



REF: 120TACD2020

REDACTED

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

## DETERMINATION

### Introduction

1. The issue in this appeal is whether the Appellant is responsible for the discharge of amount assessed of €44,672 in respect of the 'Notice of Estimation of Amounts Due' dated 1<sup>st</sup> September 2015 for PAYE, PRSI and USC for the period from 27<sup>th</sup> October 2014 to 31<sup>st</sup> December 2014.
2. The Respondent raised the estimate on the basis that the Appellant was the principal employer and had paid emoluments to the employees of Name of Nursing Home Redacted (CL), a company engaged in the provision of nursing home care to incapacitated and elderly patients. The Appellant asserted that it should not be accountable for the amounts assessed as it was not the principal employer.

### Background

3. The Appellant entered into a Management Services Agreement (the 'Agreement') in October 2014 with CL for an initial term of 4 months (Initial Term) to provide management services to CL in the management and operation of a nursing home in consideration for an agreed fee.
4. CL was the registered provider of the nursing home care services to the residents of the Name of Nursing Home Redacted. The contracts for care for each resident of the Name of Nursing Home Redacted during the Term of the Agreement remained with CL.
5. Under the Agreement, the Appellant was required to operate and manage the Business, Business Assets and Employees. The Appellant was also entitled to collect and receive all Business Income to which CL was previously entitled. However due to a discrepancy, the Appellant received most but not all of the Business Income.
6. The Appellant was also required to manage the Business Liabilities on behalf of CL and to ensure that such liabilities were funded out of the Business Income and discharged in an orderly fashion.



7. To continue to care for the 39 residents and to maintain the employment of 80 people, the Appellant set up a new bank account for the purposes of lodging the Business Income and to discharge Business Liabilities on behalf of CL.
8. During the Initial Term, the Appellant discovered certain issues with the payroll system used by CL which were of concern to the employees of the nursing home. Attempts were made to resolve the payroll issues with the Respondent to ensure that employees received the salary payments to which they were entitled. On 18<sup>th</sup> December 2014, the Appellant discharged an amount of €16,800, relating to a 'P30 – Notice of Estimation of Tax Due'.
11. The Appellant acquired the business of CL on 1<sup>st</sup> January 2015, by way of an Asset Purchase Agreement, and all of the employees of CL transferred to the Appellant at that point under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (TUPE).
12. Contractual arrangements in place between CL and the employees remained in force up to the date of the transfer of the Business by CL to the Appellant.
9. CL submitted Form P45's for the nursing home employees through the Revenue Online Service on 5<sup>th</sup> May 2015 with a 'Date of Cessation' of employment of 27<sup>th</sup> October 2014, despite the fact that the transfer of the employees to the Appellant took place on 1<sup>st</sup> January 2015 in accordance with the TUPE Regulations.
10. It was the understanding of the Appellant's agent that the Business Liabilities exceeded the Business Income and therefore CL did not have the resources to pay the initial amount of €16,800 to the Respondent in December 2014. Furthermore, it was also the agent's understanding that there has been no recourse to CL to account for and the discharge of the PAYE/PRSI/USC up to the year ended 31<sup>st</sup> December 2014 as that company appears to have been dissolved in the UK as a consequence of it been compulsory struck off.
11. The Appellant set up a bank account to lodge the Business Income and to discharge the Business Liabilities on behalf of CL. As a consequence, and in accordance with its contractual obligations, the Appellant made an initial payment of €16,800 for the PAYE /PRSI /USC liability to the Respondent leaving a balance of €27,872 to be paid.



## The Agreement

12. The Agreement dated 10<sup>th</sup> October 2014 is between *inter alia*, the Appellant defined as the “**Manager**”, CL defined in the Agreement as the “**Company**” and KBC Bank, for an initial term of 4 months unless otherwise terminated in accordance with conditions prescribed in the agreement. The relevant parts of the Agreement are set out below:

### 1.1. Definitions

“**Business**” means the Business of a nursing home carried on at Address Redacted;

“**Business income**” means all income which the Company is entitled to receive at the Effective Date in respect of the Business and any such amounts earned after the Effective Date

“**Business liabilities**” means all liabilities arising in respect of the Business whether before or after the Effective Date (including all liabilities to the Revenue Commissioners)

“**Employees**” mean all employees of the Company working in the business on the effective date

“**Services**” means the services provided by the Manager, details of which are set out in the Schedule hereto

2. ...

### 3. **Management Services**

3.1 The Company hereby engages the Manager to provide the Services for the Term of This Agreement and the Manager agrees to provide the Services upon the terms and conditions set out therein.

3.2 ....

3.3 The Company acknowledges and agrees that the manager will, subject to its obligations hereunder, operate and manage the Business, the Business Assets and the Employees on behalf of the Company at the Premises as and from the Effective Date for the term



- 3.4 During the term the Manager will be entitled to collect and receive all Business Income on behalf of the Company and the Partnership and/or the Company will take such steps as may be reasonably be required to give effect to this clause including (if requested to do so) by setting up a new bank account in the name of the Company but in the control of the Manager. Any Business Income received by the Partnership or Company during the Term will be immediately paid over to the Manager.
- 3.5 The Company will be entitled to any profits arising in connection with the Business during the term and remain liable for Business Liabilities during the term and as part of the Services to be delivered by the Manager during the Term, the Manager will manage the Business Liabilities (including without limitation in respect of the Employees) on behalf of the Company during the Term and will ensure that such liabilities are funded out of the Business Income and discharged in an orderly fashion endeavouring to meet all debts as they fall due for payment.
- 4.1 For the purpose of this Agreement and for the provision of Services, the Manager shall procure and make available to the Company the services, skills and expertise of Name Redacted and any additional or substitute persons as may be agreed between the parties hereto.
13. In accordance with section 7 of the Agreement, the Appellant was entitled to receive a fee of €5,000 a month for the first 2 months and €2,500 per month thereafter.
14. The Services provided under the Agreement were in accordance with the Schedule to that Agreement, the relevant parts of which provide:

Schedule  
The Services

A. Operation Control

- (1) Recruitment and management of staff
- (2) Rostering of staff
- (3) Remuneration of staff and their PAYE, PRSI and USC
- (4) ..
- (5) ..
- (6) ..



- (7) ..
- (8) Pay the instalment arrangement in place with the company each month, including inter alia:
- (a) .
  - (b) .
  - (c) .
  - (d) .
  - (e) .
  - (f) Revenue Commissioners arrears of €2,500 per month.

### Legislation

15. Part 42 Chapter 4 of the Act provides for the collection and recovery of income tax under the Pay As You Earn (PAYE) system.
16. Taxes Consolidation Act 1997 (TCA), section 983 provides, *inter alia*, the following definitions:

*“emolument” means anything assessable to income tax under Schedule E, and references to payments of emoluments includes references to payment on account of emoluments”*

*“employer” means any person paying emoluments*

17. TCA, section 984 applies the PAYE provisions to all emoluments except emoluments where the operation of PAYE is impracticable and in respect of which the inspector has issued an exclusion order to the employer.
18. TCA, section 985 provides that:

*“On the making of any payment of any emoluments to which this Chapter applies, income tax shall, subject to this Chapter and in accordance with regulations under this Chapter, be deducted or repaid by the person making the payment notwithstanding that–*

*(a) when the payment is made no assessment has been made in respect of the emoluments, or*

*(b) the emoluments are in whole or in part emoluments for some year of assessment other than that during which the payment is made.”*



19. TCA, section 985C provides that where any payment of emoluments is made to an employee by an intermediary of the employer, the employer will be liable to account for any PAYE which falls due if the intermediary fails to account for the PAYE in accordance with the PAYE regulations. The relevant parts of TCA, section 985C provides as follows:
- (1) Subject to subsection (2), where any payment of emoluments of an employee is made by an intermediary of the employer, the employer shall be treated, for the purposes of this Chapter and regulations made under this Chapter, as making a payment of such emoluments of an amount equal to the amount referred to in subsection (3).*
  - (2) Subsection (1) does not apply if the intermediary deducts income tax from the payment to the employee and accounts for it in accordance with this Chapter and regulations made under this Chapter.*
  - (3) The amount referred to in this subsection is—*
    - (a) if the amount of the payment made by the intermediary is an amount to which the recipient is entitled after deduction of any income tax, the aggregate of the amount of that payment and the amount of any income tax due, and*
    - (b) in any other case, the amount of the payment made by the intermediary.*
  - (4) For the purposes of this section, a payment of emoluments of an employee is made by an intermediary of the employer if it is made—*
    - (a) by a person acting on behalf of the employer and at the expense of the employer or a person connected (within the meaning of section 10) with the employer, or*
    - (b) by trustees holding property for any persons who include, or class of persons which includes, the employee.*
20. TCA, section 986 grants authority to the Respondent to make regulations to administer the operation of PAYE and set out the principles and policies for implementing the mechanism under which the assessment, charge, collection and recovery of income tax is administered under the PAYE system.



*Income Tax (Employments) (Consolidated) Regulations, 2001 (S.I. No. 559 of 2001)*

21. The principle provisions giving effect to TCA, section 986 are contained within the Income Tax (Employments) (Consolidated) Regulations, 2001 (the Regulations). The Regulations revised and consolidated the existing regulatory provisions and prescribe the manner in which deduction of tax from salaries and wages under the PAYE system operates. The 2001 Regulations also revoked an assortment of other PAYE regulations dating back as far 1960. There have been a number of subsequent amendments of a minor nature.

22. Regulation 2 provides the necessary definitions which include *inter alia*:

*“employee” means any person in receipt of emoluments;*

*“employer” means any person paying emoluments;*

23. Regulation 3 is entitled ‘Intermediate employers’ and provides

*(1) Where an employee works under the general control and management of a person who is not his or her immediate employer, that person (referred to hereafter in this Regulation as the “principal employer”) shall be deemed to be the employer for the purposes of these Regulations, and the immediate employer shall furnish the principal employer with such particulars of the employee's emoluments as may be necessary to enable the principal employer to comply with the provisions of these Regulations.*

*(2) If the employee's emoluments are actually paid to him or her by the immediate employer —*

*(a) the immediate employer shall be notified by the principal employer of the amount of tax to be deducted or repaid when the emoluments are paid to the employee, and shall deduct or repay accordingly the amount so notified, and*

*(b) the principal employer shall make a corresponding deduction or addition on making to the immediate employer the payment out of which the said emoluments will be paid.*



24. Regulation 4 places the obligation to discharge the PAYE on emoluments by providing that:

*“Persons who are required to make any deduction or repayment referred to in these Regulations shall, in the case of a deduction (whether or not made), be accountable for the amount of the tax, and liable to pay that amount, to the Revenue Commissioners and shall, in the case of a repayment, be entitled, if it has been made, to be paid it, or given credit for it, by the Revenue Commissioners.*

25. Regulation 28(1) states:

*“Within 14 days from the end of every income tax month the employer shall remit to the Collector-General all amounts of tax which he or she was liable under these Regulations to deduct from emoluments paid by him or her during that income tax month, reduced by any amounts which he or she was liable under these Regulations to repay during that income tax month.”*

### ***Appellant’s Submissions***

26. The Appellant asserted that CL was ‘paying’ the emoluments and incurring the expense and as such CL remained the Employer as defined in Regulation 2. CL, in its capacity as an employer was contractually obliged under each contract of employment and paid the employees out of the Business Income. The Appellant, during the Relevant Period, managed this process on behalf of CL. Therefore, it was submitted that Appellant should not be regarded as an employer under Regulation 2 and therefore had no liability to the tax in respect of the Relevant Period.
27. While the Appellant managed the employees of CL as part of the Services provided, the legal position was that the employment status of each employee remained with CL up to 1<sup>st</sup> January 2015 at which point the employees transferred by written agreement under the application of the TUPE Regulations to Appellant.
28. Notwithstanding that the Appellant had the authority to recruit, manage and roster staff, it had no authority under the Agreement to cease an employment, to alter the terms and conditions of an employment contract or to make a payment to a new employee *“without the prior written consent of the Company’s representative”*.
29. Therefore, it was submitted that the Appellant could not be regarded as a principal employer under Regulation 3(1) as ultimately the employees worked under ‘general





control and management' of CL throughout the relevant period. As such the Appellant could not have had a liability to the tax during the relevant period.

30. While it is denied that the Appellant was principal employer, if it were to be regarded as a principal contractor then consideration must also be given to Regulation 3(2).
31. The Appellant submitted that Regulation 3(2)(b) only applies where the cost of the payments to the employees was incurred by the principal employer as opposed to the immediate employer. As the cost of 'emoluments' was incurred as a cost by the immediate employer, CL, the payments were made out of Business Income of CL. Therefore, even in a hypothetical situation if the Appellant was to be regarded as a principal employer the fact that it did not incur the cost of the payments to the employees and that CL was not in a position to recover such costs from the Appellant, would result in Regulation 3 not having application to the Appellant. Therefore, there would be no resulting obligations for the Appellant under the PAYE System as regards the employees of CL. The Appellant would, in the case of each payroll run, notify CL of the details "*of the amount of the tax to be deducted or repaid*".
32. Therefore, it was submitted that the Appellant could not have any obligations / liabilities arising under Regulation 3, as all such obligations remained with CL, the immediate employer, who would continue to have the liability to account for any such taxes deducted to the Respondent. As such the Appellant can therefore have no liability to the tax which is the subject of the appeal.
33. The Appellant also relied on TCA, section 985C(4) which provides that "*a payment of emoluments of an employee is made by an intermediary*" if it is made "*by a person acting on behalf of the employer and at the expense of the employer*". It was submitted that the Appellant made the payments to the employees of CL out of the Business Income of CL and therefore would be regarded as a 'intermediary' for the purposes of Section 985C TCA 1997 on the basis that it was acting on behalf of CL in making those payments and those payments were a cost expense to CL.
34. Therefore, it was submitted that CL was "*the employer ... for the purposes of this Chapter and regulations*" and as such CL should be treated as having made the payment of the emoluments to the employees. All obligations as regards calculating, deducting and accounting for such payroll taxes, as set out in the Regulations, rest entirely with CL. Therefore, in these circumstances CL as the employer (immediate employer) remained fully liable to account to Revenue for all payroll taxes due on the payment of emoluments to the employees of CL during the Term of the Agreement.



35. As such, the Appellant, in accordance with the provisions of TCA, section 985C could not have any liability to taxes under the provisions of the TCA or the Regulations, as an employer in relation to the employees of CL and therefore had no liability to the tax in respect of the relevant period.
36. It was also submitted that any obligation of the Appellant as Manager under the Agreement did not absolve CL of the liabilities attaching to the operation of the CL nursing home business and that as such any creditor of CL including the Respondent remains a creditor of that company and cannot transfer to the Appellant in its capacity purely as a Manager under the Agreement.
37. The Appellant submitted that estimates as per the 'Notice of Estimation of Amounts Due' dated 1st September 2015 issued to the Appellant in respect of the 'Year of Assessment 1 Jan 2014 – 31 Dec 2014' be reduced to nil on the basis that the Appellant was not a principal employer of the employees of CL (or indeed any other form of Employer to those employees of CL) in the period from 27th October 2014 to 31st December 2014.
38. Furthermore, the date on which the Appellant should be registered as an employer with the Respondent be amended to 1st January 2015 being the date on which the Appellant commenced as an employer.

#### **Respondent's submissions**

39. The authority to cease an employment, alter terms and conditions or make a payment to a new employee fall under the normal definition of recruitment and management of staff. Section B(3)(i) of the schedule to Agreement must be interpreted in the context of the 'Services' section of the agreement as a whole. Where the Appellant had been granted the authority to recruit staff, it is implausible that it would not have the authority to then pay them. Section B(3)(i) specifies 'existing employees' only because the term 'creditors' might not cover employees, not to distinguish them from new employees who might be recruited by the Appellant.
40. The term 'General control and management' does not mean complete control. The phrase must be given its ordinary meaning. Even if CL retained some control and management functions, the Appellant had general, day to day, control and management of the employees. The fact that the Appellant had general control and management of the nursing home employees for the relevant period is not in dispute.



41. The Appellant in its submission claims that CL paid the emoluments. However, it is the Respondent's position that the Appellant paid the emoluments. In the letter to the Respondent of 4<sup>th</sup> December 2014, the Appellant stated that:

*"We set up a bank account from 1st November 2014 and took control of the receipts and payments. We converted the payroll system to Thesaurus and ran a monthly payroll for the month of November 2014".*

42. Thereafter the Appellant sent a cheque to the Respondent out of its own bank account for €16,800.00 on 18<sup>th</sup> December 2014 for the estimated PAYE /PRSI /USC liability for November 2014.
43. The letter from the Appellant's agent to the Respondent dated 19<sup>th</sup> May 2015 set out what actually happened during the relevant period as opposed to what was intended by the written agreement. There is no evidence that CL paid any money to the Appellant to pay the PAYE /PRSI/USC. The fact is that the Appellant opened its own bank account to lodge all the business income out of which it paid the nursing home employees.
44. At a meeting with the Respondent on 16<sup>th</sup> February 2017, the representative of the Appellant stated that some of the nursing home income was inadvertently going to a director of CL from HSE patients without the knowledge of the Appellant. This error was discovered by accident when the post for CL was sent to the nursing home address in error. Apart from this error there is no evidence that CL paid any money to the Appellant.
45. There is no doubt that the Appellant was responsible for remunerating and accounting for payroll taxes to the Respondent pursuant to the Agreement. As no payment was made by the Appellant to CL in respect of the month of December 2014, the onus is on the Appellant to prove that CL suffered the expense of the emolument payments. As there was no evidence of this, the Appellant does not fall within the definition of an intermediary employer in TCA, section 985C(4). As such the Appellant was the principal employer in accordance with Regulations 2 and 3.
46. The Appellant paid the employees out of its own bank account from the income of the Nursing Home during the relevant period and should have remitted the full PAYE /PRSI/USC deducted from these employees for the full Nov- Dec 2014 period in line with B(3)(h) of the "Services" section of the written agreement.



47. In support of the Respondent's argument reliance was placed on the following passage from *EN Hearne (Inspector of Taxes) v O'Cionna and Others T/A J A Kenny & Partners* IV ITR 113 – High Court case on 24<sup>th</sup> June 1998 per Hanlon J.:

*“ With regard to the PAYE claim , however , it appears to me that whatever the internal arrangement may have between the partnership and the limited company , the partnership assumed the role of paymaster to these employees in respect of the period covered by the plaintiff's claim , and as such must be regarded as “the employer” within the meaning ascribed to that term by provision of the Income Taxes Acts 1967 and to the regulations I have already referred .*



## Analysis

48. On the making a payment of emoluments, TCA, section 985 requires that:

*“income tax shall, subject to this Chapter and in accordance with regulations under this Chapter, be deducted .... by the person making the payment”*

49. The authority to make regulations to administer the operation of PAYE and the mechanism under which the assessment, charge, collection and recovery of income tax is administered under the PAYE system is governed by TCA, section 986.

50. In this regard, both TCA, section 983 and Regulation 2 define “employer” as the “person paying emoluments”. A person is also deemed to be an employer where that person exercises ‘general control and management’ over an employee. Regulation 4 places the obligation to discharge the PAYE on emoluments by the person who is “required to make any deduction or repayment referred to in these Regulations”. Thereafter, Regulation 28 requires that “the employer shall remit to the Collector-General all amounts of tax which he or she was liable under these Regulations to deduct from emoluments paid by him or her during that income tax month”.

51. Therefore, in accordance with the Agreement in particular Clause 3.3, the Appellant operated and managed “the Business, the Business Assets and the Employees on behalf of” CL, a fact also confirmed by the Appellant’s representative, Name Redacted at the hearing.

52. Furthermore, in accordance with the Schedule to the Agreement, the prescribed services to be and were actually performed by the Appellant included, *inter alia* the operation and control of “Remuneration of staff and their PAYE, PRSI and USC”. The Appellant, pursuant clause 3.5 “will manage the Business Liabilities (including without limitation in respect of the Employees) on behalf of the Company during the Term and will ensure that such liabilities are funded out of the Business Income and discharged in an orderly fashion endeavouring to meet all debts as they fall due for payment.”

53. The Appellant’s assertion that CL paid the emoluments is factually incorrect and is contrary to the provisions of the Agreement pursuant to which the Appellant was required to pay the emoluments. Indeed, the evidence of Name Redacted at the hearing also confirmed that the Appellant operated the payroll system and paid the emoluments.



54. As such, the Appellant's reliance on Regulation 3(2) is misplaced as the emoluments were paid by the Appellant and not CL, the immediate employer. Correspondingly TCA, section 985C has no application as there was no evidence that the Appellant was acting behalf of CL. Furthermore, as observed by *Maguire Irish Income Tax: 2019* at 11.101, TCA, section 985C was introduced:

*"primarily at artificial structures (typically involving the use of offshore trusts to pay remuneration) designed to take advantage of the principle established in Clarke v Oceanic Contractors [1983] STC 35"*

55. It is also relevant that the Appellant's submission did not address the statutory obligations pursuant to TCA, section 985, to deduct *"income tax"* on the payment of the emoluments *"by the person making the payment"* and indeed that both TCA, section 983 and Regulation 2 define *"employer"* as the *"person paying emoluments"*
56. Finally, it is clear from Clause 3.5 of the Agreement that CL remained *"liable for the Business Liabilities"* which included *"all liabilities to the Revenue Commissioners"* and therefore the Appellant had recourse to CL to be reimbursed for the amount of tax payable in respect of the liability that arose during the Initial Term.

### Determination

57. From a consideration of the contractual documentation and indeed from the evidence adduced at the hearing, the Appellant was not only the person paying the emoluments and therefore pursuant to TCA, section 985 required to deduct the income tax, but also considered to be the *"employer"* in accordance with TCA, section 983 and Regulation 2.
58. Furthermore *"where an employee works under the general control and management of a person who is not his or her immediate employer, that person (referred to hereafter in this Regulation as the "principal employer")," the employee, in accordance with Regulation 3, is deemed to be employed by the principal employer notwithstanding that the contract of employment may be with the "immediate employer."*
59. Regulation 28 mandates that *"the employer"* in this case the Appellant, was required *"to remit to the Collector-General all amounts of tax which he or she was liable under these Regulations to deduct from emoluments paid by him or her during that income tax month"*.



60. As such TCA, section 985 and indeed the Regulations are highly prescriptive and impose the obligations on the person paying the emoluments to deduct income tax and remit same to the Collector General notwithstanding that the cost of the emolument may be borne by another person or indeed that the main employment contractual arrangements may be with a person other than the person paying the emoluments.
61. TCA, section 985C(4) can impose the liability on the main employer where the emoluments are made by an intermediary *“acting on behalf of the employer and at the expense of the employer”*. However, and notwithstanding that under clause 3.5 of the Agreement that the Appellant was required to *“manage the Business Liabilities”* of behalf of CL, there was no evidence that the Appellant was an intermediary or indeed *“acting behalf of”* CL. On the contrary, the evidence of Name Redacted was that KBC Bank wanted the nursing home business sold as there was a default in monies owing to it by CL and its associated entities. As such the appointment of the Appellant would appear to have been at the instigation of KBC as opposed to CL.
62. In this regard, the amount assessed of €44,672 in respect of the ‘Notice of Estimation of Amounts Due’ dated 1<sup>st</sup> September 2015 for PAYE, PRSI and USC for the period from 27<sup>th</sup> October 2014 to 31<sup>st</sup> December 2014 that issued to the Appellant stands. This appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

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**Conor Kennedy**  
**Appeal Commissioner**  
**2<sup>nd</sup> March 2020**

**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.**

