NAME REDACTED

60TACD2019

V

CRIMINAL ASSETS BUREAU

DETERMINATION

Introduction

1. Notices of Assessment were raised against the Appellant on 12th December 2012 in respect of years of assessment 2004 – 2010 inclusive and appealed on 9th January 2013. Those assessments record the following income and the associated tax payable:

Year of Assessment	Income	Tax
31st December 2004	€63,000	€24,123.00
31st December 2005	€44,000	€13,895.20
31st December 2006	€25,000	€5,082.00
31st December 2007	€30,000	€6,314.00
31st December 2008	€87,000	€33,831.60
31st December 2009	€60,000	€21,918.60
31st December 2010	€64,000	€24,778.60

2. On 7th January 2013, the Appellant's tax returns for the years 2004 to 2010 inclusive were filed through the Revenue on Line Service and assessments issued on 7th, 8th and 9th January 2013 in accordance with the returned figures as follows:

Year of Assessment	Income	Tax
31st December 2004	€8,621	€0
31st December 2005	€8,669	€0
31st December 2006	€18,787	€2,703.65
31st December 2007	€13,485	€416.13
31st December 2008	€10,605	€278.30
31st December 2009	€14,157	€278.30
31st December 2010	€14,756	€253.00

3. By letter dated 16th January 2013, the Respondent wrote to the Appellant's agent **Accountant's name redacted** confirming that the Appellant had been assessed more than once for the same tax year and that the later assessments had issued in error. As a consequence, the Respondent informed **Accountant's name redacted** that the later assessments were vacated pursuant to Taxes Consolidation Act 1997 (TCA), section 929(2).

Preliminary issue - Validity of Assessments

Appellant's Submission

6. The Appellant argued that once a return is submitted there is no obligation on the Respondent to raise an assessment. As such, the Respondent had no power to vacate the assessments for the years 2004 to 2010 inclusive that issued on 7th, 8th and 9th January 2013. It was asserted that the only power, subject to certain conditions, that the Respondent had was to amend the said income tax assessments.

7. In light of such a submission, the Appellant argued that as there were no double income tax assessments for those income tax years given that the income tax assessments that issued on 12th December 2012 were displaced on 7th, 8th and 9th January 2013, the corrective action proposed by the Respondent pursuant to TCA, section 929 could not be invoked. Furthermore, it was argued that the Respondent did not have any power to take corrective action under TCA, section 929.

Finding

8. Finance Act 2012, section 129 and Schedule 4 deleted TCA, Part 39, sections 918 to 931, and inserted Part 41A in respect of years of assessment 2013 and subsequent years of assessment. However, TCA, Part 39 is relevant to these appeals to the extent that the years under appeal relate to the years 2004 to 2010 inclusive. As such it is necessary to consider TCA, section 929(2) which provides:

> *"Where it appears to the satisfaction of the Revenue Commissioners that a person has been assessed more than once for the same cause and for the same year of assessment or the same accounting period, as the case may be, they shall direct the whole, or such part, of any assessment as appears to be an overcharge to be vacated, and thereupon the whole, or such part, of the assessment shall be vacated accordingly."*

9. Therefore, for the years 2006 to 2010 inclusive, the Respondent became aware that the Appellant had been assessed more than once for the same tax year resulting in additional tax payable and on 16th January 2013 took remedial action to vacate the assessments that issued on 7th, 8th and 9th January 2013.

10. Prior to the Finance Act 2012 the Respondent could only vacate an assessment where there has been an overcharge of tax. However, while the assessments for the years 2004 and 2005 that issued 7th January 2013 reflected no double charge to tax and as a consequence no additional tax was payable, it would appear that the Respondent did not possess the statutory authority to vacate the later assessments.

11. However, it would appear that the corrective action to amend that anomaly was made by TCA, section 959F as inserted by the Finance Act 2012. As such TCA, section 929 was replaced by TCA, section 959F(1) which provides as follows:

> *"Where it appears to the satisfaction of the Revenue Commissioners that a person, either on the person's own account or on behalf of another person, has been assessed to tax more than once for the same chargeable period for the same cause and on the same account, they shall vacate the whole, or the part, of any assessment as appears to them to constitute a double assessment."*

12. Notwithstanding the Respondent's lack of authority to vacate an assessment in the event of an underpayment of tax, I explained at the hearing to Counsel for the Appellant that the Appellant had appealed the assessments for the years of assessment 2004 to 2010 inclusive that issued on 12th December 2012 and those were the only assessments before me. As a consequence, I was required to hear the appeal of those assessments. Furthermore, the later assessments that issued in January 2013 for the same years of assessment 2004 to 2010 inclusive were not in front of me.

13. Furthermore, the jurisdiction of an Appeals Commissioner was clarified by Peart J. in the recent Court of Appeal judgment in *Robert Stanley v The Revenue Commissioners* [2017] IECA 279 when opining:

> 33. *The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.*

34. *A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where as in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings. This is clear from the judgment of Finlay C.J in Deighan v. Hearne [1990] 1 IR 499 where the Chief Justice expressed his agreement with what had been decided by the High Court, by stating the following at p. 506:*

> *"The learned High Court judge decided that having regard to the provisions of the income tax code and the procedure for assessment in default of the making of returns which has been outlined in the decision of the Court, that the Court could only intervene to set aside or vary an assessment otherwise than under the procedure provided by the Income Tax Acts if it were established either that the procedure carried out was ultra vires the statutory provisions or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution. The court could not try an issue of fact arising from an assessment made in default of a return otherwise than through the appeal procedure provided in the income tax code."*

14. Therefore, and contrary to the Appellant's submission, any challenge to the validity of the assessments that issued on 12th December 2012 in respect of the years of assessment 2004 to 2010 inclusive is a matter for judicial review and as a consequence does not fall within the jurisdiction of the Appeal Commissioners.

15. On this basis, the hearing proceeded accordingly.

Legislation

16. The charge to tax under Schedule D is governed by TCA, section 18(1) and relates to:

> *"(a) the annual profits or gains arising or accruing to —*
>
> *(i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,*

(ii) any person residing in the State from any trade, profession, or employment, whether carried on in the State or elsewhere,
(iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and
(iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State, …"

16. TCA, section 52 TCA identifies the person chargeable to tax and states:

"Income tax under Schedule D shall be charged on and paid by the persons ... receiving or entitled to the income in respect of which tax under that Schedule is directed in the Income Tax Acts to be charged."

17. TCA, section 58(1) charges profits and gains from an unknown source and provides:

"Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made –

(a) the source from which those profits or gains arose was not known to the inspector,
(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or
(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains."

Evidence

18. The Appellant gave the following evidence:

2004

(a) In January 2004 he set up a new business in waste disposal but it was not until January 2006 when the Council issued the permit. During that year, he earned money selling cars but was unable to verify how much he had earned as the bank

refused to give him statements. Therefore, he borrowed money from the credit union to '*keep the insurance going and everything'* but was unable to determine how much he had put into the bank. He was unable to verify the source of bank lodgements of €16,992, as he could not get bank statements. He was also uncertain of the margin he made on selling cars but it was in the region of €500 to €1,000. He also stated that the value of the cars may have been €2,000 - €2,500.

2005

(b) There had been a couple of claims from traffic accidents that amounted to €17,000 or €18,000 and €11,000, but that he could not fully remember the source of the bank lodgement of €88,000. He had borrowed €15,000 from the credit union and put it into AIB or Bank of Ireland.

2006

(c) In 2006 he was working '*at the rubbish'* and that his accountant '*has all my things, what I made that yea*r'. He accepted the figures of €14,560 '*declared rubbish removal*'. However, he was unable to confirm the source of the €57,780 declared in bank lodgements stating that he would have to look at the bank statements to know exactly where it had come from but that he did not have access to the bank statements as they were "blocked". The income from his car business went through his bank account but he was unable to confirm the gross turnover of car sales.

2007

(d) He was engaged in rubbish collection again in 2007 and had declared income of €9,860 however he could not recollect the source of €29,719 in bank lodgements.

2008

(e) He was '*still at the rubbish'* in 2008 and had earned €3,460 and a further €6,200 from used car sales. He could not '*fully think back'* to any other sources of income in 2008 but when probed further he remembered an €8,000 cheque that he had received from a car accident. A further cheque of €14,225 was received from Quinn Direct as compensation for his truck that had been burnt out. He confirmed that the source of €118,884 in lodgements recorded on his bank statements was from the rubbish business and the car sales. He also said that this figure was the turnover for his business.

2009

(f) He received two cheques of €8,000 and €15,000 respectively, from injuries sustained in car accidents in 2009 and confirmed that his declared earnings from car sales amounted to €4,350. The lodgements of €61,430 to his accounts represented the borrowed money from the credit union that he was putting in and out of the bank to buy cars.

2010

(g) He borrowed money from the credit union in 2010 which he withdrew every five, six or seven months and still owed €10,000 to the credit union. The bank lodgements of €26,214 was from the car trade and possibly one cheque from the credit union.

The Business Model for the Motor Trade

(h) The business model for car dealing involved buying a car for €3,000 and selling it on for €3,500 and make a profit of €500 on the sale. He bought the cars in Ireland and the UK. In relation to the UK purchases he said that '*if I bought a car, I'd go over and get the car and I might get €1,000 off it but I'd have to pay my fees out of it with the boat and stuff coming back and stuff. So I'd end up with €700/€800*'.

(i) After acquiring the car in the UK, he would "*give the car to you, I'd book it in for the VRT under your name so you'd pay the VRT on the car. So the car would be booked in and you'd go to the VRT and give them all your details and it would be declared in your own name*.'. The only cars that he registered as owner of, were his own cars, and he also confirmed that he was turning over two cars per week for a couple of hundred euro.

Cross Examination of the Appellant

(j) His accountant prepared the accounts which were based on the bank statements. In 2012 he got bank statements for 2007, 2008, 2009 and 2010 but that he could not get statements for 2004, 2005 or 2006 as the banks did not go back that far. He was unable to provide any evidence of his credit union statements.

(k) His accountant filed tax returns for the years 2004 – 2010 based on the bank statements that the Appellant was able to source. However, he was unable to provide any evidence of these bank statements at the hearing. He later stated that he thought he had given his accountant bank statements from 2007 onwards.

(l) He was not in a relationship but had eight children that were aged from **Ages redacted** all of whom he supported financially. He did not own any property during the period 2004 - 2010. He managed to save over €5,000 while on the dole and supporting his children and sold a few cars at the time that amounted to a couple of thousand Euro, but that he did not declare the profit. He thought his dole payment in 2004 amounted to €90 per week.

(m) He was unable to provide a copy of the permit that he had attained for his waste disposal business in 2006 and said that his accountant had all the books and records in respect of the business. His waste disposal truck cost €5,500 in 2004 which he had financed from borrowings from the credit union.

(n) In order to buy cars, he borrowed from his mother and that he also had some money put away. His mother often gave him €2,000 or €5,000. His mother was working as a cleaner in the **Place of employment redacted** in 2004 and that this allowed her to provide him with money.

(o) He did not know why he did not file tax returns on the money he had earned but between the period 2004 – 2010 he had another accountant who "*had been messing him around*." This accountant should not have registered him for VAT as his business was not earning enough money. The Appellant was unable to provide evidence of the car business on his bank statements. He explained that he bought the cars from garages around Ireland but he did not have any documentary evidence to support this. He also stated that he sold the cars on Donedeal but was unable to provide evidence of this process.

(p) He could not comment when questioned about the Respondent's assertion that the €16,992 was lodged into his credit union account in 2004. He had received €8,621 in social welfare benefits which were recorded on his income tax return and that the return showed that he did not earn any other money. He was unable to explain how he funded the purchase of the truck and he stated that he was not sure as he could not think back. He was also unable to explain why there had been such significant movements on his credit union account.

(q) He was unable to comment on his credit union account that showed lodgements of €86,205 in 2005 nor was he able to comment on the €48 bank interest that he had earned. He also confirmed that he did not earn any other income in 2005. However, after further questioning he stated that the €86,205 was not all in the credit union at the one time and that the money was going in and going out. When explaining the

transferring of money in and out of the account he stated '*I could take out 15 from the account today and I'm going to put it back in tomorrow and then I'm going to put another 200 on top of it. That's the way I'd be like, Like, I never had €86,000 in my life and I haven't got it today*.'

(r) When asked to explain where he got €2,000 to lodge and withdraw, he said that if his mother gave him money to enable him to buy a car to make a profit. He also stated that he thought his mother had given him €10,000 in 2003. The series of lodgements paid into his account in 2005 may have been cheques but that he could not recall the lodgements. He could not fully remember the source of the lodgements of €57,880 in 2006

(s) His business account was mostly with AIB because he had a cheque book from AIB but was unable to provide any bank statements. However, he did not accept that the money going in and out of the credit union was in addition to what was in his business account.

(t) In relation to waste disposal business in 2006, he said that if he did a load for €200 that he might get €40 out of it. He also confirmed that he advertised in the **Newspaper Redacted** but was unable to provide the names of customers that he dealt with but stated that there were no customers as he was dealing with people ringing based on the ads in the paper from **Region Redacted**. He did not collect waste on a weekly basis and said that he worked on his own. He provided customers with receipts but that he did not have them with him.

(u) He confirmed that he had business accounts in AIB and Bank of Ireland. He was unable to provide evidence to support his operating expenses that amounted to €26,540, on a turnover of €36,500 for his rubbish removals, or evidence for the sales amounting to €18,500 for his used car business in 2016. For the year 2007, he did not know anything about the payments that amounted to €29,719 that went in and out of his credit union account and Bank of Ireland account.

(v) He confirmed that he owed the credit union €10,000 but was unable to provide any evidence. He also confirmed that he was unable to provide evidence of the €35,000 for rubbish removal, the €15,500 for 'car sales, cost of sales' or the €3,500 in operating expenses. He received two cheques in 2008 - €8,000 from insurance proceeds and €14,250 as compensation for his burnt-out truck and that he had acquired a new truck.

(w) For the year 2009, the Appellant was unable to remember the €6,000 spent on his credit card account and thought the source of a cheque dated 2nd January 2009, was from a car accident He could not verify the source of a lodgement of €5,000 on 21st January 2009, and stated that a cheque lodged on 11th September 2009, in the amount of €15,000 was in respect of compensation from a car accident. He accepted that he probably spent €660 on his credit card in April/May 2009 but had no comment on the transactions of €1,264 for October 2009.

(x) He had no comment with regard to the payments paid into his credit union account in 2008. These sums of money amounted to €8,500 in February, €1,000 in April, €5,000, €2,000 and €3,955 in June, €3,000, €1,200 in August and €12,000 and €4,500 in December. He was unable to give details regarding the number of cars that he sold in 2009. He was on the dole for between 3-5 weeks in 2009. He had no comment on the cumulative lodgements of €26,214 into his Bank of Ireland and credit union accounts in 2010.

(y) He confirmed that during the period he did not own any assets. He stated that his family lived in a house that was purchased by his '*misses*' and that he contributed €35,000 towards the purchase of the home from the money that he had received from the car accidents However, he was unable to provide evidence. He disagreed that the source of the funds to purchase the home was derived from activities other than the compensation claim.

(z) He could not remember how he financed the purchase of a brand new car in 2010 but may have borrowed from his business. However, he provided no evidence to support this claim. He later confirmed that he made two cash deposits of €6,000 and €5,000 on the car '*for his misses'*.

(aa) Finally, his financial transactions were recorded in a book which he had "at home" which he did not bring with him to the hearing.

Examination in chief of ***Accountant's name redacted***

19. **Accountant's name redacted** gave the following evidence:

(a) He was contacted by the Appellant on 26 September 2012, to complete his income tax return for 2011. He had further contact with the Appellant in December 2012, when he received the assessments. He completed the tax returns and put a note on each return '*stating that the original records were all*

destroyed and that the returns reflect the best estimate of what the client was aware of.'

(b) He agreed that there was inconsistency between the analysis and the returns that he had prepared but stated '*the client declared to me that he was in receipt of Job Seekers for the year 2004 and I had not seen 2004 nor 2005 because he said they were not available. He couldn't get copies*.'

(c) His belief that the transactions on the Appellant's credit union account indicated a pattern of trading and was of the opinion that you could not infer that it indicated a taxable profit as he was in a continuous pattern of taking out loans and clearing them.

Cross examination of **Accountant's name redacted**

(d) He stated that the Appellant "*gave me invoices, sales, you know, he just gave me an idea of what the sales were.'*

(e) He explained that the invoices were market trade invoices from 2011 and 2012, as the Appellant was buying umbrellas and detergents and selling them in the market.

(f) He confirmed that the accounts were filed through ROS and that the Appellant had told him that his records had been destroyed.

(g) He stated that he received Bank of Ireland statements and one or two Credit Union statements in January 2013, and that he did not change his prepared accounts as '*the accounts seemed to indicate that there were no sales records, it was an estimation by the client of what the situation was*.

(h) He said that the Appellant had no accumulation of wealth or assets and that he was not aware of the AIB accounts.

Submissions - Appellant

Quantum's of the Income Tax Assessments issued on 12 December 2013

20. The estimation by the Respondent of the Appellant's alleged income arising for income tax years 2004 to 2010 was fundamentally flawed for the following reasons:

(a) Only the gross annual lodgements to the Appellant's credit union and bank accounts were taken into account.

(b) No outgoings from these accounts were taken into account. This fundamental error comes into sharp focus given the factual position that cumulative outgoings in these accounts for each year were, in effect, matched by outgoings from these accounts. For example, the cumulative outgoings €18,536 from the credit union account put in evidence by the Respondent for 2004 exceeded the cumulative lodgements of €16,992 to this account for this year. The total cumulative outgoings (€86,593) from the credit union account for 2005, again put in evidence by the Respondent, exceeded the cumulative total lodgements of €86,205 to this account for this year. There was a similar pattern (i.e. in effect lodgements matched by outgoings) re bank and credit union accounts for the other years;

21. There was a failure to take into account loans draw downs which were lodged to the bank accounts. For example, included in the cumulative lodgements of €118,885 for the year 2008 there was a loan draw down of €11,000 on 6 February 2008.

22. In the total while there were cumulative lodgements totalling €26,214 for 2010, there was a loan draw down of €8,000 from **Region Redacted** credit union on 17 September 2010. There was also a failure to fully take into account the rescheduling of various credit union loans in the years 2004 -2010.

23. For the years 2008 and 2009 there was a failure to take into account compensation received on foot of fire damage to a truck and compensation received on foot of motor vehicle accidents. These compensation payments, as shown in the financial accounts were €22,250 and €15,000 for 2008 and 2009 respectively. Towards this end documentary and oral evidence in relation to these receipts was produced and given at the hearing on 16 October 2019. The documentary evidence was in relation to Quinn insurance compensation payment and monies received *via* his legal representatives on foot of motor insurance accident claims.

24. The failure to take into account outgoings as set out above mirror a failure to take into account that the Appellant carried on the business of the purchase and sale of second hand cars as well as a rubbish removals business from January 2006 to November 2008. The overall pattern of lodgements and withdrawals allied to the credit union loan(s) borrowings/movements were consistent with a second hand motor car trading activity.

25. The credit union loan(s)/borrowing (s) reflecting working capital position and requirement at particular times, a critical factor in such a business. Reference is also made to the Appellant's oral evidence at the hearing that the second hand car dealing business consisted of the buying and selling of second hand cars in this country and the purchase of motor vehicles in the UK for a specific customer in this country.

26. The particular motor car was not registered in his name. The registration together with the payment of VRT and VAT was made directly by the specific customer. Again, the bank accounts put in evidence by the Respondent reflected the UK second hand motor car activity. The Appellant also gave evidence concerning the rubbish removals business including incurring costs of €6,000 to acquire a licence/permit.

27. In effect the failure to take into account outgoings comes into particularly sharp focus in relation to a second hand motor car dealing business as, in essence it fails to take into account allowable business costs – in particular the purchase price of the particular motor vehicle – the major cost component factor in such a business. There is also the issue of annual wear and tear entitlement which was included in income tax returns filed on 7, 8 and 9 January 2013.

28. There was no evidence to support the Respondent's contention that the lodgements to these accounts were the proceeds or the suspected proceeds of crime. Furthermore, on a without prejudice basis to the issue of admissible evidence, the High Court Judge in the civil proceedings taken against the parties (one of them being the Appellant) did not make any findings that the lodgements to the said accounts constituted the proceeds or the suspected proceeds of crime.

29. Reference is also being made to the oral evidence of the Appellant's accountant at the hearing regarding the Appellant's business activities. In addition, he stated that he was satisfied that there was no accumulation of wealth on the part of the Appellant for the periods at issue.

30. The inclusion by the Respondent in its estimation of alleged profits for income tax year 2010, of cash payments €30,300 towards the purchase of a house at **Location Redacted**, as well as alleged cash payments totalling €11,000 on the acquisition of a motor vehicle in November 2010 was based on an unapproved copy of a judgement given by Judge **Name Redacted** in the High Court in the matter of section 3 (1) of the Proceeds of Crime Act 1996 and 2005. This decision is not available on the Courts.ie web site. Neither is there any trace of this case in the High Court search facility. A further copy has been forwarded by the Respondent since the date of the hearing on 16 October 2019.

This purported attested copy, date of attestation unknown is also not approved. Therefore, no material from this decision should be admitted in evidence.

31. Without prejudice to the above, the point at issue was whether the source of these cash payments were the proceeds or the suspected proceeds of crime. The position in Irish tax law is that, unlike the UK, such a source was not until 1983 within the scope of Irish income. This was based on the decision and reasoning of the Supreme Court in *C Hayes (Inspector of Taxes)- V – RT Duggan* [1929] IR 406 which was followed by the High Court in *Collins - v – Mulvey* [1956] IR 223. The key point being that the State could not share in the profits or gains from such activity (i.e. from an unlawful business/trade). This position was changed in this country by Finance Act 1983 now TCA, section 58. This states that profits or gains from such activity or suspected such activity are chargeable to Irish income tax under schedule D Case IV.

32. Clearly, the confiscation of assets flowing from the profits or gains from such an activity or suspected such activity can only be construed as the individual being deprived of the said profits or gains. Consequently, he or she cannot be regarded as having profits or gains chargeable to income tax under TCA, section 58.

33. Furthermore, a confiscation undermines the whole basis for the 1983 legislation which is the overcoming of the moral and legal obstacles in this country (as established in *Hayes - v- Duggan*) regarding the State sharing with the individual the benefits arising from the carrying on by him or her of such activity or suspected such activity. Confiscation takes out of the equation any such sharing with the individual of the benefits arising from the carrying on by him or her of such activity or suspected such activity and by extension the foundation on which TCA, section 58 is based.

34. Furthermore, the classification of such a confiscation as a fine advanced by the HMRC in the UK (which is by no means the settled view in the UK) is not relevant here. The HMRC viewpoint invokes the principle established in case law that while a fine is a business disbursement (where connected to the business activity) it is not laid out wholly and exclusively for the purposes of the trade/ business.

35. However, these words of limitation set out for Irish income tax law in TCA, section 81(2)(a) apply only to profits or gains within Cases I or II. Unlike the UK, such activity or suspected activity does not come within the scope of Cases I and II.

36. Consequently, even if the confiscation were to be classified for income tax purposes as a fine, it is an allowable deduction in computing profits or gains from such activity or suspected activity as it is clearly connected with such activity or suspected activity.

37. Finally, the Respondent at the hearing did not take into account the following in relation to the Appellant's personal annual living expenses/drawings for the years under review:

    (a) the mother of his children, **Name Redacted** was in receipt of single parent and other social welfare payments - a fact which was within the knowledge of the Respondent.;
    (b) the number of dependent children for the years at issue here was 4 and not 7 as alleged by the Respondent.
    (c) The Respondent failed to take into account the financial maintenance and indeed personal position of the Appellant which applied re the said children.

38. Apart from the above, the Respondent's estimates for business income for each of the above income tax years are seriously flawed. Detailed and extensive reasons have been given to support this conclusion and indeed to conclude that the Appellants income tax liabilities for each of the above years was not in excess of the liabilities set out in the income tax assessments issued on 7th, 8th and 9th January 2013.

Submissions - Respondent

39. Prior to the raising of assessments by the Respondent in December 2012, the Appellant had only filed one tax return for 2011. The Appellant had filed no tax returns for the periods in question.

40. The Appellant registered as a sole trader with the Revenue Commissioners in 2005 describing his trade as "*a contract for waste collection*". However, prior to the raising of the assessments, he never declared any income from this trade and he later informed the Revenue Commissioners that his business had failed.

41. The Respondent carried out a significant and detailed analysis of the Appellant's income and expenditure for the relevant periods and had formed the view that the Appellant had undeclared income from an unknown source.

42. Notices of assessment were raised on the Appellant on 12th December 2012 which were appealed. The Appellant filed tax returns for the purposes of making this appeal.

43. The Appellant has provided no books and records to support his returns.

Burden of Proof

44. In the context of tax appeals, the burden of proof to show that the amount due is excessive rests with the taxpayer. This accords with the general law in civil cases that the burden of proof falls on he who asserts. This onus may be justified on the basis that only the taxpayer has access to the full facts relating to his personal tax situation. 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. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J in TJ v Criminal Assets Bureau [2008] IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue. The Applicant in that case was assessed for income tax by a tax inspector assigned to the Criminal Assets Bureau. He was assessed to tax on a large amount of income from apparently mysterious sources. Invoking his statutory right of appeal in those circum-stances, the Applicant sought disclosure of all information on which the assessment was made. Referring to the Revenue Customer Service Charter, the court noted that there was a self-imposed obligation on the Revenue Commissioners to give all relevant information whereby the taxpayer would understand his tax obligations. This did not extend, it was held by Gilligan J, to making an order for discovery. In taking the appeal, the taxpayer was undertaking the burden of appeal within the relevant formula as to the relief which he might be granted if successful. At para 50 Gilligan J stated:*
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> > *"The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the*

relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court...There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant.""

45. As such, the Appellant has failed to discharge the burden of proof that he and the mother of his children did not earn the amounts assessed and it was clear that their expenditure clearly surpassed their means.

The Appellant's alleged trade

46. There is no evidence to support the Appellant carrying out any trade at all. The Appellant failed to produce any books or records, or any credible evidence of any kind, to support his alleged trade. The Appellant stated that he used an AIB account for the purposes of his trade but failed to produce any statements for this account. The Appellant produced no books or records to support any suggestion of the carrying of a trade.

The Appellant's bank accounts

47. An analysis of the Appellant's bank statements showed significantly more lodgements than the Appellant declared. As the Appellant's accountant, **Accountant's name redacted** himself stated, you have to be generating funds in order to make lodgements. The fact that the Appellant's outgoings did or did not match simply suggests that he spent these funds.

48. In raising these assessments, the Respondent analysed the Appellant's Bank of Ireland account and a credit union account. However, the Appellant's own evidence referred to an AIB account which the Respondent was not even aware of and the activity in this account has not even been analysed for the purpose of the assessments.

49. The Appellant's own evidence was that his AIB account was his trading account and so one would expect that there would also be significant lodgements to his AIB account. As such, the overall pattern of the Appellant's credit union account is in fact contrary to the Appellant's own testimony that the AIB account was his trading account. Simply put, whatever the Appellant's agents would like to assert the credit union account shows, the Appellant's own evidence says that the credit union account was not his trading account.

50. If the AIB account was the Appellant's trading account, it raises the question what he used the Bank of Ireland and credit union accounts for?

Compensation the Appellant says he received.

51. The Respondent contests that the draft from a credit union to the Appellant could represent compensation received by the Appellant for a road accident. No explanation was proffered to explain how such compensation would come from a credit union.

52. The Appellant gave evidence that he received compensation for a truck which he later replaced and so it must be assumed that the compensation proceeds were used for this purpose.

53. The Appellant gave evidence of receiving two cheques from **Legal Firm Redacted** but provided no other corroborating evidence in support of his assertion that these sums represented compensation payments.

Capital and other expenditure incurred by the Appellant

54. In 2010, the Appellant purchased a property at **Location Redacted** with cash in the sum of €30,300. This property was subject to a successful proceeds of crime application by the Respondent against the Appellant.

55. In 2011, the Appellant's partner, **Name Redacted** purchased vehicle registration number Redacted and that the Appellant paid cash in the amount of €11,000, a year where his own taxable income is declared at €13,181. The total purchase price of this vehicle, including extras, was €29,500. The order for this vehicle was placed on 1st November 2010. This car was subject to a successful proceeds of crime application by the Respondent against the Appellant.

56. The Appellant's living expenses appeared to surpass his means. The Appellant was supporting between four and six dependent children during the relevant period.

57. It is the Respondent's position that the Appellant's expenditure exceeded his declared income.

The failure of the Appellant to adduce evidence to discharge the burden of proof

58. The Appellant failed to produce any books and records**. Accountant's name redacted** evidence was that the Appellant told him his books and records had been destroyed. This did not appear to be the Appellant's evidence he had the books and records at home, just not with him at the appeal.

59. The Appellant also received copies of all of his bank statements in August 2014 in the course of the Proceeds of Crime application. It also remained open to the Appellant to obtain this information from his own banks and he gave no good reason why he did not do so.

60. The Appellant failed to adduce any corroborative evidence outside of his own oral testimony that he was in fact carrying on a trade.

61. The Appellant's accountant, **Accountant's name redacted** accepted that he had no books and records and in fact prepared the Appellant's returns solely on the information provided to him by the Appellant which cannot be independently verified. As such, the suggestion that the evidence from the Appellants' accountant to the effect that there was no accumulation of wealth on the part of the Appellant for the periods at issue here is wholly unreliable in the circumstances. Unfortunately, the Appellant's accountant based this assertion on some Bank of Ireland statements and "one or two" credit union statements. The Appellant's accountant does not seem to have seen any information relating to the Appellant's AIB account either.

62. The Appellant makes various assertions as to what the Respondent allegedly failed to include in the analysis of the Appellant's income and expenditure without any actual evidence of same.

63. The comprehensive analysis carried out by the Respondent noted that the Appellant drew down loans but that these loans were also paid off by the Appellant.

64. The Appellant and the mother of his children are not jointly assessed for tax purposes and his evidence was that they were not in a relationship although two of his children

appear to have been born after the years of assessment. In any event, **Partner's Name Redacted** required income herself and therefore, it is not clear why the Respondent should have been attributing her income to the Appellant as now suggested. The Appellant's own evidence was that he paid maintenance payments for his children but not to **Partner's Name Redacted.**

65. The Appellant gave evidence that his children were **Ages Redacted** in 2019 which means in 2010, he had **Ages Redacted**, which is six children.

66. One would expect an appellant who bears the burden of proof and who is contesting such an analysis to prepare his own detailed account of his income and expenditure for the period. The Appellant failed to do so. All the Appellant offered was a set of accounts and tax returns which contain a health warning to the effect that the figures are a "*best estimate with the exception of bank balances and loans and assets*" and as such, must be unreliable.

The Proceeds of Crime Application

67. The Respondent attached a copy of the approved judgment of **Name of Judge Redacted** in the Proceeds of Crime application against the Appellant. Nowhere in the judgment does it state that the decision is unapproved. Moreover, the Appellant pointed to no legal basis to support his assertion that a decision that is not published on courts.ie cannot be relied upon.

68. Particular attention is drawn to the Court's findings of the Appellant's purchase of the property at **Location Redacted** in 2010 (a year under assessment) was funded with the proceeds of crime. In this regard, the Respondent also highlights that the Appellant gave evidence that he gave **Partner's Name Redacted** €35,000 for the purchase of **Location Redacted** which he said he received from "car accidents" However, irrespective of this finding of fact by the High Court, it is the Respondent's position that the Appellant has put no evidence in this appeal to discharge the burden of proof that he did not receive this income in the years in question.

69. The Appellant made legal submissions in relation to TCA, section 58 which was not raised in the course of appeal. Furthermore, such an argument is difficult to dissect. However, to clarify, the house at **Location Redacted** is now subject to a section 3 order under the Proceeds of Crime Act 1996 as amended which is in effect a freezing order (not a confiscation) which remains in place for a minimum period of seven years after which the Criminal Assets Bureau can apply to the High Court to have it vest in the

Minister for Public Expenditure for the benefit of the Exchequer. There is contained within sections 3, 4 and 6 of the Proceeds of Crime Act 1996 as amended provision to offset, any tax liability generated in respect of those assets deemed the proceeds of crime.

70. It was not in dispute between the parties that the income from criminal or unlawful source is subject to taxation in this jurisdiction. It was submitted that in assessing quantum it is incumbent to take into account all income and not confine himself to income from lawful sources. If, in making the determination, assessments are confirmed which included income attributed to the assets the subject of the section 3 order, the appropriate course would then be for the Appellant to apply, pursuant to the aforementioned provisions of the Proceeds of Crime Act, to offset that portion of the liability and, in doing so, avoiding the possibility of any double recovery.

71. It is the Respondent's position that the Appellant earned significantly more income than he has declared for the purposes of income tax. The Appellant has failed to discharge the burden of proof necessary to displace the assessments raised on him in December 2012, the subject matter of the appeal.

Determination

72. The Appellant was unable to provide explanations as to the source of numerous lodgements to his credit union account. Furthermore, the revelation at the hearing by the Appellant of the existence of a business bank account with AIB, was not only a surprise to his accountant **Accountant's name redacted** but to the Respondent. Indeed, in raising the assessments, the Respondent had only analysed his Bank of Ireland and credit union accounts and was unaware of the AIB account. Furthermore, while **Accountant's name redacted** evidence was that the "*original records were all destroyed and that the returns reflect the best estimate of what the client was aware of*", the Appellant provided a conflicting version of events when confirming that he had his financial records "at home"

73. In accordance with the default position in tax litigation as espoused by Charleton J. stated in *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49, the Appellant is required to provide sufficient evidence to reduce or displace a tax assessment. However, in this appeal the Appellant did not provide documentation and indeed failed to adduce cogent evidence to warrant a reduction or abatement of tax payable. As such, the Appellant frustrated his own appeal and indeed any prospect that

he may have had to have the assessments to tax reduced. As such the assessments issued by the Respondent on 12th December 2012 in respect of years of assessment 2004 – 2010 inclusive shall stand.

74. Therefore, and contrary to the Appellant's submission, any challenge to the validity of the assessments that issued on 12th December 2012 in respect of the years of assessment 2004 to 2010 inclusive is a matter for judicial review and as a consequence does not fall within the jurisdiction of the Appeal Commissioners.

75. This appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK

Conor Kennedy
Appeal Commissioner
7th February 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.