,197	5,015,922
[redacted] (FY2015)	835,715	4,115,868	4,951,583
[redacted] (FY2016)	640,735	3,553,745	4,194,480
Total	3,191,494	24,632,884	27,824,378

k) The Appellant was not in a Corporation Tax payable position for the Relevant Periods. This was due to the Appellant's Corporation Tax liability for the accounting periods ending [redacted] 2010 and [redacted] 2011 being fully offset by R&D tax credits and the Appellant's taxable profits arising in the other accounting periods being fully sheltered by relevant trade charges and or R&D tax credits.

l) In calculating its adjusted taxable trading oncome for the Relevant Periods, the Appellant claimed a tax deduction for the RWHT incurred as set out in Table A.

m) The Respondent have denied a tax deduction for the RWHT incurred by the Appellant as set out in Table A.

Disputed material facts

106. The following material facts are at issue in the within appeal:

i. The RWHT incurred by the Appellant was imposed on gross royalties payable.

107. The Commissioner considers that the appropriate starting point 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 the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49 (hereinafter "*Menolly Homes*"), at paragraph 22, Charleton J. stated:

> *"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".*

108. The Appellant has claimed that the RWHT which it incurred during the Relevant Periods was imposed on gross royalties payable. The Appellant claims, and Witness 1 gave direct evidence to the Commissioner to the effect that, during the Relevant Periods, RWHT was deducted by its customers prior to payments being remitted to the Appellant. Following a deduction of RWHT being remitted to the Appellant, the Appellant claimed that the customers are then contractually required to produce a certificate to the Appellant confirming that RWHT has been returned to the relevant authorities in the relevant jurisdictions.

109. Witness 1 was cross examined at the oral hearing. During the course of the cross examination he was challenged as to the basis on which RWHT was calculated. In particular, Witness 1 was challenged on his evidence to the effect that RWHT is imposed on gross royalties payable. In response, Witness 1 was unable to clarify the basis on which RWHT is calculated in the various jurisdictions in which it is imposed. Witness 1 stated that it is his general understanding that RWHT is calculated as a percentage applied to the gross invoice amount.

110. The evidence adduced to the Commissioner on behalf of the Appellant in relation to the calculation of RWHT was limited to that of Witness 1. The Respondent did not adduce any evidence as to how RWHT is calculated.

111. In its oral submissions, Senior Counsel for the Respondent submitted to the Commissioner that Argentina is one of the jurisdictions from which the Appellant received trade related income in the accounting period ending [redacted] 2010. Senior Counsel for the Respondent submitted that the Respondent does not accept that RWHT in Argentina is calculated as a percentage applied to the gross invoice amount**.** In oral submissions to the Commissioner, Senior Counsel for the Respondent submitted that:

"*…the internet would suggest that, in respect of some Argentinian royalties, it is 35% on an assumed profit of 60%...*"[3]

112. No reference was provided to the Commissioner as to the source of the Respondent's information in relation to this calculation and no evidence in that regard was adduced to the Commissioner. The Commissioner assumes that the Respondent, being the State body, would have submitted the source material to the Commissioner during the course of this appeal if it was readily available.

113. The only evidence which was adduced to the Commissioner in in relation to the calculation of RWHT was that of Witness 1 who gave the following direct evidence in relation to the calculation of RWHT:

"*Q. So the withholding tax that you have described, that's a tax that's deducted from the gross royalties; is that right?*

A. That's correct.

Q. Okay. Is that tax deducted irrespective of whether or not you have made any profits or losses?

A. Correct, yes. It's on the gross line.

Q. Right. The expression has been used that it is a cost of doing business, can you just explain what you mean by that and in what was is it a cost of doing business?

A. Ultimately it's a cost or an expense of doing business in those locations. We don't really have any choice but to suffer that cost. And, therefore, it's ultimately a cost to do business in those jurisdictions. And ultimately it's coming off the gross line, as opposed to being a tax on the actual profit.

Q. Is the imposition of withholding taxes across jurisdictions a very common practice among many jurisdictions?

A. More so within the CALA and Asian regions."[4]

[3] Transcript, Day 2, Page 63, Line 11.
[4] Transcript, Day 1, Pages 138 and 139

114. The Commissioner must consider the evidence adduced along with the submissions made in this regard.

115. The only evidence adduced to the Commissioner by the Appellant is that it is the Appellant's understanding and experience within its business that RWHT is imposed on gross royalties payable. The Respondent has challenged that position in relation to the imposition of RWHT in Argentina where the Respondent has submitted, without any documentary or expert evidence, that RWHT is calculated as a percentage of 35% on an assumed profit margin of 60%.

116. The Commissioner received submissions of the Appellant's Corporation Tax computations for the Relevant Periods along with the Appellant's Financial Statements for the Relevant Periods. The Corporation Tax computations are set out at section B9 information in relation to "Trade Related Foreign Income". Whilst the Commissioner was not specifically brought through this section in each document relating to the Relevant Periods, Witness 1 was asked under cross examination about section B9 in the period ending [redacted] 2010. In considering this material fact, the Commissioner had cause to review this section of the Appellant's Corporation Tax computations for each of the Relevant Periods. The Commissioner notes that trade income from Argentina is only identified in the period ending [redacted] 2010, although the Commissioner also notes that specific countries from which trade income was received are identified only in the Corporation Tax calculations for the periods ending [redacted] 2010 and [redacted] 2011. Thereafter the Corporation Tax calculations do not set out specific countries from which trade income was received.

117. As set out, *Menolly Homes* confirms that the burden of proof rests on the Appellant. The standard of proof in a tax appeal is the civil standard of the balance of probabilities. Having considered the oral and documentary evidence along with the submissions made, the Commissioner finds as a material fact that the Appellant has established that the RWHT which it incurred during the Relevant Periods was imposed on gross royalties payable in all jurisdiction save and except for Argentina.

118. The Commissioner considers that the doubt raised by the Respondent in relation to the calculation of RWHT in Argentina means that the Commissioner must find as a material fact that the Appellant has not established that the RWHT incurred by the Appellant during the Relevant Periods in Argentina was imposed on gross royalties payable.

Commissioners findings of material facts

119. For the avoidance of doubt the Commissioner makes the following findings of material fact in this appeal:

a) The Appellant is an Irish registered and tax resident company whose principal activity consists of [redacted].

b) The Appellant's revenue stream from its principal activity comprises of a number of different elements which include the sale [redacted].

c) In carrying out its principal activity, the Appellant [redacted] Licensees which are tax resident in foreign jurisdictions.

d) Licensees in a number of those foreign jurisdictions deduct RWHT at source in accordance with local withholding tax rules.

e) Where Licensees deduct RWHT in accordance with local tax rules, they provide the Appellant with a deduction certificate which evidences the payment of the RWHT to the foreign tax authority.

f) During the Relevant Periods the Appellant licenced its technology solutions to Licensees which were resident in various overseas territories outside of North America and Mexico.

g) The Appellant does not have a branch or permanent establishment for Corporation Tax purposes in any of the overseas territories where the Licensees who withhold RWHT are tax resident.

h) In each of the Relevant Periods, the Appellant was in receipt of foreign source royalties in respect of the licenced technology solutions from customers in treaty countries and also from customers in non-treaty countries.

i) Table A below sets out the total amount of RWHT incurred by the Appellant during the Relevant Periods and where the Respondent has allowed a deduction for an element of the RWHT incurred. Table A also shows the net withholding tax incurred in the Relevant Periods for which the Respondent have disallowed a tax deduction which is the subject of this appeal:

Table A				
Accounting Period ending	RWHT claimed by Appellant ($)	RWHT Allowed by Respondent ($)	Net RWHT disallowed by Respondent ($)	Net RWHT disallowed by Respondent (€)
[redacted] (FY2010)	$4,934,406	$114,267	$4,820,139	€3,554,937
[redacted] (FY2011)	$4,481,194	$143,196	$4,337,998	€3,111,460
[redacted] (FY2012)	$6,707,445	$0	$6,707,445	€5,168,718
[redacted] (FY2013)	$2,397,389	$0	$2,397,389	€1,827,278
[redacted] (FY2014)	$6,803,597	$0	$6,803,597	€5,015,922
[redacted] (FY2015)	$5,973,976	$287,578	$5,686,398	€4,951,583
[redacted] (FY2016)	$4,659,648	$0	$4,659,648	€4,194,480
Total	$35,957,655	$545,041	$35,412,614	€27,824,378

j) Table B below sets out the division of RWHT received by the Appellant during the Relevant Periods into receipts from treaty countries and from non-treaty countries:

Table B			
Accounting Period ending	RWHT withheld in treaty countries €	RWHT withheld in non-treaty countries €	Total €
[redacted] (FY2010)	332,677	3,222,260	3,554,937

[redacted] (FY2011)	293,209	2,818,251	3,111,460
[redacted] (FY2012)	153,940	5,014,778	5,168,278
[redacted] (FY2013)	339,493	1,487,785	1,827,278
[redacted] (FY2014)	595,725	4,420,197	5,015,922
[redacted] (FY2015)	835,715	4,115,868	4,951,583
[redacted] (FY2016)	640,735	3,553,745	4,194,480
Total	3,191,494	24,632,884	27,824,378

k) The Appellant was not in a Corporation Tax payable position for the Relevant Periods. This was due to the Appellant's Corporation Tax liability for the accounting periods ending [redacted] 2010 and [redacted] 2011 being fully offset by R&D tax credits and the Appellant's taxable profits arising in the other accounting periods being fully sheltered by relevant trade charges and or R&D tax credits.

l) In calculating its adjusted taxable trading oncome for the Relevant Periods, the Appellant claimed a tax deduction for the RWHT incurred as set out in Table A.

m) The Respondent have denied a tax deduction for the RWHT incurred by the Appellant as set out in Table A.

n) The RWHT which the Appellant incurred during the Relevant Periods was imposed on gross royalties payable in all jurisdiction save and except for Argentina.

o) The Appellant has not established that the RWHT incurred by the Appellant during the Relevant Periods in Argentina was imposed on gross royalties payable.

Analysis

120. This appeal is made on the basis that the Appellant claims that the RWHT which it incurred during the Relevant Period leads to an entitlement to a deduction pursuant to section 81 of the TCA1997.

121. The Appellant has made an alternative claim that the RWHT which it incurred during the Relevant Period is deductible pursuant to the provisions of section 77 of the TCA1997 and Schedule 24 (paragraphs 7 and 9DB) of the TCA1997. This claim, the Appellant submits, only arises if the claim in relation to section 81 of the TCA1997 fails. The Appellant's position is that, if it is entitled to a deduction pursuant to section 81 of the TCA1997, then there is no need to consider the alternative claim which it has made.

122. The first issue, therefore, which the Commissioner must consider in this appeal is whether the Appellant is entitled to a deduction of RWHT incurred pursuant to section 81 of the TCA1997. This is on the basis that the Appellant has submitted in both oral and written submissions, that if it is entitled to a deduction pursuant to section 81 of the TCA1997 then "*…we don't even have to worry about schedule 24 at all*"[5].

123. For the purposes of considering whether the Appellant is entitled to deduct RWHT pursuant to section 81 of the TCA1997, the Commissioner will proceed on the basis that the Appellant is not in a position to avail of any relief for foreign RWHT either under Schedule 24 or section 77(6B) of the TCA1997. As a result, the Commissioner will proceed to consider the provisions of section 81 of the TCA1997 hereunder, in the context of the Appellant's argument that foreign RWHT is a final cost of the Appellant and that no credits for foreign RWHT are available to the Appellant, in accordance with the position of the Respondent.

124. Should the Appellant not succeed in its arguments as to the applicability of section 81 of the TCA1997, the Commissioner will then proceed to consider the parties competing arguments as to Schedule 24 of the TCA1997. Should the Appellant succeed in its arguments as to the applicability of section 81 of the TCA1997, the Commissioner will then not proceed to consider the parties competing arguments as to Schedule 24 of the TCA1997.

125. The Appellant claims that RWHT is a cost incurred in selling its products into the jurisdictions of its customers. As a result, the Appellant submits that RWHT incurred on

[5] Page 24, Transcript Day 2 lines 22-23

gross receipts from foreign countries, should be a deductible expense under section 81 of the TCA 1997.

126. The evidence adduced to the Commissioner by Witness 1 is that foreign the RWHT incurred by the Appellant is incurred on gross receipts, that is to say is a percentage of the invoiced sales price for royalties. As a result, the Appellant submits, RWHT is one of the costs of doing business which the Appellant suffers on selling licenses to their customer's resident in certain countries where RWHT is applied.

127. The Respondent does not accept that section 81 of the TCA1997 allows the Appellant to deduct RWHT as an expense. Further, the Respondent does not accept that RWHT is an expense wholly and exclusively incurred for the purpose of the trade and submits that, therefore, RWHT cannot be deductible as an expense in accordance with section 81 of the TCA1997.

128. The Commissioner has already found as a material fact that the RWHT which the Appellant incurred during the Relevant Periods was imposed on gross royalties payable in all jurisdiction save and except for Argentina.

Statutory Interpretation

129. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said*

that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the*

taxing Act as interpreted by the established canons of construction so far as possible".

130. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 (hereinafter "*Heather Hill*").

131. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*, the Commissioner finds that the words "*any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession*" contained in section 81 of the TCA1997 are plain and their meaning is self-evident, such that a literal interpretation is sufficient. The Commissioner does not consider that the words "*any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession*" are imprecise or ambiguous and so there is no requirement to proceed to a purposive approach. The Commissioner considers that the ordinary and basic meaning of the words should prevail.

Expert evidence and accounting treatment

132. The Commissioner notes that evidence from two expert witnesses in relation to accounting treatment was adduced during the oral hearing of this appeal. In addition both expert witnesses submitted written reports to the Commissioner.

133. The evidence from both expert witnesses largely focussed on the correct categorisation of royalty income and RWHT when completing financial accounts. Both expert witnesses agreed that GAAP and FRS102 were and are the applicable accounting standards relevant to the Appellant's financial statements during the Relevant Periods.

134. The scope of the jurisdiction of an Appeal Commissioner, has been discussed in a number of cases, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter "*Lee*"), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and the *State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577 and is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Appeal Commissioner or based on undisputed facts as the case may be.

135. Most recently Murray J. in *Lee* held as follows:

"*From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment.*"

136. The determination which the Commissioner is required to make in this appeal is whether the RWHT incurred by the Appellant is an expense which is deductible pursuant to the provisions of section 81 of the TCA1997. That is the charge to tax on which Commissioner's focus is required to be placed.

137. The Commissioner has had regard to the provisions of section 76A of the TCA1997 which is entitled "*Computation of profits or gains of a company – accounting standards"*. Section 76A(1) of the TCA1997 provides that "*(1)For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.*"

138. The evidence adduced to the Commissioner by both experts tends to outline that an element of judgement is required in deciding the most appropriate place and the most appropriate manner for dealing with RWHT. Whilst there was divergence as to where each expert considered the most appropriate place and the most appropriate manner for dealing with RWHT, there is no dispute between the Parties that the Appellant's financial reports for the Relevant Periods have been produced in accordance with the applicable financial standards.

139. In this appeal, the Commissioner does not consider the application or otherwise of accounting standards to the completion of financial statements to be relevant to the determination which is required to be made. As a result the evidence adduced by both expert witnesses, who are without doubt eminent experts in their fields, was not of assistance to the Commissioner in coming to the determination in this appeal.

140. As the RWHT incurred by the Appellant is an expense incurred in earning its profits it therefore follows that RWHT incurred by the Appellant is a deductible expense wholly and

exclusively incurred for the purposes of the business activity for Irish tax purposes under the provisions of section 81(2)(a) of the TCA1997.

Tax on income

141. Having determined that the words in section 81 of the TCA1997 are plain and their meaning is self-evident, such that the ordinary, basic and natural meaning of the words should prevail, the Commissioner will now proceed to consider the requirements that must be satisfied in order for the Appellant to claim a deduction under section 81 of the TCA1997. The Commissioner will initially consider what the nature of the income is. Thereafter, the Commissioner will consider whether such a deduction is an expense wholly and exclusively laid out for the purposes of the Appellant's trade.

142. As noted above, it is the Respondent's position that all royalties received by the Appellant and from which RWHT has been deducted, are in the nature of income, and are therefore charged to Corporation Tax on the basis that they are trading income. Consequently, the Respondent maintains that RWHT on income is by its nature a tax on income. It is the Respondent's position that RWHT is not an expense for the purpose of earning profits, and as a result, is not deductible in accordance with section 81 of the TCA1997.

143. In addition, the Commissioner notes that it is the Respondent's position that the fact that RWHT may be applied to the gross income, should not be taken as an indication that RWHT is not in the nature of a tax on income or profits, and more specifically, as contended for by the Appellant, it is the Respondent's position that RWHT does not satisfy the requirements of a trading expense which is deductible in accordance with section 81 of the TCA1997.

144. On the other hand, it is the Appellant's position that, because RWHT is applicable to gross receipts, it cannot be a tax on profits. The Appellant maintains that RWHT incurred is not a tax on the profits of the trade, but, rather, is an unavoidable cost of carrying out its business. The Appellant maintains that it cannot carry out its business without incurring RWHT in the jurisdictions which levy it.

145. The Commissioner has further considered the Appellant's argument that it is not relevant when the liability to RWHT is incurred or when it is paid, but what is relevant is that RWHT is a liability which is wholly and exclusively incurred for the purposes of the trade.

146. Furthermore, the Commissioner understands there to be many compulsory deductions imposed on businesses which are permissible as a deduction pursuant to section 81 of the TCA1997. Examples of such deduction are Irish and foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges, and employer's PRSI.

147. The Commissioner notes that the Respondent has submitted that it is prepared to accept that Digital Services Taxes are deductible expenses, if they have been incurred wholly and exclusively for the purposes of the trade, on a jurisdiction by jurisdiction basis[6]. The Commissioner notes that Digital Services Taxes are a tax on income which is deductible in accordance with the provisions of section 81 of the TCA1997, in addition to the list as set out in paragraph 112 *supra*. Therefore, the Commissioner is satisfied that there is no bar to a tax on income being treated as a deduction for the purposes of section 81 of the TCA1997. The Commissioner notes that in order for such a tax to be deductible pursuant to the provisions of section 81 of the TCA1997, it must meet the test for deductibility, such that it was incurred wholly and exclusively for the purposes of the trade.

148. Accordingly, the Commissioner is satisfied that RWHT, being in the nature of a tax on income, does not automatically exclude it from consideration as a deduction under section 81 TCA 1997. The Commissioner will now consider the application of section 81 TCA 1997, to the circumstances of the Appellant's appeal.

Section 81 of the TCA1997 – the test of deductibility

149. Section 81(2) of the TCA1997 sets out that, in computing the profits or gains to be charged to tax, no deduction is allowed for any expense, not being money "*wholly and exclusively laid out or expended for the purposes of the trade or profession*". The Commissioner considers that it is the case that when arriving at business profits assessable to tax, a taxpayer must first look to section 81 of the TCA1997 to determine what expenses are deductible. Section 81 of the TCA1997 is drafted to restrict deductibility, but permits a deduction for an expense where it was "*wholly and exclusively laid out or expended for the purposes of the trade or profession*." The Commissioner is satisfied that is the test of deductibility.

[6] Hearing day 2, transcript, page 107 line 9.

Case Law

150. The Commissioner was directed by both Parties to the appeal to numerous decisions of the Superior Courts both within this jurisdiction and elsewhere, in addition to decisions of various Tribunals and decision making bodies, including the Commission itself, in support of the Parties' respective positions. The Commissioner has considered the case law.

151. The test of deductibility is set out in the decision in *Strong and Co*. which said decision is cited and endorsed by the judgment of Budd J. in *MacAonghusa.* In *Strong & Co*, at page 220 of the decision, Lord Davey states that:

> "*It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits*".

152. In *Strong & Co* the taxpayer, a brewing company which also carried on a trade as an innkeeper, sought to take a deduction for compensation paid to a customer injured by falling masonry at one of its premises. The claim was refused by the Commissioners of Inland Revenue and the company appealed. The Court of Appeal and the House of Lords upheld the Commissioner's refusal to grant a deduction. The expense was found to be incurred by the taxpayer in their role as the building owner, rather than as part of the trade of inn keeping. The test articulated by Lord Davey in the House of Lords, as set out above, has established the principle that there must be a nexus between the expense and the earning of profits for deductibility. He opined that the words appear to mean "*for the purpose of enabling a person to carry on and earn profits in the trade*". This principle was upheld in both the decisions in *MacAonghusa* and *Smith v Lion* which was referred to in *Strong & Co*.

153. In the decision of *MacAonghusa*, the Supreme Court was asked to consider whether the interest on a term loan taken out to redeem preference share capital was an expense of the company's trade. While the case was not in connection with deductibility of taxes, the Supreme Court endorsed the test in *Strong & Co* and the case was decided in favour of the taxpayer. The Court upheld that the interest payments were integral to the trading of the company and were as such deductible. The purpose of the payment was key to the decision in that it was found to be for the purpose of earning profits, rather than the financing of the trade. If it had been for the latter purpose, Geoghegan J stated the payments could not have been deductible. Furthermore, the Court stated that the matter had to be approached by making a finding of fact as to the purpose of the payment and in

light of that it would become "*reasonably clear whether as a matter of law the payment [is] deductible or not*".

154. The Respondent submits that the facts in *MacAonghusa*, are distinguishable from those in the present case. Nevertheless, the Commissioner notes that the Supreme Court, in dismissing the appeal, held that the interest was a deductible expense, because it was laid out to retain the benefits of the borrowed money which enabled the respondent in that appeal to carry on its trade, thus expenditure incurred wholly and exclusively for the purposes of the trade. Geoghegan J held at page 516 of the decision that:

> "*I have no doubt that, in this case, the learned Circuit Court Judge took the view that the ongoing interest payments were necessarily part and parcel of the trading of the company and were clearly deductible. In my opinion the learned High Court Judge was correct in upholding that view*".

155. In *Smith v Lion*, a brewery company, as an essential part of its business, acquired and held licensed houses which were "tied" to the brewery. Under the licensing legislation in force at that time, the Licensing Act 1904, compensation fund charges were levied on licences which could be recouped from rents paid by the licensee. The levy was thus a form of withholding tax on the rents paid to the brewery. In calculating the yearly profits of the business, the brewery company claimed a deduction for the levy imposed and which they were obliged to bear. It was contended that the sum was wholly and exclusively laid out for the purposes of their business activity as the system of "tied" houses was essential to their trade. While the decision was not unanimous it was decided in the brewery company's favour. Lord Atkinson, with whom Earl Halsbury agreed, held at page 159 of the decision that:

> "*In the present case the respondents cannot set up the system of trading through tied houses, unless they first acquire these premises as owners in fee or lessees, and secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation levy attaches. The impost must, therefore, necessarily be paid in order to set up the system which it is found to be vital to their trade prospects to set up. And if the substance of the transaction be looked at, this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a particular trade or business, such as that of an auctioneer, or a pawnbroker, or a publican.*
>
> *It is an expenditure which must be incurred in order to earn the receipts which, after the due deductions have been made, form the balance of the gains and profits*

assessable to the income tax, and may therefore, according to the decision of your Lordships' House, be properly deducted from those receipts".

156. The Respondent argues that the decision in *Strong & Co*. and the following jurisprudence such as *Smith v Lion* can be distinguished on the basis that RWHT herein, was not incurred for the purpose of earning the royalties that contributed to the profits of the trade, but rather was deducted as tax from income received during the course of the trade.

157. The Respondent relies on the decision of *Farquharson* in support of its position that RWHT which is required to be deducted by a payer of a royalty in a source State does not bear the hallmarks of an expense which is deductible in accordance with section 81 of the TCA1997. The Respondent referred to the finding of Finlay J in *Farquharson* where he stated that an expense of the trade:

"…means something or other which the trader pays out; I think some sort of volition is indicated. He chooses to pay out some disbursement; it is an expense…"

158. The Commissioner does not consider the absence of volition to be of any significant relevance in considering of the application of section 81 of the TCA1997 and to the question of whether RWHT was expenditure incurred wholly and exclusively for the purposes of the Respondent's trade and whether it is therefore deductible in accordance with section 81 of the TCA1997. As set out above, the Commissioner has already found that the test for deductibility is as set out in the decision in *Strong & Co*. The Commissioner does not consider volition to be part of the test to be applied.

159. The Commissioner notes that the test as set out in *Strong & Co*., was also applied in the decision in *Harrods,* a case in which the dividing line between deductible and non-deductible taxes was considered. In *Harrods*, the taxpayer company which was incorporated and resident in the United Kingdom (hereinafter the "UK"), carried on a retail business in Argentina. As a requirement of doing business in that jurisdiction, the company was required to pay a substitute tax which was levied at a rate of 1% on the capital of the company. It sought a tax deduction for the annual tax. The substitute tax was payable whether or not there were profits liable to Argentine income tax. Under Argentine law there were sanctions to prevent non-payment of the substitute tax. A key point was when and how the tax was incurred. It was found that the tax was not payable on profits earned as a consequence of doing business in Argentina, but as a condition of carrying on business. Danckwerts L.J. held that:

"*There are a number of authorities on the question of deductible expenses and the guiding principle appears to me to be that if the expense has to be incurred for the purpose of earning the company's profits, it is a deductible expense; on the other hand if the payment of the expenses or charges is made after the profits have been ascertained, then the expense is not deductible, because it is simply an application of the profits which have been earned*."

160. Further, the Commissioner considers it relevant to consider the dictum of Buckley L.J. where he held that:

"*The tax is not, in my judgment, a tax which is of the same character as Income Tax or Excess Profits Tax; it is not a tax which can only be measured and the liability to which can only be ascertained after the profits position of the Company has been finally determined in any year. Payment of that tax is not, as it seems to me, an application of the Company's profits, nor is it a payment which in its nature could be said to fall to be made out of the earned profits of the Company, for it is not a tax the liability to which depends upon the Company having earned any profits. It is a liability which the Company has exposed itself to, or undertaken, in order that it may be able to carry on its business in the Argentine. And so it is, in my judgment, a liability which the Company has undertaken for the purposes of its trade, and the payment of the tax is, in my judgment, a payment wholly and exclusively made for the purposes of the Company's trade….*"

161. The dictum of Diplock L.J, is also relevant, wherein he states that:

"*….can a tax really be as simple as I think this is? But the only question here is: was the money paid by the Company in settlement of its liability for Argentine substitute tax "money wholly and exclusively expended for the purposes of the trade" which it carried on in the Argentine? In order to engage lawfully in its trading lawfully in the Argentine at all, whether or not it made a profit by doing so, it had to pay the substitute tax. That was the purpose for which the money was expended by the Company…. why then is it not deductible*".

162. In addition to *Strong & Co*, the House of Lords also considered the decisions in *IRC v Dowdall*, *Smith v Lion* and the decision of Lord Oaksey in *Smith's Potato Estates Limited*, wherein Oaksey LJ considered whether certain legal costs incurred in connection with an appeal were monies wholly and exclusively laid out for the purposes of the company's trade. He considered whether an expense is incurred to earn profit or is an application of the profit and he states at page 297 of the decision of the House of Lords that:

"*In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade, or is the application of the gain or profit when earned.*"

163. The Respondent submits that the decision in *Harrods* decision has little relevance to the Appellant's appeal. The Respondent distinguishes the decision in *Harrods* based on the factual circumstances, but specifically on the grounds that the Argentinian tax was not charged on the basis of profits, or on the basis of income, but was charged entirely on the basis of certain capital of the company that was employed in the trade. Secondly, the Respondent distinguishes the decision in *Harrods* based on the fact that non-payment of tax could result in the company being precluded from trading.

164. In the Appellant's case, no such restriction or sanction is imposed for failing to pay RWHT. The Commissioner notes the Respondent's argument that the decision in *Harrods* decision is wholly distinguishable on the grounds that the tax was a tax on capital, not on income and was a pre-condition to doing business in Argentina, which in no way equates to suffering a deduction by way of RWHT. The Commissioner does not agree. The Commissioner observes that the Appellant does not disagree that the tax at issue in *Harrods* was a tax on capital, but distinguishes its argument on the basis that the tax in *Harrods* was charged not on the basis of profit or income of the company and therefore, amounted to a liability the company had undertaken in order to trade in the Argentine. The Commissioner agrees with that assessment of the nature of the tax imposed in *Harrods*. Further, the Commissioner agrees that the tax in *Harrods* can be distinguished in such a way, such that it was unrelated to the income or profits of the company and failure to pay the liabilities precluded the company from trading in Argentina.

165. The Appellant states that it is of note that the tax in *Harrods* was not something that was incurred and paid prior to generating sales but it was, in fact, paid not only subsequent to it, but in the following financial year after the sales were incurred. In addition, the tax was charged not on the basis of profits nor on the basis of income, but was charged entirely on the basis of certain capital of the company that was employed in the trade. Therefore, it was payable whether or not the company generated any income or made any profit at all.

166. Further, the Appellant argues that the absence of sanction is entirely irrelevant, as it does not bear at all on the question of whether the deduction from the licence fee is wholly and exclusively incurred for the purpose of the trade. As stated above, the Commissioner

does not consider volition to be part of the test for deductibility. The test is outlined in the decision of *Strong & Co* and affirmed in *MacAonghusa*, *Smith v Lion*, and *Harrods*.

167. The Respondent submitted that the decision in *Yates* is significant insofar as the issue was whether a turnover tax could correspond to UK income tax or Corporation Tax. The question which arose in *Yates* is whether a turnover tax levied under Venezuelan law could correspond to UK income tax or Corporation Tax in the context of double taxation. Scott J. held that it could and did, in part. Having quoted article 54 of the Venezuelan tax code, Scott J. stated:

> "*The purpose behind art 54 is, in my opinion reasonably apparent from the language and context of the article. The article is dealing with profits of taxpayers 'not resident or not domiciled in Venezuela'; profits, that is to say, of foreign individuals or entities. There are obvious difficulties in obtaining full tax returns from foreign tax payers. The difficulty is dealt with in art 54 by simply providing for 10% of gross receipts to be deducted in order to produce the taxable income – the 'net profits' to use the expression employed in the article.*"

168. Further, Scott J. held that:

> "*But it is not said that no tax expressed as a charge on a percentage of gross receipts can, for s.498 purposes, correspond to United Kingdom income tax or corporation tax. And it is not, in my judgment, practicable to exclude a particular tax on the ground that the percentage to be deducted was not high enough to represent the likely level of expenses incurred by the foreign taxpayer in earning its gross receipts. Moreover, there were no facts before the Special Commissioner to justify a conclusion either that the 10% percent deduction was unrealistic in relation to the majority of business activities falling to be taxed under Article 54 or that the 10% deduction was unrealistic in relation to the extra expense incurred by the company, over and above its normal establishment expenses, in executing the Maraven contract*".

169. The Respondent submits that the above quotations represent an important recognition that a withholding tax may correspond to tax on income profits, even in circumstances where the authorities in the withholding country do not go about attempting to calculate the actual profits of the recipient.

170. The Appellant does not agree with the Respondent's interpretation of *Yates*, as the issue considered in that case was whether the Venezuelan tax had the same function as UK income or Corporation Taxes. It was held by Scott J. that although the Venezuelan

tax was computed on the basis that only 10% of the gross income was deductible, it was intended to be a tax on profits rather than on turnover. The Court held that the Venezuelan tax corresponded to income or Corporation Tax and was therefore creditable. In this regard, the Commissioner agrees with the Appellant and finds that the decision in *Yates* is of little persuasive value for the purposes of determining this appeal.

171. Furthermore, the Respondent sought to rely on the decision in *IRC v Dowdall*. The Commissioner is satisfied that this decision can be distinguished, in circumstances where it considered the deductibility of taxes after the profit was ascertained. In this appeal, a consideration is required of taxes imposed on gross receipts prior to the deduction of expenses and the ascertainment of profit.

172. The Commissioner observes also the significance placed by the Appellant on the *Hong Kong decision*. That decision emphasises the distinction between taxes which are a tax on profits or gains as opposed to taxes which apply to the income itself. The Respondent dismissed the relevance of the decision on the basis that it is a decision of a Tribunal, as opposed to a Court, and therefore has little persuasive authority. In this context, the Commissioner notes the reliance placed by the Respondent on the decision of the former Appeal Commissioner in the *2018 Determination*, a decision of the Commission, as opposed to a Court.

173. In the *Hong Kong decision*, the taxpayer was a shipping company which owned and operated container ships which shipped between Hong Kong, Taiwan and Australia and incurred taxes on gross receipts in those jurisdictions. The company claimed that the foreign taxes were deductible from its total profits because they were outgoings or expenses incurred in the production of the profits or for the purposes of producing such profits. It was held that to the extent the overseas taxes were charged on gross receipts and not on net income they were capable of being deducted when ascertaining the total profits. As such, part of the Australian taxes were not allowed as a deduction. In reaching its decision the Board considered a number of UK cases concerning the meaning of "*for the purposes of the trade*" and the UK provisions analogous to section 81 of the TCA1997 and it found at paragraph 6 that:

> "*in each case the foreign tax was an impost on the gross receipts relevant to the territory concerned whether or not the profits are earned… However on the clear evidence … that the taxes were in each case a tax on turnover as opposed to net income, we are of the view that the "taxable income" treatment in Taiwan and Australia is but a mechanism, a device to subject to tax the amount*

representing the fixed proportion of the gross receipts, and does not change the fact that the tax is imposed on the gross receipts before any deduction is made in respect of outgoings or expenses."

174. Further, the Board held at paragraph 17 of the decision that it was satisfied that:

"*the Taxpayer could not have gone on earning income without paying the foreign taxes. Directly or indirectly the imposition of the sanctions available to the authorities would have forced the Taxpayer to have ceased its operations.*"

175. Both parties relied on previous decisions of former Appeal Commissioners, dealing with the deductibility of withholding tax, namely the decisions in the *2018 Determination* and the *2019 Determination*. The *Hong Kong decision* was cited in one of the two Determinations concerning withholding tax, namely the *2019 Determination*. The former Appeal Commissioner's decision in the *2018 Determination* dealt with the deductibility of RWHT incurred on licence income and the *2019 Determination* dealt with withholding tax on dividends for a company carrying on the trade of securities trading. The former Appeal Commissioner in the *2018 Determination* found against the taxpayer and the former Appeal Commissioner in the *2019 Determination* found for the taxpayer. The *2018 Determination* takes no account of the *Hong Kong decision*.

176. In the *2019 Determination*, the former Appeal Commissioner upheld the taxpayer's appeal. The dividend withholding tax for which the taxpayer was seeking a deduction was specifically excluded from relief under Schedule 24 and Section 21B (4)(c) TCA 1997 and as such, they were not otherwise entitled to a deduction or credit. Dividend withholding tax was determined to be the price of carrying out the business and non-recoverable dividend withholding tax impacted profits of the trade. The former Appeal Commissioner determined that while the parties agreed that dividend withholding tax was a tax on income, it was possible for a deduction to be permitted under section 81 TCA 1997, so long as the taxes were calculated prior to the ascertainment of profit.

177. In the *2018 Determination*, the former Appeal Commissioner held that taxes which are applied to a taxpayer's income (as distinct from profits) are incapable of constituting a deductible expense. At paragraph 30, the former Appeal Commissioner held that:

"*Sequence is an important aspect in this analysis. Expenses deductible for the purposes of s.81(2)(a) are incurred in the course of a trade prior to the generation of income in the form of sales. For example, in the Appellant's trade, the cost of developing the software is first incurred, with sales subsequently generated in relation*

to that software once the software is brought to market. Tax is payable on the monies generated through sales. Usually that tax will be on profits, i.e. income after deductions, however, the fact that deductions are placed after income in the calculation of net profit is simply an accounting practice to assist in the computation of income for the purpose of, inter alia, ascertaining tax. In real time, the deductions/expenses are incurred prior to sales/turnover in that they comprise the cost of generating the product that is to be sold. Similarly, the cost of sales occurs before those sales are generated. Once the product has been made, it is brought to market and sold, turnover is generated and tax applied."

178. Furthermore, the former Appeal Commissioner in that decision, agreed with the submissions of the Revenue Commissioners as follows:

"... it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts. ... So, when looked at in this light, and this is how Irish law says profits must be calculated, it is quite impossible to regard a tax on receipts as being expenditure laid out to earn those receipts. And the Revenue case is really that simple. I mean, this is a straightforward, logical impossibility".

179. The Appellant contends that this analysis is wrong. As stated above, the Commissioner is satisfied herein, that RWHT is in the nature of a tax on income, having regard to the manner in which it is imposed. Nonetheless, there is no case law which states that taxes which are imposed on income are by their nature, non-deductible. Accordingly, the Commissioner does not accept, as submitted by the Respondent and as held by the former Appeal Commissioner in the *2018 Determination*, that "*It is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts*". Again, as aforementioned, the decision of the former Appeal Commissioner is not binding on the Commissioner herein. The Commissioner has some reservations in terms of why the former Appeal Commissioner came to that conclusion, in the absence of case law to support the reasoning outlined.

180. The Commissioner observes that in the *2019 Determination* the former Appeal Commissioner rejected the precise proposition, holding at paragraph 99 of the decision that "*there is no general principle of law that specifically denies a deduction for taxes in accordance with the prescribed rules as set out under TCA, Section 81, where those taxes are not calculated after the ascertainment of profit.*" The Commissioner considers this to be a correct analysis of the law. As aforementioned, there are many compulsory

deductions imposed by the State that are permissible as a deduction pursuant to section 81 TCA 1997.

181. It is also of note that the *Hong Kong decision* was not before the former Appeal Commissioner in the *2018 Determination* and therefore the *2018 Determination* takes no account of the *Hong Kong decision* which in coming to its decision, conducted a review of the applicable decisions referenced above, and permitted the deduction of taxes incurred on gross receipts relying on the principles enunciated in *Harrods* and *Strong & Co*. Moreover, the former Appeal Commissioner in the *2018 Determination* distinguishes the decision in *Harrods* and relies on the decision in *Yates* to dismiss the Appellant's appeal. The Commissioner has already indicated her satisfaction that the *Harrods* decision is significant for the Appellant in the within appeal and that the *Yates* decision is of little or no persuasive authority, in circumstances where *Yates* concerned a tax on profits and has no relevance to the facts herein.

182. Also of note in the *2018 Determination*, and which seemed critical to the former Appeal Commissioner's decision in that appeal, was the fact that relief from double taxation was available and was claimed by the taxpayer under Section 826 TCA 1997 and Schedule 24 TCA 1997. The former Appeal Commissioner in the decision concluded that RWHT was in the nature of tax on income, as this was the basis upon which relief from double taxation was available. The inference being that withholding taxes are taxes on income rather than expenses of the trade and that the provisions for relieving such income from double taxation were fully exploited.

183. In this appeal, the position is somewhat different, such that the Appellant was taxed on its royalty income without a corresponding entitlement to a credit or deduction for the foreign tax withheld on that income. In the *2019 Determination*, relief from double taxation had not been claimed, a significant difference from the earlier decision in the *2018 Determination*.

184. As already found, the Commissioner accepts the evidence of the Witness 1 such that he confirmed RWHT is assessed and collected on the gross income stream of the Appellant, save and except for the RWHT incurred in Argentina. As is illustrated in the above referenced case law, the determinant or test is whether the tax in question was a tax on profits, which would not be deductible, or a tax incurred in earning profits, which should be deductible. In this appeal, RWHT is incurred irrespective of whether the Appellant earns any profits and withholding tax is calculated on the gross income (save and except for the RWHT incurred in Argentina) and not the profits.

185. The Commissioner is satisfied that RWHT must be incurred by the Appellant in order to earn or profit from the trade; it is part and parcel of the Appellant's business activity and was a foreseeable condition of earning income and gains. RWHT is incurred on royalty income irrespective of whether the Appellant makes a profit. Therefore, incurring RWHT was not merely foreseeable, it is an unavoidable component in determining profit before tax. The sale cannot be made without incurring the concurrent obligation to discharge or suffer RWHT on the sale.

186. The Commissioner accepts that it does not matter whether the obligation to suffer RWHT is before the sale, concurrent with the sale or after the sale, the fact is that it is incurred in order that the Appellant may be able to carry on its business. Where the Appellant is not in a position to derive any benefit from double taxation relief under Schedule 24 TCA 1997 in relation to the RWHT incurred. It is clear to the Commissioner that in such circumstances, the Appellant is not precluded from treating that tax as an expense incurred in carrying on its business in those jurisdictions, if the test of deductibility as set out in *Strong & Co* is satisfied, which the Commissioner considers is met for the reasons set out hereunder.

187. The Commissioner considers the principles enunciated in *Harrods* to be significant to the Appellant's appeal, as not dissimilar to the Appellant, the "substitute tax" was something which the company was compelled to pay if it was to carry on business in Argentina, and if it could not carry on its business in Argentina it could not earn profits. Of importance, the withholding tax was incurred irrespective of whether the company in *Harrods* earned any profits. Therefore, such taxes represented a cost of doing business. The Commissioner considers this is analogous to the Appellant's position.

188. The Commissioner is satisfied that it was not possible for the Appellant to trade in those jurisdictions imposing RWHT without incurring the imposition of the RWHT. The Commissioner considers that the factual situation is akin to that in *Harrods*. In addition, as is evident from the decisions in *Harrods* and the *Hong Kong decision*, there is a distinction to be made between taxes calculated before and after profits have been ascertained. As such, RWHT was incurred by the Appellant irrespective of whether the Appellant generated any profits. RWHT was applied to the gross income of the Appellant (save and except the RWHT incurred in Argentina). Therefore, the Commissioner is satisfied that the RWHT incurred by the Appellant in all jurisdictions save and except for Argentina can be treated as a cost incurred for the purpose of earning the Appellant's profits.

189. Having carefully considered all of the evidence, case law and legal submissions advanced by Counsel for both parties, in addition to the written submissions of the parties including, both parties statement of case and outline of arguments and the material findings of fact, the Commissioner has taken her decision on the basis of clear and convincing evidence and submissions in this appeal. The Commissioner determines that the Appellant has shown on the balance of probabilities that it meets the test for deductibility as outlined by Lord Davey in the decision in *Strong & Co* and affirmed in the decision in *Harrods*. The principles were also upheld in the Irish decision *MacAonghusa*. In the context of the facts of this appeal, the Commissioner is satisfied that, the following factors entitle it to treat RWHT suffered, as a final cost of doing business in those jurisdictions;

(i) The tax is calculated prior to the ascertainment of profit;

(ii) The tax is calculated irrespective of whether the Appellant makes a profit or a loss;

(iii) There is a nexus between the expense of RWHT and the earning of profits for deductibility. The Appellant suffered RWHT, for the purpose of enabling it to carry on and earn profits in the trade (as per Lord Davey in *Strong & Co*.);

(iv) The sequencing or the timing of when the liability is incurred is irrelevant, as is the absence of volition, to the test for deductibility under section 81 of the TCA1997.

Schedule 24 of the TCA1997

190. The Commissioner indicated at paragraphs 121 to 124 of this determination that the question of the availability or otherwise of the relief from double taxation set out at schedule 24 of the TCA1997 would not be considered if the Appellant succeeded in its argument that it was entitled to deduct RWHT as an expense pursuant to section 81 of the TCA1997. For reasons set out, and having found in favour of the Appellant in relation to the deductibility of RWHT under section 81 of the TCA1997, the Commissioner is not required to proceed to consider the question of schedule 24 of the TCA1997 in relation to this appeal. The Commissioner makes no comment or finding in relation to this ground.

Determination

191. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded, on the balance of probabilities, in showing that the Respondent was incorrect to issue the Notices of Amended Assessment in respect of the accounting periods ended [redacted] 2010 to [redacted] 2016 inclusive.

192. The Commissioner further determines that the Appellant is entitled to a deduction pursuant to section 81 of the TCA1997 in relation to the RWHT incurred during the Relevant Periods in all jurisdictions save and except Argentina.

193. The Commissioner determines that, if the Appellant establishes to the Respondent that the RWHT incurred in Argentina during Relevant Periods was imposed on gross royalties payable, the Appellant is then entitled to a deduction pursuant to section 81 of the TCA1997 in relation to the RWHT incurred during the Relevant Periods in Argentina.

194. This appeal is determined in accordance with Part 40A of the TCA1997 and in particular, sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA1997.

Notification

195. This determination complies with the notification requirements set out in section 949AJ of the TCA1997, in particular section 949AJ(5) of the TCA1997 and section 949AJ(6) of the TCA1997. For the avoidance of doubt, the Parties are hereby notified of the determination under section 949AJ of the TCA1997 and in particular the matters as required in section 949AJ(6) of the TCA1997. This notification under section 949AJ of the TCA1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The Parties shall not receive any other notification of this determination by any other methods of communication.

Appeal

196. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Clare O'Driscoll
Appeal Commissioner
13 December 2023

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