AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

128TACD2023

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This is a consolidated appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("TCA 1997") brought on behalf of [redacted] ("the Appellant") against Notices of Determination dated 13 November 2020, issued by the Revenue Commissioners ("the Respondent") pursuant to section 864 TCA 1997, in respect of the accounting periods ended 31 December 2015 to 31 December 2018 inclusive.

2. The appeal involves two separate Notices of Determination issued by the Respondent, in respect of deductions for foreign royalty withholding tax ("RWHT") in the Appellant's Corporation Tax returns, filed for the periods ended 31 December 2015 to 2018 inclusive. One of the determinations relates to the period ended 31 December 2015, and the other relates to the period ended 31 December 2016 to 2018 inclusive ("the Relevant Period").

3. Each Determination purports to deny future claims in respect of trading losses that may be made by the Appellant in calculating its Corporation Tax liability in future years. The matter in dispute relates to deductions for foreign RWHT in [redacted] Corporation Tax returns filed for the periods ended 31 December 2015 to 2018 inclusive.

4. The Appellant in calculating its adjusted taxable trading income for the above accounting periods treated the foreign RWHT suffered as a deductible expense. The Respondent objected to this treatment.

5. On 10 December 2020, the Appellant submitted two Notices of Appeal in respect of the said determinations, resulting in two separate tax appeals, which were subsequently consolidated. There was agreement that the Commission could hear the appeals with respect to the Notices of Determination. The appeal proceeded by way of a hearing over three days on 27 February 2023. Both the Appellant and Respondent were represented by Senior Counsel. The Commissioner heard sworn oral testimony from a number of witnesses, including expert witnesses, in addition to submissions from the parties to the appeal.

Background

6. The Appellant is an indirect subsidiary of [redacted] and is the owner of the majority of [redacted].

7. [redacted] to [redacted]. On 20 June 2016, [redacted]

8. The Appellant's principal activities are operations associated with [redacted]. [redacted] operates [redacted].

9. In carrying out its trade, the Appellant licenses [redacted] to its customers, which include both affiliated entities and third party customers in foreign jurisdictions. This arrangement is governed by way of licence agreements for the specific jurisdictions concerned. A number of licence agreements formed part of the documents associated with this appeal.

10. The foreign jurisdictions imposing foreign RWHT to which the Appellant licenses its [redacted] include (but are not limited to) [redacted]. The Appellant does not have a branch or permanent establishment for Corporation Tax purposes in any of the foreign jurisdictions in which it licenses [redacted] to customers located there. In a number of those jurisdictions, customers deduct foreign RWHT at source.

11. When a royalty payment is made, foreign RWHT is applied on the gross royalties payable, regardless of whether a profit or loss is generated on that transaction. Royalty payments are generally subject to a standard rate of 20%. However, lower rates may be accessed under treaties or double taxation agreements ("DTA").

12. During the Relevant Period, the Appellant's royalty receipts included royalties from customers in both treaty and non-treaty jurisdictions. In summary, during the Relevant Period, foreign RWHT suffered by the Appellant approximated €23,356,919 in Irish treaty jurisdictions, and €8,090,064 in non-Irish treaty jurisdictions.

13. The Appellant in calculating its adjusted taxable trading income for the Relevant Period treated foreign RWHT suffered as a deductible expense. The Respondent objected to this treatment.

14. [redacted]

15. [redacted].

16. [redacted]

17. [redacted]

18. On 13 November 2020, a formal Notice of Determination was issued in respect of the period ended 2015. (It was reissued on 10 December 2020 due to a typographical error on the original determination). In addition, a Notice of Determination for periods ended 2016 to 2018 issued. The total amount of the determinations under appeal is €31,446,983. A table illustrating licensing revenue and RWHT incurred per jurisdiction is contained in Book D of the Booklet of Documents at page 1. There is no dispute between the parties concerning the licencing revenue.

19. The Determinations (and this consolidated appeal) concern losses realised, carried forward but not yet used. Accordingly, there is no tax at stake in respect of this

consolidated appeal unless, and until, the losses are sought to be used in future accounting periods against taxable profits.

20. The foreign RWHT deductions in dispute, as set out in the Appellant's Outline Submissions[1], are as follows:-

Period Start Date	Period End Date	RWHT Deduction in dispute
01/01/2015	31/12/2015	€6,595,997
01/01/2016	31/12/2016	€8,491,502
01/01/2017	31/12/2017	€8,105,913
31/01/2018	31/12/2018	€8,253,571

21. The total tax in dispute for the period 2015-2018, as set out in the Respondent's Outline of Arguments[2], is as follows:-

Period Start Date	Period End Date	Foreign Tax Deductions in Dispute	Tax Value of Losses Restricted
01/01/2015	31/12/2015	€6,595,997	€824,500
01/01/2016	31/12/2016	€8,491,502	€1,061,438
01/01/2017	31/12/2017	€8,105,913	€1,013,239
31/01/2018	31/12/2018	€8,253,571	€1,031,696
Total		€31,446,983	€3,930,873

22. The Respondent submits that the matter was dealt with by way of Determinations as "*the Form CT1 return on file for 2016 could not be amended, because the Appellant was in a*

[1] Page 1, Appellant's Outline Submissions
[2] Page 5, Respondent's Outline of Arguments

loss-making situation. A 'nil' return was originally filed, and any amended return made to reflect the foregoing issues would also have given rise to a 'nil' return"[3].

23. On 10 December 2020, the Appellant duly appealed to the Commission by way of two Notices of Appeal in respect of each of the Determinations for the relevant years, requesting that the correct treatment of same be determined.

Legislation and Guidelines

24. The legislation relevant to this appeal is as follows:-

25. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides:-

(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;*

…….

26. Section 77 TCA 1997, Miscellaneous Special Rules for the Computation of income, *inter alia* provides:-

(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.

[3] Page 3, Respondent's Outline of Arguments, May 2022

27. Section 826 TCA 1997, Agreements for relief from double taxation, inter alia provides:-

(1) 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

(2) 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.

28. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, Paragraph 2, General, *inter alia* provides:-

(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.

29. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, Paragraph 4, Limit on total credit— Corporation Tax, *inter alia* provides as follows:-

(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.

30. 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, provides as follows:-

(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.

(3) 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.

31. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 9DB, Unilateral Relief (royalty income), *inter alia* provides:-

(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.

Evidence and Submissions

Appellant's Evidence

32. [redacted] gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given:-

(i) The witness testified that [redacted] The witness stated that in [redacted] witness explained the nature of [redacted], including the Appellant and the [redacted] that it licences and owns.

(ii) The witness testified that the Appellant has the rights to license [redacted] outside [redacted] and has subsidiaries and affiliates in various other countries, maybe 50 or 60 other countries, which are granted licences. The witness gave the example that [redacted] has a sub licence from the Appellant to pursue generating revenue in [redacted] with [redacted] customers. The witness confirmed that the Appellant does not have a permanent establishment or branches in any of the jurisdictions which licences [redacted] and has no presence or employees in said jurisdictions. The witness stated it is the business model used in each country.

(iii) The witness testified that the licence income stream is subject to foreign RWHT, imposed by the local jurisdictions, at different rates depending on whether a DTA applies. The witness confirmed that there are approximately one hundred jurisdictions in which the Appellant licences [redacted] throughout the world and foreign RWHT is a common feature of nearly all of those jurisdictions.

(iv) The witness gave evidence that in Ireland, the Appellant treats foreign RWHT suffered, as a deduction of the cost of doing business in those jurisdictions. The witness confirmed that there are competitors in respect of the Appellant's business and that it is not just as simple as increasing its prices in order to absorb the costs incurred. The witness testified that foreign RWHT is assessed and calculated on the gross licence fee. The witness gave the example that in [redacted], if the Appellant received [redacted]100.00, that gross payment will be subject to foreign RWHT. The witness testified that it is in no way associated with whether the Appellant makes a profit or loss, it is simply charged as a flat percentage of the licence fee i.e. a percentage of the gross royalty.

(v) The witness testified that the Appellant shows foreign RWHT separately in its consolidated financial statements, as advised by the Appellant's accountants. The witness gave evidence that the Appellant's accounts are prepared by a professional firm of advisors, [redacted] in Ireland. The witness gave evidence that as foreign RWHT is a material number, the Appellant was advised to state it separately in its accounts. In addition, the witness confirmed that it separates the taxes on its corporate profit from its foreign RWHT. The witness stated that in any event, this has to do with accounting principles which are governed by either US GAAP or IFRS, rather than tax treatment which is governed by statute and relevant herein.

(vi) During cross examination by Senior Counsel for the Respondent, the witness confirmed that the Appellant is recognised by the Respondent as a taxpayer in this jurisdiction. The witness testified that whilst one of the reasons the [redacted] was to secure more favourable double taxation treaty benefits, the other reason was that when looking through a company it is through an [redacted] company now, to the [redacted] company. The witness agreed that the benefit of being established in Ireland, is that the Appellant achieves a lower rate of foreign RWHT, in certain circumstances.

(vii) The witness testified that the Appellant conducts its business on the basis of sub-licences and distribution agreements. The witness gave evidence that there is a physical team in Ireland of in or around [redacted] employees, which the witness stated are "customer service agents" that assist the sales teams in other jurisdictions. The witness confirmed that he agreed that the Irish entity did not have any exposure to taxation, in jurisdictions where there is no foreign RWHT, which are mostly in Europe. In addition, the witness agreed that where the Appellant has no permanent residence in a jurisdiction, it is subject to foreign RWHT. The witness confirmed that there are good commercial reasons why entities are in place, rather than permanent establishments in foreign jurisdictions. The witness testified that whilst for example the Appellant does not pay tax in [redacted] pays tax to the [redacted] Government.

(viii) Senior Counsel for the Respondent referred to 3 Licencing agreements, two of which were examined, the first being the [redacted] agreement in the Booklet of Documents entitled Book D, at Tab C6 page 135, the second being the [redacted] agreement at page 145, and the third being the [redacted] Agreement at page 155. A number of questions were put to the witness in relation to the absence of a reference to foreign RWHT for example, in the [redacted] agreement. The witness testified that perhaps it is due to the fact that a zero rate is applicable due to the [redacted] DTA, as opposed to 15% non-treaty rate. Senior Counsel also made reference to certain withholding tax certificates at Book D, Tab D of the Booklet of Documents, in particular to a [redacted] withholding tax certificate at Book D page 163 of the Book of Documents.

(ix) The witness testified that in accordance with a prior agreement, a reseller provides the Appellant with a withholding tax certificate, following payment of foreign RWHT by the reseller. The witness accepted that the purpose of the agreement is to enable the Appellant to seek a credit against tax liabilities, but that a certificate

could also be used for a deduction in tax liabilities. Reference was also made to page 5 of the additional Booklet of Documents containing the DTA's and specifically the [redacted] DTA. The witness testified that he was in agreement that the point of double taxation agreements is to avoid double taxation.

(x) The witness gave evidence that the Appellant has not had the ability to utilise credits for foreign RWHT suffered against its Corporation Tax as a result of losses the Appellant has made to date. The witness restated that he had no doubt that foreign RWHT is assessed on the gross royalties' income.

33. [redacted] gave expert evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given:-

(i) The witness confirmed that he has prepared a report which has been submitted at Book B, Tab 2 of the Booklet of Documents and that he adopts the contents of his report as his evidence. The witness testified that he is a [redacted]. The witness gave evidence that he has been asked by the Appellant to address certain accounting related matters and the standards that govern the preparation of accounts in Ireland, in particular, FRS 102.

(ii) The witness testified that financial reporting standards are written for the generality of companies and that it is important to understand the context in which they are applied. The witness gave evidence that accounting standards are a principles-based approach, as opposed to being, a rules-based approach. This allows for flexibility in approach.

(iii) The witness testified that at a global level, there are broadly two globally accepted standards of accounting, US GAAP ("Generally Accepted Accounting Practice") and IFRS (International Financial Reporting Standards). The witness confirmed that at individual country level, there can be individual country accounting standards or GAAP's.

(iv) The witness testified that FRS 102 (Financial Reporting Standard 102) was applicable from 2015 onwards and it is FRS102 which is the series of accounting standards which the Appellant applies when preparing its statutory financial statements. The witness gave evidence that FRS 102 applies to financial statements that are intended to give a true and fair view of a reporting entity's financial position and profit or loss for a certain period.

(v) The witness testified that Irish GAAP was not designed for the determination of matters of Irish tax law. The witness stated that the primary purpose of general purpose financial statements is to assist existing or potential investors, lenders or other creditors to make decisions about whether or not they would trade with the entity.

(vi) The witness testified that when “above the line” is referenced in accounting, it refers to income that is recorded or expenses that are incurred, such that these matters are listed usually “above the line”. The witness testified that if there is a profit which is taxed, then it is usually recorded “below the line”. The witness stated that in other words, it appears after the pre-tax profit line. The Appellant accounted for foreign RWHT below the line but separated it out as a separate section, given the significance of the amount of foreign RWHT suffered. The witness stated that a decision would have been taken by its advisors to treat/show the tax in such a way and that a principles based approach in terms of accounting standards, allows for such decisions and flexibility with accounting.

(vii) The witness testified that as foreign RWHT is not applied to a company’s profits but to the gross income, it would be considered an operating expense like any other. The witness gave evidence that such an approach namely, to treat foreign RWHT as a cost of doing business is a reasonable judgment to make and as a level of judgment is required when preparing statutory financial accounts, a judgment may have also been made to put them above the operating profit line. The witness testified that he considers foreign RWHT to be an operating expense, because of the cost of doing business.

(viii) Senior Counsel for the Respondent cross examined the witness on certain elements of his report. Reference was made to the years 2017 and 2018 and that foreign RWHT is shown below the profit line. The witness explained that the Companies Act was followed in that regard and that foreign RWHT is in a line called "other taxes". The witness confirmed that a set of consolidated financial statements represents the consolidation of the [redacted] company, plus any of its subsidiaries that it controls. If those subsidiaries in their individual financial statements pay tax to the local jurisdiction, that will get rolled up and included as the consolidated tax. The witness confirmed that there will always be an element of judgment involved in the preparation of statutory accounts, but that if it is the same type of transaction, it should be treated consistently. The witness confirmed that he considered foreign RWHT to be an operating expense on the basis of a process of elimination, such

that if it is not cost of sales, then it has to be another operating expense. The witness testified that if foreign RWHT is not calculated by reference to profits, then he does not consider foreign RWHT to be an income tax for accounting purposes.

Appellant's Submissions

34. Senior Counsel made the following submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions made:-

(i) Foreign RWHT suffered by the Appellant on royalty receipts earned in foreign countries should be considered part of the cost of selling its products/services into such countries. RWHT is applicable to gross receipts. Therefore, it cannot be a tax on profits and as such, the foreign RWHT suffered by the Appellant is not a tax on the profits of the trade, but rather an unavoidable cost incurred wholly and exclusively in carrying out its trade in such jurisdictions. Economically, this is similar to a payment processing fee incurred by a shopkeeper when a customer makes a payment using a credit card.

(ii) 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, reference was made to the decision in *Harrods (Buenos Aires) v Taylor-Gooby* 41 TC 450 ("*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*". Reference was made to the decision of *Strong & Co of Romsey Limited v Woodifield (Surveyor of Taxes)* 5 TC 215 "(*Strong & Co.")*. In *Harrods*, Diplock L.J. referred to the judgment of Lord Davey in *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*".

(iii) Reference was made to Book E1 page 505 of the Book of Authorities wherein the decision in *Strong & Co.* is cited and endorsed by the Judgment of Budd J. in *MacAonghusa v Ringmahon* [2001] 2 IR 507 ("*MacAonghusa*"). Reference was made to the decision of *Smith v Lion Brewery Co*. *Ltd* [1911] AC 10 ("*Smith v Lion*"). Reference was made to the decision in *Smith's Potato Estates v Bolland* 30 TC 267 ("*Smith's Potato Estates Limited")*.

(iv) Reference was made to the decision of the *Hong Kong Inland Board of Review* D43/91 [1991] 1 HKRC 80-154 ("the *Hong Kong decision*") and to the determination

of a former Appeal Commissioner in 08TACD2019. It was submitted that the 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*".

(v) Reference was made to the determination of a former Appeal Commissioner in 02TACD2018, 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 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 foreign RWHT was in the nature of tax on income, as this was the basis upon which double tax relief was available under Ireland's DTA's and therefore, was not deductible under section 81 TCA 1997. The former Appeal Commissioner in 02TACD2018 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"*.

(vi) The decision in 08TACD2019 follows the Hong Kong decision. In that appeal, 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.

(vii) In light of jurisprudence, it must follow that the foreign RWHT suffered on gross royalty receipts from foreign countries, should be a deductible expense. The *Hong Kong* decision was not opened in 02TACD2018.

(viii) In respect of the expert witness evidence, the accounting treatment is not determinative of the income tax treatment and therefore, the evidence of the witnesses is not critical one way or the other. It will be a matter for the Commissioner to consider that evidence and consider what, if any, relevance that evidence has.

(ix) Schedule 24, is entitled "*Relief from Income Tax and Corporation Tax and is a means of credit in respect of Foreign Tax*". This only comes into play if the Appellant is not entitled to a deduction under Section 81 TCA 1997.

(x) Reference was made to Schedule 24 TCA 1997. The correct interpretation of the relevant provisions of Schedule 24 TCA 1997 is that the Appellant can reduce relevant income to a negative amount and create a loss. Where this loss is denied, the appropriate method is to recognise the income as net of this amount.

(xi) Reference was made to the principles of statutory interpretation and relevant jurisprudence of the Superior Courts, namely: - *Bookfinders v The Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"), *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 ("Dunnes Stores"), *Heather Hill Management Company CLG and Gabriel McCormack v An Bord Pleanala, Burkeway Homes Limited and The Attorney General* [2022] IESC 43 ("*Heather Hill"*).

(xii) The Appeal relates to a determination made under Section 864 TCA 1997 which can only relate to a claim. No "claim" or otherwise has been made as the only matter in dispute is the amount of the losses stated on the tax returns of the Appellant. To the extent that the foreign RWHT increased the losses available to be carried forward, this relates to a time when the Appellant has taxable income. The Appellant has not made any claim for the losses, but may (or may not) claim the losses in the future under section 396 TCA 1997.

(xiii) Foreign RWHT is similar to any other cost or expense incurred by the Appellant in carrying out its trade and it is entitled to treat foreign RWHT that is the subject of the determinations dated 20 November 2020, as a deductible expense.

(xiv) 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 Evidence

35. [redacted] gave expert evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given:-

(i) The witness gave expert accounting evidence on behalf of the Respondent. The witness testified that he prepared a report dated 13 February 2023, in relation to financial reporting standards and the witness confirmed that he adopts the contents of his report as his evidence. The witness testified that he is [redacted] and is a

specialist in the study of financial reporting, with particular emphasis on the application of both local and international financial reporting standards in the preparation of financial statements of both private and public listed companies both in the UK and Ireland.

(ii) The witness referred to FRS 102 and the applicable standards to be applied to accounting in Ireland. The witness testified that FRS 16 was the immediate regulatory predecessor to FRS 102. The witness made reference to Section 8 of FRS 16 which requires that "*Outgoing dividends paid and proposed (or declared and not yet payable), interest and other amounts payable should be recognised at an amount that: (a) includes any withholding taxes; but (b) excludes any other taxes, such as attributable tax credits, not payable wholly on behalf of the recipient"*

(iii) In addition, the witness made reference to Section 9 of FRS 16, which required that "*Incoming dividends, interest or other income receivable should be recognised at an amount that: (a) includes any withholding taxes; but (b) excludes any other taxes, such as attributable tax credits, not payable wholly on behalf of the recipient. The effect of any withholding tax suffered should be taken into account as part of the tax charge*."

(iv) The witness testified that FRS 102 provides guidance in Section 29. The witness gave evidence that it was his opinion that Para 29.19 clearly states that '*any withholding tax suffered shall be shown as part of the tax charge*'. Effectively, there is no substantive change in the definition or reporting of withholding tax in FRS 102 from the previous accounting rules.

(v) The witness testified that it was his opinion that foreign RWHT is not an expense in creating a product or providing a service, but is the result of income being earned. Foreign RWHT is only payable to the relevant foreign tax authorities when payments from customers to the Appellant have been made. Normally cost of sales includes materials, labour costs and overheads which are incurred to create income and if no income is earned they are still incurred and written off as expenses. The witness stated that no foreign RWHT is incurred until foreign customers pay for the royalties due i.e. after the sales transaction has occurred.

(vi) The witness testified that operating expenses are not defined in FRS 102, but that in practice, an operating expense is regarded as an expense that a business incurs through its normal business operations, such as rent, depreciation of equipment, marketing, payroll, insurance, and funds allocated for research and development. The witness stated that foreign RWHT is not an expense incurred through normal

business operations. The witness said that it is incurred by the reporting entity setting up a particular structure in a foreign country, whereby net income is not taxed in that country in the normal way via corporation tax on the profits created in that country.

(vii) The witness was cross examined by Senior Counsel for the Appellant on aspects of his report. A number of questions were put to the witness in relation to the Digital Services Tax in the UK being akin to withholding tax. The witness confirmed that there are no provisions in relation to Digital Services Taxes in FRS 102. The witness testified that he would consider a Digital Services Tax to be akin to customs or import duties.

Respondent's Submissions

36. Senior Counsel made the following submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-

(i) The principles of statutory interpretation as they apply to tax legislation are well established. Reference was made to the relevant case law, namely the decisions in *Bookfinders, Dunnes Stores and Heather Hill*. There is no doubt or ambiguity in respect of the relevant provisions of section 81 TCA 1997; section 77 and Schedule 24 TCA 1997. If, as contended by the Appellant, there is any doubt, then the Appeal Commissioner ought to resort to '*a consideration of the purpose and intention of the legislature'* when construing same. In this regard the Respondent submits that income simply cannot be reduced below zero as to allow otherwise would go beyond double tax relief into the realms of the Irish Exchequer providing compensation for foreign tax, which it is respectfully submitted, was not what the legislature intended.

(ii) Foreign RWHT is by its nature a tax on income and not an expense. It is immaterial that withholding tax may be calculated as a percentage of the gross income. Foreign RWHT deducted from income is not an expense "made for the purpose of earning the profits" and so is not deductible in accordance with section 81 TCA 1997. There must be an expense which has been incurred "wholly and exclusively laid out or expended for the purposes of the trade" to be deductible.

(iii) All royalties received by the Appellant and from which foreign RWHT is deducted, are in the nature of income, and are charged to Corporation Tax on the basis that they are trading income. Furthermore, withholding taxes deducted from those royalties in the source State (whether that source State is a double tax treaty

country or a non-double tax treaty country) are taxes on income. In order for the Appellant to succeed in its argument, it must establish that the foreign RWHT deducted from its royalty income is not in the nature of a tax on income. Withholding taxes are imposed as the income stream is taxable in the source State and the withholding tax mechanism is a means of discharging the relevant tax liability in the source State.

(iv) The very basis on which double tax relief is available under Ireland's double taxation treaties and under Schedule 24 TCA 1997 for foreign withholding tax suffered is that withholding taxes are taxes on income. Any suggestion to the contrary is inconsistent with the entire scheme that exists, both in Irish tax law and under international double tax treaties, for relieving double taxation.

(v) Foreign RWHT deducted from foreign income is not an expense "made for the purpose of earning the profits" and so is not deductible in accordance with section 81 TCA 1997. Reference was made to the decision of *Ashton Gas Company v the Attorney-General* [1906] AC 10 ("*Ashton Gas Company*"), in particular the dicta of Halsbury LC at page 12.

(vi) The fact that foreign RWHT may be applied to the gross income should not be taken as an indication that it is not in the nature of a tax on income or profits. The foreign RWHT is not a pre-condition for earning the income, it arises as a result of the fact that the income is earned. Foreign RWHT is imposed based on the laws of the foreign jurisdictions concerned and such taxes are usually imposed. in circumstances where it would be difficult for a source State to exercise control over a non-resident in receipt of income, profits or gains from that State and in particular, to fully regulate the collection of taxes from that non-resident. Withholding taxes are a mechanism for a jurisdiction to protect its tax base.

(vii) Reference was made to the decision in *Yates (Inspector of Taxes) v GCA International Limited* [1991] STC 157 ("*Yates*") and the dicta of Scott J. Counsel submitted that it is particularly relevant in the context of the present case and it is an important recognition that a withholding tax may correspond to tax on income, even in circumstances where the authorities in the withholding country do not go about attempting to calculate the actual profits of the recipient. The decision is a correct analysis of the nature of withholding tax and is particularly relevant in the case of a withholding tax on royalty income.

(viii) 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. Reference was made

to the determination of the former Appeal Commissioner in 02TACD2018, in particular to paragraphs 30-33. The facts in this appeal are directly comparable to those in 02TACD2018.

(ix) Reference was made to the decision in *IRC v Dowdall O'Mahony & Co. Limited* [1952] 33 TC 259 ("*IRC v Dowdall*"). It was not a disbursement made for the purpose of earning the profits per the dicta of Lord Davey in *Strong & Co*. Reference was made to the decision in *MacAonghusa*. The facts in that case are wholly distinguishable from those in the present case. Reference was made to the decision in *Harrods.* The decision in *Harrods* is wholly distinguishable on the grounds that the tax in that case was a tax on capital, not on income and this decision provides no persuasive authority or logical basis for the proposition that a withholding tax levied by a foreign country on income received by a trader constitutes an expense of carrying on the trade or business. Reference was made to the *Hong Kong* decision and that it is not a decision of a Court and has little persuasive value.

(x) Reference was made to the decision of the former Appeal Commissioner in 08TACD2019. The difference in outcome is the fact that 08TACD2019 is entirely premised on the nature of the trade carried out by the Appellant in that appeal. The Appeal Commissioner in 08TACD2019 held that dividend withholding tax was incurred at the volition of the Appellant. The differences between this case and 08TACD2019 are many and significant.

(xi) Reference was made to Schedule 24 TCA 1997 and its operation. The deduction is limited to the extent of the income available to be reduced, i.e. the Irish measure of that income. 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, which was not what the legislature intended.

(xii) In relation to the expert evidence, the Respondent agrees that it is not absolutely critical, but nonetheless the appropriate and correct treatment is of some significance, such that profit is to be determined in accordance with standard accountancy practices. It is to be considered a baseline to start with.

(xiii) Part 35 and Schedule 24 TCA 1997 contain specific provisions for relief from double taxation. The scheme of relief from double taxation under the TCA is comprehensively set out in these provisions, and that the legislature did not intend to provide an alternative basis for such relief under section 81 TCA 1997.

(xiv) That being the case, foreign withholding taxes are taxes on the income from the trade and are not expenses laid out wholly and exclusively for purposes of earning profits of the trade. Therefore, they cannot be deductible under section 81 TCA 1997.

(xv) In respect of digital services tax, the current position is that if a digital services tax is imposed in the eight identified jurisdictions in the Respondent's Tax and Duty Manual, the Respondent then looks at it on a case by case basis. However, the fact that it is levied in those jurisdictions does not mean that it is allowable as an expense. Each and every instance has to be considered having regard to the requirements of section 81 TCA 1997.

Material Facts

37. Having read the documentation submitted, and having considered both the oral testimony and submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

(i) In addition to the findings of material fact, the Commissioner finds that the facts as set out in the document entitled "Agreed Statement of Facts" at paragraphs 1 to 15 inclusive of that document and which is attached herein in **Appendix 1** to this Determination are also material facts found.

(ii) The Appellant's principal activities are operations associated with [redacted]

(iii) In carrying out its trade, the Appellant licenses the use of its database of [redacted] which include both affiliated entities and third party customers in foreign jurisdictions. This arrangement is governed by way of licence, sub-licence and distribution agreements for the specific jurisdictions concerned.

(iv) The foreign jurisdictions imposing RWHT to which the Appellant licenses its [redacted] include (but are not limited to) [redacted].

(v) The Appellant does not have a branch or permanent establishment for Corporation Tax purposes in any of the foreign jurisdictions in which it licenses its [redacted] to customers located there.

(vi) When a royalty payment is made, RWHT is applied on the gross royalties payable, regardless of whether a profit or loss is generated on that transaction.

(vii) Foreign RWHT is in the nature of a tax on income.

(viii) At present, the Appellant cannot avail of a credit or deduction for foreign RWHT withheld on its royalty income.

(ix) Many compulsory deductions imposed are permissible as a deduction pursuant to section 81 TCA 1997, such as Irish and foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges, and employer's PRSI.

Analysis

Expert evidence and accounting treatment

38. The Commissioner is mindful that she heard expert evidence from two witnesses in relation to accounting treatment. The Appellant states that it is a well-established principle that a tax liability has to be determined by reference to the taxing provisions of the legislation. The Commissioner agrees with that statement.

39. The Appellant submits that the accounting principles referred to are generally accepted accounting principles which are non-statutory and non-binding guides, as to how a set of accounts is approached and that those accounts are frequently matters of judgment. Certainly, the Commissioner considers that the evidence of both expert witnesses confirmed that statement. The way a tax liability may be treated for accounting purposes may be different in certain circumstances, but the statutory provisions of the Companies Act must be complied with.

40. The Appellant submits that it has recorded foreign RWHT "*in a separate line which it calls "other tax" and it is below the line*"[4]. The Appellant contends that the Respondent places some reliance on that, such that it does not come above the line as one of the operating expenses and therefore, cannot be considered an operating expense.

41. The Commissioner notes the submission of the Appellant that it is not determinative one way or the other and the evidence of the expert witnesses is by no means central to the appeal.

42. The Commissioner was directed by the Appellant to the decision in *Willingale v International Commercial Bank Limited* [1978] 52 TC 242, at page 1066 of Book E3 of the Booklet of Documents, which deals with the relationship between accounts and the tax liability. It was accepted in the High Court, the Court of Appeal and by the House of Lords,

[4] Page 10, Transcript Day 10

that the accounts are not determinative of the tax liability. Lord Fraser quotes from the decision in *Sun Insurance Office v Clark* [1912] AC 443 at page 29 of the decision and states:

> "*but that general rule is subject to the exception that where ordinary commercial principles run counter to the principles of income tax they must yield to the latter when computing profits or gains for tax purposes*."

43. The Commissioner observes that both parties agree that the evidence of the two expert witnesses, both of whom were addressing accounting standards, is by no means central either way to the case and not in any way determinative. The Commissioner has not attached any significance to the evidence in terms of her consideration of the facts and test to be satisfied in accordance with section 81 TCA 1997. The Commissioner considers that the appeal herein is concerned with a liability to tax, not accounting principles and that as per the evidence, the accounting standards are subjective and adopt a principles based approach. The Commissioner has based her consideration of the issues on the applicable jurisprudence in respect of section 81 TCA 1997. This is because the Commissioner did not find either expert to be of assistance to the Commissioner, with her determination of the taxing provisions and availability of section 81 TCA 1997. The Commissioner is of the opinion that the case law opened by the parties are persuasive authorities upon which to base her decision on.

Substantive Issue

44. The Commissioner considers that the appropriate starting point for the analysis of the issues 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, 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".*

45. At the outset the Commissioner considers it relevant to note that the Appellant was in a non-profit making or loss making scenario for the Relevant Period that it has been tax resident in this jurisdiction. In circumstances where the Appellant has no profits in Ireland, the result is that it returns no profits in its Corporation Tax returns to the Respondent.

Therefore, presently, the Appellant pays no Irish Corporation Tax. The Commissioner observes that the Appellant submits that "…*it is important to note that the determinations (and this consolidated appeal) concern losses realised, carried forward but not yet used by* [the Appellant]. *Therefore, neither the Exchequer's finances nor the quantum of* [the Appellant] *International's tax payments have been impacted. This is unlikely to change for a number of years until* [the Appellant] *becomes profitable. Accordingly, there is no tax at stake in respect of this consolidated appeal unless, and until, the losses are sought to be used in future accounting periods against taxable profits"*.

46. In summary, the Appellant's appeal is made on the basis that it claims an entitlement to a deduction pursuant to section 81 TCA 1997, in respect of foreign RWHT suffered. Further and in the alternative, the Appellant claims that foreign RWHT is deductible pursuant to the provisions of section 77 TCA 1997 and Schedule 24 (paragraphs 7 and 9DB) TCA 1997. The Respondent points out that the latter claim was not made [redacted] which resulted in the Determinations now under appeal.

47. Section 77 TCA 1997 provides for "*the Irish measure of income*", such that where the trading income of a trade carried on by a company includes royalties, the amount of the income, relating to that royalty income, chargeable to tax may be reduced by the relevant foreign tax attaching to that income. However, the reduction is limited to the amount of the income for Corporation Tax purposes relating to the relevant royalties i.e. the Irish measure of the income.

48. Schedule 24 TCA 1997 sets out the "mechanics" for determining the amount of the credit, against Corporation Tax, in respect of foreign tax paid that can be given.

49. The Respondent's position is that it does not accept the Appellant's submission that the reductions provided for under section 77 or Schedule 24 TCA 1997 can reduce the Irish measure of that income below zero, i.e. that a loss can be created. As the Appellant was in a loss-making situation for all relevant periods, the Respondent is of the view that the Appellant is not in a position to avail of any relief for foreign RWHT either under Schedule 24 or section 77(6B) TCA 1997, as there was no Irish measure of income. The reduction cannot reduce the Irish measure of the foreign income below zero.

50. The first issue in this appeal is whether the Appellant is entitled to deduct foreign RWHT suffered by it in accordance with section 81 TCA 1997. In considering the Appellant's entitlement to deduct foreign RWHT, the Commissioner intends to 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) TCA 1997, in accordance with the Respondent's position in this appeal.

51. The Commissioner observes that Counsel for the Appellant states "*that's our point, if we get it under Section 81 we don't seek to get it under Schedule 24, whether by way of credit or by way of deduction. So we say it's a final cost to us. The Revenue are disallowing it under Schedule 24. So for the purpose of Section 81 we say, okay, we accept that*".[5] Accordingly, the Commissioner intends to proceed to consider the availability of section 81 TCA 1997 on the basis that the Appellant is not in a position to avail of any relief for foreign RWHT under either Schedule 24 or section 77(6B) TCA 1997.

52. The Commissioner has considered the Appellant's submission that section 81 TCA 1997 must be looked at logically, in prior sequence "*as that is the way that profits are ascertained….if we are successful in that, I say we don't need to go any further*".[6] Therefore, the Commissioner will proceed to consider the provisions of section 81 TCA 1997 hereunder, in the context of the Appellant's argument that foreign RWHT is a final cost of the Appellant and no credits for foreign RWHT are available to the Appellant, in accordance with the position of the Respondent. Should the Appellant not be successful in its arguments as to the applicability of section 81 TCA 1997, the Commissioner will then proceed to consider the parties competing arguments as to Schedule 24 TCA 1997.

53. The Commissioner considers that the appeal was argued on both sides with great conviction and the parties presented clear and cogent arguments in respect of their differing positions. The Appellant claims that foreign RWHT is a cost incurred in selling its products/services into the jurisdictions of its customers and as such, foreign RWHT suffered on gross receipts from foreign countries, should be a deductible expense under **section 81 TCA 1997**. The Appellant's witness (as opposed to its expert witness) testified that foreign RWHT is suffered on gross receipts.[7] The Appellant submits that foreign RWHT is applied on gross royalties payable, regardless of whether a profit or loss is generated on that transaction. Therefore, foreign RWHT is one of the **costs of doing business** for all providers of [redacted] to their customer's resident in certain countries. Consequently, foreign RWHT is suffered in many markets in which the Appellant trades.

54. The Respondent refutes that foreign RWHT suffered by the Appellant is a deductible expense under section 81 TCA 1997. The Respondent does not accept that foreign RWHT is an expense wholly and exclusively incurred for the purpose of the trade and therefore, cannot be deductible as an expense in accordance with section 81 TCA 1997. The Respondent makes the point that the Appellant pays foreign RWHT in the jurisdictions in

[5] Page 98, Transcript Day 3
[6] Page 98, Transcript Day 3
[7] Page 176, 222, 244, Transcript Day 1

which it trades, for the reason that the Appellant is non-resident and has "*no permanent establishment in those jurisdictions".*[8]

55. The Commissioner will now proceed to consider the well-established principles of statutory interpretation and the relevant jurisprudence as referred to by the parties to this appeal.

(i) Statutory Interpretation

56. The Commissioner notes the various decisions opened to the Commissioner in relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point of which is generally accepted as being the judgment of Kennedy CJ. in *Revenue Commissioners v. Doorley* [1933] I.R. 750 at page 765 who held that:

> "*The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is...as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament*."

57. The Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* and the judgment of O'Donnell J. in *Bookfinders*, as helpfully set out by McDonald J. in 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 ("*Perrigo*") at paragraph 74:

> "*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. 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:*

[8] Page 130, Transcript, Day 2

"… 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"*.

58. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other judgements. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

59. Furthermore, the Respondent directed the Commissioner to the recent decision in *Heather Hill* and submits that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner was directed to the dicta of Murray J. at paragraph 108 of his decision in *Heather Hill* wherein he states:

> *"it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is not clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

60. The Appellant argues that where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. That is not incorrect. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words 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*".

61. The Respondent submits that there is no doubt or ambiguity in respect of the relevant provisions. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. The Commissioner is satisfied that if the sections are clear and self-evident, the literal approach should suffice. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and

proximate, certainly within the TCA 1997 as a whole, but in some circumstances perhaps even further than that.

62. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of McKechnie J's dictum in *Dunnes Stores* at paragraph 66 wherein he states that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."*

63. 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 the engaged section 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"* in the engaged section are imprecise or ambiguous and so there is no requirement to proceed to a purposive approach.

(ii) Tax on income

64. Having determined that the words in section 81 TCA 1997 are plain and their meaning 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 TCA 1997. 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.

65. As noted above, the Commissioner observes that it is the Respondent's position that all royalties received by the Appellant and from which foreign RWHT has been deducted, are in the nature of income, and are charged to Corporation Tax on the basis that they are trading income. Moreover, foreign RWHT deducted in the source State (whether that source State is a double tax treaty country or a non-double tax treaty country) are taxes on income. The Commissioner has considered the Respondent's submission that

"*royalties are, in essence, sums paid as a percentage of income receivable for the right*".[9] Furthermore, the Respondent submits that "*Withholding tax may be likened to a crude mechanism for approximating the liability due on income, and the withholding tax will usually satisfy an underlying tax liability in the source State".*[10]

66. The Respondent referred the Commissioner to the "OECD Model Tax Convention on Income and on Capital", wherein the nature of royalties are so described, under the heading "Preliminary remarks", as follows:

> "*In principle, royalties in respect of licences to use patents and similar property and similar payments are income to the recipient from a letting*."[11]

67. Consequently, the Respondent maintains that foreign RWHT on income is by its nature clearly a tax on income. It is not an expense for the purpose of earning the profits, and so is not deductible in accordance with section 81 TCA 1997. In addition, the Commissioner observes that it is the Respondent's position that the fact that foreign RWHT may be applied to the gross income, should not be taken as an indication that foreign RWHT is not in the nature of a tax on income or profits, and more specifically, as contended for by the Appellant, that the tax satisfies the requirements of a trading expense which is deductible in accordance with section 81 TCA 1997.

68. It is submitted by the Respondent that the very basis on which double taxation relief is available under Ireland's double taxation treaties and under Schedule 24 TCA 1997, for foreign RWHT suffered, is that foreign RWHT are taxes on income. The Respondent submits that *"any suggestion to the contrary is inconsistent with the entire scheme that exists, both in Irish Tax Law and under International double taxation treaties, for relieving double taxation*".[12]

69. Conversely, the Appellant's position is that income tax or Corporation Tax is ascertained on the net income of a company, such that it is the profits earned by a company, taking its gross revenue, and then deducting from it, operating expenses, to arrive at its net income. The Commissioner accepts this as uncontroversial. The Appellant argues that as foreign RWHT is applicable to gross receipts, it cannot be a tax on profits. As such, foreign RWHT suffered by the Appellant is not a tax on the profits of the trade, but rather an unavoidable cost. The Commissioner notes that it is argued by the Respondent that the Appellant has

[9] Paragraph 29, Respondent's outline of argument, May 2022
[10] Page 16, Respondent's outline of argument, May 2022
[11] "Commentaries on the Articles of Model Tax Convention"- Model Tax Convention (Condensed Version) issued by OECD 2010 at page 220.
[12] Paragraph 33, Respondent's outline of argument, May 2022

produced no authority to support its submission that as foreign RWHT is levied on the gross royalties, it does not comprise a tax on income.

70. The Commissioner observes that the Appellant makes the distinct point that "*the distinguishing feature herein, is not whether the disputed item is in itself a tax or not. The distinguishing feature is whether it is a liability or a cost that is suffered, as part and parcel of the business, before profits are ascertained*".[13] Moreover, the Commissioner has considered the Appellant's argument that it is not a question of when the liability is incurred or when it is paid, but is it a liability that is wholly and exclusively incurred for the purposes of the trade. The Appellant is resolute in its argument that the sale cannot be made without incurring the concurrent obligation to discharge or suffer foreign RWHT on the sale and as such, *"its character, as an integral part of the cost of the sale, makes it a liability wholly and exclusively incurred for the purpose of the trade"*.[14]

71. Notably, the Appellant argues that in the absence of the availability of a credit or deduction for foreign RWHT suffered, in accordance with the provisions of Schedule 24 TCA 1997, Section 81 TCA 1997 provides the legislative basis for the general rules as to whether an expense incurred by a company is deductible for corporation tax purposes.

72. Aside from the question of deductibility and the application of section 81 TCA 1997 which the Commissioner considers hereunder, the Commissioner is satisfied that foreign RWHT is **a tax on income**. Nonetheless, the Commissioner is satisfied that this finding is not fatal to the Appellant's appeal. This finding is in accordance with the former Appeal Commissioner's finding in the decision in 08TACD2019, wherein the former Appeal Commissioner held 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*." Whilst the decision of the former Appeal Commissioner in 08TACD2019 is not binding on the Commissioner herein, such that the Commissioner is free to come to a different conclusion, the Commissioner considers that those observations are particularly relevant to this appeal and moreover, to be a correct analysis of the law.

73. Furthermore, the Commissioner understands there to be many compulsory deductions imposed that are permissible as a deduction pursuant to section 81 TCA 1997, such as Irish and foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges, and employer's PRSI.

[13] Page 17, Transcript Day 1
[14] Page 24, Transcript Day 1

74. In addition, the Commissioner has considered both parties arguments in relation to the Digital Services Tax ("DST") and the Respondent's Tax and Duty Manual dated September 2022, in relation to the manner in which the Respondent approaches such a tax. The Commissioner understands that DST's are levied in a number of jurisdictions and are charges typically levied on gross revenues associated with the provision of digital services and advertising.

75. The Commissioner observes that the Respondent is prepared to accept that DST are deductible expenses, if they have been incurred wholly and exclusively for the purposes of the trade, on a case by case basis. Of importance, the Commissioner observes that this is a tax on income which is deductible in accordance with the provisions of section 81 TCA 1997, in addition to the list as aforementioned. 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 TCA 1997, but that it must meet the test for deductibility, such that it was incurred wholly and exclusively for the purposes of the trade.

76. Accordingly, the Commissioner is satisfied that foreign 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.

(iii) Section 81 TCA 1997 – deductible expenses

77. In accordance with the provisions of section 81(2) TCA 1997, 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 TCA 1997 to determine what expenses are deductible. The section 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**.

78. The Commissioner notes that the Appellant proffers an alternative position, such that if foreign RWHT is neither a disbursement nor an expense, the deduction is not prohibited by section 81(2) TCA 1997. The Appellant states that if the Respondent is correct in its argument that foreign RWHT is something that is paid out of profits or a tax on profits, then that it is not an expense and its deductibility is not prohibited by Section 81(2) TCA 1997. The Appellant submits that it is therefore *prima facie* deductible unless it falls foul of some

other prohibition on deduction. Nevertheless, the Commissioner notes the Appellant's submission that its "mainstream" argument is that it is deductible under section 81 TCA 1997.

79. Section 81(2)(a) TCA 1997 prevents the deductibility of "*disbursement[s] or expenses, unless such disbursements or expenses are incurred wholly and exclusively for the purposes of the trade in computing income for Case I purposes*". As stated above, the Appellant claims that foreign RWHT is a cost incurred in selling its products/services into the jurisdictions of its customers and as such, foreign RWHT suffered on gross receipts from foreign countries, should be a deductible expense in the normal course. The Commissioner observes the Appellant's submission that it is "*a well-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*"[15].

80. The Appellant argues that foreign RWHT is generally viewed as a direct cost of carrying out international business in the Appellant's sector and it is not feasible to pass that cost onto customers in pricing, because of global and local competition in the market. The Appellant's witness testified in respect of this point.[16] The Appellant contends that this means that foreign RWHT is similar to any other costs or expenses incurred by the Appellant in carrying out its trade and is no different than bank fees, customer discounts, bad debts or other similar amounts deductible in respect of sums receivable from customers. The Appellant is clear in its argument that foreign RWHT has a very significant impact on the Appellant's gross revenues and return, such that "*the commercial realities and contracts in place between the Appellant and its overseas customers compels the Appellant to treat such RWHT as a reduction in the gross royalty fee received*"[17].

81. Specifically, the Commissioner observes that it is the Appellant's position that where relief from foreign RWHT is not available to the Appellant, in accordance with the provisions of Part 35 TCA 1997 and Schedule 24 TCA 1997, given the circumstances in which the Appellant finds itself in relation to losses, it should be regarded as a deductible trading expense in arriving at taxable trading income in accordance with section 81 TCA 1997.

82. The Appellant states therefore, that this impacted on the final net profit or loss realised on the overall transaction, as a final cost of making the sale. Thus, it is argued that foreign RWHT was incurred by the Appellant for the purposes of earning profits, if any, and as such is a prerequisite to the making of the sale. Moreover, the Appellant contends that if

[15] Paragraph 17, Appellant's outline submissions
[16] Page 176 and 241 Transcript Day 1
[17] Paragraph 11, Appellant's outline submissions

a cost is ascertained on the **gross revenue** of a business and is paid subsequent to the calculation of profits, then it is a deductible expense. The Commissioner notes the evidence of the Appellant's witness such that foreign RWHT is ascertained on gross revenue[18].

83. The Respondent argues that the consequence of what the Appellant is endeavouring to achieve by appealing the determinations issued by the Respondent is firstly, to impose on the Irish State an obligation to fund its liability to foreign taxes by permitting it to deduct those foreign taxes against receipts generated in future years of trading and secondly, the Appellant is seeking "*the Irish state to insulate them from the tax obligations that arise by virtue of their trading in a foreign state otherwise than by the establishment of a permanent establishment*".[19]

84. The Commissioner notes the Respondent's submission that the very basis upon which double taxation relief is available under Ireland's double taxation treaties and under Schedule 24 TCA 1997 for foreign RWHT suffered, is that foreign RWHT are taxes on income and any suggestion to the contrary is inconsistent with the entire scheme that exists, both in Irish Tax Law and under international double taxation treaties, for relieving double taxation.

(iv) Case Law

85. 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, in support of the divergent positions. The parties argued for differing relevance and weight to be attached to the decisions and or determinations. The Commissioner now considers hereunder the aforementioned decisions and/or determinations.

86. The Commissioner observes that the **core test for deductibility** is set out in the decision in *Strong and Co* at page 1008 of Book E2 of the Book of Authorities. The decision is cited and endorsed by the Judgment of Budd J. in *MacAonghusa* at page 505 of Book E1 of the Book of Authorities. Lord Davey in *Strong & Co*, at page 220 of the decision 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"*.

[18] Page 245, Transcript Day 1
[19] Page 132, Transcript Day 2

87. 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. Whilst the appeal was decided against the taxpayer, 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 innkeeping. 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 the Learned Judge referred to in *Strong & Co*.

88. In the Irish decision of *MacAonghusa,* the 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 this 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 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, he 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*".

89. The Respondent submits that the facts in *MacAonghusa,* are wholly distinguishable from those in the present case. Nevertheless, the Commissioner observes that the Supreme Court held, in dismissing the appeal, 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 Jude was correct in upholding that view".*

90. In *Smith v Lion,* a brewery company, as an essential part of their 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 auctioneer, or a pawnbroker, or a publican.*
>
> *It is an expenditure which must be incurred in order to earn 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"*.

91. 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 foreign RWHT herein, was not suffered 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. "*It was not a disbursement made for the purpose of earning the profits per the dicta of Lord Davey in Strong & Co. v Woodfield*".[20]

92. The Respondent contends that foreign RWHT is not a requirement of earning the receipts of the sublicensing. There is no requirement, restriction, entry fee or charge for trading in the various jurisdictions in which the Appellant choose to trade globally. It is a tax which accrues once the receipts have been generated. The Respondent submits that "*it is in no sense incurred for the purposes of generating those receipts and is entirely distinguishable from what was in truth a levy or the equivalent of a registration fee and so likened by*

[20] Paragraph 57, Respondent's outline of arguments, May 2022

Atkinson LJ in his judgment".[21] Therefore, these decisions are of no assistance to the Appellant.

93. The Respondent relies on the decision of *Allen (H.M. inspector of Taxes) v Farquharson Brothers & Company* 17 T.C. 59 page 924 of Book E2 of the Book of Authorities in support of its contention 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*".[22] The Commissioner does not consider the absence of volition to be of any significant relevance to her consideration of the application of section 81 TCA 1997 and to the question of whether foreign RWHT was expenditure incurred wholly and exclusively for the purposes of the Respondent's trade and thus, deductible in accordance with section 81 TCA 1997. 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.

94. The Commissioner observes that the test as set out in *Strong & Co.,* was also applied in the decision in *Harrods* at page 935 of Book E2 of the Book of Authorities. The Appellant placed significant reliance on the *Harrods* decision*,* 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 ("UK"), carried on a retail business in Argentina and 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. As set out at page 956 of Book E of the Book of Authorities, 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."*

[21] Page 169, Transcript Day 2
[22] Paragraph 61, Respondent's outline of arguments, May 2022

95. Further, the Commissioner considers it relevant to consider the dicta of Buckley L.J. wherein at page 949 of Book E of the Book of Authorities, 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…."*

96. Relevant also is the dicta of Diplock L.J, at page 957 of Book E2 of the Book of Authorities, 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".*

97. 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 J. considered whether certain legal costs incurred in connection with an appeal were moneys wholly and exclusively laid out for the purposes of the company's trade. The Learned Judge considered whether an expense is incurred to earn profit or is an application of the profit and he states at page 1043 of Book E2 of the Book of Authorities (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."*

98. The Respondent submits that the *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, non-payment of tax could result in the company being precluded from trading.

99. In the Appellant's case, no such restriction or sanction is imposed for failing to pay foreign RWHT. The Commissioner notes the Respondent's argument that the *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 foreign 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 the Argentine.

100. 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.

101. 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 violation 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*.

102. The Respondent placed significant reliance on the decision in *Yates* at page 1103 of Book E3 of the Book of Authorities. The Respondent also argues that *Yates* 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.

103. 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*."

104. 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*".

105. The Respondent submits that the above quotations strongly support the proposition advanced in this case on behalf of the Respondent and is a correct analysis of the nature of foreign RWHT. The Respondent states 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.

106. 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.

107. Furthermore, the Respondent sought to rely on the decisions in *Ashton Gas Company* and *IRC v Dowdall* at pages 924 and 961 of Book E1 of the Booklet of Documents. The Commissioner is satisfied that these decisions can be distinguished, in circumstances where both cases 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.

108. The Commissioner observes also the significance placed by the Appellant on the *Hong Kong decision* at page 1129 of Book E3 of the Book of Authorities. The decision emphases the distinction between taxes which are a tax on profits/gains versus 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.[23] In this context, the Commissioner notes the significant reliance placed by the Respondent on the decision of the former Appeal Commissioner in 02TACD2018, a decision of the Commission, as opposed to a Court.

109. The Commissioner notes Counsel for the Appellant's submission that *"the fact remains that it is a decision of the Hong Kong review body, a panel of, I think, three people on the panel giving the decision, with clearly very extensive argument addressed to them on all the relevant principles…"*[24]

110. Turning to the *Hong Kong decision,* the taxpayer was a shipping company which owned and operated container ships which supplied 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 TCA 1997 and it found at paragraph 6 that:

[23] Page 149, Transcript Day 2
[24] Page 83, Transcript Day 3

"*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*."

111. 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."

112. Both parties relied on previous decisions of former Appeal Commissioners, dealing with the deductibility of withholding tax, namely the decisions in 02TACD2018 and 08TACD2019 at pages 1241 and 1206 of Book E3 of the Book of Authorities. The *Hong Kong decision* was cited in one of the two Commission decisions concerning withholding tax, namely decision 08TACD2019. The former Appeal Commissioner's decision in 02TACD2018 dealt with the deductibility of foreign RWHT suffered on licence income and the latter decision with withholding tax on dividends for a company carrying on the trade of securities trading. The former Appeal Commissioner in 02TACD2018 found against the taxpayer and the former Appeal Commissioner in 08TACD2019 found for the taxpayer. The Determination in 02TACD2018, takes no account of the *Hong Kong decision*.

113. In 08TACD2019, 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.

114. In 02TACD2018, 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 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.*"

115. 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".

116. The Appellant contends that this analysis is wrong. As stated above, the Commissioner is satisfied herein, that foreign 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 held by the former Appeal Commissioner in 02TACD2018, 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.

117. The Commissioner observes that in 08TACD2019 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.

118. Likewise, it is notable that the former Appeal Commissioner in 02TACD2018 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 02TACD2018 distinguishes the *Harrods* decision and relies on the decision in *Yates* to dismiss the Appellant's appeal.

119. As aforementioned, the Commissioner is satisfied 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.

120. Also of note in 02TACD2018, 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 foreign 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.

121. In the present 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 08TACD2019, relief from double taxation had not been claimed, a significant difference from the earlier decision in 02TACD2018.

122. The Commissioner accepts the evidence of the Appellant's witness such that he confirmed foreign RWHT is assessed and collected on the gross income stream of the Appellant. 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). Herein, foreign RWHT is suffered irrespective of whether the Appellant earns any profits and withholding tax is calculated on the gross income and not the profits.

123. The Commissioner is satisfied that foreign RWHT must be incurred by the Appellant in order to earn or profit from the trade; it is part and parcel of the business activity and was a foreseeable condition of earning income and gains. The Appellant's business involves the sale of [redacted] as a means of generating the profits. Foreign RWHT is incurred irrespective of whether the Appellant makes a profit. Therefore, incurring foreign 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 foreign RWHT on the sale. The Commissioner accepts that it does not matter whether the obligation to suffer foreign RWHT is before the sale, concurrently 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. The Appellant is not in a position to derive any benefit from double taxation relief under Schedule 24 TCA 1997 in relation to the foreign RWHT suffered. 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.

124. The Commissioner considers the principles enunciated in the *Harrods* decision 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.

125. The Commissioner is satisfied that it was not possible for the Appellant to trade in those jurisdictions imposing foreign RWHT without incurring the imposition of the foreign RWHT. The Commissioner considers that the factual situation is akin to that in *Harrods*. In addition, as is evident from the decision 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, foreign RWHT was incurred by the Appellant irrespective of whether the Appellant generated any profits. Foreign RWHT was applied to the gross income of the Appellant. Therefore, the Commissioner is satisfied that the foreign RWHT suffered can be treated as a cost incurred for the purpose of earning the Appellant's profits. The Respondent argues that the Appellant chose to conduct business in such jurisdictions. The Commissioner rejects that argument entirely. The Commissioner observes that if the Respondent's argument is accepted, the Appellant would be effectively suffering a tax on income that it never receives, which cannot be correct.

126. 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, 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 balance 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 the Appellant to treat foreign RWHT suffered, as a final cost of doing business in those jurisdictions;

(i) The Appellant is not entitled to avail of relief for double taxation under Schedule 24 TCA 1997;

(ii) The tax is calculated prior to the ascertainment of profit, that is the tax is applied to gross royalty income;

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

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

(v) 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 TCA 1997.

(v) Schedule 24 TCA 1997

127. For reasons set out above, having found in favour of the Appellant in relation to the deductibility of foreign RWHT under section 81 TCA 1997, the Commissioner considers that there is no requirement to contemplate the rules relating to relief from double taxation in accordance with Part 35 TCA 1997 and Schedule 24 TCA 1997 and to determine the availability of relief in accordance with Part 35 TCA 1997 and Schedule 24 TCA 1997.

(vi) The Finance Act

128. The Appellant argues that the amendment to section 81 TCA 1997, effected by the Finance Act 2019, suggests that the legislation at issue here should be interpreted in light of the amendment and that the amendment suggests that the foreign withholding tax would otherwise be deductible for the periods under appeal.

129. The Commissioner observes that the Finance Act 2019 introduced a new subsection (p) to section 81(2) TCA. It commenced from 1 Jan 2020 and whilst it is not applicable to the periods in question in this Appeal, it provides that: "*no sum shall be deducted in respect of…any taxes on income*".

130. The Respondent drew the Commissioner's attention to the decision in *Cronin (Inspector of Taxes) v Cork and County Property Company* [1986] IR 599 which makes clear that any such approach to the interpretation of statutes is entirely impermissible. In that case, the Supreme Court held that a Court cannot construe a statute in the light of amendments that may thereafter have been made to it. Griffin J. in his judgment in the Supreme Court stated at page 572 of the decision that

> "*An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be.*"

131. The Commissioner is satisfied that it is appropriate and correct to accept the Respondent's submission in this regard. The Commissioner is satisfied having regard to the jurisprudence that an amending provision cannot be used to interpret pre-existing statutory provisions.

132. Accordingly, based on a consideration of the evidence and submissions together with a review of the facts and documentation, the Commissioner is satisfied that in circumstances where foreign RWHT suffered by the Appellant, cannot be reclaimed under Schedule 24 TCA 1997, and which impacted on the final net profit or loss realised in an overall transaction, foreign RWHT suffered is an expense necessarily incurred by it in order to carry on its trade and is "*wholly and exclusively laid out for the purpose of the trade of the company*". The foreign RWHT incurred by the Appellant is an expense incurred in earning its profits and so should be deductible for Irish tax purposes under Section 81(2)(a) TCA 1997, as an expense wholly and exclusively incurred for the purposes of the business activity.

133. In reaching her conclusions in this appeal, the Commissioner has accepted the submissions advanced on behalf of the Appellant. For all of these reasons, the Commissioner reached the clear conclusion at the end, for the high quality of the work involved in this complex appeal, and for the clarity of submissions by all parties.

Determination

134. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded in showing on balance that the Respondent was incorrect to issue the Notices of Determination dated 13 November 2020, pursuant to section 864 TCA 1997, in respect of the accounting periods ended 31 December 2015 to 31 December 2018 inclusive.

135. This appeal is hereby determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Claire Millrine
Appeal Commissioner
1 August 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.

APPENDIX 1 - AGREED STATEMENT OF FACTS

THE TAX APPEALS COMMISSION

[redacted]

BETWEEN:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

AGREED STATEMENT OF FACTS

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1. This appeal involves two separate determinations made against [redacted] or "**Appellant**"), in respect of deductions for foreign royalty withholding tax ("**RWHT**") in the Appellant's corporation tax returns filed for the periods ended 31 December 2015 ("**FY2015**") to 2018 ("**FY2018**") inclusive. One of the said determinations related to FY2015 and the other related to the periods ended 31 December 2016 ("**FY2016**") to FY2018 inclusive (the "**Relevant Period**"). On 10 December 2020, the Appellant submitted two Notices of Appeal in respect of the said determinations, resulting in two separate tax appeals, which were subsequently consolidated.

2. [redacted]

[redacted]

3. The Appellant contends that the determinations concern, inter alia, losses realised, carried forward but not yet used by it. The Appellant considers that neither the Exchequer's finances nor the quantum of the Appellant's tax payments have been impacted and that accordingly, there is no tax at stake in respect of this consolidated appeal unless, and until, the losses are sought to be used by the Appellant in future accounting periods against taxable profits.

BACKGROUND

4. The Appellant is [redacted].

5. The Appellant's business is comprised of the licensing [redacted] to its customers, which include both affiliated entities and third party customers, in more than 100 foreign jurisdictions where its [redacted] Customers in a number of those jurisdictions deduct royalty withholding tax ("**RWHT**") at source.

6. The overseas territories imposing RWHT to which the Appellant licenses its [redacted] include (but are not limited to) [redacted]

7. The Appellant grants permission for the use of its [redacted] to licensees in the many foreign jurisdictions in which it carries out its trade. This arrangement is governed by way of licence agreements for the specific territory concerned. The contents of the licence agreements distributed to customers in various jurisdictions do not differ substantively from one another in any way, save for contract-specific details, such as party and product details.

8. During the Relevant Period, the Appellant's royalty receipts included royalties from customers in both DTA and non-DTA jurisdictions.

9. The Appellant in calculating its adjusted taxable trading loss or nil position for the FY2015, FY2017 and FY2018 accounting periods treated the foreign RWHT suffered as outlined above as a deductible expense. [redacted]

10. The Appellant attempted to claim the RWHT as a deductible expense in the FY2016 period [redacted]

11. [redacted].

12. [redacted]

13. [redacted].

14. By letter dated 1 October 2020, [redacted]. The Respondent noted its stated position that

deductibility for Irish tax purposes of foreign withholding tax suffered by companies is not allowed under general principles.

NOTICES OF DETERMINATION

15. On 13 November 2020 Revenue issued a Notice of Determination in respect of FY2015 and a Notice of Determination in respect of FY16 - FY18. Due to an error in the FY2015 Notice of Determination Revenue issued an updated Notice of Determination on 10 December 2020 in respect of FY2015. In each of the Notices of Determination, the Respondent objected to the Appellant's treatment of deductibility for Irish tax purposes of foreign withholding tax suffered by companies. As such, on 10 December 2020, the Appellant issued two Notices of Appeal to the Tax Appeals Commission (the "**TAC**") in respect of each of the determinations for FY15 and FY16 - FY18 asking that the correct treatment of same be determined.