30TACD2017

NAME REDACTED

BETWEEN/

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to income tax in relation to the tax years of assessment 2008 to 2013. The Appellant was a shareholder, director and employee of X Ltd. (hereafter 'the Company') from 2006 to 2013. In his income tax returns the Appellant claimed a credit for PAYE deducted by the company in respect of his salary however, the tax was not remitted by the Company on the Appellant's behalf. The company went into liquidation in February 2014. On 7 March 2014 the Respondent raised assessments on the Appellant in respect of the tax years of assessment 2008 to 2012 and on 10 March 2015 the Respondent raised an assessment in respect of the tax year of assessment 2013. The Appellant duly appealed.

2. On agreement of the parties this appeal is adjudicated in accordance with the provisions of s.949U of the Taxes Consolidation Act 1997, as amended (hereafter 'TCA 1997').

Background and submissions

3. The Appellant was employed by the Company from 2006 to 2013. He submitted income tax returns for those years in which he indicated that he was a proprietary director. Corporation tax returns and Companies Registration Office returns also

noted the Appellant as a proprietary director. The Appellant contended that he was not a proprietary director and that the assessments raised by the Respondent were incorrect.

Legislation

4. As set out in **Appendix I** below, the relevant legislative provisions are;

- Section 997A TCA 1997 – Supplementary provisions (Chapter 4)

- Section 997A TCA 1997 – Credit in respect of tax deducted from emoluments of certain directors

Analysis and findings

5. Section 997A(2) provides that *'This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.'* Thus the provision applies to proprietary directors. Section 997A(1)(b) defines a proprietary director as follows;

'[(1)(b) For the purposes of this section—

> *a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and*
>
> *the question of whether a person is connected with another person shall be determined in accordance with section 10.'*

6. Section 997A(3) provides: *'Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies [shall be given against the amount of tax chargeable in any assessment] raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is*

documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.'

7. The Appellant did not dispute the fact that the tax was not remitted by the Company and did not advance any issue as to whether the assessments were raised within time. Thus the only matter in issue between the parties was whether the Appellant was a proprietary director for the purposes of s.997A TCA 1997 in respect of the tax years in question.

8. The Respondent stated that the Appellant's income tax returns for the tax years of assessment 2006-2013 provided that he was a proprietary director, that the corporation tax return of the Company to Mar 2011 provided that the Appellant was a proprietary director and that the Companies Registration Office returns provided that he was a proprietary director.

9. The Appellant contended he was not a proprietary director on the basis that, on 1 October 2006, at a shareholders meeting, it was agreed that shareholdings of 50% held by the Appellant and by Ms. A. would be altered so that the Appellant would hold a 12.5% shareholding and Ms. A. would hold an 87.5% shareholding. The Appellant stated that this agreement was made as the initial shareholding of 50% per shareholder '*was incorrect*'. The minutes furnished were unsigned. The Appellant also furnished a copy of an undated share certificate.

10. The Appellant stated that he instructed his accountant to adjust the shareholding on foot of this meeting but that the shareholding was never adjusted.

11. The Appellant stated that he possessed e-mails from Ms. A., confirming she was an 87.5% shareholder however no emails purporting to be from Ms. A. were furnished. The Appellant furnished an e-mail from Mr. B. stating that the shareholdings in the company were held 87.5% by Ms. A. and 12.5% by the Appellant. There was no formal document or letter signed by Mr. B., just an unsigned email.

12. The documentation furnished by the Appellant in support of his assertion that he was not a proprietary director is inadequate and insufficient. I find as a material fact that for the tax years of assessment 2008 – 2013, the Appellant had a material interest in the company in accordance with s.997A TCA 1997 and was a proprietary director.

Conclusion

13. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant. In appeals against assessments, the Appellant must prove on the balance of probabilities that the assessments are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 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.'*

14. In the High Court case of *TJ v Criminal Assets Bureau,* [2008] IEHC 168, at para 50, Gilligan J. stated:- *'The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period.'*

15. The Appellant did not succeed in proving on the balance of probabilities that he was not a proprietary director for the tax years of assessment 2008-2013 and that the assessments were incorrect and thus I determine that the assessments shall stand. This appeal is determined in accordance with section 949AK TCA 1997.

APPEAL COMMISSIONER

November 2017

The parties to this appeal have not requested the Appeal Commissioner to state and sign a case for the opinion of the High Court

Appendix I

Section 997 TCA 1997 – Supplementary provisions (Chapter 4)

(1) No assessment under *Schedule E* for any year of assessment need be made in respect of emoluments to which this Chapter applies except where –

(a) the person assessable, by notice in writing given to the inspector […], requires an assessment to be made,

(b) the emoluments paid in the year of assessment are not the same in amount as the emoluments which are to be treated as the emoluments for that year, or

(c) there is reason to suppose that the emoluments would, if assessed, be taken into account in computing the total income of a person who is liable to tax at the higher rate or would be so liable if an assessment were made in respect of the emoluments;

but where any such assessment is made credit shall be given for the amount of any tax deducted […] from the emoluments [against the amount of tax chargeable in the assessment on the person assessed][3].

[(1A)[Subject to *sections 959AB* and *959AD*], an assessment under Schedule E in respect of emoluments to which this Chapter applies shall not be made for any year of assessment –

(a) where *paragraph (a)* of that subsection applies, unless the person assessable has requested the assessment –

(i) in the case of any year of assessment prior to the year of assessment 2003, within 5 years, and

(ii) in the case of the year of assessment 2003 or any subsequent year of assessment, within 4 years,

from the end of the year of assessment concerned, and

(b) where *paragraph (b)* or *(c)* of that subsection applies, at any time later than 4 years from the end of the year of assessment concerned.]

(2) Where an employer pays to the Revenue Commissioners any amount of tax which, pursuant to this Chapter and any regulations under this Chapter, the employer has deducted from emoluments, the employer shall be

acquitted and discharged of the sum represented by the payment as if the employer had actually paid that sum to the employee.

[(3) Where the inspector, in accordance with the provisions of Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) sends a statement of liability to an employee, that statement shall, if the inspector so directs and gives notice accordingly in or with the statement sent to the employee, be treated in all respects as if it were an assessment raised on the employee, and all the provisions of the Income Tax Acts relating to appeals against assessments and the collection and recovery of tax charged in an assessment shall accordingly apply to the statement.]

Section 997A TCA 1997 – Credit in respect of tax deducted from emoluments of certain directors

[(1) (a) In this section—

"*control*" has the same meaning as in *section 432*;

"*ordinary share capital*", in relation to a company, means all the issued share capital (by whatever name called) of the company.

(b) For the purposes of this section—

(i) a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and

(ii) the question of whether a person is connected with another person shall be determined in accordance with *section 10*.

(2) This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.

(3) Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies [shall be given against the amount of tax chargeable in any assessment] raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.

(4) Where the company remits tax to the Collector-General which has been deducted from emoluments [paid by the company in a year of assessment, the tax remitted for that year of assessment] shall be treated as having been deducted from emoluments paid to persons other than persons to whom this section applies in priority to tax deducted from persons to whom this section applies.

(5) Where, in accordance with *subsection (4)*, tax remitted to the Collector-General by the company is to be treated as having been deducted from emoluments paid by the company to persons to whom this section applies, the tax to be so treated shall, if there is more than one such person, be treated as having been deducted from the emoluments paid to each such person in the same proportion as the emoluments paid to the person bears to the aggregate amount of emoluments paid by the company to all such persons.]

[(6) Where, in accordance with *subsection (5)*, the tax to be treated as having been deducted from the emoluments paid to each person to whom this section applies exceeds the actual amount of tax deducted from the emoluments of each person, then the amount of credit to be given for tax deducted from those emoluments shall not exceed the actual amount of tax so deducted.]

[(7) Notwithstanding *section 960G* and for the purposes of the application of this section, where a company has an obligation to remit any amount by virtue of the provisions of—

(a) the Social Welfare Consolidation Act 2005 and regulations made under that Act, as respects employment contributions,

(b)*Part 18D* and regulations made under that Part, as respects universal social charge, and

(c) this Chapter and regulations made under this Chapter, as respects income tax,

any amount remitted by the company for a year of assessment shall be set—

(i) firstly against employment contributions,

(ii) secondly against universal social charge, and

(iii) lastly against income tax.

[(8) A person aggrieved by a decision of the Revenue Commissioners in relation to a claim by that person for credit for tax deducted from emoluments, in so far as the decision was made by reference to any provision of this section, may appeal that decision to the Appeal Commissioners, in accordance with *section 949I*, within the period of 30 days after the date of that decision.]