



**129TACD2020**

**BETWEEN/**

**AB. LIMITED**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

This is an appeal against an amended assessment to corporation tax in respect of the accounting period ended 31 March 2013.

The assessment dated 17 November 2016, relates to the levying of a surcharge in accordance with section 440 of the Taxes Consolidation Act 1997, as amended ('TCA 1997') in respect of the undistributed portion of a dividend paid to the Appellant by its subsidiary, XY Ltd. during the accounting period ended 31 March 2012. The surcharge totalled €26,581.

**Background**

The Appellant trades as a retail florist. The Appellant's subsidiary, XY Ltd., paid a dividend of €665,000 to the Appellant in March 2012. The dividend was not distributed by the Appellant to its shareholders. Neither the Appellant nor XY Ltd. made an election pursuant to section 434(3A) TCA 1997.



On 10 April 2015, the Respondent notified the Appellant of a Revenue audit in respect of the year ended 31 March 2012, which commenced on 10 June 2015. The Appellant was provided with an opportunity to make a voluntary disclosure and the Appellant declined.

During the audit, the Respondent queried the treatment of the dividend and highlighted the absence of an election pursuant to section 434(3A) TCA 1997, by the Appellant and by XY Ltd. Subsequently, in 2015 and in 2016, agents for the Appellant requested the Respondent to allow an amendment to the 2012 CT1 returns filed on 17 November 2012, to allow for the retrospective input of an election pursuant to section 434(3A) TCA 1997 by both XY Ltd. and by the Appellant. The Respondent declined this request and raised an amended assessment to corporation tax levying a surcharge in accordance with section 440 TCA 1997 in the sum of €26,581. The Appellant duly appealed.

### **Submissions in brief**

The submissions in this appeal can be summarised as follows;

#### *Section 440 TCA 1997*

The Appellant submitted that the dividend was not income and was not subject to surcharge for the purposes of section 440 TCA 1997. The Respondent's position was that the dividend was income and was subject to surcharge. The Appellant also submitted that the dividend was not franked investment income pursuant to section 156 TCA 1997.

#### *Amendment of the return*

The Respondent did not allow the Appellant to amend its return and the Appellant's position was that the exercise of the Respondent's discretion to disallow amendment of the return was unfair and was in breach of the Respondent's customer service charter.

#### *Section 130 TCA 1997*

The Appellant submitted that the dividend was not a distribution for the purposes of section 130. The Respondent's position was that the dividend was a distribution in accordance with sub-section 130(2) TCA 1997.



## **Legislation**

The relevant legislation in this appeal is as follows:

- Section 440 TCA 1997
- Section 434 TCA 1997
- Section 130 TCA 1997
- Section 156 TCA 1997
- Section 884 TCA 1997
- Section 951 TCA 1997

## **EVIDENCE**

Evidence on behalf of the Appellant was provided by Witness C, tax agent for the Appellant. Evidence on behalf of the Respondent was provided by Revenue officer, Witness D.

### Witness C.

C. gave evidence in relation to the Appellant and its subsidiary, the preparation of the accounts, the accounting treatment of the dividend received, correspondence with the Respondent and communications in relation to the Appellant's request to amend its return to allow the making of an election pursuant to section 434(3A) TCA 1997.

C. stated that the dividend was treated in the Appellant's accounts as a reduction in the cost of the investment in XY Ltd. and that this accounting treatment was correct.

C. stated that he became aware of the omission of the election when it was raised as a query by the Respondent's official, on the day of commencement of the audit. C. e-mailed the Respondent that evening to request that the CT1 be amended to allow for an election pursuant to section 434(3A) TCA 1997. C. gave evidence in relation to the correspondence which arose subsequent to this request.



Witness D.

D. Revenue officer, was involved in the audit and gave evidence in relation to; the audit, the offer of voluntary disclosure which was declined and the correspondence between the parties in relation to the request to amend the return in order to make a retrospective election pursuant to section 434(3A) TCA 1997. D. confirmed that he had no dispute with the accounting treatment of the dividend transaction.

**ANALYSIS**

In 2015 and 2016 agents for the Appellant requested the Respondent to revise the 2012 CT1 returns filed on 17 November 2012, to retrospectively input an election pursuant to section 434(3A) TCA 1997, by both XY Ltd. and the Appellant. The requests were made after the Respondent's audit had commenced. The Respondent did not allow amendment of the returns.

Section 434(3A) TCA 1997 permits close companies to jointly elect that a dividend or distribution passing between them be treated for the purposes of section 440 as *not* being a distribution. The section provides;

*(3A) (a) Where a close company pays a dividend, or makes a distribution, to another close company, the companies may jointly elect, by giving notice to the Collector-General in such manner as the Revenue Commissioners may require, that the dividend, or as the case may be the distribution, is to be treated for the purposes of section 440 as not being a distribution.*

*(b) Where notice is given in accordance with paragraph (a), the dividend, or as the case may be the distribution, shall be treated –*

*(i) for the purposes of section 440 as not being a distribution, and*

*(ii) for the purposes of subsection (5) as not being franked investment income.*



*(c) An election by a company under paragraph (a) as respects an accounting period shall be included with the return under [Chapter 3 of Part 41A] which falls to be made by the company for the accounting period.*

[emphasis added]

Section 951(1)(b) TCA 1997 requires the Appellant in filing a return to include ‘.. *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.*’

Section 884(2)(aa) provides;

*(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) ...*

*....*

*[(aa) such information, accounts, statements, reports and further particulars—*

*(i) relevant to the tax liability of the company, or*

*(ii) otherwise relevant to the application of the Corporation Tax Acts to the company,*

*as may be required by the notice or specified in the prescribed form in respect of the return],*

*(b) the distributions received by the company from companies resident in the State[...].*





Section 884(5) provides; *'Every return under this section shall include a declaration to the effect that the return is correct and complete.'*

Section 434(3A) TCA 1997 provides. *'(c) An election by a company under paragraph (a) as respects an accounting period shall be included with the return under [Chapter 3 of Part 41A] which falls to be made by the company for the accounting period.'* [emphasis added]

This request for amendment of the 2012 corporation tax return arose as the election pursuant to s.434(3A) had not taken place and as a result, was not included in the return. The error was discovered by the Respondent during the audit. Further, the Respondent submitted that the Appellant's CT1 in respect of 2012 was not complete and correct as it did not include the dividend received from XY Ltd.

The Appellant sought to rely on section 434(7) TCA 1997 which provides; *'where a company is subject to any restriction imposed by law as regards the making of distributions, regard shall be had to this restriction in determining the amount of income on which a surcharge shall be imposed under section 440.'* However, the Respondent submitted that at 31 March 2012, and at 31 March 2013, the Appellant had accumulated realised profits and there were no restrictions on the distribution of the dividend received from XY Ltd.

#### *Section 440 TCA 1997*

Section 156(1) TCA 1997 provides; *'Income of a company resident in the State which consists of a distribution made by another company resident in the State shall be referred to in the Corporation Tax Acts as "franked investment income" of the company, and the amount of the franked investment income of such a company shall be the amount or value of the distribution.'*

The Appellant contended that the dividend paid by XY Ltd. was not subject to surcharge as it was not income. The Appellant contended that while XY Ltd. paid a dividend, the dividend was not treated as income by the Appellant but was used to reduce the value of the investment in XY Ltd. The Appellant opened *Cronin (Inspector of Taxes) v Cork & County Property Co Limited* III ITR 198 and *Whimster and co v The Commissioners of Inland Revenue* 12 TC 813 in relation to the relevance to be attributed to accounting treatment and principles. The Appellant contended that as the dividend was not treated as income in the accounts of the Appellant, it did not constitute franked investment income.





The accounting treatment itself was not in dispute as between the parties. However, I do not accept that the character of the dividend was altered on the basis that it was used to reduce the value of the investment in XY Ltd. and was not included in the profit and loss account. The surcharge in this appeal was limited to the distributable reserves and I am satisfied that the dividend was income and was subject to surcharge in the hands of the Appellant in accordance with the provisions of section 440 TCA 1997.

#### *Amendment of the return*

It was accepted by the parties that section 959V(7) TCA 1997, as inserted by section 129 of Finance Act 2012, had no application in the within appeal.

In terms of amendment of the return, the Appellant contended that section 955 TCA 1997 applied to authorise the Appellant in this appeal to amend his return by making an election in accordance with section 434(3A) TCA 1997. I do not accept the Appellant's submission in this regard. Section 955 allows the Respondent to amend an assessment and in certain circumstances, to do so outside of the four-year statutory period, however, in this appeal the Respondent has exercised its discretion not to allow the Appellant to make an election on a retrospective basis pursuant to section 434(3A) TCA 1997. It is the exercise of this discretion that the Appellant seeks to contest.

#### *Jurisdiction of the Appeal Commissioner*

The nature of the statutory jurisdiction of the Appeal Commissioner was considered in a number of authorities including; *IRC -v- Sneath* [1932] KB 362, *Elmhurst -v- IRC* 21 TC 381, *The State (Whelan) -v- Smidic* [1938] 1 I.R. 626, *The State (Calcul International Ltd.) -v- The Appeal Commissioners III* ITR 577 and *Menolly Homes Ltd. -v- The Appeal Commissioners* [2010] IEHC 49.

The jurisdiction of the Appeal Commissioner is confined to making a final determination as to the amount of tax on the assessment and does not extend to the provision of equitable relief or to the provision of remedies available in High Court judicial review proceedings.

#### *Burden of proof*

The Appellant in this appeal argued that the onus was on the Respondent to point to a statutory provision which prohibited the amendment sought by the Appellant. This submission is erroneous.





In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments to tax are incorrect.

In the High Court case of *Menolly Homes Ltd. v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

The onus in this appeal is on the Appellant and the question is whether the Appellant has shown that the amended assessment to corporation tax raised by the Respondent on 17 November 2016 is incorrect.

#### *Section 130 TCA 1997*

The Appellant sought to argue that based on the provisions of section 130(3) TCA 1997, there was no distribution however, I am satisfied that the dividend paid by XY Ltd. to the Appellant constitutes a distribution in accordance with section 130(2) TCA 1997.

### **Determination**

For the reasons set out above, I determine that the Appellant has not succeeded in proving that the corporation tax assessment is incorrect.

Thus, I determine that the amended assessment to corporation tax dated 17 November 2016, in the sum of €26,581 respect of the year ended 31 March 2013, shall stand.

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

**COMMISSIONER LORNA GALLAGHER**

**27<sup>th</sup> day of March 2020**



