31TACD2017

NAME REDACTED

BETWEEN/

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against an assessment to income tax in relation to the tax year of assessment 2015. The Appellant was a director of Company X Ltd. ('the company') and was the sole shareholder in the company.

2. During a period of financial difficulty in 2015, the company defaulted on tax liabilities in relation to salaries, which were not fully remitted by the company. The company traded from June 2001 to July 2015; however, as it was unable to overcome its difficulties, the company went into liquidation in 2015 and was subsequently wound up.

3. On 6 April 2016, the Respondent raised an amended assessment to income tax in respect of the tax year of assessment 2015, in accordance with the provisions of s.997A of the Taxes Consolidation Act 1997 ('TCA 1997'). The Appellant duly appealed.

Background and submissions

4. The Appellant was employed by the company from June 2001 to July 2015. As the sole shareholder in the company he accepted that he was a person with a '*material*

interest' in the company in accordance with s.997A TCA 1997. He accepted that the company failed to remit certain taxes in relation to his emoluments in respect of the tax year of assessment 2015 but stated that this arose only in the two months prior to liquidation.

5. The Appellant submitted that the operation of s.997A had caused undue hardship. He stated that the company at its peak employed 37 employees and that it provided employment for approximately 15 employees prior to its liquidation. He stated that the company deducted and paid over the correct amount of tax for periods other than the final two months prior to liquidation. He stated that the company was a casualty of the recession and that it did not intentionally default on taxes. He stated that the company liquidation process had had a deleterious effect on his health.

Legislation

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

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

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

Analysis and findings

7. 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) provides 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.'

8. 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.'*

9. The Appellant did not dispute the fact that he was a proprietary director and that a deficit arose in relation to tax remitted by the company regarding his emoluments for the tax year of assessment 2015. The Appellant pleaded undue hardship in relation to the application of the relevant provision in circumstances where he submitted that he had tried very hard to assist the company to continue trading and to retain its employees. The Respondent acknowledged the difficulties faced by the Appellant but stated that it was bound by the legislation in raising the assessment pursuant to s.997A TCA 1997.

10. Section 997A(3) provides that '*no credit for tax deducted .... shall be given against the amount of tax chargeable in any assessment raised on the person ... unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General'.* The Appellant did not dispute the deficit which arose in relation to the failure of the company to remit income tax in relation to his emoluments for the tax year of assessment, 2015. His submission was that the operation of the provision gave rise to undue hardship. The wording of the statutory provision is clear in that it provides that '*no credit ..... shall be given'* in the circumstances which arise in the within appeal. Thus I do not consider that I have discretion to depart from the clear wording of s.997A and as a result, I must determine this appeal in favour of the Respondent.

Conclusion

11. The assessment raised on 6 April 2016 failed to adequately account for PRSI and USC. Thus, in correcting this error in accordance with the proper application of s.997A TCA

1997, it is necessary to increase the assessment to €14,644.78 in accordance with section 949AK(1)(b) TCA 1997 and I determine that the assessment be increased accordingly. This appeal is hereby determined in accordance with section 949AK TCA 1997.

APPEAL COMMISSIONER

December 2017

Appendix I

<u>Section 997 TCA 1997 – Supplementary provisions (Chapter 4)</u>

(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 <u>*sections 959AB*</u> and <u>*959AD*</u>], 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.]