



**135TACD2020**

**REDACTED**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal related to Value Added Tax and Employers Income Tax (PAYE), Social Insurance Contributions (PRSI) and Universal Social Charge (USC).
2. The VAT issue in this appeal concerns whether or not the Appellant under declared its sales for VAT purposes. VAT assessments the subject of this appeal are as follows:
  - a) €2,346 for year ended 30 April 2015 and
  - b) €2,540 for year ended 30 April 2016
3. The PAYE/PRSI/USC issue concerns; whether or not certain payments of motor expenses, certain asset purchases for and/or on behalf of the directors and motor expenses paid to an employee should be treated as emoluments. There are also issues around benefit in kind and employers PRSI. Estimates of additional PAYE/PRSI/USC the subject of this appeal are as follows:
  - a) €30,815.81 for year ended 31 December 2015 and
  - b) €4,020.00 for year ended 31 December 2016
4. This appeal is adjudicated with a hearing in accordance with Chapter 4 Part 40A of the Taxes Consolidation Act, 1997.



## Background

5. The Appellant company is in liquidation since 11 November 2016.
6. The Directors of the Company were Mr NAME REDACTED (Director A), and his wife Mrs NAME REDACTED (Director B).
7. The Liquidator for the company is Mr NAME REDACTED (Liquidator).
8. The Company was a motor assessor company specialising in accident damage reporting, taking instructions from the insurance and legal industries and from private individuals.
9. The Assessments under appeal arose from a Revenue audit in relation to the calendar years 2014, 2015 and 2016.

## VAT Issues

10. VAT – Year ended 30 April 2015 - Respondent submitted that there is a liability of €2,346 on the difference between cash lodged and the receipts for VAT purposes declared. This is mainly accounted for by an unexplained amount of €10,500 included in a lodgement by the Company of €13,839.45 on 7 October 2014. The Respondent advised the TAC in correspondence after the Appeal hearing that this amount is not due and offered to vacate the assessment.
11. VAT - Year ended 30 April 2016. The Respondent submitted that there is a liability of €2,504 relating to a bad debt. The Respondent conceded in evidence at the Appeal hearing that there is no liability in relation to this year and offered to vacate the assessment to VAT for 2016.

## PAYE/PRSI/USC Issues

12. PAYE/PRSI/USC – 2015. The Respondent has raised an assessment for additional liabilities on the Appellant of €30,815.81. This is essentially based on the following figures of liability as determined by the Respondent:



- a) Benefit in Kind (BIK): PAYE/PRSI/USC for additional liability of €418 in respect of the use of a company car by the director. The BIK was ascertained at €1,530 and the assessment represents the consequent liability by the Appellant.
- b) Mileage payments to a director: PAYE/PRSI/USC additional liability based on Mileage payments (as recorded by Mr NAME REDACTED (Director A) of net €20,947 to the director, Mr NAME REDACTED (Director A).
- c) Car Purchase for a director: PAYE/PRSI/USC additional liability based on the payment of €14,200 by the company towards the purchase of a car for the personal use of Mrs NAME REDACTED (Director B).
- d) Mileage payments to an employee: PAYE/PRSI/USC for additional liability on Mileage payments to an employee, NAME REDACTED of net €2,856.
- e) Employers liability: Grossing up of tax due under b) and c). Both figures were aggregated and were grossed up to €63,480 and treated as emoluments for the director, Mr NAME REDACTED (Director A).
- f) Employer PRSI for additional liability of €477.

13. PAYE/PRSI/USC – 2016. The Respondent has raised an assessment for additional liabilities on the Appellant. This is essentially based on the following figures of liability as determined by the Respondent:

- a) BIK: PAYE/PRSI/USC for additional liability of €403 in respect of the benefit in kind (BIK) on the use of a company car by the director. The BIK was ascertained at €1,441 and the assessment represents the consequent liability by the Appellant.
- b) Mileage Payments to a director: PAYE/PRSI/USC for additional liability based on mileage payments of net €5,552 (as recorded by Mr NAME REDACTED – Director A) to the director Mr NAME REDACTED (Director A).
- c) Lawnmower Purchase for a director: PAYE/PRSI/USC additional liability based on the payment of €3,400 by the company towards the purchase of a lawnmower for the personal use of Mr NAME REDACTED (Director A).
- d) Employers liability: Grossing up of tax due under b) and c). Both figures were aggregated and were grossed up to €12,970 and treated as emoluments for the director, Mr NAME REDACTED (Director A).

### Legislation



14. Section 990 of the Taxes Consolidation Act, 1997 provides:

***“990. Estimation of tax due for year***

- (1) *Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as “other officer”) has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respective income tax months comprised in any year of assessment was greater than the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer –*
- (a) *may make an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and*
  - (b) *may serve notice on the employer specifying:*
    - (i) *the total amount of tax so estimated,*
    - (ii) *the total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and*
    - (iii) *the balance of tax remaining unpaid.”*

**Appeal Hearing**

15. At the outset of the appeal hearing, counsel for the Respondent queried whether or not the previous director Mr **NAME REDACTED (Director A)** was available to provide evidence. The Liquidator for the Company Mr **NAME REDACTED** advised that he would provide evidence and that the previous director Mr **NAME REDACTED (Director A)** was not present. Counsel for the Respondent asserted that any evidence provided by Mr **NAME REDACTED (Liquidator)** would be of a hearsay nature in the absence of the principal director Mr **NAME REDACTED (Director A)**. Mr **NAME REDACTED (Liquidator)** asserted that as the Liquidator of the company he had access to all the books, records and accounts of the company in liquidation and was personally able to provide evidence in support of the submissions he wished to make. In addition, he pointed to the fact that he had a witness who was employed as the financial accountant of the company. He pointed out his witness was present to give evidence in relation to a particular aspect of the case concerning her own emoluments. Mr **NAME**



REDACTED (Liquidator) declined an offer to adjourn to allow Mr NAME REDACTED (Director A) to attend.

16. The Liquidator for the Company Mr NAME REDACTED set out his objections to the making of the assessments in the first instance as follows:

- The notice of audit was not sent to him as liquidator – rather a copy of same was sent to his firm as agent for the Company
- The audit was conducted in the private residence of the previous Director
- Revenue obtained and removed records from the company

Mr NAME REDACTED (Liquidator) contended that a number of aspects of these actions were not carried out within the law. He submitted that:

- The legal identity of the Company changed from the date of liquidation
- The notification should have been sent directly to NAME REDACTED Ltd. (In Liquidation)
- The Revenue audit took place with a person who didn't represent the Company
- Other meetings took place with the former directors and third parties, according to Mr NAME REDACTED (Liquidator). Mr NAME REDACTED (Liquidator) advised that he had informed the Gardai of this.
- Books and records were handed over in contravention of the Companies Act as the former director did not have a lawful entitlement or authority to the records and therefore the Revenue Official acted outside the law in taking possession of the records.

[For clarity I have included the text of the Liquidator's submission in this at Appendix B]

17. Counsel for the Respondent submitted that Mr. NAME REDACTED (Liquidator) was aware of the Revenue investigation and that assessments were raised in accordance with the audit findings. He pointed to various correspondence in the matter from Mr NAME REDACTED (Liquidator) which acknowledged Mr NAME REDACTED (Liquidator's) awareness of the ongoing audit of the company records for 2015 and 2015.

18. Counsel for the Respondent submitted the jurisdiction of the Appeals Commissioners does not extend to decide on matters of criminal import. Counsel went on to assert that *"if there was a genuine issue here, the only course that was open to Mr. NAME REDACTED (Liquidator) at that time would be by way of judicial review to the High Court."*



19. The appeal was adjourned for a short while to allow counsel for the Respondent time to consider the points raised in relation to 16. above.

20. On resumption I advised that in accordance with Section 949AC (b) of the Taxes Consolidation ACT (TCA) 1997 that the Appeal Commissioner may:

*“admit evidence whether or not the evidence would be admissible in proceedings in a court in the State,”*

21. The hearing resumed with Mr **NAME REDACTED (Liquidator’s)** submissions and evidence. Counsel for the Respondent reserved to right to challenge any hearsay evidence adduced and stated.

*“I will try and assist and I will try and keep my objections down to an absolute minimum and I mean, really what we all want here, we all want the same thing. We want this to be dealt with efficiently and fairly.”*

### **Liquidator’s Submissions and Evidence**

22. The Liquidator’s submission presented in evidence by the liquidator for the company included the following:

a) Points raised at 16. above in relation to the audit findings.

#### **VAT Issues**

b) That there is no basis for the VAT assessments because the bad debt adjustment and bank account difference do not amount to additional sales for VAT purposes.

#### **PAYE/PRSI/USC Issues**

c) That the Revenue Officer based his assessments on information extraneous to the accounts of the company.

d) That as liquidator he had been unable to identify in the nominal ledger and ultimately in the accounts of the company any of the figures used by the Revenue officer in making his assessments.

**2015**



- e) That the application of benefit in kind (BIK) on the Appellant amounted to double taxation as the director had included the BIK in his own return of income for 2015 and 2016
- f) That there were no mileage payments made to the director in 2015.
- g) That the mileage paid to the employee is fully supported by appropriate documentation.
- h) That the mileage expense payments to a director (as used by the Respondent) arrived at for making the assessments were re-grossed. In this he raised the question of whether or not such re-grossing was permissible and he pointed to the amended TCA 1997 in section 986A.
- i) He referred also to an unpublished Appeal Commissioner decision (not supplied by the Appellant) from 2013 in the matter of re-grossing untaxed remuneration
- j) That there is no basis for the Respondent's assessment on the classification of a company car purchased in 2015 as director's remuneration because the vehicle in question is in fact a company asset. [Evidence of this was provided by the Liquidator in the form of an entry in the nominal ledger and by the Respondent from the company bank account]

#### **2016**

- k) That the application of benefit in kind (BIK) on the Appellant amounted to double taxation as the director had included the BIK in his own return of income for 2016.
- l) That there were no mileage payments made to the director in 2016.
- m) That there is no basis for the Respondent's assessment on the classification of a lawnmower purchased in 2016 as director's remuneration because the equipment in question is in fact a company asset. [Evidence of this was provided by the Liquidator in the form of an invoice and by the Respondent from the company bank account]

23. I have reproduced the salient points of the submissions and evidence in my analysis and findings.

#### **Employee's (NAME REDACTED) evidence**

Ms NAME REDACTED (employee) provided credible evidence that she incurred the mileage expenses recorded for business purposes by visiting Company clients in Dublin monthly and by going to the bank to make lodgements.



## **Respondent's Submissions and Evidence**

24. The Respondent submitted the basis for the assessments as set out in the background note above.

### **Value Added Tax 2015 and 2016**

- a) See my comments under paragraphs 26-28 below.

### **PAYE/PRSI/USC Issues 2015**

- b) BIK: The witness for the Respondent outlined that the BIK was calculated at 6% of the value of the Company car used by the director in making the BIK assessment for 2015.
- c) Mileage payments to a director: The witness outlined how he had examined a detailed spreadsheet of the mileage records maintained by Mr **NAME REDACTED (Director A)** and explained that he had taken the figure of €20,947 as the value of this mileage from the spreadsheet and used it in making his assessment for 2015.
- d) Mileage payments to an employee: The witness outlined that he failed to get a satisfactory explanation in relation to expenses paid amounting to €2,856 to an employee Ms **NAME REDACTED** and made his assessment for 2015 on the basis that the payment was an emolument for the employee in question.
- e) Car Purchase for a director: The witness outlined that a car was purchased using Company funds for the sole use of Mrs **NAME REDACTED (Director B)** who is a director but not involved in the business. The witness explained that he concluded that the value of the car amounted to an emolument for Mr **NAME REDACTED (Director A)** and that this formed the basis of assessment in this matter.

### **PAYE/PRSI/USC Issues 2016**

- f) BIK: The witness for the Respondent outlined that the BIK was calculated at 6% of the value of the Company car used by the director in making the BIK assessment for 2016.
- g) Mileage payments to a director: The witness outlined how he had examined a detailed spreadsheet of the mileage records maintained by Mr **NAME REDACTED (Director A)** and explained that he had taken the figure of €5,552 as the value of this mileage from the spreadsheet and used it in making his assessment for 2016.
- h) Lawnmower Purchase for a director: The witness explained that he did not regard the lawnmower as totally and exclusively for the business and stated that the director accepted that a taxation liability arose in relation to it. He concluded that the amount



paid for the lawnmower was an emolument to Mr **NAME REDACTED (Director A)** and made his assessment accordingly.

25. I have reproduced the salient points of this evidence in my analysis and findings below.

## **Analysis and Findings**

### **Value Added Tax**

26. The Respondent conceded in evidence at the Appeal hearing that there is no liability to VAT in relation to the year ended 30<sup>th</sup> April 2016 and offered to vacate the assessment to VAT for that year.

27. The Respondent advised the TAC after the appeal hearing and before this Determination was issued that it was withdrawing the VAT assessments for the years ended 30<sup>th</sup> April 2015 and 2016.

28. I have accordingly concluded that the Appeal in relation to VAT is upheld and that the VAT assessments should be vacated.

### **PAYE/PRSI/USC.**

29. The Income Tax (Employments) (Consolidated) Regulations, 2001 apply to an employer who makes a payment of emoluments. Section 112 provides that 'emoluments' means anything assessable to income tax under Schedule E. A similar meaning of emoluments is provided in section 983 (within *Chapter 4, Part 42 – Collection and recovery of income tax on certain emoluments (PAYE system)*). Tax on emoluments is deducted and remitted by the employer on the making of a payment of emoluments. For an assessment on the Appellant, as an employer, under section 990 of the Taxes Consolidation Act, 1997 to stand it must be that the amount of tax which the Appellant was liable to remit was greater than the amount of tax paid by the Appellant. The requirement to deduct and remit derives from the Appellant making a payment of emoluments. A comprehensive analysis of taxable emoluments and the application of section 112 was delivered in the Tax Appeals Commission determination 29TACD2019 [www.taxappeals.ie](http://www.taxappeals.ie). In the instant appeal, the matter under appeal is a Notice



of Estimation of PAYE/PRSI/USC made on the Appellant, as an employer, in respect of the payment of emoluments.

## 2015

30. The assessments for 2015 can be broken down as follows:

a) **Benefit in Kind 2015 €418**

31. The company has failed to return this amount in the year under appeal. In mitigation, Mr **NAME REDACTED (Liquidator)** submitted that this amount had been accounted for in the tax return of the director concerned. No evidence was presented to verify this. In any event the liability falls exclusively on the Appellant in accordance with S112 of the TCA 1997. I conclude that the assessment as above in respect of BIK for this year is correct.

b) **PAYE/PRSI/USC based on Mileage payments attributed to the director for 2015.**

[Some of this analysis relates to 2016 and is included here where it is not feasible to separate it from 2015.]

32. It was agreed between the parties that the director used a car owned by the Appellant Company in the course of carrying out his duties. The witness for the Respondent presented evidence for the basis of his assessment.

33. The witness for the Respondent described the basis of his assessment as being derived from detailed mileage records maintained by Mr **NAME REDACTED (Director A)**. In evidence he stated:

*"Mr. **NAME REDACTED (Director A)** kept meticulous notebook records of every trip he made every day, from time leaving to coming back, to the amount of miles and where he went".*

34. The Liquidator disputed this and stated that there were no payments of mileage expenses in records examined by him. He did however say in evidence that



*"I have further examined the nominal ledger listing for the year ended 30th April 2016 and I've noted that there is a journal entry debited to motor expenses in the amount of €21,008 and the credit for this amount has been posted to accruals".*

35. The Liquidator stated clearly in relation to mileage expenses; *"They weren't paid. They weren't paid to a director, period."* The witness for the Respondent suggested that these expenses were attributed to Mr **NAME REDACTED (Director A)** as follows; *"he has calculated the mileage expenses. He has credited his directors current account with these figures to offset against money he owes to the company."*
36. We have therefore, a conflict of evidence in the matter of whether or not the Director Mr **NAME REDACTED (Director A)** has actually been paid mileage expenses for the periods under appeal.
37. I have examined the evidence submitted in the form of the nominal ledger entries from books of first entry used to support the annual accounts entries for the company for the years ended 30<sup>th</sup> April 2015 and 2016 in order to determine the veracity of these matters. I have confirmed that the annual accounts for the Company contained entries in the annual accounts for motor expenses 30 April 2015 - €28,763 and 30 April 2016 - €31,355.
38. It was necessary therefore to examine the make-up of these amounts from the prime records submitted to TAC.
39. The table in Appendix A indicates that Mr **NAME REDACTED (Director A)** was paid €5,939 by cheque in 2015.
40. In summary then we have a picture of what probably occurred in the appeal year 2015. The Appellant has not succeeded in discharging the burden of proof that the payment of €5,939 made to him in 2015 does not amount to an emolument for the director and consequent liability to PAYE/PRSI and USC by the company for 2015.
41. Payment made tax free to a director in the circumstances that the director when using a company car, the cost of its acquisition and running costs having being borne by the company, amounts to an emolument in the hands of the director.



42. I have set out in the table attached in Appendix A, the summary of the evidence provided by the Liquidator, in relation to the make-up of the entries in the accounts for the years ended 30<sup>th</sup> April 2015 and 2016, as they relate to motor expenses payments. These accounts display a payment in 2015 of €5,939 in respect of motor expenses for the director. This evidence is somewhat confusing. Based on the statements provided to me and on my understanding of this evidence, I have concluded bearing in mind the need for fairness and efficiency that this payment is an emolument paid to the director.

**c) PAYE/PRSI/USC based on Car Purchase valued €14,200 for a director:**

43. The Respondent's witness presented the following evidence in relation to the purchase of the car used by Mrs **NAME REDACTED (Director B)**:

*"I have a figure of €14,200 for the purchase of Mr. **NAME REDACTED**'s wife's car. Now Mr. **NAME REDACTED (Director A)** told me from the very outset that his wife's car was purely her own car. Was not involved in any shape or form or any expenses paid out for it by the company.*

*Well my understanding of it was that the company paid €14,200 for the purchase of Mrs. **NAME REDACTED (Director B's)** car who yes is a director of the company but the car was not bought as an asset of the company. It was bought on a personal capacity. So therefore €14,000 of the company's monies was used to purchase the car."*

44. In cross examination the witness for the Respondent was asked:

*"You are making a statement, the Appellant used company funds in the amount of €14,200 to purchase car registration **REDACTED** for the director Mrs. **NAME REDACTED (Director B)** it was company funds. You know that that car was capitalised in the records of the company as a company car?*

*Respondent's Witness: I did not because I was advised..."*



45. The witness for the Respondent gave evidence from his conversation with Mr **NAME REDACTED (Director A)** that €14,200 of company funds was used to pay the balance (after trade-in) of the purchase price for Mrs **NAME REDACTED (Director B's car)**. He concluded from this interaction and from the facts of the matter, that the car was used exclusively by Mrs **NAME REDACTED (Director B)**. The Respondent provided company bank account evidence, that company funds in the amount of €14,200 was used to part pay for the car on 8 January 2015.

46. The Respondent regarded the purchase of the car for the use of Mrs **NAME REDACTED (Director B)** as an emolument of the director Mr. **NAME REDACTED (Director A)** when making the assessment. In fact, the witness for the Respondent in evidence pointed out that Mr **NAME REDACTED (Director A)** had told him:

*"from the very outset that his wife's car was purely her own car. Was not involved in any shape or form or any expenses paid out for it by the company."*

47. The witness for the Respondent pointed to a letter from Mr **NAME REDACTED (Director A)** which included the following in relation to the car purchased for Mrs **NAME REDACTED (Director B)**:

*"This was bought by me, using expenses due to me and not drawn down."*

48. The Respondent and the Appellant have provided evidence of the use of company funds in the amount of €14,200 to purchase a car. The Respondent portrays this expenditure as the personal use of the company funds by the directors. The Appellant points to the fact that the €14,200 has been capitalised in the balance sheet of the company and should accordingly be treated as a depreciating asset and taxed in accordance with benefit in kind rules for the provision of motor vehicles to employees.

49. We have therefore, a conflict in the matter in relation to the taxation treatment of the €14,200. The Respondent has provided evidence in the form of a VRT history search that the car was initially registered to the company name on 10 January 2015 but registered to Mrs **NAME REDACTED (Director B)** on 1 June 2015.



50. The evidence adduced by the Respondent in this matter indicates that Mr **NAME REDACTED (Director A)** used company funds to purchase a car for the exclusive use of Mrs **NAME REDACTED (Director B)**. The car was purchased with assistance from the trade-in of Mrs **NAME REDACTED (Director B's)** old car. The Liquidator agreed that the car was transferred to Mrs **NAME REDACTED (Director B)** in the year ended 30 April 2016. He stated in evidence

*“The car purchased in the year ended 30th April 2015 was sold to the directors in the year ended 30th April 2016 by way of offset against the accrual balance. See attachment four. There was however sufficient funds available to directors to cover the purchase.”*

51. I have concluded that the amount expended on a car part purchased for €14,200, is in fact the purchase of an asset for the company. In these circumstances the car falls to be taxed under the benefit in kind rules for 2015 and cannot be regarded as an emolument paid to the director of the Appellant company. The matter of any additional tax on the benefit in kind in this matter can be agreed between the parties.

**d) PAYE/PRSI/USC for additional liability of €1,585 in 2015 based on Mileage payments to an employee.**

52. The Respondent's witness gave evidence of having failed to receive verification of the validity of untaxed mileage payments to the employee, he based his assessment on the amounts paid to the employee. The mileage payments were made to an employee Ms **NAME REDACTED** in a net amount of €2,856.

53. **Ms NAME REDACTED**, the employee concerned in evidence for the Appellant, provided credible evidence of incurring the traveling expenses, in the course of her duties as an employee of the Appellant.

54. I have concluded that the amount paid is in fact an expense of the Appellant company and is not an emolument paid to the employee.

**e) Employer PRSI for additional liability of €477 in 2015.**



55. This is a consequential amount and will require some adjustment based on my final determination below.

## 2016

56. The assessments for 2016 can be broken down as follows:

### a) Benefit in Kind 2015 €403

57. The company has failed to return this amount in the year under appeal. In mitigation, Mr **NAME REDACTED (Liquidator)** submitted that this amount had been accounted for in the tax return of the director concerned. No evidence was presented to verify this. In any event the liability falls exclusively on the Appellant in accordance with S112 of the TCA 1997. I conclude that the assessment as above in respect of BIK for this year is correct.

### b) PAYE/PRSI/USC based on Mileage payments attributed to the director for 2016

58. Please refer again to the table in Appendix A for an analysis of the make-up of the Company accounts figures in relation to motor expenses for 2016. This table indicates that an amount of €21,008 was accrued in the accounts for 30 April 2016 in respect of mileage expenses due to Mr **NAME REDACTED (Director A)**.

59. The Liquidator has submitted that

*“The accruals on 30th April and creditors at 30th April 2016 in the financial statements amounted to €21,038. That amount was corrected after the year end and reversed. The accrual for the motor expenses was never paid or the incorrect amount of motor expenses wasn't paid, wasn't paid to anyone.”*

The Liquidator also submitted

*The CT1 that went in on 30th April 2016 showed creditors and accruals of €21,000, it still hadn't been paid out and the correction was made in the following period after 30th April 2016. No payment whatsoever of expenses to Mr. **NAME REDACTED (Director A)**.”*



60. It is certain from the submissions made to TAC and reproduced in evidence by the Liquidator that Mr **NAME REDACTED (Director A)** cleared his director's current account in 2018. The Liquidator submitted to TAC and said at the Appeal Hearing:

*"On the day of liquidation, the director purchased the remaining car and equipment from the company. There were insufficient funds to pay for these and on 12th March 2018, **NAME REDACTED (Director A)** made a payment of €14,198 to the Liquidator to cover the purchase of his own car."*

61. If the director Mr **NAME REDACTED (Director A)**, purchased the company assets on 11 November 2016 using a combination of his directors account which included the accrued expenses and an overdrawn current account finally settled in March 2018, then the liability accrued to him by the Company in its accounts for the year ended 30<sup>th</sup> April 2016, was discharged on the date of Liquidation 11 November 2016.

62. I have no evidence from either party of adjustments made in the accounts after the year ended 30 April 2016. I have concluded therefore, that these accounts of the company which included an amount of €21,008 accrued, was for the purpose of allocating mileage expenses due for the director. Accordingly, Mr **NAME REDACTED (Director A)** has been paid untaxed motor expenses albeit perhaps in a different period to that as set out in the Respondent's assessment.

63. Payment made tax free to a director in the circumstances that the director when using a company car, the cost of its acquisition and running costs having being borne by the company, amounts to an emolument in the hands of the director.

64. The Appellant has not succeeded in discharging the burden of proof that the accrued liability in the directors current account was not included as an expense item in the profit and loss accounts of the company. The Appellant has not succeeded in discharging the burden of proof that the accrued expenses have not been paid or discharged to the director. Consequently, the Appellant has not proved that the amount so, accrued does not amount to an emolument for the director and consequent liability to PAYE/PRSI and USC by the company for 2016.

65. I have set out in the table attached in Appendix A the summary of the submissions and evidence provided by the Liquidator in relation to the make-up of the entries in the accounts for the years ended 30<sup>th</sup> April 2015 and 2016. These accounts display an accrual of €21,008



in 2016 in respect of motor expenses for the director. This evidence is somewhat confusing. Based on the statements provided to me and on my understanding of this evidence, I have concluded, bearing in mind the need for fairness and efficiency, that the net amount of €21,008 accrued in the accounts for the year to 30 April 2016 and discharged as above is an emolument paid to the director.

**c) PAYE/PRSI/USC based on the purchase by the company of a lawnmower for the personal use of the directors of €3,400.**

66. The witness for the Respondent asserted that the lawnmower should be added back [in the corporation tax computation] and provided evidence that the director agreed that a tax liability arose in relation to it. The Respondent regarded the purchase of the lawnmower as an emolument of the director when making the assessment.

67. The witness for the Respondent pointed to a letter from Mr **NAME REDACTED (Director A)** which included the following in relation to the lawnmower purchased

*"purchase of lawnmower, €3,400 a taxation liability arises".*

68. The Liquidator pointed out that the lawnmower is in fact a company asset and agreed with the witness for the Respondent that it was in fact purchased by the Appellant company. However, the Liquidator argued that the lawnmower should have been treated as a company asset and any taxation consequence of its use for the personal benefit of the director should be correctly dealt with in accordance with the appropriate benefit in kind rules.

69. I have concluded that the lawnmower, was an asset in the balance sheet of the company, and was acknowledged by the director as used exclusively to maintain the private house of the director. In these circumstances, the director's personal use of the lawnmower requires an adjustment to his remuneration for the year under appeal. However, the personal use is a taxable benefit and as such subject to PAYE/PRSI and USC. The matter of any additional tax on the benefit in kind in this matter can be agreed between the parties.

**Grossing Up Emoluments.**



70. The Respondent in making its assessments regarded the payments for the director and employee's expenses, the payment for the car and the payment for the lawnmower (I have already determined that the payment towards the car purchase in 2015 and the lawnmower in 2016 should be dealt with under BIK rules) as being net of PAYE, PRSI and USC paid as emoluments to the director or employee. The Respondent grossed these amounts up in making its assessments of liability.

71. The Appellant dealt with this matter in its submission and the Liquidator, Mr **NAME REDACTED** said in evidence at the appeal:

*"All of the expenses in which the assessments have been raised have been re-grossed. I understand the conditions for re grossing have now been put in statutory footing by way of Section 986A of the Taxes Consolidation Act 1997. This is further developed in Part 42-04-66 of the Tax and Duty Manual. In particular, I refer you to paragraph 2.2 of the manual and I further understand that there may be a 2013 Appeal Commissioners decision regarding the taxable remuneration and I was unable to obtain that."*

72. The PAYE system works on the fundamental principle of making the employer liable for the tax in the first instance. If the employer fails to do that, then they have to suffer the liability.

73. Regulation 4 makes the employer liable for the amount of the deduction that ought to have been made from the payment, not the amount due on a theoretical grossed up amount i.e.

*"Persons who are required to make any deduction . . . shall, in the case of a deduction (whether or not made), be accountable for the amount of the tax, and liable to pay that amount"*

74. Whilst Regulation 25, makes provision for grossing up where an employer agrees to pay a net sum to the employee 'clear of tax'. The regulation ensures that the taxable amount in such cases is the equivalent gross amount. In the instant case, the employer is not making " *a payment to or for the benefit of the employee in respect of his or her tax*", rather the employer is required to discharge a liability which the employer itself owes. Consequently, Regulation 25 is unhelpful in determining if the Respondent should gross up the payments in the instant case.



75. Section 986A and the connected relevant Revenue Tax and Duty Manual, provides some useful insights on how to treat emoluments which were paid without deduction of income tax. The Revenue guidance note says in particular that section 986A is not intended for situations where genuine or innocent mistakes or errors happen in payroll.
76. I cannot rely on the provisions of Section 986A TCA 1997 in relation to this appeal as it is effective only from 1 January 2018. I have concluded that there was no statutory basis for grossing up in this particular case for the years under appeal. Accordingly, I have determined that the tax liability arising in this determination should be computed on the net amounts paid or deemed to have been paid as emoluments.

### **Appellant's objections to the making of the assessments**

77. The Appellant raised concerns about the Revenue audit and investigations in the company which was in liquidation at the outset of the audit. The Appellant considered that the Liquidator should have been contacted directly and that the former director had no standing in providing books and records of the company, attending meetings with Revenue or in answering queries raised by the Revenue auditor.
78. The Respondent provided copies of correspondence in relation to this matter which included references to internal reviews by Revenue and to an external review carried out by an external reviewer in accordance with the code of practice for Revenue Audit. These reviews have not been supportive of the Appellant's views in the matter.
79. The determinations that can be made by an Appeal Commissioner are those delineated in sections 949AK and 949AL of TCA 1997. Those provisions confine the Appeal Commissioners to making a determination in relation to the assessments, decisions, determinations or other matters which are the subject matter of the appeal actually before the Appeal Commissioners. The jurisdiction of the Appeal Commissioners is confined to interpreting tax legislation and ensuring that the Revenue Commissioners have complied with that legislation. The Appeal Commissioners do not have the jurisdiction to determine whether a legislative provision is discriminatory or unfair or otherwise unlawful; we are not empowered by statute to apply the principles of equity or to grant declaratory reliefs.
80. Accordingly, I am satisfied that it would be ultra vires for me to embark upon a consideration of, or to make a finding or determination in relation to, the issue of whether the conduct of



the Revenue investigation in this case is, as argued by the Appellant, discriminatory or unfair or otherwise unlawful. I must therefore decline to consider this argument or to make any finding in relation thereto.

81. I do not consider that the jurisdiction of the Tax Appeal Commissioner extends to decide on matters of criminal import.

### **Burden of Proof**

82. In appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the relevant tax is not payable. In the High Court judgment of *Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners* [2010] IEHC 49 (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”.*

83. The Appellant, being the person with access to the facts and documents relating to their tax affairs, and the taxation system developed on the premise of self-assessment, must present evidence in support of the appeal in order to meet the burden of proof. If an Appellant cannot demonstrate that an assessment is incorrect, the assessment stands. There is a separate requirement to retain records in accordance with the requisite statutory provisions.

### **Determination**

#### **VAT.**

84. The Respondent has agreed to vacate both VAT assessments. I am accordingly allowing the Appellant’s appeals in relation to the VAT Assessments for both years without further commentary on the matters raised during the Appeal hearing.

#### **PAYE/PRSI/USC**

85. I determine



- a) That the Appellant did not succeed in discharging the burden of proof that the liability to BIK is not payable. I determine that the amounts of €418 for 2015 and €403 for 2016 are due in this regard.
- b) That the net amounts of €5,939 in 2015 and €21,008 in 2016 in relation to mileage paid to the director to be emoluments paid to the director, and are subject to PAYE/PRSI/USC and to employers PRSI by the Appellant, which should be calculated on these net payments without re-grossing the amounts.
- c) That the net amounts of €14,200 used to part purchase a motor car in 2015 for the benefit of the director's wife is not an emolument paid to the director. The matter of any additional tax on the benefit in kind in this matter can be agreed between the parties.
- d) That the net amount of €3,400 used for the lawnmower purchased as a company asset in the net amount of €3,400 in 2016 is not an emolument paid to the director. The matter of any additional tax on the benefit in kind in this matter can be agreed between the parties in line with the normal rules for BIK on the personal use of employer assets.
- e) That the net amount of €2,856 paid as travel expenses to the employee of the company is not an emolument paid to the particular employee. Accordingly, the PAYE/PRSI/USC additional liability of €1,585 is not due.
- f) The Employer PRSI liability of €477 is a consequential amount and will require some adjustment based on my determination above.

86. The PAYE/PRSI/USC estimates should be amended to reflect my determination in 85 above. In addition, an appropriate consequential adjustment should be made to account for any additional employer's PRSI for 2015 as outlined at 55 above

87. This appeal is hereby determined in accordance with Section 949AK TCA 1997.

**CHARLIE PHELAN**

**APPEAL COMMISSIONER**

**30 APRIL 2020**



## Appendix A – Make-up of Motor Expenses in the Accounts of the Appellant Company

Source of entry	To	Ye 30 April 2015	Ye 30 April 2016
Bank	REDACTED (employee)	3,190.00	1,97.50
Bank	Employee loan	9,240.00	
Bank	NAME REDACTED(Director A)	5,939.00	
Bank	Motor expenses		3,400.00
Journal entry	From Repairs	10,000.00	7,520.16
Journal Entry	Unexplained	1,424.00	
Journal Entry	Motor expenses accrual		21,007.73
Journal Entry	REDACTED (Director A) Subsistence	4,909.31	
Journal Entry	Accruals reversal '14	-5,939.00	
Totals		28,763.31	33,725.39
Profit & Loss A/C entry		28,763.31	31,355.00

### Notes:

- The journal entry amounts of €10,000 and €7,520.16 respectively are predominantly made up of normal motor expense items shown in the bank account such as diesel, tyres etc.
- There is a definitive bank payment to Mr NAME REDACTED (Director A) on 26 February 2015 for motor expenses of €5,939 which equates to an incoming accrual of expenses due per the accounts to Mr NAME REDACTED (Director A) from ye 30 April 2014.
- There is an accrual of €21,007.73 for motor expenses for the year ended 30 April 2016. The other side of that journal entry is simply reflected as an accrual.



- d. There is a slight unidentified difference in the Profit and loss charge in year ended 30 April 2016 between the nominal ledger listing and the accounts.

**Appendix B Submission in evidence from Mr. NAME REDACTED (Liquidator)**

(See paragraph 16 in the determination)

*Firstly, I will refer you to Section 596 of the*

*Companies Act 2014, which states:*

*"A person who without lawful entitlement or authority has:*

*(a) at the date of appointment of a liquidator to the company position or control of the book, records or other property of the company or;*

*(b) subsequent to such date, comes into possession or control shall surrender immediately to the Liquidator such books, records and property as the case may be."*

*As under Section 776(3), Companies Act 2014, Mr. NAME REDACTED (Director A) no longer had a lawful entitlement or authority. The act of handing over the books and records to the case worker was unlawful.*

*The case worker knew or should have known that Mr. NAME REDACTED (Director A) did not have a lawful entitlement or authority to the books and records and therefore acted outside the law in taking possession of those books and records.*

*I subsequently discovered that after the date of the Revenue audit, copious letters, e-mails and telephone conversations took place between Mr. NAME REDACTED (Director A) and Revenue.*

*As a result, a meeting took place on 25th July 2017 at the Revenue offices in REDACTED between two Revenue officials, Mr. NAME REDACTED (Director A) and a third party, Mr. NAME REDACTED.*

*I was not made aware of the meeting and was not present.*

*During the meeting the business of the company would have been openly discussed not alone with a Director whose function has ceased on my appointment but also with a third party Mr. NAME REDACTED".*

