REF: 16TACD2019

Redacted

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal pursuant to Taxes Consolidation Act 1997 (TCA) section 955(3) against Notices of Assessment to Dividend Withholding Tax (DWT) dated 10 October 2018, which issued to the Appellant for the years beginning on 1 January 1999 and ending on 31 December 2010, in respect of distributions made by the Appellant in each of those years.

2. The Appellant maintains that it did not have any liability to DWT for the years 1999-2010 as the distributions in question were made from disregarded income within the meaning of TCA section 141.

3. The Appellant contends that a preliminary issue to be determined in this appeal is whether the Notice of Assessment to DWT of 10 October 2018 is valid in circumstances where the Notice of Assessment issued outside of the four-year time limit for the making or amending an assessment by the Respondent under TCA, section 955(2)(a).

4. The Appellant also has two further related extant appeals (the Substantive Issues). The first of these concerns a determination by the Respondent that patent income generated by a patent held by the Appellant in respect of an apparatus for the manufacture **Activities Redacted** did not involve radical innovation and consequently that distributions out of that income would not be treated as distributions out of disregarded income under section 141(5)(d) of the TCA 1997 ("the Radical Innovation Issue").

5. The second extant appeal concerns the Respondent's decision that the Appellant's claim for expenditure on research and development (R & D) did not qualify as expenditure in respect of which relief could be claimed on distributions from patent income under TCA, section 141(5)(c) ("the R & D Issue").

6. Furthermore, there are related income tax appeals in respect of 49 individuals who have been assessed to income tax on the distributions received from the Appellant based on the Respondent's view that such individuals were not entitled to tax-free distributions.

Background

7. Prior to the Notice of Assessment, the Respondent issued two demands for DWT dated 30 December 2013, in respect of the years 1999 to 2010. The Appellant lodged an appeal against those demands by letter dated 24 January 2014. That appeal, together with the preliminary issue of the application of the four-year time limit under TCA, section 955(2)(a) was due to be heard on 2 October 2018, as directed by the Tax Appeals Commission (TAC) at the Case Management Conference in July 2018. By letter of 27th September 2018 the Respondent indicated that it objected to the determination of the application of the time limit by way of a preliminary issue and contended that that issue should be determined at the same time as the other issues.

8. On 2 October 2018 the Respondent indicated that it accepted that no valid Notices of Assessment to DWT had issued to the Appellant and it was agreed that the Respondent would issue a Notice of Assessment to DWT in respect of the years 1999 to 2010 and that the Appellant would appeal that Notice of Assessment.

Legislation

9. TCA, section 955(2) provides for a four-year time limit on assessments to tax or amendments to such assessments by the Respondent in the following terms:

> *(a) "Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and-*
>
> > *(i) No additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
> >
> > *(ii) No tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> *by reason of any matter contained in the return.*

(b) Nothing in this subsection shall prevent the amendment of an assessment

(i) Where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) To give effect to a determination on any appeal against an assessment,

(iii) To take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment and nothing in this section shall affect the operation of section 804(3).”

10. The deduction of DWT from distributions is provided for by TCA, section 172B(1) in the following terms:

(1) Except where otherwise provided by this Chapter, where, on or after the 6th day of April 1999, a company resident in the State makes a relevant distribution to a specified person-

a) The company shall deduct out of the amount of the relevant distribution dividend withholding tax in relation to the relevant distribution,

b) The specified person shall allow such deduction on the receipt of the residue of the relevant distribution, and

c) The company shall be acquitted and discharged of so much money as is represented by the deduction as if that amount of money had actually been paid to the specified person

11. TCA, section 172B(7) provides for certain exemptions in respect of DWT as follows:

“This section shall not apply where a relevant distribution is made by a company resident in the State and that distribution is-

(a) a distribution made out of exempt profits within the meaning of section 140,

(b) a distribution made out of disregarded income within the meaning of section 141 and to which subsection (3)(a) of that section applies, or

(c) a distribution made out of exempted income within the meaning of section 142"

12. The Appellant is, for the purposes of DWT, an Accountable Person who is obliged to file a return to DWT pursuant to TCA, section 172K. The relevant provisions provide, *inter alia*:

(1) Any person (in this section referred to as 'the accountable person'), being a company resident in the State which makes, or an authorised withholding agent who is treated under section 172H as making, any relevant distributions to specified persons in any month shall, within 14 days of the end of that month, make a return to the Collector-General which shall contain details of –

(a) the name and tax reference number of the company which actually made the relevant distributions,

(b) if different from the company which actually made the relevant distributions, the name of the accountable person, being an authorised withholding agent, in relation to those distributions,

(c) the name and address of each person to whom a relevant distribution was made or, as the case may be, was treated as being made by the accountable person in the month to which the return refers,

(d) the date on which the relevant distribution was made to that person,

(e) the amount of the relevant distribution made to that person,

(f) the amount of the dividend withholding tax (if any) in relation to the relevant distribution deducted by the accountable person or, as the case may be, the amount (if any) to be paid to the Collector-General by the accountable person in relation to that distribution as if it were a deduction of dividend withholding tax,

(g) the aggregate of the amounts referred to in paragraph (f) in relation to all relevant distributions made or treated under section 172H as being made by

the accountable person to specified persons in the month to which the return refers, and

(h) in a case where section 172B has not applied to a relevant distribution by virtue of the operation of subsection (7) of that section, whether the relevant distribution is a distribution within paragraph (a), (b) or (c) of that subsection.

(2) Dividend withholding tax which is required to be included in a return under subsection (1) shall be due at the time by which the return is to be made and shall be paid by the accountable person to the Collector-General, and the dividend withholding tax so due shall be payable by the accountable person without the making of an assessment, but dividend withholding tax which has become so due may be assessed on the accountable person (whether or not it has been paid when the assessment is made) if that tax or any part of it is not paid on or before the due date.

(3) Where it appears to the inspector that there is any amount of dividend withholding tax in relation to a relevant distribution which ought to have been but has not been included in a return under subsection (2), or where the inspector is dissatisfied with any such return, the inspector may make an assessment on the accountable person in relation to the relevant distribution to the best of the inspector's judgment, and any amount of dividend withholding tax in relation to a relevant distribution due under an assessment made by virtue of this subsection shall be treated for the purposes of interest on unpaid tax as having been payable at the time when it would have been payable if a correct return under subsection (1) had been made."

13. TCA, 172K(5) provides that DWT assessed on an accountable person is due within one month of the notice of assessment subject to any appeal that may be brought and reads as follows:

" Any dividend withholding tax assessed on an accountable person under this Chapter shall be due within one month after the issue of the notice of assessment (unless that tax is due earlier under subsection (2)) subject to any appeal against the assessment, but no such appeal shall affect the date when any amount is due under subsection (2)".

14. TCA, section 172K(6) builds into the DWT regime the framework for appeals against assessments contained in Part 41 of the TCA 1997 and states:

"*The provisions of the Income Tax Acts relating to –*

(i) assessments to income tax, and

(ii) appeals against such assessments (including the rehearing of appeals and the statement of a case for the opinion of the High Court), and

(iii) the collection and recovery of income tax,

shall, in so far as they are applicable, apply to the assessment, collection and recovery of dividend withholding tax."

15. For the years under appeal, the obligation to prepare and deliver an income tax, capital gains tax and corporation tax return to the Respondent was governed by TCA, section 951(1) which provided:

"Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form of –

(a) ….

(b) in the case of a chargeable person who is chargeable to corporation tax for a chargeable period which is an accounting period, all such matters and particulars in relation to the chargeable period as would be required to be contained in a return delivered pursuant to a notice given to the chargeable person by the appropriate inspector under section 884,

and such further particulars (including particulars relating to the preceding year of assessment where the profits or gains of that preceding year are determined in accordance with section 65(3)) as may be required by the prescribed form."

16. TCA, section 884 sets out the matters and particulars which should be included in a corporation tax return. The relevant provisions provide, *inter alia*:

(2) A company may be required by a notice served on it by an inspector or other officer of the Revenue Commissioners to deliver to the officer within the time limited by the notice a return of-

(a) the profits of the company computed in accordance with the Corporation Tax Acts-

(i) specifying the income taken into account in computing those profits, with the amount from each source,

(ii) giving particulars of all disposals giving rise to chargeable gains or allowable losses under the Capital Gains Tax Acts and the Corporation Tax Acts and particulars of those chargeable gains or allowable losses, and

(iii) giving particulars of all charges on income to be deducted against those profits for the purpose of the assessment to corporation tax, other than those included in paragraph (d),

(aa) such further particulars for the purposes of corporation tax as may be required by the notice or specified in the prescribed form in respect of the return [Inserted by Finance Act 1999]

(b) the distributions received by the company from companies resident in the State

(c) […]

(d) payments made from which income tax is deductible and to which subsections (3) to (5) of section 238 apply, and

(e) all amounts which under section 438 are deemed to be annual payments.

(3) …..

(4) A notice under this section may require a return of profits arising in any period during which the company was within the charge to corporation tax, together with particulars of distributions received in that period from companies resident in the State

(5) Every return under this section shall include a declaration to the effect that the return is correct and complete.

(6) A return under this section which includes profits which are payments on which the company has borne income tax by deduction shall specify the amount of income tax so borne.

Appellant's Submissions

17. The Appellant made the following submissions:

i. The preliminary issue relates to the four-year time limit and dispenses with the need for a further hearing on the Substantive Issues if the Appellant is successful. Further, as is clear from the decision in *Stanley v the Revenue Commissioners* [2017] IECA 279 the time limit issue is a fundamental (and by its very nature a preliminary) issue which can and should be determined prior to the substantive issues which arise in the tax appeal. It is only if the Notices of Assessment have been served within time that the TAC will be required to engage in a consideration of the Substantive Issues. As a matter of principle, therefore, the preliminary issue approach is not only appropriate but it is the only correct approach to adopt.

ii. The Respondent's request to have the TAC determine the Substantive Issues at the same time as the time limit issue made no sense and as it would involve an enormous waste of the TAC's time and resources and have considerable consequent disadvantage for other appeals awaiting determination. Furthermore, while the time limit was referred to as a preliminary issue, it was preliminary only in the sense that its resolution in favour of the Appellant would resolve all issues. In essence, the Appellant submitted that its appeal be case-managed and that the issues arising be dealt with on a modular or phased basis by way of case management because of the benefit in time saved and efficiency.

Grounds for Preliminary Determination of Time Limit Issue

iii. The Appellant opposed the adjournment of the preliminary issue to the substantive hearing as proposed by the Respondent, on the grounds that the application of the time-limit to the Notice of Assessment of 10 October 2018 was appropriate for trial by way of a preliminary hearing. It was only if the Notice of Assessment issued within time that it was appropriate for the TAC to consider the Substantive Issues. The time limit issue could be determined discretely on the basis of the Notice of Assessment and the CT1 Returns as oral evidence would not be required. This is to be contrasted with the lengthy evidence and submissions that would be required in relation to the hearing of the Substantive Issues.

iv. The Respondent's position made no sense because even if the preliminary issue and the Substantive Issues were listed together for hearing, it was inconceivable that the TAC would not first determine the time limit issue before going on to hearing the Substantive Issues.

Justification for Determination of the Time Limit Issue prior to determination of Substantive Issues

v. The Appellant's case is that the Notice of Assessment to DWT in respect of the years 1999 to 2010 which issued on 10 October 2018 was invalid by virtue of the operation of the four-year time limit. Whether the Appellant's contention with regard to the time limit was correct can be determined by reference to the CT1 Returns and the Notice of Assessment. The Respondent's objections based on a contention that the Appellant had no entitlement to the tax reliefs claimed are irrelevant to the issue of whether or not the validity of the Notice of Assessment should be determined in advance of the Substantive Issues. Furthermore, arguments that go to the issue of whether or not the Notice of Assessment in fact complied with section 955(2)(a) are irrelevant to a consideration of whether that very issue should be determined prior to hearing the Substantive issues. If the TAC rules that it is appropriate to determine the time limit issue first then the Respondent's arguments that go to the entitlement to issue the Notice of Assessment and the validity of the Notice of Assessment are relevant.

vi. The facts which are relevant to the question of whether the four-year limit applies are the contents of the CT1 Returns which the Appellant filed for the years 1999 to 2010. The Appellant contended that those Returns contained full and true disclosure of the facts but acknowledged that that was the issue that will have to be determined by the TAC if it agreed to trying this issue first. However, there can be no dispute between the parties as to the contents of the CT1 Returns.

vii. In light of the Respondent's argument that there was a dispute in respect of "*what the material facts are*" because it was claimed the CT1 returns were prepared on a false premise namely that the Appellant was entitled to patent royalty relief when there had been no determination to that effect and the Appellant was not entitled to patent royalty relief. However, the question of whether full and true disclosure had been made on a return is a question which is separate from the Appellant's entitlement to tax relief under section 141 of the TCA 1997. This question of whether full and true disclosure had been made cannot be answered by determining whether the patent income was exempt or whether there was in fact a liability to DWT. The question is instead answered by determining whether the disclosure of the information in respect of patent income and liability to DWT constituted full disclosure of the facts necessary to enable the Respondent to raise an assessment to DWT. At no stage had the Respondent identified the material facts which the Appellant failed to disclose on the CT1 Returns which would have prevented the Respondent from raising an assessment to DWT in respect of the Appellant.

viii. The discrete question of law which is raised in this case is whether the Appellant's entries on the CT1 Returns for the years 1999-2010 amounted to full and true disclosure of all material facts necessary for the Respondent to raise DWT assessments in respect of those years so that the exception to the four-year time limit on the raising of assessments which was provided for by section 955(2)(b)(i) does not apply.

ix. If the Appellant is successful on the time-limit issue, the assessments raised by the Respondent in respect of the years 1999 to 2010 will be invalid and each of the Appellant's appeals which are currently pending before the TAC will be disposed of. Such an outcome would obviate the need for the TAC to hear any evidence in respect of the Appellant's entitlement to tax relief in respect of expenditure on research and development (R & D) under TCA, section 141(5)(c) in respect of all years. In order to demonstrate the significance of the saving of time and costs which such an outcome would give rise to, it is worth recalling that when the Appellant submitted the documentation supporting its claim for entitlement to relief in respect of expenditure on R & D in respect of the years 2008 to 2010 only in December 2016, it took the Respondent until April 2018 to review these documents and make a determination that the Appellant was not entitled to claim this relief. This delay was indicative of the volume of documents and the level of analysis required to assess entitlement to relief for R & D expenditure.

x. If the Appellant is successful on the time limit issue, the parties and the TAC will not be required to assess the extensive vouching documentation which accompanies a claim for R & D relief, in respect of 12 separate years. The Respondent's suggestion that the elimination of the requirement to analyse such documentation and make a decision in respect of the entitlement of the Appellant to this relief in respect of 12 years, would not lead to a saving of time or costs, was not justified or explained in the submissions delivered by the Respondent.

xi. While the determination of the time-limit issue had been listed for hearing for 1 day, a hearing on the Appellant's entitlement to R & D relief for the years 1999-2010 would take considerably longer than that, not only in terms of the length of time required to prepare for such a hearing by the parties, but in respect of the length of the hearing itself. The task facing the TAC in assessing the validity of the Appellant's claim to R & D relief for those years would be a burdensome one which would be far more time-consuming than the determination of the time-limit issue if that matter is allowed to proceed first.

xii. Equally, the appeal in respect of the Respondent's determination on the Appellant's radical innovation claim will also involve a considerable commitment of time and resources on the part of the TAC and each of the parties. The preparation for this aspect of the appeal will necessitate extensive technical analysis of the features of

the invention which is the subject of the patent held by the Appellant. This would involve a significant amount of oral evidence from experts and other witnesses involved in the process. The radical innovation "module" of the appeal will therefore involve a further considerable allocation of time by the TAC, which would be entirely unnecessary if the time limit issue is resolved in favour of the Appellant at the outset.

xiii. The Respondent asserted that a decision on the time limit issue would not be dispositive of the Appellant's entitlement to make tax-free distributions to shareholders. In fact, such a decision would be dispositive of this issue because if the time-limit point is determined in favour of the Appellant, the Respondent's assessment to DWT will be invalid with the consequence that the Appellant's entitlement to make tax-free distributions in those years becomes moot.

The convenience of the preliminary issue

xiv. The Respondent asserted that the TAC must determine the evidence required to be considered to determine the preliminary issue, before determining the preliminary issue itself. Nowhere in the decision in *Campion v South Tipperary County Council* [2015] 1 IR 716, a case also relied upon by the Respondent**,** was the support for the proposition that a decision maker must assess the relevant evidence in advance of determining a preliminary issue. It is the facts which are relevant, and those facts are those which are contained in the CT1 Returns and in respect of which there can be no dispute between the parties.

xv. At paragraph 29 of the Respondent's submissions it was asserted that *"at a minimum the question of whether the CT1 return was full or true for the purpose of s.955 requires determination of the central appeal*." This proposition, which is central to the Respondent's opposition to the trial of a preliminary issue, is fundamentally wrong. First, that argument goes to the merits of the issue which the Appellant seeks to have tried first. If the TAC accedes to the Appellant's application to try the time limit issue first then of course in determining the issue of the validity of the Notices of Assessment, the TAC will decide whether the CT1 Return was a full or true return.

xvi. Furthermore, the question of whether the Appellant made full and true disclosure of material facts on a return can only be determined by reference to the information that is included on the return. If this issue is determined in the Appellant's favour then the question of the Appellant's entitlement to the relief claimed on the return is a matter which will not arise at all for determination by the TAC. This is a separate matter which only arises for consideration if the Appellant is unsuccessful on the time limit issue and the determination of this separate matter

will require a separate hearing. With respect the Respondent seeks to confuse these separate issues.

xvii. In *Stanley v The Revenue Commissioners* [2017] IECA 279, the Applicant had sought to have a notice of assessment to Capital Acquisitions Tax (CAT) issued by the Respondent quashed on the grounds that it was issued outside of the four-year time limit provided by section 49(6A) of the Capital Acquisitions Tax Consolidation Act 2003(CATCA). The High Court judge concluded that the Applicant had not delivered a correct return and refused an order of *certiorari.* The Applicant appealed to the Court of Appeal. Peart J. found that the Respondent had never suggested, or otherwise relied upon any failure by the Applicant to provide correct details of the gift or of any other information sought by the Respondent on the CAT self-assessment form. He found that it was the assessment by the Applicant of his liability at nil on foot of that return with which the Respondent disagreed (because they considered the Applicant not to be entitled to claim credit for a C.G.T. liability which the Applicant had listed on the form) and which caused them to issue the assessment. Judge Peart held that the Applicant had delivered a correct relevant return and that if the Respondent disagreed with the amount of CAT self-assessed by the Appellant on foot of his correct return, they were required by law to issue a notice of assessment no later than four years from the date of the return.

xviii. In the present case, as in the *Stanley* case, the Respondent disagreed with the assessment by the Appellant of its liability to DWT at nil because it considered that the Appellant was not to be entitled to claim tax relief pursuant to section 141(5)(c) or section 141(5)(d). However, the decision in *Stanley* makes it clear that the Respondent's assertion that the question of whether the CT1 return was full or true for the purpose of s.955(2(b) requires determination of the central appeal is not correct. In that case the Court of Appeal made a determination in respect of whether the Applicant had delivered a correct return in respect of CAT and on the application of the four-year rule without determining the question of whether the Applicant was entitled to the relevant tax credit. In the same way, in the present case the TAC can clearly decide whether the CT1 Returns constituted full and true disclosure of all material facts necessary for the Respondent to raise an assessment to DWT without determining the Appellant's entitlement to relief under section 141(5)(c) or 141(5)(d).

Likelihood of an appeal on the time limit issue

xix. At paragraph 30 of the Respondent's submissions, it is suggested that the trial of the preliminary issue in this case would inevitably result in an appeal on that issue with the inevitable addition of substantial time and costs and the lengthy postponement of the trial and that according to the test in *Campion,* is a factor which militates against the trial of an issue in this way.

xx. In *Campion,* McKechnie J. relied on the decision of O'Flaherty J. in *Duffy v Newsgroup Newspapers Limited (No.2)* [1994] 3 I.R. 63 where he made the following observation:

> *"The whole point of setting down a preliminary point of law is to save in time and costs. This is surely not being achieved in the course of these proceedings. Even if there were a preliminary hearing on this matter whoever lost would, presumably, appeal to this Court and would mark the third appeal in an interlocutory matter in these proceedings*."

xxi. However the decision of the Supreme Court in the case of *O'Rourke v The Revenue Commissioners* [2016] 2 I.R. 615 made it clear that while an appeal from the TAC to the Circuit Court was open to a taxpayer in respect of whom an adverse finding in respect of the time for the making of an assessment by an inspector of taxes had been made and where final liability to taxation had been decided, this appeal would not be open at the point at which any intermediate finding is made, but only when the entire appeal is determined. An appeal is only determined by the TAC where there is a final decision by them as to liability to pay and as to the amount of tax for which the taxpayer is liable.

xxii. The decision in *O'Rourke* means that if the Appellant is unsuccessful on the preliminary issue, any appeal it wishes to bring cannot be brought until after the determination of the substantive appeal. Accordingly, such an appeal will not give rise to any increase in costs or postponement of the trial as suggested by the Respondent because it simply cannot be pursued until the TAC has made a determination in relation to the Substantive Issues on the appeal.

xxiii. The Respondent grounded its opposition to the trial of the time limit issue first, on the basis of case law developed by the courts in an entirely different context, namely, whether in litigation before the courts it is appropriate to try a point of law by way of a preliminary issue. The Rules of the Superior Courts which provide for the preliminary trial of such an issue have no relevance to this application. The Appellant presented its application on a different basis, namely, the jurisdiction of the TAC to manage the cases in an efficient manner and to determine that a particular issue should be tried first, because depending on the determination of that issue it may be unnecessary to determine the Substantive Issues on appeal.

xxiv. Entirely without prejudice to the Appellant's contention that the jurisprudence of the courts in relation to the Rules of the Superior Courts is irrelevant, it is in fact the case that the requirements laid down by the courts in that context are met here. In *Campion v South Tipperary County Council,* the Supreme Court at p.732, laid down the following principles:

a) There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.
b) There must exist a question of law which is discrete, and which can be distilled from the factual matrix as presented.
c) There must result from such a process a saving of time and cost when the same is contrasted with any other suggested method by which the issues may be disposed of; in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.
d) The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.
e) Conversely if irrespective of the court's decision on that issue (s) there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order
f) Exceptionally however even if the follow-on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.
g) As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate
h) It must be "convenient" to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters
i) The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties
j) The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally
k) Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to do so.

xxv. It is apparent that even if these principles were applicable, the Appellant complies with the same.

Summary on grounds for trial of a preliminary issue

xxvi. The Respondent and its legal advisors agreed to the hearing of a preliminary issue in respect of the application of the four-year time limit provided for by TCA, section 955(2)(a) on 23 July 2018. The fact that the issue now before the TAC is the application of the time-limit to the Notice of Assessment of 10 October 2018 does not alter the fact that the Respondent had agreed that it was appropriate to hear the time-limit issue first and the Respondent should not be permitted to renege on that agreement.

xxvii. The question of whether the Appellant has provided full and true disclosure of all material facts necessary for the Respondent to raise DWT assessments in respect of those years so that no exception to the four-year time limit on the raising of assessments arises is an issue which is more appropriate to be heard first, on a modular or phased basis, prior to the hearing of the Substantive Issues. It is not accepted that the test set out in the *Campion* decision in respect of the trial of a preliminary issue, which test relates to a particular rule of the Superior Courts, has any bearing on the decision of the Appeal Commissioner to direct that the time-limit issue be heard first in the present case. Without prejudice to this contention, the time-limit issue does in fact satisfy the test set out in *Campion* for the trial of a preliminary issue. In particular, the facts which are relevant to the determination of the issue were not in dispute and a decision in favour of the Appellant, which will obviate the necessity for the TAC to embark on a lengthy hearing analysing the Appellant's entitlement to R & D relief under section 141(5)(c) in respect of 12 separate periods of taxation, and the requirement to assess the validity of the Radical Innovation claim, would unquestionably give rise to a very significant saving of time and costs.

xxviii. For these reasons, the TAC should not accede to the Respondent's request for an adjournment of the preliminary issue and should instead proceed to hear that issue in advance of the appeal on the Substantive Issues, in accordance with the agreement reached between the parties on 23 July 2018.

Application of section 955(2) to the facts

xxix. The Notice of Assessment to DWT of 10 October 2018 is invalid unless the Respondent can establish that the four-year time limit does not apply by virtue of the exception provided for in TCA, section 955(2)(b)(i), namely an alleged failure on the part of the Appellant to have made a full and true disclosure of all material facts necessary for the Respondent to raise an assessment. No such exception arises in the present case because the Respondent was in possession of all the material facts

necessary for the raising of an assessment to DWT, as those facts were apparent from the CT1 Returns filed by the Appellant.

xxx. TCA, Section 955 (2)(b)(i) refers only to a return in the singular and it is sufficient if that return provides all the material facts necessary for the making of an assessment. Once that threshold is met it is irrelevant whether any other return might provide the same or additional information. Consequently, the Respondent should not be permitted to ignore the disclosures in respect of relief claimed on distributions from patent income which were contained in the CT1 Returns and which indisputably provided the Respondent with the necessary information to raise an assessment of DWT, for years on end, and then to raise assessments without any reference to the four-year time limit provided for in TCA, section 955(2)(a).

xxxi. If the TAC believes contrary to the Appellant's submissions the above interpretation is not clear then any ambiguity in the section must be construed in favour of the Appellant. In circumstances such as the present case, the Appellant maintained that it cannot have been intended by the Oireachtas that where a company returned all material facts enabling the Respondent to raise an assessment of a particular tax in one return, but failed to complete a different return which would not have provided the Respondent with any further material information relevant to the tax in question, that the Respondent could rely on such failure to defeat the four-year time limit laid down by TCA, section 955(2)(a). In *Harris v Quigley*, [2006] 1 I.R. 165 Geoghegan J. held as follows at p.183:

> *"While, as far as possible, a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, nevertheless there is a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer*."

xxxii. The Respondent in effect seeks to unlawfully penalise the Appellant for not making a DWT return by depriving it of the benefit of TCA, section 955(2)(a) to which it is entitled. This is wholly impermissible and *ultra vires.*

xxxiii. The observations of the Court of Appeal in *Stanley v The Revenue Commissioners,* [2017] IECA 279 where at p. 17 Peart J. emphasised the importance of the statutory time limit imposed on the Respondent to examine returns compiled by a tax payer are apposite to the present case:

> "*The legislative provisions give the Revenue a reasonable period to examine the return and self-assessment and raise a different assessment if they consider appropriate and also give certainty to tax payers so that they can*

order their tax affairs. Without that protection, there could be no way of knowing whether a donee's own self-assessment of CAT liability made on an otherwise correct return is accepted by Revenue, or whether perhaps five, ten, fifteen or even more years down the road a notice of assessment might, so to speak, issue out of the blue, not only in respect of a liability to tax which the Revenue have decided arises, but also exposing the taxpayer to the prospect of substantial interest and penalties going back to the date on which the return was delivered. It is reasonable and a matter of fundamental fairness that a state body such as the Revenue Commissioners, who exercise statutory powers, should be subject to some restraint in the form of time limits within which to exercise their considerable powers to raise assessments of tax, particularly where those assessments may also give rise to a liability for additional interest and even penalties going back to the date of delivery of the CAT return."

xxxiv. The fact that the CT1 Returns meet the requirements of TCA, section 955(2) is definitively determined by the fact that the Notice of Assessment of 10 October 2018 was issued without any additional returns or information being requested from or provided by the Appellant (other than that contained in the CT1 Returns). In other words, the actions of the Respondent in issuing the Notice of Assessment now relied upon, demonstrated beyond doubt that the CT1 Returns contained all material relevant information. In the Appellant's submission this incontestable fact resolves this appeal. The fact that the purported Notices of Assessment mistakenly issued by the Respondent included the same gross distribution amounts assessable for DWT as did the Notice of Assessment of 10 October 2018 confirms that the Respondent was in possession of all such material facts on 30 December 2013 at the latest.

xxxv. Without prejudice to the above argument the Appellant maintained that the information included in the CT1 return in each of the years from 1999 to 2010 is only capable of one interpretation and could have left the Respondent in no doubt but that the Appellant's claim was in respect of distributions out of patent income and that an exemption from DWT was claimed.

xxxvi. Without prejudice to the foregoing, if the TAC were of the view that the initial CT1 Returns did not provide a full and true disclosure of all material facts necessary for the Respondent to raise an assessment to DWT in respect of the Appellant for the years 1999 to 2010 (contrary to the Appellant's position), the Appellant at the request of the Respondent in or about late 2013 and prior to the issue of the purported Notices of Assessment in December 2013, provided additional returns and/or information in the form of a list of the distributions made by it in each year between 1995 and 2010 and a list of the dividends paid to individual shareholders in the year 2008. Accordingly, as and from late 2013, the Respondent had in its

possession all material facts and was not entitled to issue another assessment after the end of December 2017.

xxxvii. The Appellant's entitlement to rely on the four-year time limit as a ground of appeal pursuant to the provisions of section 955(3) accrued prior to the insertion of TCA, section 172K(9)(b) into the TCA 1997 and the Appellant's filing of DWT returns on 7 November 2018 is without prejudice to this entitlement, and does not extinguish any rights, privileges or entitlements which accrued to the Appellant before the introduction of TCA, section 172K(9)(b) or now accrue.

DWT Returns

xxxviii. The Appellant accepted that no DWT returns recording the Appellant's nil liability to DWT were made for the relevant years. However, this was irrelevant to the operation of TCA, section 955(2)(a). On its plain wording that provision only required that a return be made and that it should contain all relevant material facts. The CT1 Return was made and complied with that requirement.

xxxix. At no stage has the Respondent identified the material facts which the Appellant failed to disclose on the CT1 forms which would have prevented the Respondent from raising an assessment to DWT in respect of the Appellant. As already explained, this was proved by the purported Notices of Assessment which issued in December 2013. As a matter of law, the Respondent, not having identified any material fact which has not been disclosed is not entitled to issue the Notice of Assessment and it was submitted that that is an end to the matter.

xl. The position now adopted by the Respondent, namely, that there was no DWT Return does not as a matter of law permit the Respondent to issue the Notice of Assessment and in this regard the Respondent misunderstands the legal position. TCA, section 955 contained no provision which permitted a Notice of Assessment to be outside the time limit because some other return had not been made. The deduction of DWT from distributions is provided for by TCA, section 172B(1). TCA, section 172B(7) provides for certain exemptions in respect of

(i) the profits or gains from stallion fees, the occupation of woodlands or stud greyhound fees,
(ii) income from certain patents, or
(iii) the profits of certain mines.

xli. While TCA, section 172K(1) lists the information which must be provided by a company which makes a relevant distribution in a return, the CT1 Returns which were filed by the Appellant in respect of the years 2003 and 2005 to 2010 included

the dates and value of distributions made, and the value of DWT assessed by the Appellant which was in each instance zero. While the identity of those to whom distributions were made and the value of each individual distribution was not identified, this omission could not be considered to be material for the purpose of the assessment of the Appellant to DWT.

xlii. TCA, section 172K (1) of the TCA 1997 requires that details of the basis upon which an exemption from DWT is claimed under either section 172B(7)(a), (b) or (c) be recorded in the DWT return. However, the DWT return provided by the Respondent does not include any section which allows such information to be provided. A letter dated 4 July 2017 from the Respondent to the Appellant's advisor, attached what was described as a sample DWT return to be completed in respect of all distributions made after 6 April 1999 which it was asserted "*agrees with the provisions of section 172K of the TCA 1997*." In fact, an analysis of the return attached by the Respondent made it clear that the return does not seek any information in respect of the type of exemption from DWT nor does the return contain any space in which a reference to an exemption from DWT claimed by a company could be made. In a separate letter of 9 May 2017, the Respondent asserted that where DWT was not deducted from those distributions, the reason for the non-deduction will be shown on the DWT return. However, the returns which were subsequently forwarded by the Respondent demonstrate that in fact there is no facility on the return to include such information. Conversely, this information which could not be supplied on the DWT return (as there was no facility to do so) was supplied on the CT1 return and thus in the Respondent's possession at all times, thereby enabling the Respondent to raise a DWT assessment.

xliii. Even if the Appellant had filed DWT returns in the relevant years these returns would not have provided the Respondent with any information in relation to the exemption claimed by the Appellant (such as had been provided on the CT1 form) as there was no scope for the provision of that information on the DWT returns. In fact, the CT1 Returns provided more relevant information to the Respondent than the DWT returns did by identifying TCA, section 234 as the basis upon which an exemption was claimed. In those circumstances any contention by the Respondent that the failure to file DWT returns amounted to a failure to make full and true disclosure of the material facts necessary to make a DWT assessment, thereby bringing the exception to the four-year limit provided by TCA, section 955(2)(b)(i) into operation doesn't stand up to scrutiny. The DWT returns would have provided the Respondent with no further material facts enabling it to make an assessment. In those circumstances any reliance by the Respondent on TCA, section 955(2)(b)(i) cannot be sustained.

Section 141 exemption in respect of distributions out of patent income

xliv. The Appellant at all times relied on the provisions of TCA, section 141 which provides for the exemption from tax for distributions made out of patent income.

xlv. Section 141 (3)(a) provides as follows:

> *"So much of any distribution as has been made out of disregarded income,*
>
> *(i) shall subject to subsection 4(a) not be regarded as income for any purpose of the Income Tax Acts, and*
>
> *(ii) shall where the recipient of that distribution is a company and the distribution is in respect of eligible shares, be deemed for the purposes of this section to be disregarded income."*

xlvi. "*Disregarded Income*" is defined by Section 141(1) as follows:

> *(a) "as respects distributions made out of specified income accruing to a company on or after 28 March 1996-*
>
> *(i) income from a qualifying patent which by virtue of section 234(2) has been disregarded for the purposes of income tax, and*
>
> *(ii) income from a qualifying patent which by virtue of section 234(2) and section 76(6) has been disregarded for the purposes of corporation tax"*

xlvii. Section 141(5)(c) as amended by section 55(1)(a) of the Finance Act 2006 provides as follows:

> "*Where for an accounting period a company makes one or more distributions out of specified income which accrued to the company on or after 28th day of March 1996, and the specified income is income from a qualifying patent in respect of an invention which was patented for bona fide commercial reasons and not primarily for the purpose of avoiding liability to taxation so much of the amount of that distribution or the aggregate of such distributions as does not exceed the amount of aggregate expenditure on research and development incurred by the company in relation to the accounting period shall be treated as a distribution made out of disregarded income."*

xlviii. Section 76(6) provides that provisions of the income tax acts in respect of exemptions from income tax shall have like effect for the purposes of corporation tax

xlix. The definition of disregarded income contained in section 141 requires the section to be read in conjunction with section 234(2) which concerns the treatment of certain income derived from patent royalties for income tax and corporation tax purposes and provides as follows:

(a) "A resident of the State who makes a claim in that behalf and makes a return in the prescribed form of his or her total income from all sources as estimated in accordance with the Income Tax Acts shall be entitled to have any income from a qualifying patent arising to him or her disregarded for the purposes of the Income Tax Acts.

(b) In paragraph (a) the reference to a return of total income from all sources as estimated in accordance with the Income Tax Acts shall apply for corporation tax as if it were or included a reference to a return under section 884."

l. In the present case the Appellant completed the prescribed forms required by TCA, section 234(2) and the nature of the tax relief being claimed by the Appellant was absolutely clear. In this context it is of some importance to note that the CT1 Returns do not include any section which allows for expenditure on research and development within the meaning of TCA, section 141(5)(c) to be recorded. Accordingly, any contention by the Respondent to the effect that the Appellant has not made true and full disclosure of the material facts necessary for the Respondent to evaluate the Appellant's claim to relief on distributions on account of expenditure on research and development under section 141(5)(c) has no basis. There was no scope in the CT1 Returns to record expenditure on research and development and in those circumstances no exception to the four-year limit can apply arising from the non-disclosure of details in respect of that expenditure. There simply was no facility to make any such disclosures.

li. The Appellant is a company whose sole purpose is to collect patent income and as patent income was the only income received by the company, and the only relief claimed by the company was relief under TCA section 234, the Respondent could have been in no doubt that the TCA, section 141 relief was applied by the Appellant to the distributions made by the company, the value of which was also recorded on the CT1 Returns.

lii. Without prejudice to the foregoing argument, the other companies in Appellant's group each elected under TCA, section 141 (5)(a) TCA 1997 that all R & D expenditure incurred from 1 January 1996 to 31 December 2010 by those

companies would be treated as expenditure on R & D activities by the Appellant. Each of these companies filed complete CT1 Returns in respect of the years 1999 to 2010.

liii. Any contention on the part of the Respondent that it was unaware of the distributions made or of the fact that the Appellant had assessed the sum of DWT due during the relevant years as zero, was simply not tenable as that information had been provided to the Respondent. In those circumstances it remains unclear on what basis it was asserted that the four-year limitation period provided by TCA, section 955(2)(a) does not apply.

liv. The Respondent has extensive powers of investigation pursuant to the provisions of TCA, section 956 and having received the CT1 Returns for the years 1999 to 2010, was at liberty to conduct an inquiry into the accuracy of those returns either in respect of the section 234 tax relief sought by the Appellant, or in respect of the distributions made or any other matter. However, the Respondent simply failed to raise an assessment on foot of any investigations conducted by it within the time limit laid down by TCA, section 955(2)(a), with the consequence that the assessment ultimately raised by it in October 2018 in respect of DWT for the years 1999 to 2010 is out of time.

Appellant's summary

lv. The Respondent is prohibited by TCA, section 955(2)(a) from raising a Notice of Assessment to DWT in October 2018, outside the four-year time limit in respect of the years 1999-2010, unless it can establish that there was a failure on the part of the Appellant to make true and full disclosure of all material facts necessary for the Respondent to make an assessment of tax.

lvi. The Respondent has not identified any basis upon which it could overcome the statutory prescribed time limit by the application of any of exceptions to the limit which are contained in TCA, section 955(2)(b).

lvii. Insofar as the Respondent may seek to argue that the exception contained in subsection (i) of that section, namely that the Appellant has failed to make a true and full disclosure of the material facts necessary for the Respondent to make an assessment of tax, the Appellant rejects any such argument. The Appellant supplied the Respondent with all the material facts which permitted it to make an assessment to DWT if it deemed it appropriate to do so. Critically, the Respondent knew that distributions had been made, that the Appellant claimed an exemption in respect of patent income and that the Appellant assessed its own liability to DWT as nil. The Respondent cannot be entitled to ignore those facts which were in its

possession and which enabled it to make an assessment to DWT in respect of the Respondent within the four-year time limit. In this regard the Respondent's power to carry out investigations is of considerable importance.

lviii. The issuing of the purported Notices of Assessment by the Respondent in December 2013, underlines the fact that the Respondent was in possession of all material facts necessary to raise a Notice of Assessment to DWT by December 2013 at the latest.

lix. While the Respondent apparently purported to rely on the omission to deliver DWT returns, it had not addressed in correspondence or otherwise, why the disclosure which was made in the Forms CT1 was inadequate for the purpose of the full and true disclosure obligations which are imported by TCA, section 955(2)(b)(i).

lx. The Respondent's contention that its Notice of Assessment to DWT issued on 10 October 2018 is valid, in circumstances where that assessment is *prima facie* out of time and where the Respondent has been in possession of all material facts necessary for it to make assessments of DWT prior to the expiration of the time limit, if accepted by the Appeal Commissioner, would render the protections which are afforded to the Appellant by the four year limit provided for in section 955(2)(a) nugatory. The facts of the present case clearly demonstrated that the Appellant is entitled to the protection provided by that section and the Appeal Commissioner is urged to give effect to that protection by upholding this appeal.

Respondent's Submissions

18. The Respondent made the following submissions:

Whether the time limit issue is appropriate to be tried in isolation

i. The Respondent took issue with the Appellant's assertion on whether or not the time limit issue should be tried in isolation is one which cannot be heard on the basis that Counsel for the Respondent "*expressly agreed*" at a case management conference on 23 July 2018 that it could be heard in isolation where the Appellant produced no evidence of the alleged agreement. It was noted that neither Senior and Junior Counsel for the Appellant were not present in July 2018.

ii. At the time of the case management conference in July 2018 the Respondent had not seen any written description of the preliminary issue to be raised at all. This very point was made by Counsel at the case management conference who also made the related point that it was not therefore possible to say whether the preliminary issue could be tried as such.

iii. Furthermore, if the Respondent had expressly agreed that the preliminary issue could be tried as such, it was surprising that this express agreement was not relied on by Senior Counsel for the Appellant on 2 October 2018 to argue that the first part of this hearing – whether the preliminary issue could be tried in isolation – could not proceed.

iv. As such no agreement was given to the trial of the time-limit issue in isolation and therefore the TAC has jurisdiction to control its procedures so as to ensure that all matters in issue on the appeals before it are dealt with appropriately and so as to ensure fair procedures are afforded to both parties to the appeals. The Respondent noted that the TAC enjoys full jurisdiction to decide whether it is better that the preliminary issue proceeds in isolation from the main appeal, or whether it is better that it be heard at the same time as the main appeal.

v. In *LM v An Garda Siochana* [2015] 2 IR 45, a case in which the Supreme Court held that a court was entitled on the hearing of a preliminary issue to consider if the issue was one appropriate for determination in that manner. It was therefore submitted that the TAC, as a decision-making body, with power to control its own procedures in significant ways, must also enjoy this important jurisdiction. In *LM*, O'Donnell J said at paragraph 36:

> *"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to*

determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession. In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact-dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion."

vi. It was therefore submitted that it was not appropriate that the Appellant should seek to tie the hands of the TAC as to procedures by reference to the alleged conduct of the counterparty to its appeal. This was to deny the TAC the important power to control its own procedures and ensure a fair and appropriate determination of all issues in the appeals before it.

vii. The Respondent expressed concern that the trial of a time-limit issue was attended by the real risk of procedural inefficiency or, much worse, procedural unfairness. The Appellant alluded to the fact that at least two witnesses were to give evidence and be cross examined on the time limit issue, including as to matters of taxation. The Respondent also referred to the Appellant's submission when stating that "*the time limit issue can be determined discretely on the basis of the Notice of Assessment and CT1 returns*" and "*it is not anticipated that oral evidence will be required. If it is, it will merely be of a formal nature*." It was also stated in its submission that "*Whether the Appellant's contention, on the time limit issue, is correct can be determined by reference to the CT1 Returns and the Notice of Assessment.*"

viii. The ability of a court or tribunal to separate out factual and legal issues arising on a preliminary issue is the core test of whether such an issue can be tried in isolation. The TAC cannot safely conclude that the time limit issue is one which is or can be discrete and it ought not therefore accede to its being heard by way of separate preliminary trial.

ix. In this regard, the central concern of the Respondent is that the time-limit issue, an issue of undoubted significance given the quantum of tax in issue is heard and determined in a manner which is procedurally fair and appropriate. This means that any hearing must take into account the right of each party to adduce evidence, and the right of each party to contest evidence. Further, a hearing has to take into account the right of both parties to be able to know and to meet all of the legal

issues arising at that hearing. A hearing which poses a real risk of failing to take account of these rights is one which simply should not proceed. This is so regardless of the nature of the issue, and whether it is one which might dispose of other, subsequent issues.

Asserted saving of time and costs

x. The key issue in deciding on the trial of a preliminary issue is whether it will be dispositive of the underlying appeal.

xi. In *LM v An Garda Siochana* O'Donnell J [2015] 2 IR 45 at p 64 sets out the balancing exercise required of a Court (or tribunal) in considering whether a preliminary issue is appropriate to be tried as such or not by reference to the central issue arising:

> *"[34] It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law. The decision to direct a trial of a preliminary issue is therefore one which requires careful consideration by trial judges. It is important that judges do not too readily accept a respondent's protestations of complexity, impossibility or inconvenience in trying a preliminary issue, while at the same time interrogating with some scepticism a moving party's claim that the point is clear and potentially dispositive of the litigation or some significant portion of it."*

xii. It was submitted that the proposed preliminary issue fails this central test and the appropriate decision to be made is to refuse to proceed to its hearing.

xiii. As with the Appellant, the Respondent also placed reliance on *Campion v South Tipperary County Council* [2015] 1 IR 716 where the Supreme Court (McKechnie J) set out a summary of the factors to be taken into account in deciding whether to order the trial of a preliminary issue.

xiv. While the Appellant held out the prospect of a preliminary hearing which will save time and resources of the TAC, it is worth recalling that the appeals are not the only appeals that turn on the issue of whether the Appellant was entitled to make tax free distributions to its members. The recipients of such distributions (referred to here as "the Members" of whom there are 49) have been assessed to income tax and the determination, in substance, of the entitlement of the Appellant to make tax-free distributions remains live in respect of those appeals regardless of the

outcome of a preliminary application. Those appellants share a common tax agent with the Appellant. The Respondent could not know what interactions there have been as between the Appellant and the Members. The Appellant has not said in its submission that if it succeeds on the preliminary issue, its right (or otherwise) to make tax free distributions to Members is no longer an issue in any appeal. It is and will still be an issue in the context of the Members' appeals. Thus, if the time limit point is determined in favour of the Appellant "*the Appellant's entitlement to make tax-free distributions in those years becomes moot*" must be treated with considerable caution, to say the very least.

xv. As to the submissions concerning the inevitable length and complexity of the radical innovation and research and development issues, two points can be made. First, the Appellant grounds its submission as to the length of time to be taken on appeal on what appears to be an allegation of delay on the part of the Respondent in processing the Appellant's belated provision of information in support of its claim to relief. It was neither logical nor legitimate for the Appellant to rely on a perceived delay on the part of the Respondent to support its position with regard to the length or complexity of its own appeal. Nor was it fair, in circumstances where the Appellant claimed relief having begun, but never completed, the process of obtaining the determination required for such relief. The failure to obtain the requisite determination subsisted not merely for months, but years, during which relief was claimed without the benefit of a determination as to entitlement.

xvi. It was convenient to highlight this was but one example of an argument made by the Appellant which was based on speculation in respect of matters which could only properly be determined on examination in chief and cross-examination.

Asserted convenience of the preliminary issue

xvii. The Appellant sought to argue that determination of the time limit issue nowhere meets the issue to be determined in the main appeal. First, it was clear that the premise for this submission that all that was required to be determined could be determined on the basis of the Notice of Assessment and CT1 returns was wrong. Secondly, the basis for this submission is the decision of the Court of Appeal in *Stanley v the Revenue* Commissioners. The Appellant's reliance on *Stanley* is fundamentally flawed. To appreciate why this is so requires some brief analysis of that decision, and also the facts and legal context for this appeal.

xviii. The Respondent could not agree with the analysis *of Stanley* contained in the Appellant's submission. The analysis was far too broad in seeking to draw from *Stanley* a proposition of general application which does not arise at all from the careful and precise reasoning of Peart J. in the Court of Appeal.

xix. In *Stanley*, the taxpayer issued judicial review proceedings seeking to quash assessments to Capital Acquisitions Tax ("CAT") on the basis that they were out of time having regard to the provisions of s. 49(6A) CAT Consolidation Act 2003. The first point to note is that in *Stanley* the taxpayer delivered a CAT return prior to being assessed to CAT. Central to the High Court's determination that the assessment to tax was late, was its finding that the provisions governing the making of a return to CAT contained quite separate obligations. The first obligation was to make a correct return – containing facts – as to gifts received and their market value. The second obligation, which was a separate and distinct obligation was to make on the return "*an assessment of such amount of tax as, to the best of that persons knowledge, information and belief, ought to be charged believed and paid….*" In circumstances where the factual details contained in the return were accepted to be correct, the Court found that the return was a correct return and that the four-year time limit applied. The Court expressly found that:

> *"That distinction is evident from the provisions of themselves and is critical to the determination of this appeal."*

xx. This case is very different from *Stanley.* First, in *Stanley* the taxpayer complied with his obligation to file a return. That is not the case here. No DWT return was filed at all. Therefore, the critical starting point for determination of the time limit issue is entirely different to the starting point in *Stanley*.

xxi. Secondly, the return filed in *Stanley* was a return to CAT whose contents were prescribed by s. 46(2) of the CAT Consolidation Act 2003. The return in issue here was a return to DWT whose contents are prescribed by TCA, section 172K. Leaving aside the fact that none of the requirements of TCA, section 172K could have been complied with, in the absence of any return to DWT having been filed, the prescribed contents of the return are completely different to those in issue in *Stanley.* Most significantly, none of the wording relating to an assessment of tax to the best of the taxpayer's knowledge or belief is contained in TCA, section 172K.

xxii. It was therefore not possible for the Appellant to rely on the *Stanley* case in support of the proposition that a time limit issue in a tax appeal must always be separate and distinct from the issue of whether or not a correct liability was contained in a return. The distinction drawn in *Stanley* was drawn by reference to very specific statutory wording. To apply the *Stanley* case in the manner contended for by the Appellant, is to fall into grave error in transposing the findings of the Court of Appeal on an entirely different statutory scheme to the statutory scheme in this case.

xxiii. While the Appellant correctly indicated that there is no statutory right of appeal in respect of a time limit issue, it does not and could not assert that a remedy by way of judicial review would not be available where the TAC embarked on a hearing in

which the entire of the tax in issue was concerned and was the subject of complaint by either side as to the procedure or approach adopted at that hearing.

xxiv. Perhaps more importantly however, the key issue to be determined under the "*convenience*" heading was whether the hearing assigned to the time limit issue was one which properly reflects the extent and nature of the evidence actually to be given or likely to be given (since there are no witness statements available to confirm the evidence to be given), and the legal issues actually arising or likely to arise and which acknowledged whether in fact that evidence and those legal issues could in fact be regarded as discrete or not. Given the position adopted by the Appellant in respect of those matters, it was submitted that the TAC simply could not be satisfied that the time limit issue was one which can properly be heard and determined discretely.

xxv. In light of the foregoing, and having regard also to the matters set out below the Respondent submitted that the time limit issue is one which the TAC cannot safely be heard in isolation and should be heard at the hearing of the tax appeal. There could be no saving of costs and time as the time-limit issue is inextricably linked to and overlaps with the substantive issue.

Assessment to dividend withholding tax not out of time

xxvi. The statutory schemes providing for time limits as to assessments are inextricably linked to the obligation to file returns and furnish information in respect of the tax assessed. This is so across all taxes – see for example, s. 113 VATCA 2010. s. 46 CATCA 2003 as referred to in the *Stanley* case above, and is no less the case with regard to the time limit provided for in TCA, section 955, to which the Respondent now turns.

xxvii. The Appellant's reliance on *Harris v Quigley* to the extent that where there is any ambiguity as to the interpretation of TCA, section 955(2)(b)(i), then *"any ambiguity in the section must be construed in favour of the Appellant"* is wrong. This much is clear from consideration of *O'Rourke v Revenue* [2016] 2 I.R. 615 in which the distinction was made between provisions of statute imposing a liability to tax, and those which do not. The Appellant was at pains to point out in its submission that the time limit issue was not one which met the issue of its liability to tax at all, yet at the same time called for an interpretation of TCA, section 955 which presumed that that section imposed a liability to tax. In *O'Rourke*, a case in which the Supreme Court (Charleton J, with whom Clarke J and Dunne J agreed) said as follows with regard to competing submissions as to the interpretation of TCA, section 955:

> "[*4]…Both sides have also asserted the applicability of various canons of statutory construction. Reference has been made to the need for a purposive construction on*

the part of the applicant whereas the notice party has argued for the need to avoid anomalous consequences in the interpretation of the relevant legislation. As the hearing proceeded it became apparent that no such resort was necessary in this analysis. Instead, it is appropriate to restate that a statute is to be construed according to its plain meaning and that such emerges from the text of the relevant provision, considered within its proper context. In another decision of this court on the entitlement of taxpayers to appeal an assessment to taxation, Keogh v. Criminal Assets Bureau [2004] 2 I.R. 159 at p. 170, Keane C.J. stated the applicable rule of statutory construction thus:-

> *"In construing the relevant provisions of the Taxes Consolidation Act 1997, the duty of the court is, as stated by Lord Russell of Killowen C.J. in Attorney General v. Carlton Bank [1899] 2 Q.B. 158, at p. 164:-*
>
> *'to give effect to the intention of the Legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed'*

a passage which was cited with approval at pp. 763 to 764 by Kennedy C.J. speaking for the Supreme Court of Saorstat Éireann in Revenue Commissioners v. Doorley [1933] I.R. 750. It is true that, as pointed out in that and other authorities, where the court is considering whether a particular person is subject to a tax claimed to have been imposed by a statute, its sole task is to determine whether, having regard to the language used, the tax has been expressly imposed; the court cannot have regard, as might be possible in other contexts, to what might be assumed to be the intention or governing purpose of the Act, other than an intention to levy such tax as the statute imposes. We are here concerned with provisions in the Taxes Consolidation Act 1997 which do not impose any tax but set out the machinery by which the taxpayer is to be assessed and the appropriate tax recovered and in construing those provisions the court must apply the normal principles of construction to which I have already referred."

[5] Consequently, the task of a court is one of analysis only. It is not the substitution of a court's own views as to what provision ought to be made regarding taxation or exemption from liability: McGrath v. McDermott [1988] I.R. 258. The basic and ordinary rules of statutory construction apply in determining the meaning of any taxation statute, which are to give each section its ordinary meaning within its relevant context and to consider exemptions from taxation, against the backdrop of the ordinarily applicable liability, with a view to analysing if that exception applies: Revenue Commissioners v. Doorley [1933] I.R. 750 and Harris v. Quigley [2006] 1 I.R. 165.

[6] Here, the relevant section requiring analysis is s. 955 of the 1997 Act. This section gives an inspector of taxes the entitlement to raise an assessment and sets a time limit for that once the taxpayer has submitted an apparently valid income tax return. The temporal limitation on this power is coupled with an exception extending the time for raising an assessment indefinitely, but only where it can be established that there is some want in proper disclosure by the taxpayer. While this must be analysed within its proper context, the text thereof operates as the fundamental provision which determines the question in issue on this appeal."

xxviii. The Respondent contended that the wording of TCA, section 955 is clear in every material respect, but whether it is or not, it is not a section which imposes a liability to tax, or an exemption from tax, and it is therefore to be construed in line with the ordinary canons of interpretation giving the words used their ordinary meaning within their statutory context. In any event, the obligation to file the return is as clear as it ever could be.

xxix. The attempt to argue for an incorrect approach to the construction of TCA, section 955 by the Appellant suggested that the Respondent sought to *"unlawfully penalise"* the Appellant for failing to file a return to DWT. There was no such attempt. The position is that the TAC must decide whether or not the four year time limit applies by reference to whether or not a return was made – whether a return to Corporation Tax satisfies the requirement to make a return to Dividend Withholding Tax, and whether or not a return, if it meets the requirement to file a return, meets the further requirement to contain a full and true disclosure of the material facts necessary to enable the Respondent to make an assessment to DWT.

xxx. TCA, section 955(1) as amended provides for a general power to make assessments without reference to any limitation. Subsection (2)(a) which immediately follows makes very clear that an essential pre-requisite for the time limit which it imposes on the power given by subsection (1) is the filing of a return for a chargeable period – the chargeable period to which the assessment of tax relates.

xxxi. The Respondent emphasised that the Assessments the subject of this hearing are assessments to DWT, a tax that is entirely separate and distinct from other taxes. It is a withholding tax where an amount of income tax or corporation tax is withheld by a company making distributions to corporate or individual members in a given month and an accountable person's rights and obligations concerning DWT are the subject of a distinct set of statutory provisions, and a distinct set of obligations.

xxxii. The essential prerequisite to the application of the four-year time limit to an assessment to DWT is the making of a DWT return. Absent such return, the time limit does not apply. The wording of subsection (2)(b) could not be any clearer in this regard. This is not of course the only prerequisite to the application of the time limit. It is however the first, and one which the Appellant accepted does not satisfy.

The Appellant argued however, that the filing of a CT1 return is an *acceptable substitute* for the filing of a DWT return, and that the filing of a CT1 return should be regarded as fulfilling the prerequisite to file a return contained in subsection (2)(b). Quite apart from the fact that the Appellant roundly ignored the fact that a CT1 return is not the same thing as a DWT return, the Taxes Acts make expressly clear that the fulfilment of one obligation under the Taxes Acts cannot be regarded as fulfilling an entirely separate obligation.

xxxiii. In this regard, TCA, section 950(3)(a) TCA 1997 is relevant and provides, *inter alia*, as follows:

> *"Where any obligation or requirement is imposed on a person in any capacity under this Part and a corresponding obligation or requirement is imposed on that person in another capacity, the discharge of any one of those obligations or requirements shall not release the person from the other obligation or requirement."*

xxxiv. Simply put, it was not open to the Appellant to argue that the filing of a CT1 return is to be regarded as, or deemed to be, or is the same as filing a return to DWT. There is no authority for the proposition that filing a return to Corporation Tax fulfils an obligation to file a return to any other tax, either in practical terms or more importantly, in law.

xxxv. The Respondent submitted that the period within which an accountable person must make a return under TCA, section 172K is entirely different from that which applies to Corporation Tax. A DWT return must be filed within 14 days of the month within which any relevant distribution is made. This is so regardless of whether the taxpayer believed an amount to be due on foot of the return or not – the requirement to state the basis for the absence of a liability makes this clear. By contrast, Corporation Tax returns are filed within 9 months of the end of a company's accounting period and not by reference to the month during which a relevant distribution is made at all. The filing of a CT1 could not possibly fulfil the obligations which arise under TCA, section 172K because the obligation to file a CT1 return is tied into the payment obligation that arises to corporation tax and not to Dividend Withholding Tax.

xxxvi. The wording of TCA, section 955(2)(b) states that "*Where a chargeable person has delivered a return for a chargeable period*" how could the filing of a return nine months after financial year end possibly fulfil the obligation of filing a return *for a chargeable period* which is specific to individual distributions and for which a return is required 14 days from the month in which the distribution is made? Quite simply, it could not.

xxxvii. TCA, 172K(5) provides that DWT assessed on an accountable person is due within one month of the notice of assessment subject to any appeal that may be brought. TCA, section 172K(6) builds into the DWT regime the framework for appeals against assessments contained in Part 41 of the TCA 1997

xxxviii. These provisions are key to a proper understanding of the position the Appellant now finds itself in. The time limit for raising a DWT assessment depends on the making of a DWT return, in precisely the same way that the time limit for raising an assessment to income tax depends on the filing of an income tax return.

xxxix. TCA, section 172K(9) makes explicit the availability of the appeal mechanism in respect of an assessment to DWT under the new appeals regime as follows:

> *(a) " Subject to paragraph (b), an accountable person aggrieved by an assessment made on that person under this section may appeal the assessment to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of assessment.*
>
> *(b) Where, in accordance with this section, an accountable person is required to make a return and account for dividend withholding tax to the Collector-General, no appeal lies against an assessment until such time as the accountable person makes the return and pays or has paid the amount of the dividend withholding tax payable on the basis of that return."*

xl. Fundamentally, it was clear that there is a comprehensive statutory scheme setting out the Appellants obligations to DWT, and its rights in respect of an appeal against an assessment to that tax. The Appellant did not fulfil the first essential prerequisite to the application of a four year time limit under TCA, section 955 to the extent that it has not filed a return to Dividend Withholding Tax.

xli. The second prerequisite to the four year time limit is that the chargeable person has in the return filed for the chargeable period to which an assessment relates "*made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period".* Since the contents of a CT1 return, as prescribed, are not the same as the contents of a return to DWT, as prescribed, filing a CT1 return cannot be regarded as fulfilling the obligation to file a full or true return to DWT.

xlii. As to the Appellant's contention that a return to DWT could not have contained a disclosure as to the claimed exemption from that tax was wrong. In fact, a DWT Return contains a box in which the accountable person must indicate whether it is liable to the tax, or exempt. Had returns to DWT been completed then the

appropriate indication would have informed Revenue that exemption was being claimed from DWT. There is no equivalent space in a CT1 return.

xliii. Over and above this, the Appellant nowhere makes reference to the unusual circumstance attending making of tax-free distributions by it from 1999 to 2010. As noted above, there is a twofold basis for claiming exemption from tax on distributions under s. 141 TCA 1997 That is, of course that despite claiming the benefit of provision(s) allowing for relief from tax on distributions made, the Appellant nowhere disclosed that it had not received any determination that it was in fact entitled to such relief.

xliv. Given that it was not until 2011 that the Appellant contended that it was entitled to make tax-free distributions on the basis of research and development relief, and given that the Appellant had begun but never completed (until 2012) the process of applying for a determination on radical innovation relief, the very least that was to be expected of a full or true return filed by the Appellant in the period 1999-2010 was that an expression of doubt would be made, pursuant to TCA, section 955 (4)(a), which provides as follows:

> *"Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter."*

xlv. It was very difficult if not impossible to understand how the Appellant could have been in no doubt as to its entitlement to make tax-free distributions since it saw fit to apply for a determination as to radical innovation relief but had not received a determination in its favour when it made returns for any of the years 1999-2010. It was equally difficult to understand how a return which did not contain an expression of doubt on this issue is to be regarded as a full or true return where the return (a) did not refer to any claimed exemption from DWT and (b) did not refer to the fact that no favourable determination was received at the time tax-free distributions were made – a matter that was subsequently the subject of a determination by the Appeal Commissioners and the High Court. It was worth emphasising that this provision is contained within TCA, section 955 itself and is therefore to be regarded as highly relevant to the question of whether a return contains a full or true disclosure such that the four year time limit applies.

xlvi. The Appellant placed considerable emphasis on the words "*material facts necessary for the making of an assessment*" and contended that the CT 1 return filed by it contained the facts necessary to enable Revenue to raise assessments to DWT, and contends that the raising of assessments to DWT by the Respondent without a request for further information is proof of this.

xlvii. However, neither the filing of CT1 returns nor the provision of "*additional information*" are substitutes for a return to DWT and the provision of the prescribed information contained in that return. There is no authority for the proposition that the Respondent is aware of, that indicates that a taxpayer can discharge a statutory obligation otherwise than by specific compliance with that obligation. In practical terms, the DWT return contains information which cannot be included on the form CT1. There is a facility on the return to indicate whether the dividend paid to the recipient is liable to tax or exempt from tax.

xlviii. In light of all of the foregoing, the Respondent submitted that the four-year time limit for the making of assessments does not apply because:

(a) The Appellant has not made a return to DWT at all,

(b) Even if the CT1 returns as filed were to be regarded as fulfilling the obligation to file a return to DWT, those returns did not contain a full and true disclosure of the material facts necessary for the Respondent to make an assessment to DWT.

Respondent's Summary

xlix. Fundamentally, the time-limit issue was based on an assumption that there was no liability. This unilateral assumption could not have been validly made at the relevant time and can only now be considered to be retrospectively valid if the Appellant succeeds on the underlying appeals in respect of entitlements to claim relief.

l. The Respondent submitted that the time limit issue sought to be advanced by the Appellant should be tried at the hearing of the main appeal where both sides have sufficient time and opportunity to examine and cross examine on oral testimony and to raise and respond to all facts and legal issues which touch on that issue. The facts and legal issues arising on the time limit issue are not truly discrete from the substantive issue of whether the liability to tax arises at all.

li. In any event, the Respondent submitted that as to the time limit issue itself, the four year time limit for the raising of an assessment does not apply because the twofold requirement of filing a return, which is a full and true return containing all the material facts necessary for raising an assessment to DWT has not been met.

Analysis

Overview

19. The Appellant is a company whose sole purpose is to collect patent income on which exemption from corporation tax was sought under TCA sections 234 and 76(6). On this basis, the Appellant submitted that notwithstanding that no DWT returns were made for the relevant years, the plain wording of TCA, section 955(2)(a) only required that a return be made and that it should contain all relevant material facts. As such, it was argued that the Respondent could have been in no doubt that the TCA, section 141 relief applied to the distributions made by the Appellant with reference to the information recorded on its CT1 Returns. As such, the Appellant argued that it had complied with the requirement to have made a full and true disclosure of all material facts necessary for the making of a DWT assessment.

20. There is no doubt that the CT1 returns prepared and submitted on behalf of the Appellant for the years 1999 - 2010 inclusive made reference to the distributions paid to its members and as a consequence the Respondent was aware of the date of each distribution, the amount of the distribution and that no DWT was deducted from those distributions.

21. Furthermore, unlike a source of income derived from a process constituting radical innovation requiring formal approval from the Respondent, the Appellant did not require formal approval to pay tax free distributions to its members with reference to the distributions paid where those distributions did not exceed the aggregate amount of qualifying research and development expenditure incurred by the Appellant.

22. As a consequence, the Appellant submitted that if the Respondent is precluded from raising an assessment to DWT, each of the Appellant's appeals which are currently pending before the TAC will be disposed of. Such an outcome would obviate the need for the TAC to hear any evidence in respect of the Appellant's entitlement to tax relief in respect of expenditure on research and development under TCA, section 141(5)(c) in respect of all years.

23. However, in considering such submissions, it is significant that while the Appellant's agent furnished the Respondent with details of the patents and the manufacturing process by letter dated 11th December 1996, the Respondent was not satisfied that the "*radical innovation*" applied and informed the Appellant, that "*no approval has been granted for your radical innovation and therefore the exemption is not allowable.*"

24. It is also relevant that the conditions associated with the exemption from income tax on distributions pursuant to TCA, section 141 were significantly more onerous than those that applied to the exemption from corporation tax in accordance with TCA, sections

234 and 76(6). For the distributions to be exempt from income tax in the hands of the shareholders pursuant to TCA, section 141, it was necessary that the quantum of distribution corresponded with the expenditure incurred by the Appellant on "*research and development activities*" as defined by TCA, section 766(1) as the:

> *"systematic, investigative or experimental activities in a field of science or technology being one or more of the following –*
>
> *(i) basic research, namely, experimental or theoretical work undertaken primarily to acquire new scientific or technical knowledge without a specific practical application in view,*
> *(ii) applied research, namely, work undertaken in order to gain scientific or technical knowledge and directed towards a specific practical application, or*
> *(iii) experimental development, namely, work undertaken which draws on scientific or technical knowledge or practical experience for the purpose of achieving technological advancement and which is directed at producing new, or improving existing, materials, products, devices, processes, systems or services including incremental improvements thereto:*
>
> *but activities will not be research and development activities unless they –*
>
> *(I) seek to achieve scientific or technological advancement, and*
> *(II) involve the resolution of scientific or technological uncertainty;"*

25. In comparison, for distributions to be exempt from corporation tax in accordance with TCA, sections 234 and 76(6), it was necessary that the income be derived from a *"qualifying patent"* where the *" research, planning, processing, experimenting, testing, devising, designing, developing or similar activity leading to the invention which is the subject of the patent was carried out in an State"* prior to 2007 and in an "*EEA State"* thereafter until the relief was abolished in 2010. It was a further requirement that the royalties were paid for the purposes of*, inter alia*, activities regarded as the manufacture of goods as provided for by TCA, Part 14.

Time Limit

26. Therefore, the issue in this appeal is whether the information contained on the Appellant's CT1 Returns for the years 1999-2010 amounted to full and true disclosure of all material facts to enable the Respondent raise DWT assessments in respect of those years and whether the Appellant is entitled to rely on the protection afforded by TCA section 955(2)(a) which states:

> *"Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and -*
>
> *(i) No additional tax shall be payable by the chargeable person after the end of that period of 4 years, and*
>
> *(ii) No tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> *by reason of any matter contained in the return."*

27. Notwithstanding that all of the relevant information to enable the Respondent raise an assessment to DWT was contained on the Form CT1 for all relevant years, the statutory basis for that return, as governed by TCA 1997, section 884, does not mandate the reporting of distributions made by companies to its members. Therefore, while the CT1 return is a form designed by the Respondent that requires more information than is actually required by statute, it is not the statutory prescribed form for returning details of distributions paid by a company to its members. Rather that obligation is prescribed by TCA, section 172K under the heading '*Returns, payment and collection of dividend withholding tax*'.

28. Subsection 1 of that section specifies the information to be contained on the DWT return to include, *inter alia*, the name and address of the "*beneficiary*", the date and amount of the distribution, the amount of DWT, if any, and whether the distribution was exempt from tax by virtue of TCA, section 172B(7)(a), (b) or (c), as a consequence of being income derived from:

> (i) the profits or gains from stallion fees, the occupation of woodlands or stud greyhound fees,

(ii) certain patents, or

(iii) the profits of certain mines, respectively.

29. In accordance with subsection 2, the DWT included in the return is due at the same time as the return which is within 14 days of the end of the month, and is payable to the Collector-General without the making of an assessment. However, an assessment may be made on the company where DWT or any part of it is due and has not been paid.

30. Subsection 3 provides that where the inspector who is dissatisfied with any such return, may make an assessment on the accountable person in relation to the relevant distribution. Furthermore, subsection 6 applies the provisions of the Income Tax Acts relating to assessments and the collection and recovery of income tax to DWT.

31. Every return by an accountable person is to be made in an electronic format approved by the Revenue Commissioners and must be accompanied by a declaration made by the accountable person, on a form prescribed or authorised for that purpose by the Commissioners, to the effect that the return is correct and complete in accordance with subsection 7. Where, however, the Revenue Commissioners are satisfied that an accountable person does not have the facilities to make a return in electronic format as required above, pursuant to subsection 8, the return is to be made in writing in a form prescribed or authorised by the Commissioners and must be accompanied by a declaration made by the accountable person, on a form prescribed or authorised for that purpose by the Commissioners, to the effect that the return is correct and complete

32. Therefore TCA, section 172K is a self-contained provision that not only imposes an obligation to report details of the distributions, to whom paid and to pay DWT when liable, but also provides the Respondent with the necessary authority to make assessments in cases where the information provided is insufficient or inaccurate. Furthermore, the necessary procedures for assessment, collection and recovery of the tax are also contained within that provision.

33. There is no doubt that the DWT return, designed by the Respondent, does not provide the opportunity of reporting distributions that are specifically exempt from DWT by virtue of TCA, section 172B(7)(a), (b) or (c), considered above. However, that return does provide a general tick box facility to report the tax status of the distribution as to whether the dividend is liable or exempt from DWT.

34. Furthermore, there were more stringent requirements associated with the exemption from income tax pursuant to TCA, section 141 as opposed to the exemption from corporation tax in accordance with TCA sections 234 and 76(6). Therefore, while the Respondent was in an appropriate position to determine the exemption from corporation tax due to the information previously furnished by the agent for the

Appellant in December 1996, the failure of the Appellant to file DWT returns compromised the Respondent's position to determine the exemption from income tax, notwithstanding the limitations on the DWT return.

35. However even if provision was made on the DWT to describe the type of exempt distribution, it would still be incumbent on the Respondent to undertake further enquiries to satisfy itself as to the basis in fact and in law as to the exempt status of the distribution to the extent that no further details are required by statute to be included on the DWT return. Therefore, the general nature of the reporting requirement on the Respondent's DWT return is not so deficient to justify the Appellants' argument that the lack of sophistication on that form could exonerate the Appellant from its obligation to comply with statutory obligation to file a DWT return or indeed rely on other provisions of the TCA to support a position that a full and true return was made.

36. In light of the above, I am therefore of the view that if the Appellant is seeking the protection of TCA, section 955(2)(a), it must have fully complied with its statutory obligations. As considered above, while the CT1 returns provided details of the dividend payments to its members without the application of DWT, that return was not in the prescribed format in which to report such distributions.

37. Furthermore, as observed by Clarke J. *The Revenue Commissioners v Droog* [2016] IESC 55, at paragraph 7.4:

> *"However, the wording of s.955(2) as it stood in 2007 is clear. Section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four year period. That provision is expressed in clear and unambiguous terms. It is in addition to the prohibition on raising further assessments. The section clearly prohibits the imposition of any additional tax burden outside the four year period in the case of a person who has made a fully compliant return."* [Emphasis added].

38. Therefore, the statutory prescribed form to report DWT, as mandated by the Oireachtas, is contained in TCA, section 172K and to understand why the Respondent should require that such information be included on the CT1 return is to engage into a process of speculation.

39. Furthermore, the Appellant's reliance on *Stanley* can also be distinguished as in that case the taxpayer used the prescribed form, designed in compliance with the statute, that contained all of the necessary information to be furnished to the Respondent. Such compliance with both statute and operation was confirmed by Peart J. when stating at paragraph 44:

"The matters required to be inserted into the return are provided for in Pts 1 – 7 of the prescribed I.T 38. One can see that from the manner in which those Parts are worded and constructed. Provided that the tax payer has fully and correctly completed those Parts, omitting no relevant detail that ought to be provided therein, he/she will have complied with the requirements of s. 46(2)(a)."

40. As such, the statutory obligation on the Appellant to include details of the dividends paid by it to its members was explicitly mandated by TCA, section 172K. Therefore, contrary to its statutory obligation, the failure to file a DWT return extinguished the Appellant's entitlement to argue that it had made "*a fully compliant return*" and is thereby denied the protection afforded by TCA, section 955(2)(a).

41. In light of the above, the consideration of whether the preliminary issue will be dispositive of the underlying appeal or is appropriate to be tried as such does not arise in light of my determination that the Appellant is not entitled to avail of TCA, section 955(2).

Conclusion

42. In light of my findings, review of the submissions and the law, I have determined that the Respondent was not precluded from raising an assessment to DWT in accordance with TCA, section 955(3)(b).

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Conor Kennedy
Appeal Commissioner
5th April 2019

As a consequence of the decision of the Supreme Court in the case of *O'Rourke v The Revenue Commissioners* [2016] 2 I.R. 615, an appeal from the Appeal Commissioners is open to a taxpayer in respect of whom an adverse finding in respect of the time for the making of an assessment by an inspector of taxes had been made and where final liability to taxation had been decided. An appeal is not open at the point at which an intermediate finding is made, but only when the appeal has been determined.