**04TACD2021**

**APPELLANT'S NAME REDACTED**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. The Appellant was subjected to a Revenue enquiry which commenced on 18 April 2007. However as the Appellant failed to co-operate, the Respondent procured a High Court Order pursuant to Taxes Consolidation Act 1997, (TCA) section 908 directing the Appellant to file a statement of affairs.

2. The Appellant continually failed to engage with the Respondent and as a consequence income tax assessments were raised on 22nd February 2012 for the years 31st December 2006 to 31st December 2009 inclusive in the aggregate sum of €350,119 broken down as follows:

| Year | Income Tax<br>€ |
|---|---|
| 31st Dec 2006 | 1,646 |
| 31st Dec 2007 | 152,263 |
| 31st Dec 2008 | 106,364 |
| 31st Dec 2009 | 89,846 |
| Total Tax | €350,119 |

3. Appeal hearings were held on 23 October 2012 and 29 November 2012. Following numerous adjournments, the matter eventually proceeded by way of remote hearing on 28 October 2020.

4. However notwithstanding that the Appellant had engaged in correspondence with the Tax Appeals Commission immediately prior to the hearing, she failed to attend the remote hearing. On the morning of the hearing, the Tax Appeals Commission was notified that her Former Husband's Name Redacted would appear on her behalf. While Former Husband's Name Redacted had previously appeared before the Tax Appeals Commission on the Appellant's behalf, Former Husband's Name Redacted confirmed that he had the Appellant's instructions and authority to act.

**Material Findings of Fact**

5. From the evidence, I have made the following material findings of fact:

(a) Former Husband's Name Redacted was previously married to the Appellant but they are now divorced.

*Tax Returns*

(b) The Appellant filed tax returns for the years 2006, 2007, 2008 and 2009 in February 2008, January 2009, February 2010 and January 2011 respectively.

(c) Not satisfied with the income reported, the Respondent raised assessments on the Appellant on 22nd February 2012 for the years 2006 to 2009 inclusive based on the following sources of income:

| | 2006<br>€ | 2007<br>€ | 2008<br>€ | 2009<br>€ |
|---|---|---|---|---|
| Rental Income | 45,232 | 149,596 | 175,482 | 94,898 |
| Miscel Income | 22,027 | 217,425 | 85,000 | 100,000 |
| Untaxed Interest | Nil | 705 | Nil | 2,200 |
| Total Income | 67,259 | 367,726 | 260,482 | 197,098 |

(d) However prior to the hearing, the parties agreed that the assessable rental income should be reduced to:

| Year | |
|---|---|
| 2006 | €2,910 |
| 2007 | €9,706 |
| 2008 | €38,074 |
| 2009 | (€16,794) |

(e) Correspondingly it was also agreed that the untaxed income of €705 and €2,200 for years 2007 and 2009 respectively should be excluded from assessment.

(f) In the initial assessments, issued prior to 22nd February 2012, the Appellant was assessed on 'Miscellaneous Income' of €12,000 and €10,000 for the years 2006 and 2009 respectively

*Invoices*

(g) In 2006 Company Name Redacted Ltd (WTX Ltd) trading as Trading Name Redacted (DBA) invoiced 2nd Named Company Redacted (Holdings) on 4th January 2006 an amount of €10,028 in respect of "*Financial Services in relation to the raising of money by … Holdings*". The instruction on the invoice directed Holdings to "*settle this invoice to the account of"* the Appellant.

(h) In 2007, DBA invoiced Holdings for the period February to September 2007 in monthly amounts of €5,000 in respect of "*Financial Services in relation to the raising of money by …. Holdings*" totalling €45,000. The instruction on the invoices directed Holdings to "*settle this invoice to the account of"* the Appellant.

(i) The Appellant also received payments from 3rd Named Company Redacted Ltd (SHL), a company unconnected with the Appellant and controlled by a Third Party Name Redacted in the following amounts:

| | |
|---|---|
| 21st May 2007 | €39,700 |
| 20th July 2007 | €33,000 |
| 10th August 2007 | €36,211 |
| 30th November 2007 | €63,514 |
| Total | €172,425 |

(j) By letter dated 29th of November 2011, the Appellant stated that *"SHL owed monies to* Former Husband Name Redacted *he in turn owed money to me. By arrangements between* Third Party Name Redacted *and* Former Husband Name Redacted*,* Third Party Name Redacted *paid me €172,425 to defray monies due by* Former Husband Name Redacted *to me. I have nothing to do with* Third Party Name Redacted".

(k) In 2008, DBA invoiced Holdings on 1st February 2008 in the amount of €85,000 in respect of "*Financial Services in relation to the raising of money by …. Holdings*". The instruction on the invoice directed Holdings to "*settle this invoice to the account of"* the Appellant.

(l) In 2009, DBA invoiced Holdings a total of €90,000 for the period January to July 2009 in monthly amounts of €10,000 and €15,000 for the each of the months November and December 2009 in respect of "*Financial Services in relation to the raising of money by … Holdings*". The instruction on the invoices directed Holdings to "*settle this invoice to the account of"* the Appellant.

(m) However and notwithstanding that the Appellant asserted that such payments were not assessable to tax, the Respondent included those payments in assessing the tax payable by the Appellant.

(n) The Respondent also sought to increase the 2007 assessment by a further €30,000 paid by DBA to a Solicitor Name Redacted, legal advisor by asserting that the payment was made to discharge a liability incurred by the Appellant.

(o) In a letter to the Companies Registration office on 10th February 2008, the Appellant consented to act as a director and secretary of WTX Ltd. The Appellant also opened a bank account in the name of that company with Bank of Ireland on 13th February 2008.

(p) Notwithstanding that the Appellant failed to attend the remote hearing, she was represented by her former husband, Former Husband's Name Redacted, an accountant by profession

**Submissions - Appellant**

6. The Appellant made the following submissions:

*2006*

(a) In order for the payment to be liable to income tax, it must have a source namely in trade, property or gain. However and notwithstanding that the assessment was out of time, Former Husband's Name Redacted argued that the Appellant was not liable to income tax as she did not perform any duty or supply any service to Holdings or SHL.

(b) Furthermore while it was not certain why the Appellant received funds from Holdings, the issue was irrelevant as the assessment issued out of time.

*2007*

(c) The Appellant did not provide any property to Holdings as collateral to enable that company procure a loan. However she did provide some of her property to DBA as collateral.

(d) Due to the passage of time, Former Husband's Name Redacted, as a director of WTX Ltd, had no recollection as to why he directed that amounts invoiced by that company be paid to the Appellant. However, as he owed €1 million to the Appellant, the direction to Holdings to pay the Appellant must have been to discharge his outstanding debt to her. However he was unable to provide any evidence of the existence of the loan from the Appellant.

(e) The payments made by SHL to the Appellant were made at the direction of Former Husband's Name Redacted to reduce a loan that Appellant made to Former Husband's Name Redacted. However he was unable to provide any evidence of the existence of a loan but he confirmed the Appellant's assertion in her correspondence with the Respondent of 29th of November 2011, that "*SHL owed monies to* Former Husband Name Redacted *he in turn owed money to me. By arrangements between* Third Party Name Redacted *and* Former Husband Name Redacted*,* Third Party Name Redacted *paid me €172,425 to defray monies due by* Former Husband Name Redacted *to me. I have nothing to do with* Third Party Name Redacted".

(f) Former Husband's Name Redacted maintained that the Appellant was not liable to income tax as she did not perform any duty or supply any service to Holdings.

*2008*

(g) The receipt by the Appellant of €85,000 from Holdings arose from a direction from Former Husband's Name Redacted to Holdings to pay the Appellant for the purposes of reducing his outstanding debt to her but was unable to provide any evidence of the existence of a loan. Furthermore, Former Husband's Name Redacted argued that the Appellant was not liable to income tax as she did not perform any duty or supply any service to Holdings.

*2009*

(h) The receipt by the Appellant of €90,000 from Holdings arose from a direction from Former Husband's Name Redacted for the purposes of reducing his outstanding debt to the Appellant. As above, he was unable to provide any evidence of the existence of a loan but in any event it was asserted that the Appellant was not liable to income tax as she did not perform any duty or supply any service to Holdings.

*Conclusion*

(i) Notwithstanding the Appellant's acknowledgement in her written submissions dated 10th November 2019 that she "*received in excess of €402K*" from Holdings and SHL, Former Husband's Name Redacted argued that a substantial amount of those funds related to monies that he owed to her. Furthermore it was submitted that the Appellant did not perform any duty or supply any service to Holdings and as a consequences could not be liable to tax on the amounts that she had received.

*Respondent*

7. The Respondent made the following submissions:

(a) As the assessments related to the years of assessment prior to 2013, TCA, section 955 is relevant. Therefore while TCA, section 955(2)(a) restricts the amendment of a tax assessment to 4 years from the year of assessment in which a fully complaint tax return was filed, no such time limit applies where a tax return did not contain a full and true disclosure "*of all material facts necessary for the making of an assessment*" pursuant to TCA, section 955(2)(b).

(b) Notwithstanding the above, as the Appellant filed her tax returns for all years under appeal outside of the statutory prescribed time limit, the assessments were raised within 4 years from the time she filed her tax returns.

(c) There was no evidence to support the existence of the loan between Former Husband's Name Redacted and the Appellant.

(d) It is settled law that in any tax appeal the burden of proof is on the Appellant. As the Appellant acknowledged that she received monies from Holdings and SHL, it was incumbent on her to show that the funds were not within the charge to tax. Furthermore neither the Appellant nor Former Husband's Name Redacted provided any evidence of the existence of a loan.

**Analysis**

*Overview*

8. Notwithstanding that the Civil and Criminal Law (Miscellaneous Provisions) Act 2020 makes provision, *inter alia*, for remote hearings and the use of electronic means, the authority to conduct tax appeals by way of remote hearing is governed by TCA, section 949C(1)(a) which provides:

> *"any act or function that is authorised by this Part to be done or to be performed by the Revenue Commissioners or by the Appeal Commissioners may be done or performed through electronic means"*

9. Furthermore TCA, section 949C(3) states:

> "*the Appeal Commissioners may … in their discretion, put arrangements in place for, or approve, the use of electronic means for any purpose of this section."*

10. The rules for setting the time and place for hearing is in accordance with TCA, section 949X(1) and states:

> *"The Appeal Commissioners shall from time to time appoint times and places for the hearing of appeals and shall give written notice of such times and places to the parties."*

11. The requirement for an appellant to attend for a hearing of a tax appeal is governed by TCA, section 949AA and states:

> *(1) An appellant shall attend any hearing unless the Appeal Commissioners excuse the appellant from attendance.*
>
> *(2) Where an appellant, or a person acting under the appellant's authority, fails to attend a hearing at the time and place appointed for the hearing, the appeal shall, subject to subsection (3), be treated as if it had been withdrawn.*
>
> *(3) Notwithstanding subsection (2), an appeal shall not be treated as if it had been withdrawn where, on an application in writing having been made to them after the time appointed for a hearing, the Appeal Commissioners, are satisfied that—*

*(a) owing to absence, illness or other reasonable cause, the appellant was prevented from attending the hearing, and*

*(b) the application was made thereafter without unreasonable delay."*

12. Notwithstanding the above, the Appellant's agent, Former Husband's Name Redacted, confirmed that he was duly appointed to represent the Appellant and therefore I was satisfied that that the remote hearing should proceed.

*Burden of Proof*

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

14. Furthermore in *TJ v Criminal Assets Bureau* [2008] ITR 119, Gilligan J. concluded at paragraph 50:

*"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."*

15. While there was no dispute that the Appellant received €230,028 from Holdings for the years 2006 to 2009 inclusive and €172,425 from SHL for the year 2007, Former Husband's Name Redacted argued that the Appellant was not liable to income tax as she did not perform any duty or supply any service to either company. Furthermore it was asserted that the monies from those companies were paid to the Appellant in the discharge of a €1 million loan made by her to Former Husband's Name Redacted. However, no evidence was produced of the existence of that loan.

16. Notwithstanding the submissions of Former Husband's Name Redacted, the failure of the Appellant to participate in the remote hearing denied her of the opportunity to give evidence to challenge the validity and indeed accuracy of the Respondent's assessments. As a consequence, the Appellant frustrated her own appeal and the opportunity to reduce or indeed vacate the assessments.

*Charge to tax*

17. The assessments to tax were raised on the Appellant on the undisputed amounts received from Holdings for the years 2006 to 2009 in the amount of €230,028 and €172,425 from SHL for the year 2007.

18. The charge to tax arose pursuant to TCA, section 18(2) on the:

*"annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule"*

19. In consideration of similar legislation, Rowlatt J. in *Ryall v Hoare* 8 TC 521, clarified the meaning of "*annual*" in the following passage at page 525:

*"It is inveterate now that the letting of a furnished house for a few weeks in one year will attract income tax, under this Case, upon the profit made by the letting … Now, recognising that position, it seems to me that 'annual' here can only mean 'in any*

*year', and that the phrase 'annual profits or gains' means profits or gains in any year as the succession of the years comes round."*

20. In *Ryall v Hoare*, a director of a company was held to be taxable under Schedule D Case VI on a commission received for personally guaranteeing the company overdraft at the bank, although done only once. Similarly, an isolated commission received by a company director from a syndicate for underwriting shares in a new company being floated was held taxable under Schedule D Case IV in *Lyons v Cowcher* 10 TC 438.

21. Therefore in the absence of any evidence to the contrary, I am satisfied that the Appellant is chargeable to tax in respect of the payments received for Holdings in the amount of €230,028 for the years 2006 to 2009 inclusive and €172,425 from SHL for the year 2007 in accordance with TCA, section 18(2) as "a*nnual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule"*.

22. However there was insufficient evidence to support the Respondent's claim that the payment of €30,000 paid by DBA to Solicitor Name Redacted, legal advisor was incurred on behalf of the Appellant. As such the Appellant is not liable to tax on that payment.

*The Respondent purportedly acted ultra vires*

23. The Appellant asserted that by initiating an investigation as opposed to an audit, the Respondent acted unconstitutionally. However as explained at the hearing, the jurisdiction of the Tax Appeals Commission does not extend to a consideration of the activities of the Respondent or indeed to determine whether such actions were contrary to the Constitution.

*The Respondent purportedly acted contrary to TCA, section 926*

24. The Appellant argued that in calculating rental deductions, that the Respondent acted contrary to TCA, section 926 which provides that where an assessment to income tax is made before the end of the year of assessment on income taxable on a current year basis and the inspector is required to estimate the income and allowable deductions, he/she is to have due regard to the income, deductions and tax credits of the preceding year. However it is not clear how that provision benefits the Appellant in light of the fact the assessments for the years 2006 to 2009 inclusive were raised on 22nd February 2012.

**Determination**

25. Therefore pursuant to TCA, section 949AK, the assessments for the years 2006 to 2009 should be amended to exclude the untaxed income for the years 2007 and 2009 of €705 and €2,200 respectively. Furthermore the rental income should be reduced in light of the agreement between the parties. Finally the Miscellaneous Income as calculated by the Respondent and reflected in the assessments stand. Therefore the income to be assessed on which tax is to be calculated is as follows:

| Year | Rental Income | Miscellaneous Income | Total |
|---|---|---|---|
| 2006 | €2,910 | €22,027 | €24,937 |
| 2007 | €9,706 | €217,425 | €227,131 |
| 2008 | €38,074 | €85,000 | €123,074 |
| 2009 | Nil | €100,000 | €100,000 |
| Total | €50,690 | €424,472 | €475,142 |

**Conor Kennedy**
**Appeal Commissioner**
**30th November 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 as amended.**