



56TACD2019

NAME REDACTED

Appellant

v

THE REVENUE COMMISSIONERS

Respondent

## DETERMINATION

### Introduction

1. On or about 12 December 2014, the Respondent wrote to the Appellant querying the Appellant's entitlement to offset trading losses that arose in the **Name of Partnership Redacted (SMP)** against income from employment for the years of assessment 2009 and 2010. Due to the Appellant's failure to provide sufficient documentation and supporting evidence, the Respondent issued amended notices of assessments for the years 2009 and 2010 disallowing the entitlement to loss relief giving rise to the following tax liabilities:

<u>Period</u>	<u>Income Tax</u>
31 Dec 2009	€31,557
31 Dec 2010	<u>€31,923</u>
<b>Total</b>	<b><u>€63,480</u></b>

### Issue

2. The issue in this appeal is to determine whether the Appellant can satisfy the burden of proof to support his assertion that he invested €700,000 in **SMP** and as a consequence seek to avail of loss relief pursuant to Taxes Consolidation Act 1997 (TCA) section 381. The parties have agreed that a consideration of the restrictions to loss relief by virtue of the limited partnership provisions pursuant to TCA, section 1013 was not required.

### Back to Investment Structure

3. During 2005, the Appellant was introduced to a **Name Redacted (Accountant)**. **Accountant**, through his investment vehicle **Investment Vehicle Redacted (TKR)**, recommended that the Appellant use his substantial property portfolio as equity for



investment into big-ticket investments. As such, **TKR** was a conduit used by **Accountant** to invest the Appellant's funds in the following projects:

- (a) **Property 1**
- (b) **Property 2**
- (c) **SMP**

4. As a result of formal complaints from clients and investors who had had lost **€ Amount Redacted** in property ventures managed by **Accountant**, the Disciplinary Tribunal of the **Institution Redacted** found that **Accountant** failed to provide timely and adequate information to investors and that his actions amounted to professional misconduct. As a consequence, **Accountant** had his membership from the **Institution Redacted** revoked and a costs order of **€ Amount Redacted** affirmed and costs of **€ Amount Redacted** in relation to the appeal were awarded against him.

#### **Outline of facts as contained in the written submissions by Appellant's Agent**

5. The Appellant acquired a 9.86% interest in **SMP** which operated as a trading partnership
6. In or around October 2007 **SMP** acquired a **Property Location Redacted** that cost €20m. The partners of **SMP** contributed €5m with the remaining €15m of the development cost was financed by the Zurich Bank.
7. **SMP** intended to develop the site for the construction of residential units in accordance with its planning permission.
8. The development commenced in 2008 with preparatory works carried out at the site to facilitate the preparation of the grounds and the laying of foundations. However, due to the collapse in the property market in 2008, Zurich withdrew funding and the development was abandoned resulting in significant losses for all the investors.
9. Tax returns were filed for 2009 and 2010. A claim was submitted in 2010 by the Appellant's agent to offset losses incurred against the Appellant's PAYE income in accordance with TCA section 381. This loss offset triggered a tax refund which was immediately taken by the Bank.
10. In December 2014, the Respondent raised amended assessments for 2009 and 2010. Those assessments denied the Appellant any relief for his proportionate share of losses incurred by **SMP**. Those assessments gave rise to a tax liability of €63,480.



## Burden of Proof

11. The general principle of “*he who asserts must prove*” is the civil burden of proof imposing an obligation to sustain an assertion or proposition by positive argument. The default position in tax litigation requires the taxpayer to provide sufficient evidence to reduce or displace a tax assessment. In *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, Charleton J. stated at paragraph 22:

*"The burden of proof in this appeal process, is as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable"*

## Evidence

12. The Appellant gave evidence as follows:

- (a) he began investing in properties in 1990 and had built up a substantial property portfolio of approximately 37 properties while working as **Occupation Redacted**;
- (b) in 2004 he retired from **Occupation Redacted** to concentrate on his property business. During 2005 he was introduced to **Accountant**. **Accountant** through his investment vehicle **TKR** recommended that he use his substantial property portfolio as equity for investment into big-ticket investment schemes;
- (c) the first such investment of €300,000 was in a project called **Property 1**, a property in **Location Redacted**. However, due to planning difficulties the development never took place;
- (d) the €300,000 initially targeted for investment in the **Property 1** project was then transferred to the solicitor acting on behalf of **Accountant, Name of Solicitor's Firm Redacted**. However, €100,000 of that transfer was subsequently paid to **Accountant** as property-based commissions;
- (e) the remaining €200,000 from the unutilised **Property 1** development funds together with a sum of €500,000 borrowed from AIB were invested into **SMP**. An AIB bank statement of the Appellant was produced in evidence recording the transfer of €500,000 to **TKR** on 16<sup>th</sup> July 2007. The Respondent accepted such evidence. However, the Appellant was unable to clarify the source of the lodgement of €300,000 on 8<sup>th</sup> July 2008 that appeared on the same statement. Furthermore, he was unable to confirm whether that lodgement represented a return of capital from a project managed by **Accountant**;



- (f) **SMP** acquired a property on **Location Redacted** for €20 million. **SMP** contributed €7 million and the balance was funded by Zurich;
- (g) a schedule was produced in evidence that highlighted the amount of funds invested in **SMP**. It noted that the Appellant invested €700,000 which when added to the other partner's contributions came to €6,100,000. However, he was unable to reconcile a conflicting entry on that document which showed the total partner's contribution of €7,100,000;
- (h) in cross examination, the Appellant was unable to clarify how one investor had a 7.04% interest while not making any equity contribution;
- (i) he also invested, through **TKR**, in another project described as **Property 2** in 2007 in which he had invested the sum of €500,000;
- (j) he was asked to explain this investment in context of the other projects managed by **TKR**. His attention was brought to his statement of net worth in which he had made an equity investment in **Property 1** and **Property 2**. However he was unable to reconcile the equity invested in these projects with his assertion that he had contributed €500,000 to **SMP** and the purporting entries on the client ledger of **Name of Solicitor's Firm Redacted**, Solicitors showing an amount of €300,000 credited on that firm's Cash ledger on 13<sup>th</sup> June 2007, €200,000 of which was also purportedly invested in **SMP**;
- (k) he asserted that at the time he invested in **SMP**, the **Property 1** investment was wound up. However, he was unable to provide any evidence to support the assertion that the entire €500,000 borrowed from AIB on 16<sup>th</sup> July 2007 was invested entirely in **SMP**, and
  - (l) as such, no further evidence could be furnished to confirm that the €500,00 was transferred to **TKR** as a capital contribution in **SMP** or indeed any confirmation that the additional €200,000 was invested in **SMP**.

*Appellant's Solicitor – **Witness 1 Name Redacted***

13. **Witness 1** gave evidence as follows:

- (a) he is a solicitor working for **Name of Solicitor's Firm Redacted**. He said that he was not involved in the transaction in 2007 but has reviewed the firm's financial records and was of the opinion that the money transferred of €300,000 into the practice client account on 13<sup>th</sup> June 2007 related to the Appellant. However, he



was unable to categorically confirm this position as he was not involved and his opinion was based on a review of the limited documentation available in his office;

- (b) he was also uncertain as to why the reference taken from the extract from the firm's cash ledger on 13<sup>th</sup> June 2007 describing the €300,000 lodgement purportedly relating to the Appellant as a transfer of loan proceeds. As such he was not in a position to provide any substantive evidence that the specific monies in his firm's client account related to the Appellant, and
- (c) he said that the firm's client ledger account showed that €300,000 was lodged however only €200,000 was transferred to **SMP** while the remaining €100,000 was paid to **Accountant**. In particular he was relying on an email between his former colleague a **Name Redacted** and **Accountant** dated 14<sup>th</sup> June 2007 in which **Accountant** stated " I assume these funds came from [the Appellant] of which €100,000 will need to be transferred to our account for value today to reimburse us for [the Appellant's] share of costs in relation to (architects fees and interest to Anglo etc) I will confirm that with [the Appellant] is the remitter of the funds @11:30am (he is attending the office)". However, no evidence was furnished that the monies actually related to the Appellant.

*Evidence of tax consultant – **Witness 2 Name Redacted**.*

14. **Witness 2** gave evidence as follows:

- (a) she worked with **Accountant** until March 2009 and now works as a sole practitioner preparing accounts and tax returns. She confirmed that **TKR** was a conduit for the monies to be invested in various projects and entities managed and controlled by **Accountant**. She confirmed that the properties managed by **TKR** on behalf of the Appellant were **Property 1, SMP** and **Property 2**. However, she was not able to confirm the amount the Appellant invested in each project.

### **Determination**

- 15. The Appellant was emphatic in his evidence that he invested €700,000 in **SMP**. However, this evidence conflicts with the written submissions made by his agent in which it was asserted that he contributed €500,000 to **SMP**.
- 16. The written submissions also referred to a total capital contribution made by all partners to **SMP** was €5 million whereas the Appellant produced a document stating that the capital contribution was €6 million. There was also an unexplained discrepancy in that document reflecting a conflicting partner capital contribution of €7 million. Furthermore, the Appellant was also unable to reconcile or provide any explanation as



to how one particular investor had obtained a 7.04% share in **SMP** notwithstanding that he had not made any equity contribution.

17. While it was clear from the AIB loan statement produced in evidence that the Appellant transferred €500,000 to **TKR**, there was no supporting evidence to show how those funds were allocated across the 3 projects managed by **TKR** on behalf of the Appellant. As such, the Appellant's evidence was compromised due to the failure to provide documentation supporting his investment in **SMP**. Furthermore, **Accountant** was not called to give evidence. In this regard, it is not possible to determine how much the Appellant invested in **SMP**.
18. It is also relevant that from his statement of net worth, he had a net liability on the **Property 1** project of €360,000 and no evidence was furnished as to how this liability was funded.
19. The Appellant was also unable to explain the source of the funds of €300,000 lodged into his loan account on 8<sup>th</sup> July 2008 and whether such funds were refunds of capital contributions from any of his investment holdings managed through **TKR**.
20. The solicitor, **Witness 1**, was unable to give conclusive evidence as to how his firm recorded the Appellant's funds as he was not personally involved with those transactions and could only rely on a limited number of records still in existence since 2007. As such his evidence consisted of opinion rather than factual evidence as to how those funds were utilised.
21. Furthermore, while the Appellant's evidence was that the sum of €100,000 paid to **Accountant** was commission for the property-based investments, **Witness 1** provided conflicting evidence when confirming that the €100,000 went to discharge architect's fees and interest obligations relating to the **Property 1** property.
22. The evidence of **Witness 2**, the Appellant's tax consultant confirmed that the Appellant invested monies with **Accountant** through **TKR**. While she confirmed that investments managed by **TKR** included **Property 1**, **Property 2** and **SMP**, she was unable to confirm how much he had contributed to each project.
23. Therefore, in light of the above, while I am satisfied that the Appellant transferred €500,000 to **TKR**, I am not sufficiently satisfied that such funds constituted the Appellant's equity contribution in **SMP**.
24. I have therefore found that the Appellant has not satisfied the burden of proof necessary to reduce the assessments due to:

(a) the inconsistencies of facts between the submissions and evidence;



- (b) the absence of any supporting evidence such as a partnership agreement and partnership accounts for **SMP**;
  - (c) the failure to provide an explanation as to how one partner in **SMP** was entitled to a profit share notwithstanding that he did not make an equity contribution;
  - (d) the failure to furnish any supporting documentation to confirm his investment in **SMP**;
  - (e) the uncertainty as how **Accountant**, through the investment vehicle **TKR**, managed the Appellant's funds, and
  - (f) the inability to produce evidence or indeed to provide any reconciliation of the funds invested with **TKR** with regard to his investments in **Property 1**, **Property 2** and **SMP**.
25. Therefore, as the Appellant has not satisfied the burden of proof necessary to reduce the assessments for the years 2009 and 2010 amounting to €31,557 and €31,923 respectively, those amended assessments stand.
26. As such, this appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

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**Conor Kennedy**  
**Appeal Commissioner**  
**11<sup>th</sup> October 2019**

**The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.**

