TAX APPEALS COMMISSION

131TACD2021

Between/

[redacted]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. These matters come before the Tax Appeal Commission as appeals against Notices of Estimation raised by the Respondent for the tax years 2011 to 2016 inclusive in relation to payments made by the Appellant to employees in the form of awards for successfully sitting and completing final professional examinations.

B. Facts relevant to the Appeal

2. The Parties herein submitted a Statement of Agreed Facts prior to the hearing date which recorded the following:-

(a) The Appellant made monetary awards known as Final Exam Awards (hereinafter referred to as "**FEAs**") to individual employees who were successful at their first sitting of their final set of professional body exams (with the Institute of Chartered Accountants and/or the Irish Taxation Institute) and attaining the consequent professional designation such as ACA or AITI. These FEAs are the subject matter of this appeal.

(b) In the years at issue, an FEA was made to those who were successful at the first sitting of the final exams of one of the above-mentioned professional bodies.

(c) Some individuals seek membership of both professional bodies. In the case of an individual who passed the final exams of one of the above professional bodies, who then went on to successfully pass the final exams of another of the professional bodies at first sitting, the Appellant also made an award in recognition of that achievement as follows:

	ACA (FAE)	***AITI (Part 3)***
Final Exam Awards	€[redacted]	€[redacted]

2011-2013		
Final Exam Awards 2014-2016	€[redacted] (primary qualification) €[redacted] (secondary qualification)	€[redacted] (primary qualification) €[redacted] (secondary qualification)

(d) These FEAs were not taxed.

(e) The Appellant's new intake contracts set out that "*It is a requirement of this contract that you present for all applicable examinations at the first sitting and pass the ICAI [CAI/TAI] examinations within a specific timeframe.*" The contract provides that all exams must be passed in accordance with a specified timetable.

(f) If the employee does not pass the examination as set out in the contracts the Appellant has the right to terminate the employment.

(g) An audit notification letter for the audit issued on the 20th January 2014 for the audit period 2011. The audit commenced on 2nd April 2014.

(h) The Inspector estimated a tax liability for the years 2011-2016, details of which are in the table below. The total estimate of liability was for a higher amount for the years 2011 to 2015 as issues other than FEAs were yet to be agreed with the Appellant. Those issues were agreed in 2016 and did not form part of these appeals.

Year	Exam Award Liability component of Estimate	Inspector Estimate	Date of Notice of Estimation of Amount Due
2011	€259,079	€311,061	21/12/2015
2012	€224,456	€284,115	02/02/2016
2013	€224,456	€250,264	02/08/2016
2014	€224,456	€249,251	02/08/2016
2015	€224,456	€235,341	02/08/2016
2016	€276,547	€276,547	07/03/2017
Total	**€1,433,450**		

C. Grounds of Appeal

3. The Appellant appealed against the Notices of Estimation raised by the Respondent on the following grounds:-

(a) The assessments were estimated and excessive;

(b) [In relation to 2011 and 2012] In so far as the assessment relates to Exam Award payments, these payments were not "*emoluments*" within the meaning of Schedule E and section 983 of TCA 1997, and are not assessable to income tax under section 112 of TCA 1997. Specifically, the Appellant contends that the payments, being discretionary awards made to employees in respect of success in the passing of certain exams (principally those of the Institute of Chartered Accountants and the Irish Taxation Institute) and

attaining the consequent professional designation such as ACA or AITI, did not arise from employment, were not payments in respect of services rendered under an employment and were not in the nature of salaries, fees, wages, perquisites or profits whatever therefrom;

(c) [In relation to 2013 to 2016] The assessments raised sought to assess discretionary exam awards paid to employees on the successful completion of their final qualifications (principally those of the Institute of Chartered Accountants and the Irish Taxation Institute) and attaining the consequent professional designation such as ACA or AITI. The Appellant contends that those payments did not arise from an employment, were not payments in respect of services rendered under an employment and were not in the nature of salaries, fees, wages, perquisites or profits whatever therefrom;

(d) The assessments were contrary to the position understood to have been accepted by the Respondent and subsequently acted upon in good faith following discussions with the then Inspector of Taxes in November 2008; and,

(e) Unlike the position in the UK, it was not possible to discern from the provisions of section 112 of the Taxes Consolidation Act, 1997 (hereinafter referred to as "**TCA 1997**") the intention of the Oireachtas to bring within the charge to tax discretionary exam awards.

D. ***Relevant Legislation***

4. Section 19 of TCA 1997 provides as follows:-

(1) The Schedule referred to as Schedule E is as follows:

SCHEDULE E

1. *In this Schedule, "annuity" and "pension" include respectively an annuity which is paid voluntarily or is capable of being discontinued and a pension which is so paid or is so capable.*

2. *Tax under this Schedule shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable out of the public revenue of the State, other than annuities charged under Schedule C, for every one euro of the annual amount thereof.*

3. *Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for paragraph 2 of that Schedule.*

4. *Paragraphs 1 to 3 are without prejudice to any other provision of the Income Tax Acts directing tax to be charged under this Schedule, and tax so directed to be charged shall be charged accordingly.*

5. *Subsection (2) and sections 114, 115 and 925 shall apply in relation to the tax to be charged under this Schedule.*

(2) Tax under Schedule E shall be paid in respect of all public offices and employments of profit in the State or by the officers respectively described below—

(a) offices belonging to either House of the Oireachtas;

(b) offices belonging to any court in the State;

(c) public offices under the State;

(d) officers of the Defence Forces;

(e) offices or employments of profit under any ecclesiastical body;

(f) offices or employments of profit under any company or society, whether corporate or not corporate;

(g) offices or employments of profit under any public institution, or on any public foundation of whatever nature, or for whatever purpose established;

(h) offices or employments of profit under any public corporation or local authority, or under any trustees or guardians of any public funds, tolls or duties;

(i) all other public offices or employments of profit of a public nature.

5. During the years under appeal, section 112 of TCA 1997 provided as follows:-

(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

(2) (a) In this section, "emoluments" means anything assessable to income tax under Schedule E.

(b) Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purposes of subsection (1):

(i) if in the year concerned the office or employment has never been held, the emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and

(ii) if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held.

6. Section 117 of TCA 1997 provides as follows:-

(1) Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.

(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her.

7. Section 118(1) of TCA 1997 provides that:-

Subject to this Chapter, where –

(a) a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies of –

(i) living or other accommodation,

(ii) entertainment,

(iii) domestic or other services, or

(iv) other benefits or facilities of whatever nature, and

(b) apart from the section the expense would not be chargeable to income tax as income of the director or employee,

then, sections 112, 114 and 897 shall apply in relation to so much of the expense as is not made good to the body corporate by the director or employee as if the expense had been occurred by the director or employee and the amount of the expense had been refunded to the director or employee by the body corporate by means of the payment in respect of expenses, and income tax shall be chargeable accordingly.

8. The estimates of liability the subject of these appeals were made pursuant to Chapter 4 of Part 42 of TCA 1997. However, as nothing turns on the interpretation of these provisions, I do not propose to set them forth in this Determination.

E. <u>Evidence on behalf of the Appellant</u>

9. I first heard evidence from **WITNESS A**, who was a partner in [redacted] (hereinafter referred to as **"THE FIRM"**) and who was a

director and [redacted] of the Appellant. From 201[redacted] until mid-201[redacted], **WITNESS A** was the partner within the [redacted] practice with responsibility for people matters and **WITNESS A** then took on overall firm responsibility for all people matters. In those capacities, **WITNESS A** was familiar with and part of the decision-making process involving all people matters throughout the Appellant.

10. **WITNESS A** explained that the Appellant was an unlimited company and was the arm of **THE FIRM** to which all employees were contracted. They were employees of the Appellant and most of the other costs associated with **THE FIRM** were also aggregated in the company. The Appellant then charged across at a mark-up to **THE FIRM**.

11. **WITNESS A** testified that the Appellant had a graduate intake of approximately [redacted] to [redacted] people every year. Each graduate entered into a contract with the Appellant and the witness gave evidence in relation to the terms of those contracts for the years 2009 to 2014; given that there was at least a two-year gap between a graduate commencing employment with the Appellant and taking their final professional exams, these were the contracts relevant to the years under appeal. The contracts were with graduates working in the Appellant's **DIVISION A** or in their **DIVISION B**.

12. The 2009 contract for graduates entering the Appellant's **DIVISION A** began by stating the following:-

> *"You will be employed by* [the Appellant] *("the Firm") and you may be contractually required to work for* ***THE FIRM*** *or any other international entity associated with* ***THE FIRM****.*

This contract sets out the terms and conditions of your employment, which together with your offer letter, associated appendices, the HR Policies and Procedures Database (employee handbook) and the ICAI training contract, constitutes your Contract of Employment with the Firm. The purpose of this training contract is to provide you with professional accountancy training."

13. In relation to the graduate's position and the commencement and duration of the employment, the contract provided as follows:-

*"You will be employed as an Associate (Employment Classification-Trainee) in our **DIVISION A**. You will be required to be flexible in this position and must be prepared to undertake such other duties as may be assigned to you by the Firm from time to time.*

Your employment will commence on 28 October 2009 for the fixed term of your training period. Your employment under the training contract will cease on [a date either three or 3.5 years later] *when your professional accountancy training will come to an end."*

14. The witness explained that the reference to "*other duties*" was to allow the Appellant to focus on an individual's personal development, and included such matters as training more junior graduates or working in a different part of the business.

15. The contract further provided that:-

"It is a requirement of this contract that you present for all applicable examinations at the first sitting and pass the ICAI examinations within a specific timeframe. The scenarios below outline your exam progression (based on your

*exemption certificate as notified by the ICAI). Please also refer to **THE FIRM** Examination Policy for ICAI Students in the Key Policies and Procedures Guide."*

16. Having set forth three possible scenarios for examination progression, which varied according to the qualification level of the graduate at the time of the commencement of their employment with the Appellant, the contract further provided that:-

"If you do not present for or pass your examinations as set out in the above examination scenarios, the Firm has the right to terminate your contract by giving you four weeks notice in writing or pay in lieu of notice."

17. The witness emphasised that while the FEAs the subject matter of these appeals were only awarded to employees who had passed their final professional exams at the first sitting, it was not a requirement of the employment contract that the employee be successful at the first sitting; instead, employees were required by their contracts to pass the exams in no more than two sittings, save where an exemption was granted for special circumstances such as illness or bereavement. The witness confirmed that the Appellant would pay an employee's expenses and fees for the first sitting of a professional exam but the costs relating to a second sitting had to be borne by the employee.

18. The contract further provided that, from time to time, an employee might be required to work additional hours in order to meet the needs of the business. The witness confirmed that graduate employees could be expected to work very significant levels of overtime during the "busy season" between January and April.

19. In the section of the contract dealing with Termination of Employment, it was provided that:-

"This is a fixed term training contract of employment and therefore, the provisions of the Unfair Dismissals Act, 1977 to 2007, will not apply to the termination of this contract where such termination is by reason only of the expiry of this "fixed term".

The Firm reserves the right to terminate your employment prior to the expiry of the fixed term. In the event of such early termination the Firm undertakes to give you four week's written notice or if the Firm chooses, payment of basic salary in lieu of notice.

Reasons for termination may include, but are not limited to,

…

(h) Failure to sit or pass examinations as defined by the exam progression section of this contract."

20. The witness testified that the contracts amounted almost to a tripartite arrangement between the Appellant, the trainee graduate and the ICAI, the last of which was involved because it had a role in certifying the graduates' professional education. The duration of the contract reflected the ICAI's requirements in relation to working a particular number of days and achieving a certain level of work experience.

21. **WITNESS A** further testified that they were fixed term contracts for employment law purposes, so that a graduate could be released from employment at the end of the training period or completion of the graduate program if the Appellant did not wish to keep them on. **WITNESS A** explained that this was of particular importance when the contracts relevant to these appeals were entered into

between 2009 and 2014, given the uncertain economic climate prevailing at that time.

22. Commenting on the fact that the description of a graduate's duties in the contract was relatively brief, the witness explained that a graduate joining the Appellant would already have been through the recruitment process and would have been advised of the type and nature of the duties expected of them by the time of their entering into the contract. The witness gave as an example of this samples of the recruitment brochures used by the Appellant during the years under appeal which gave significantly more detail about the type of work that a graduate might expect to engage in during the course of their training contract. The witness explained that it was not thought necessary to reiterate this detail in the contracts themselves.

23. The witness confirmed that the contracts for graduate employees taking up a position in the Appellant's **DIVISION B** contained the same terms as those detailed above in relation to contracts relating to **DIVISION A**. The contract for 20[redacted] provided that an employee was expected to complete the Irish Taxation Institute Examinations in accordance with a schedule to be agreed and confirmed with the Appellant's HR Department. The contract for 20[redacted] and subsequent years contained within them specific timetables within which an employee had to pass both the FAE and the ITI Part 3 exams.

24. The witness further testified that the contracts for employees in **DIVISION B** had changed in 20[redacted] and subsequent years and they became specific purpose contracts of employment rather than fixed term contracts; this change had been made for employment law purposes. The new version of the contract provided that:-

"As your employment is expressly linked to your achievement of the AITI Chartered Tax Adviser qualification and associated exam schedule, it is expected that this contract will be of a duration of approximately four years."

25. A graduate commencing employment with the Appellant's **DISISION A** and **DIVISION B** was also required to enter into a standard form ICAI Training Contract. The purpose of that contract was stated to be as follows:-

"(a) The Student wishes to receive this training experience in order to acquire the knowledge, skill and proficiency in the work of a Chartered Accountant so as to be eligible to apply to become a member of Chartered Accountants Ireland (hereinafter "the Institute")

(b) For the purpose of receiving this training experience, the Student has requested the Firm to accept him/her as a trainee for the fixed Term of the training contract (hereinafter "the Term")"

26. The Training Contract then provided as follows in relation to the termination of the agreement:-

"The Student hereby acknowledges and agrees that it is a condition of this contract that he/she will carry out all the educational requirements of the Institute applicable to him/her. The Training Firm may, as part of the terms and conditions of employment, stipulate a lesser number of attempts at each level of examinations than permitted by Chartered Accountants Ireland. The student must attain a successful result within the number of attempts allowed by their employment contract with the firm or the contract may be terminated on that basis. Otherwise, failure on the part of the student to sit for or to pass any Institute examination will not of itself provide grounds for termination of the contract by the Firm, UNLESS the Student has received notice in writing that he

or she is no longer eligible to sit for the Institute examinations, in which event the Firm can terminate this contract by giving one calendar month's notice in writing to the Student and to the Institute."

27. The witness explained that the Appellant had very high expectations of its graduate trainees. The Appellant provided a significant amount of exam support and time off for graduates to focus on their exams and, to ensure that graduates did so, the Appellant required in their contract that a graduate take the relevant professional exam at the first available opportunity and further required that a graduate, in most cases, pass the exam at either the first or second sitting. The witness explained that the ICAI might allow an exam candidate up to 6 attempts to pass an exam (depending on the level of examination) but the Appellant's policy was that a trainee should in general be allowed no more than two attempts.

28. Under the Training Contract, the Appellant undertook as follows:-

"The Firm will take the Student as its trainee for the duration of the term of the Training Contract and will, during the period, use reasonable endeavours to afford the Student such training experience opportunities as may be required to facilitate the Student in becoming sufficiently competent so as to apply to be admitted to membership of the Institute in due course."

29. The witness explained that each student who wished to be admitted to the ICAI was obliged not only to pass the professional exams but also to complete a diary of professional development. That was in a prescribed form and recorded the client work being done by the student, the development of their technical proficiency, the training courses they had received and details of other professional skills development.

30. The Training Contract further provided that the provisions of the Unfair Dismissals legislation would not apply to dismissal consisting only of the expiry of the term of the agreement without it being renewed, or the cessation of the purpose for which the Training Contract had been entered into.

31. Although the employees' contracts referred to **THE FIRM** Examination Policy for ICAI Students being in the Key Policies and Procedures Guide, the witness explained that it was in fact to be found in the Appellant's HR Policies and Procedures Database Index. The section thereof dealing with the Appellant's Examination Policy for CAI Students provided that it was to be read in conjunction with the CAI Training Contracts and the contracts of employment with the Appellant. It reiterated that it was a requirement that students present for all applicable examinations at the first sitting and pass the CAI examinations within the specific timeframe as detailed. In relation to the FAE, it provided that the exam had to be passed either on the first attempt or on a second attempt in the following year. A third attempt at the FAE would be facilitated subject to the timing of the contract and a certain minimum performance rating. The Examination Policy again expressly reserved the Appellant's right to terminate a student's contract in the event that a student failed to present for or pass examinations within the time allowed. The Policy further reserved to the Appellant the right to review, amend or replace the policy, and the witness explained that this was a unilateral right.

32. The Examination Policy also recorded the minimum number of training days required for a graduate who wished to apply for membership of the ICAI, which ranged from a minimum of 592 days to a maximum of 682 days. The document also contained details of the amount of study leave which would be granted to employees sitting their professional exams. For employees sitting their FAE exams for the first time, the Appellant allowed self-funded leave of 25 days (which

an employee would make up by working overtime), paid study leave of 35 days and four days to sit the exams, making a total of 64 days, or almost 13 working weeks. In addition to those leave periods, the witness explained that an employee would also have to attend in excess of 200 hours of lectures or workshops, which were attended outside of working hours. They were also required to attend internal courses designed to assist students. The witness estimated that, overall, an employee studying for their FAE would have a total time commitment of approximately 20 weeks in the year of the exam, and for many students this took place in their second or third year of employment when their work obligations had increased significantly.

33. The witness further explained that there were also very significant time commitments required for employees sitting Part 3 of the ITI exams. **WITNESS A** testified that such employees were granted some 40 days of study leave and also undertook a considerable time commitment in respect of contact hours for lectures and attending courses; **WITNESS A** estimated that this would be a minimum of approximately 60 hours. **WITNESS A** further stated that approximately 75% of the annual graduate intake attempted to obtain both qualifications.

34. The witness also gave evidence in relation to documentation given by the Appellant to graduate employees in relation to their CA Diary of Professional Development. The section there of dealing with competency-led training provided as follows:-

"A competency-based qualification process means that the focus is on work outcomes - the tasks and functions normally carried out by Chartered Accountants (CAs) in the workplace. The route qualification is comprised of three processes:

- *Academic study delivered through the 3rd level colleges*
- *A period of professional development acquired under a training contract*
- *A period of professional education and assessment by the Institute*

The competency-based approach to qualification strengthens the links between the period of professional development and the education and assessment process…"

35. The witness explained that the third of these processes incorporated the professional exams, including the final examinations the subject of these appeals, carried out by the ICAI. The second process was the period of professional development which an employee would undergo while working for the Appellant; this period, as detailed above, ranged from 592 to 682 training days. The witness confirmed that this lengthy time commitment was required to enable graduate employees to acquire key values, skills and competencies, namely professional values, personal and interpersonal skills, and awareness of the practicalities the business environment and functional competencies.

36. The witness also gave evidence in relation to the **DIVISION B** Study & Exam Leave Policy document for 2011. She explained that there was not an equivalent document for **DIVISION A**. The document contained details of the exam awards "*which **DIVISION B**, at its discretion, may choose to make to those candidates who pass their 2011 exams at first attempt*" and further provided *inter alia* that "***DIVISION B** may choose to make awards to candidates who pass their exams in 2011 at first attempt*" and specified what those award amounts might be.

37. The witness testified that these exam awards were discretionary, and that there was no entitlement on the part of the employees to receive these awards. **WITNESS A** further testified that somewhere between [redacted] and [redacted] graduate

employees would sit the FAE in any one year and approximately 75% of that number might succeed in passing their final exam at the first attempt.

38. The witness further testified that there had been changes to the exam award policy in 2014, and that these changes had been made unilaterally by the Appellant.

39. The witness further gave evidence in relation to a sample letter which issued to those employees who had succeeded in passing their FAE at the first sitting in 2015. The letter stated that an examination prize was being awarded to the recipient "*in recognition of your achievement.*"

40. The witness confirmed that there were no other references in the Appellant's literature which referred to exam awards or the payment of exam awards other than those detailed above.

41. The witness further testified that there was an annual decision-making process by the Executive of the Appellant which discussed and decided whether it was appropriate to make exam awards, and that a similar decision was made in April or May of each year when the Executive was deciding on the operational budget for the forthcoming year. Accordingly, **WITNESS A** explained, there were two checkpoints at an Executive level each year at which the appropriateness or otherwise of the awards was discussed.

42. The witness further gave evidence that approximately 85% of the award recipients had left their employment with the Appellant within 12 months of receiving the award. In respect of the period from 2011 to 2016, the witness testified that only 27% of the award recipients were still employed by the Appellant.

43. The witness further testified that although there had been a reduction in the salaries paid to employees in 2009, the exam awards were not cut at that time.

44. The witness reiterated that the exam awards were paid to recognise the personal achievement of the recipient in passing their final exam on the first attempt. It was a very significant personal commitment by any student to undertake the level of study, both in the evenings and on the weekends outside of their standard working week, particularly given the levels of overtime that students were frequently expected to work. The witness further testified that, in **WITNESS A**'s view, there was no contractual right to the exam awards, that they were entirely discretionary, that the awards could not properly be described as a payment for services or for duty as an employee or for performance on the job, and that they were not paid to the recipients as employees.

45. In cross-examination, the witness accepted that the payment of the FEAs was not in any way a reimbursement of expenses. **WITNESS A** did not accept that admission to the ICAI was the ultimate goal of the training contracts. **WITNESS A** said that this was only one aspect of the graduate program, which also encompassed completing all of the training and getting the experience that the Appellant was able to offer. While the witness agreed that the employee contracts meant that the graduate entrants had to be focused on passing their exams, **WITNESS A** did not accept that the contracts demonstrated that the requirement to sit and pass exams went to the core of the contract and the nature of the service provided by the graduate employees.

46. The witness stated that the first communication which a graduate employee would receive from the Appellant which made reference to the exam awards was the Study & Exam Leave Policy document which was sent to those employees in

the autumn or winter of each year. However, **WITNESS A** accepted that students would generally be aware that the large accountancy firms paid these awards. **WITNESS A** further accepted that a potential employee who asked if exam awards were paid would be told that the Appellant did pay them and remarked that it was "*a competitive market.*" **WITNESS A** further confirmed that all accountancy firms of a similar size to the Appellant's firm offered the exam awards. **WITNESS A** accepted that the Appellant would be at a competitive disadvantage in the employment market if it did not make the exam award payments.

47. The witness did not accept that the awards reflected the fact that the recipients had achieved a professional qualification and reiterated that they were a testimonial to the personal achievement of the recipient in passing the exam on the first sitting.

48. When asked to explain why the Appellant paid tax on the marriage gratuities paid to employees on the occasion of their getting married, but not on the exam awards the subject of these appeals, the witness speculated that this might be because the marriage gratuity payments were listed in the firm's benefit statement.

49. I further heard evidence from **WITNESS B**, who was at the time of the hearing an employee of the Appellant who had commenced her employment working in the **DIVISION A**. **WITNESS B** gave evidence that she had commenced her employment under the standard three-year contract in 2010 and first sat the FAE in 2012. She failed the exams on her first attempt but was successful the following year. She therefore did not receive an FEA.

50. The witness further testified that she had first heard about the FEAs just before she went on study leave for her final exams, probably in April or May of 2012. She had heard of them from college friends who were also working for the Appellant.

51. The witness further testified that her understanding was that the awards were made purely for an employee's success in the exams, and were not a payment for performance of services, which were paid for by salary. She said that she believed that the awards were discretionary.

52. In cross-examination, the witness accepted that sitting exams was one of the requirements of her employment contract. She said that she had never received any formal communication from the Appellant in relation to the FEAs. She further testified that she had married while working for the Appellant and had received a marriage gratuity, on which she had paid tax.

53. I further heard evidence from **WITNESS C**, another employee of the Appellant who had joined the firm in 2011 pursuant to the standard employment contract and worked in **DIVISION B**.

54. The witness said that he had succeeded in passing the FAE on his first sitting in 2013 and he had received an FEA of €2,500 as a consequence. He was not successful in passing Part 3 of the ITI exams on his first sitting them in 2014 but was successful on the second attempt. He did not receive any FEA in relation to passing the ITI Part 3 exam.

55. The witness further testified that studying for the final exams of both institutes constituted a very significant commitment of time and effort, and had to be carried out in addition to a normal workload and a frequent requirement to work overtime.

56. The witness gave evidence that he first became aware of the FEAs shortly after he joined the Appellant, when his first study cycle commenced and he received the

Study & Exam Leave Policy document. The witness stated that his understanding of the wording in that document was that the awards were discretionary, and that he did not have a contractual entitlement to same. He said he believed that the awards were made in recognition of the achievement of passing the exams on the first sitting. He testified that he did not believe that the awards were paid for his performance on the job or for achieving the relevant qualifications, for which he was compensated by the payment of salary and salary progression.

57. In cross-examination, the witness stated that he hoped that he would receive an award if he passed one or both final exams at the first sitting, but he did not believe that payment of the awards was guaranteed even if he was successful at the first sitting.

F. Submissions of the Appellant

58. The essence of the Appellant's submission in this appeal was that the FEAs were not chargeable to tax under section 112 of TCA 1997 because they were not made to the individual recipients in respect of their services as an employee and were not "*from*" the employment. The awards were not remuneration derived from "*having or exercising an office or an employment*"; they were instead payments made in recognition of a significant personal and meritorious achievement in passing a significant milestone.

59. The Respondent had, in its Outline of Arguments, submitted that it was well-established that in determining whether or not a payment arises from an employment, four criteria should be considered, namely:-

(a) In the eyes of the recipient, does the payment derive from his or her employment?

(b) Is the employer bound to make the payment?

(c) Is the payment customary or recurrent in character?

(d) Or, is the payment a present which is personal to the recipient?

60. Counsel for the Appellant said that use of the word "*derive*" in this context was inaccurate. He further submitted that the purpose of the employer in making the payment also had to be taken into consideration when considering the first criterion.

61. In relation to the second criterion, Counsel submitted that "*bound*" in this context meant contractually bound, and that the evidence before me made it clear that there was no contractual entitlement for employees to receive the FEAs, notwithstanding that there may have been a practice of paying same. He further submitted that even if he was incorrect in this regard, this was not dispositive; the real issue was whether the awards were payments for services.

62. In relation to the third criterion, Counsel submitted that the correct analysis was whether the payment was recurrent or customary to the recipient or to the holder of a particular office, and not whether such payments were generally made on a recurring basis.

63. In relation to the fourth criterion, Counsel submitted that this was overly narrow, and that the correct test was whether the payment was made in return for services. Counsel submitted that the correct test in determining whether the payment of the FEAs fell within section 112, or alternatively section 118, was that

encapsulated in the case of ***Hochstrasser –v- Mayes* 38 TC 673**, which is considered in greater detail later in this Determination.

64. Counsel referred me to the decision of the House of Lords in ***Blackiston –v- Cooper* [1909] A.C. 104**, where that Court held that voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use were, if given for the purpose of increasing his stipend, assessable to income tax as "*profits accruing to him by reason of his office*." Counsel submitted that it was clear from the judgment that the voluntary offerings were given to the incumbent "*substantially in respect of his service as incumbent*" and therefore represented payment for services. Counsel further emphasised that the recurrent nature of the payments to the Appellant was of importance and that Lord Ashbourne had accepted that while the offerings were made as personal gifts as marks of esteem and respect, they were "*given to the vicar as vicar*" and formed part of the profits accruing by reason of his office. Counsel submitted that the element of continuity and the fact that the offerings were made for the vicar's services made the decision clearly distinguishable from the present appeal.

65. Counsel further referred me to the decision in ***Reed –v- Seymour* 11 TC 625** where the committee of a cricket club had granted a benefit match to a professional cricketer in their service. The proceeds of the match and public subscriptions were invested in the name of trustees of the Club and the income, and subsequently the proceeds of the realisation of the investments, were paid over to the cricketer. The House of Lords held that the proceeds of the benefit match to the cricketer did not constitute a profit accruing to him in respect of his office or employment, but were instead in the nature of a personal gift and not assessable to income tax.

66. Counsel referred me to the decision of Rowlatt J in the High Court, who observed that the key question was whether the monies were in the nature of a personal gift or whether they were paid as remuneration, *i.e.* in respect of services. While employment in a particular office or employment might be a *sine qua non* for a particular payment, it did not necessarily follow that such employment was the *causa causans* for the payment – the question was whether the active cause or reason for the payment was services rendered in the course of the employment.

67. Counsel further submitted that Sargant L.J., giving the minority opinion in the Court of Appeal, found that the payment to the Appellant was "*not a payment for services rendered in the true sense*" and went to observe that:-

> *"…the main, the substantial reason why these monies were to be paid to Seymour was, not because he had been a mere member of the Eleven and as part of an addition to what was given to him by virtue of his office, but as a personal present by way of recognition of the pleasure that had been afforded to patrons of the Club and the general public who had flocked to see the play, by the brilliance of the particular individual cricketer's play."*

68. Counsel further pointed out that Sargant L.J. had also considered and distinguished the line of authorities culminating in ***Blackiston –v- Cooper***, which the Lord Justice noted all involved the "*systematic and recurrent augmentation of the remuneration of ministers of religion*" and in each case "*the object was to benefit the office and not to benefit the particular individual*."

69. In the House of Lords, Viscount Cave stated that it was settled that a liability to income tax under Schedule E arose on "*all payments made to the holder of an office or employment as such – that is to say, by way of remuneration for his services, even though such payments may be voluntary – but that they do not include a mere gift*

or present (such as a testimonial) which is made to him on purely personal grounds and not by way of payment for his services."

70. Viscount Cave endorsed the test voiced by Rowlatt J, namely whether the test was a personal gift or was it remuneration. Viscount Cave said that in the case before them, the purpose of the payment was "*not to encourage the cricketer to further exertions but to express the gratitude of his employers and the cricket-loving public for what he has already done and their appreciation of his personal qualities.*" Counsel submitted that this resonated with the evidence in the appeal before me, and the fact that the vast majority of the recipients of FEAs left the Appellant's employment showed that the payments were not an inducement for the recipients to stay in the Appellant's employ.

71. Counsel further referred me to the judgment of Lord Phillimore, who said that he was not compelled by any of the authorities to hold that "*an employer cannot make a solitary gift to his employee without rendering the gift liable to tax under Schedule E. Nor do I think it matters that the gift is made during the period of service and not after the termination, or that it is made in respect of good, faithful and valuable service."*

72. Counsel then turned to the decision of the Supreme Court in ***Wing –v- O'Connell*** **[1927] 1 IR 84**, where Kennedy C.J. had stated that the payment of £400 to a professional jockey was either a profit of Mr. Wing's vocation or was instead a mere gift or present, not a subject-matter of taxation. The Chief Justice said that a "*mere present*" was "*something not earned by professional services, something not paid for on Mr. Wing's part by professional work.*" The Chief Justice then went on to say:-

"I cannot, however, find in the case a fact or a trace of positive evidence of the purely personal reasons, the predominating "personal equation," which would

stamp this payment with the character of a mere gift or present, and prevent it from being reckoned as a professional receipt, or emolument. There is no evidence or suggestion that the money was sent to Mr. Wing for any such reason as that he was in ill-health and required change of climate, or that he was tired and needed a holiday, or that he was poor … or had a large family, or that he was well-mannered, or good-looking, or kind to animals; or that he was a paragon of manliness or virtue. The evidence is quite clear. The letter which he received with the cheque requests him to accept it for his "very fine riding of Ballyheron at the Irish Derby.'"

73. Counsel submitted that the concept of a personal gift was clearly far wider than the possibilities enumerated by the Chief Justice, and submitted that it was sufficiently broad to encompass the payments made to the Appellant's employees in recognition of their achievements in passing their final exams at the first sitting. In essence, it was success in the exams rather than the provision of services that was the "*real reason*" for the payments the subject of the appeal.

74. Counsel further referred me to the decision of the Court of Appeal in ***Moorhouse –v- Dooland*** **[1955] 1 Ch. 284**. That case concerned another professional cricketer whose contract of employment provided that he would be paid a salary and a certain sum for expenses and talent money, and furthermore that "*collections should be made for any meritorious performance by the professional with bat or ball in certain matches…*" The cricketer was assessed to income tax on the proceeds of certain such collections and the Court of Appeal held that "*the test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, that is, by way of remuneration for his services.*" The Court further held that if the recipient's contract of employment

entitled him to receive the voluntary payment, that was a strong ground for holding that the payment accrued by virtue of the employment. The fact that a voluntary payment was of a periodic or recurrent character afforded a further, but less cogent, ground for the same conclusion. In contrast, if a voluntary payment was made in circumstances which showed that it was given by way of present or testimonial on grounds personal to the recipient, the proper conclusion was likely to be that the voluntary payment was not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual, paid and received by reason of his personal needs or by reason of his personal qualities.

75. Applying those criteria to the facts before him, Evershed M.R. concluded that the collections received by the cricketer constituted "*in truth and substance*" part of the earnings of his profession, and could not fairly be called "*mere personal presents*" distinct from his earnings. Counsel submitted that the facts of the ***Doorland*** case, and in particular the fact that there was a contractual right to the payments, they were periodic and recurrent and had been received on eleven occasions over the course of the relevant tax year, meant that the case was clearly distinguishable from the issue before me in the instant appeal.

76. Counsel for the Appellant then turned to the decision of the House of Lords in ***Hochstrasser –v- Mayes* 38 TC 673**. In that case, the taxpayers' employer, ICI, operated a scheme under which married employees transferred from one part of the country to another might be offered a loan to assist in the purchase of a house and, if the house was kept in good repair, payment of the amount of the loss due to depreciation in its value in the case of certain events, including its sale for less than the original purchase price in consequence of the employees being transferred.

77. In the High Court, Upjohn J, referring *inter alia* to the Easter offerings case and the cricketers' benefits decisions discussed above, stated as follows:-

> *"In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration and money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."*

78. Counsel noted that Upjohn J further indicated that in the authorities he had considered, the payments under consideration were either a profit from the employment or else a present. Upjohn J also accepted, on the authority of the decision in ***Prendergast –v- Cameron* 23 TC 122**, that payments could be made to a taxpayer in connection with their office which might not fall into the category of a profit from that office.

79. In the House of Lords, Viscount Simonds stated that the test given by Upjohn J in the High Court "*cannot be improved upon*" and went on to state:-

> *"My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the causa causans or only the sine qua non of benefit, which perhaps is only to give the natural meaning to the word "therefrom" in the Statute, it must often be difficult to draw the line and say on which side of it a particular case falls. But I think the approach should not be exactly that of Parker L.J. It is for the Crown, seeking to tax the subject, to prove that the tax is*

exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the Statute but arbitrarily inferred from it."

80. Counsel for the Appellant submitted that this passage, which would be cited with approval in later decisions, is authority for the proposition that the onus was on the Respondent to show that the FEAs the subject of this appeal arose from the recipients' employment, and were not a mere gift. He submitted that the evidence before me could not support such a finding.

81. Lord Radcliffe stated in the same case that:-

"The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such." It has been said that it must have been made to him "in his capacity of employee." It has been said that it is assessable if paid "by way of remuneration for his services", and said further that this is what is meant by payment to him "as such." These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the Statute. But it is perhaps worth observing that they do not displace those words. For my part I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee."

82. In ***Laidler –v- Perry*** **[1966] A.C. 16**, the employing company gave every one of their employees a £10 voucher every Christmas and the question arose as to

whether these were chargeable to tax as emoluments of an office or employment. Counsel for the Appellant referred me to the decision of Lord Reid in the House of Lords who, having quoted from the judgments of Viscount Simonds and Lord Radcliffe in ***Hochstrasser***, found that on the facts before him employment was the *causa causans* of the annual gifts made to the employees stated as follows:-

> *"The real question appears to me to be whether these vouchers can be said to be mere personal gifts, inspired not by hope of some future quid pro quo from the done but simply by personal goodwill appropriately signified at Christmas time. That is a question of fact…"*

83. Lord Reid further went on to state:-

> *"I do not think it necessary to deal with the other authorities cited or referred to in argument. In some it is said that one ought to look at the matter primarily from the point of view of the recipient, and that may well be right where the donor is not the employer. But if one is looking for the causa causans of gifts made by the employer it must surely be right to see why he made the gifts."*

84. I was further referred to the judgment of Lord Morris of Borth-y-Gest, who found that:-

> *"The reason why the vouchers were distributed was that the directors wished to maintain a feeling of happiness among the staff and to foster a spirit of personal relationship between the management and staff"*
>
> and,
>
> *"The vouchers were not distributed to the staff workers on any individual or personal grounds nor were there any special or particular reasons which were peculiar to any of them."*

85. Counsel for the Appellant submitted that it was evident from the foregoing that the evidence before me was entirely different to that in ***Laidler –v- Perry***. Counsel further referred me in relation to the relevance of the employer's intentions to the decision of the House of Lords in ***Tyrer –v- Smart*** **[1979] STC 34**, where Lord Diplock stated:-

> *"Where the benefit is granted by and at the expense of the employer or its parent company, as distinct from benefits derived from third parties, such as a huntsman's field money or a taxi driver's tips, the purpose of the employer in granting the benefit to the employee is an important factor in determining whether it is properly to be regarded as a reward or return for the employee's services. The employer's motives in conferring the benefit may be mixed and the determination of what constitutes his dominant purpose is a question of fact for the commissioners to determine. Their finding on this matter is therefore one with which a court whose jurisdiction on appeal is limited to correcting errors of law by the commissioners should be slow to interfere."*

86. In the case of ***Shilton –v- Wilmshurst*** **[1991] 1 A.C. 684**, the Appellant taxpayer, who was a professional football player, agreed to an early transfer from one club to another on condition that the club he was leaving paid him a lump sum of £75,000. The issue for determination in the case was whether that payment was an emolument "*from*" his employment with the new club. Giving his judgment in the House of Lords, Lord Templeman stated:-

> *"Section 181 is not limited to emoluments provided in the course of an employment. The section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and, secondly, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument "from an employment" means an emolument "from being*

or becoming an employee." The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived "from being or becoming an employee" on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received "from the employment.""

87. Later in his judgment, Lord Templeman reiterated that "*an emolument arises from employment if it is provided as a reward or inducement for the employee to remain or become an employee and not for something else."* Counsel for the Appellant submitted that this reinforced his submission that the FEAs could only be taxable if they were made in return for the services provided by the recipients in acting as employees.

88. Counsel next referred me to the decision of Edwards J in ***Minister for Agriculture –v- Barry*** **[2009] 1 I.R. 215**, where it was held that the requirement of mutuality of obligation had to be satisfied if a contract of service was to exist; there had to be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality was not present, then either there was no contract at all or whatever contract there was must be a contract for services or something else, but not a contract of service.

89. Counsel submitted that in the instant appeal, it was simply a misstatement to suggest that any requirement on employees of the Appellant not to fail exams twice could in any way be said to be the provision of services to the Appellant, or

a duty to the Appellant in respect of which remuneration was paid. He submitted that, while obtaining a professional qualification was undoubtedly an important element of the relationship between the Appellant and its employees, the training and experience gained by the employees while working for the Appellant was of far greater importance.

90. Counsel further submitted that services provided by the Appellant's employees were those set out in the recruitment documentation, such as attending clients' premises, carrying out audit work, preparing tax computations and so on. He submitted that it was a complete misuse of language to suggest that an employee was providing a service in passing an exam. He further emphasised that the awards were not paid simply for passing the final professional exams, but to recognise the achievement of those employees who succeeded in passing the exams at the first sitting.

91. Counsel for the Appellant next referred me to a number of cases in which the specific issue of exam awards was considered by the courts. The first of these was ***Ball –v- Johnson* 47 TC 155**. In that case, a bank expected its male clerical staff, including the appellant therein, to study and sit for the examinations of the Institute of Bankers, the better to qualify themselves for duties as bank clerks and subsequently as bankers. The staff hand book issued to them stated that each male clerk "*shall study and sit for*" the examinations and that the bank would reimburse part of the candidate's tuition fees and paid cash awards to those who passed. Failure to sit for the examinations would not necessarily disqualify a man for continued employment, but passing them was taken into account when assessing fitness for promotion. The appellant received the usual cash awards in 1962 and 1966 for passing the exams and the question arose as to whether those awards were assessable under Schedule E. HMRC had contended that the services

required by the bank included studying and sitting for the examinations and that the awards were remuneration for those services. The Special Commissioners and, on appeal, the High Court found that the reason for the payments was the appellant's personal success in passing the examinations and they were not remuneration for his services with the bank.

92. The Special Commissioners found as material facts that the appellant regarded the awards made to him by the bank as a reward for having sat and passed the exams. The work had been done in his own time when he joined the bank and he did not think that there was any legal obligation on the bank's part to pay him an award, but he understood it was the normal practice of the bank when an employee was successful. Counsel submitted that I should make equivalent findings on the evidence before me in the instant appeal.

93. Having considered the decisions in ***Hochstrasser*** and ***Laidler –v- Perry***, the Special Commissioners found as follows:-

> *"In the present case, we find on the facts contained in the documents put before us and the evidence given by the Appellant and Mr. Bramley, the general staff manager of the Midland Bank, which we accept, that the payments in question were not made to the Appellant for acting as or being an employee of the bank. We take the view that the Appellant had no legal entitlement to the payments which were discretionary on the part of the bank. We accept that the possibility of obtaining the payments was known to the Appellant at the time of his commencing employment at the bank and that the passing of the exams could be said to be an attraction to an employee as advancing his prospects with the bank, no doubt also enhancing the bank's reputation as an employer of staff (as well as resulting in a more useful employee to the bank); nevertheless, in our view it was not within the terms of the Appellant's employment with the bank that he*

should pass the examinations and receive additional remuneration therefrom. We find that in so doing he was not performing his duties as an employee of the bank. We accordingly hold that the reason for the payments was the Appellant's personal success in passing the examinations and the payments were not remuneration for his services with the bank."

94. In the High Court, Plowman J referred to the dicta of Viscount Simonds in ***Hochstrasser*** that the onus was on the Crown to prove that a payment was a reward for an employee's services and to Lord Reid's statement in ***Laidler –v- Perry*** that the motive which inspires the payment by the employer was an important matter and was a question of fact. Plowman J further cited with approval the decision of the Scottish Court of Session in ***Inland Revenue –v- Morris* 44 TC 685**, and noted Lord Cameron's statement that "*The question at the end of the day as I see it in such a case as this is whether on the evidence a particular payment is a recognition of service or remuneration for work done in the employment.*"

95. Plowman J concluded that the Special Commissioners had made a finding of fact that the payments received by the appellant were not payments made for being or acting as an employee of the bank, that the reason for the payments was the appellant's personal success in passing the exams, that the Special Commissioners had applied the correct legal tests, and that there was evidence before them which entitled them to reach their conclusion.

96. Counsel for the Appellant next referred to me to ***R –v- Savage*** **[1983] 2 S.C.R. 428**, a decision of the Canadian Supreme Court. In that case, the respondent taxpayer voluntarily and on her own time took three courses designed to increase her knowledge and understanding of the insurance industry. She received from her

employer $300 as a result of passing the examinations in accordance with a company policy designed to encourage the self-upgrading of staff members. The issue before the Court was whether this was liable to income tax. The Supreme Court held that it was *prima facie* liable, with the Court noting that income need not constitute remuneration for services in order that it be income from employment under the relevant Canadian legislation, which taxed *inter alia* "*benefits of any kind whatever … received or enjoyed … in respect of … an office or employment.*" The Court held that the cash payment of $300 easily fell within the category of benefit and that the payment was in respect of her employment because the employee took courses to improve her knowledge and efficiency in the company business and for better opportunity of promotion.

97. Counsel submitted that that this decision was of little or no assistance to me because the Court was considering the wording of the Canadian legislation, which was manifestly different to the Irish equivalent. He emphasised in particular the use of the words "*in respect of*" in the Canadian legislation and submitted that this was much broader in its scope than the "*therefrom*" found in section 112. He said this was supported by the reference in the judgment of Dickson J to an earlier decision of the Canadian Supreme Court, ***Nowegijick –v- The Queen*** **[1983] 1 S.C.R. 29**, which held that:-

> *"The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with." The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters."*

98. Counsel further submitted that the decision further made clear that the Revenue's alternative argument in relation to section 118 could not succeed, because their interpretation of section 118 would effectively render section 112 surplusage.

99. Turning to the Respondent's written submissions, Counsel for the Appellant noted that they asserted in paragraph 18 that:-

> *"Each of these contracts clearly place significant emphasis on the training nature of the employee's role with the Appellant. The employees are, in effect, trainee accountants and tax advisors within the firm. The duration of the contracts are of a fixed term directly related to the time it takes to complete these professional exams, referred to as the "training period". The duties of the employees are described as presenting for and passing exams and while "other duties may be assigned … from time to time" the contract is solely a training contract with the presenting for and passing exams at the core of the contract of employment."*

100. Counsel for the Appellant submitted that this was a complete and unfair misconstruction and misquotation of the substance of the employee contracts, and was strongly contradicted by the evidence heard by me. He further reiterated that there was no requirement in the trainee contracts that an employee pass the final professional exams at the first sitting, and doing so could not be properly characterised as a duty of the employment or the provision of a service by the employee.

101. Counsel further submitted that the Respondent had mistakenly characterised the decision in ***Moorhouse –v- Dooland*** as an evolution of the ***Hochstrasser*** decision; he submitted that this was manifestly incorrect as ***Moorhouse*** predated the decision in ***Hochstrasser***. Counsel further submitted that the Respondent's

reliance on alleged inconsistencies between the Appellant's treatment for tax purposes of the FEAs and other exam awards and wedding gratuities was misplaced and irrelevant; the sole issue before me was the question of whether the FEAs were liable to income tax.

102. Counsel further submitted that the change from fixed-term contracts to specified purpose contracts in **DIVISION B** in 20[redacted] and subsequent years was to avoid the possibility of extensions to those contracts giving rise to contracts of indefinite duration pursuant to the provisions of the Protection of Employees (Fixed Term Work) Act 2003; the change was made solely for employment law reasons. He further submitted that the specific purpose of the contract was the "*achievement of the AITI qualifications and the associated exam schedule*", and was more than the mere passing of the exams.

103. Turning to section 118, Counsel first submitted that the Respondent's reliance upon this section as the basis for an alternative argument for liability on the Appellant's part appeared to have been arrived at relatively late in the day, and had not been referenced in earlier correspondence between the parties.

104. Counsel submitted that the wording of earlier English legislation was essentially identical to the relevant provisions of TCA 1997; section 156 of and the Ninth Schedule to the Income Tax Act 1952 were equivalent to section 112 of TCA 1997, and sections 160 and 161 of the 1952 Act were respectively equivalent to sections 117 and 118 of the Irish legislation.

105. Counsel referred me to the decision in ***Wicks –v- Firth*** **56 TC 318**, where the trustees of a fund established by ICI made awards to certain children of ICI employees to help them with their further education. The question considered by the courts was whether those awards were benefits under the relevant legislation

and, as such, liable to tax. In the House of Lords, referring to the ***Hochstrasser*** decision, Lord Denning stated:-

> *"Before 1976* [*i.e.* under the 1952 Income Tax Act] *each father was chargeable to tax under Schedule E on the "emoluments therefrom" – that is, the "emoluments from" his employment. The word "emolument" covers any advantage which can be turned to pecuniary account. The word "therefrom" brings in the test of causation. In order that any pecuniary advantage can be taxable in the hands of the employee, the employment has to be the causa causans of the money being received. It is not sufficient for the employment to be the causa sine qua non. Nor is it sufficient to say that the employee would not have received it unless he had been an employee. Thus, when I.C.I. gave financial assistance to any of their employees who wanted to buy a house or to move house, the employee was held not liable to tax on the amount. The payment was a housing grant. It was not a reward or return for his services. So he was not taxable on it…*
>
> ***The 1976 Act –*** *Thereafter many employers granted "fringe benefits" to their employees. The employers used them as a means of giving benefits to their employees free of tax. So much so that in 1976 Parliament enacted a comprehensive clause designed to make fringe benefits taxable in the hands of the recipients. They did so by s 61 of the Finance Act 1976, which was in these terms: "(1) Where in any year a person is employed in director's or higher-paid employment and – (a) <u>by reason of his employment</u> there is provided for him, or for others being members of his family or household, any benefit to which this section applies; and (b) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income, there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, <u>an amount equal to whatever is the cash equivalent of the benefit.</u> (2) The benefits*

to which this section applies are living or other accommodation, entertainment, domestic or other services, and other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this subsection)…

I will take the important phrases in order.

By reason of his employment – *It seems to me that the words "by reason of" are far wider than the word "therefrom" in the 1970 Act. They are deliberately designed to close the gap in taxability which was left by the House of Lords in Hochstrasser –v- Mayes. The words cover cases where the fact of the employment is the causa sine qua non of the fringe benefits; that is, where the employee would not have received fringe benefits unless he had been an employee. The fact of employment must be one of the causes of the benefit being provided, but it need not be the sole cause, or even the dominant cause. It is sufficient if the employment was an operative cause – in the sense that it was a condition of the benefit being granted. In this case the fact of the father being employed by I.C.I. was a condition of the student being eligible for an award. There were other conditions also, such as that the student had sufficient educational attainments and had a place at a University. But still, if the father's employment was one of the conditions, that is sufficient. If two students at a university were talking to one another - both of equal attainments in equal need – and the one asked the other "Why do you get this scholarship and not me?", he would say "Because my father is employed by I.C.I.". That is enough. The scholarship was provided for the son "by reason of the father's employment".*

The cash equivalent of the benefit – *This section is designed to overcome the evasion of tax by giving "fringe benefits". These fringe benefits are often in kind and not in cash. They may be such as not to be able to be turned to pecuniary*

account. Nevertheless Parliament intends them to be taxed. It does so by saying that tax is to be charged on "an amount equal to whatever is the cash equivalent of the benefit". But, if the fringe benefit is in cash and not in kind, then it seems to me that the tax is to be charged on the cash." [emphasis added]

106. Counsel submitted that it was clear from the decision that Lord Denning held that "*by reason of*" an employment was a much wider test than "*therefrom*". Counsel further submitted that it was equally clear from the decision that, prior to the amendment of the UK legislation by the 1976 Act, fringe benefits had been subject to the "*therefrom*" test, and this was why the legislation has been amended. He made the point that there had been no equivalent amendment in this jurisdiction, and submitted that accordingly the taxation of benefits in kind in this jurisdiction pursuant to section 118 was still subject to the criteria laid down in ***Hochstrasser***. He further submitted that the provisions of section 117 did not alter the position in this regard.

107. Counsel for the Respondent further submitted that section 118 simply didn't catch cash payments, and referred me to the decisions in ***Tennant –v- Smith* 3 TC 158**, ***Wilkins –v- Rogerson* 39 TC 344** and ***R –v- Savage*** (cited *supra*) in support of this submission. He further submitted that if the Respondent's interpretation of section 118 was correct, it would render section 112 entirely superfluous as all wages and salaries could be taxed under section 118. Counsel further submitted that the treatment of benefits in kind by section 118, which provides that so much of an expense which is not made good by the employee will be subject to section 112 as if the expense had been incurred by the employee and the amount of the expense then refunded by the employer, made it even clearer that the sections were not intended to apply to the payment of awards by an employer.

108. Counsel further submitted that payments of cash could not constitute "*other benefits or facilities of whatever nature*" within the meaning of section 118(1)(a)(iv). He submitted that, having regard to the balance of that subsection, such an interpretation would be contrary to the principle of *ejusdem generis* and referred me in this regard to the Law Reform Commission's *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC – CP14 – 1999 at paragraphs 1.063-6) and Blackstone's *Commentaries on the Laws of England*. He pointed out that, as seen in ***Wicks –v- Firth***, the English legislation was much broader than its Irish equivalent, referring as it did to "*other benefits and facilities of whatsoever nature (whether or not similar to any of those mentioned above in this sub-section)…*" Counsel further referred me in this regard to section 5 of the Interpretation Act 2005, to ***Irish Life & Permanent –v- Dunne*** **[2015] IESC 46**, to the Dáil Debates relating to the enactment of section 24 of the Finance Act 1958, which was the statutory precursor to section 118, and to ***Revenue Commissioners –v- O'Flynn Construction*** **[2013] 3 IR 533**.

109. In closing, Counsel for the Appellant said that the Appellant's position could be summarised as follows:-

(a) The exam awards at issue in the appeal were not caught by Schedule E, either under section 112 or 118;

(b) Under ***Hochstrasser***, they would only be liable to tax if they were a reward for services or a payment for being an employee;

(c) The awards were not periodic or recurrent, nor were they an incremental amount similar to the 'Easter offerings' cases;

(d) The awards were discretionary;

(e) It was an utter misconstruction to suggest that an employee's only purpose or duty under the training contracts was to pass exams. The awards were only made to those employees who passed their final exams at the first

sitting. Furthermore, the training contracts were fixed term contracts, save for the later contracts in **DIVISION B**, which were changed for employment law purposes in a difficult economic climate;

(f) The purpose of the contract from the Appellant's perspective was to have employees to do work; and,

(g) Even if a payment was made under or pursuant to a contract, it still had to be a reward for services to be liable to tax under section 112 or 118, and the FEAs at issue could not be said to be such a reward.

G. Submissions of the Respondent

110. Counsel for the Respondent submitted that the Appellant's case was essentially premised upon the statement by Upjohn J in ***Hochstrasser*** that to be a profit arising from an employment, *"the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."* Counsel submitted that this statement had to be read in the light of the later decision of Lord Radcliffe in the House of Lords, who had stated the various decisions on the meaning of the word "*from*" had provided glosses, but could not displace the words of the legislation. He held that a payment to an employee "*is assessable if it has been paid to him in return for acting as or being an employee."* Counsel submitted that it was this test which had been applied in the more recent cases, and that it was the test I should apply to decide the instant appeal.

111. Counsel submitted that, notwithstanding certain suggestions to the contrary in the UK authorities, the burden of proof in the appeal lay on the Appellant to show that the FEAs were not made to the Appellant's employees in return for them

acting as or being employees. She further submitted that it had consistently been the Respondent's position, as evidenced by Tax Briefings, TALC minutes and Revenue Guidance Notes, that exam awards were not assessable provided that they were of an amount that could reasonably be regarded as a reimbursement of the likely expense of studying for and sitting the exam.

112. Counsel for the Respondent submitted that it was illustrative to consider the payments at issue as "*exam bonuses*" rather than as "*exam awards*". She submitted that they were in effect bonuses paid to employees who succeeded in passing their final exams at the first sitting.

113. Counsel further submitted that the Appellant had somewhat confused the distinction between the services which the Appellant provided to its clients, and the services which were rendered to the Appellant by its employees. She submitted that, because it was a requirement of the training contracts that the employees sit and pass their exams, that requirement was a term of or duty under the contract, and the employees were providing a service to the Appellant in meeting that requirement. She submitted that this was evidenced by the fact that the Appellant paid its employees throughout the period when they were studying for and sitting the exams. She submitted that it was further demonstrated by the fact that an employee could have their employment terminated if they did not sit and pass their exams within the time allowed by the contracts. In essence, she submitted, an employee is providing a service under the contract of employment if he is doing what his contract of employment requires him to do.

114. Counsel further submitted that the employment contracts themselves showed that the purpose of the contract was to provide professional accountancy training and to undertake such other duties as might be assigned to the employee from time to time. She submitted that **WITNESS A**'s evidence was consistent with this,

in so far as **WITNESS A** had said that **WITNESS A** viewed the training contracts as a transition between college and work, and had emphasised the education and training obligations imposed on trainees.

115. Counsel submitted that the trainees working for the Appellant were being employees if they were complying with the terms of their employment contracts, and so they were being employees if they sat and passed their exams. If they received a bonus for passing those exams, then she submitted that they met the test enunciated by Lord Radcliffe in ***Hochstrasser***.

116. Turning to ***Blakiston –v- Cooper***, Counsel for the Respondent pointed out that Lord Ashbourne had stated that:-

> *"It was suggested that the offerings were made as personal gifts to the vicar as marks of esteem and respect. Such reasons no doubt played their part in obtaining and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar and that they formed part of the profits accruing by reason of his office."*

117. Counsel submitted that in the instant appeal, there could be no doubt but that the FEAs were paid to the trainees as trainees. She further referred me to ***Wing – v- O'Connell*** and submitted that if one substituted the word "*trainee*" for "*jockey*", it was clear that the case was analogous to the instant appeal and that, applying same, I should find that the FEAs were an emolument which arose or accrued to the trainees by reason of their vocation as trainees, and are therefore liable to income tax. She submitted that this was the appropriate authority to consider in this jurisdiction, and was in any event consistent with the conclusion reached in ***Hochstrasser***.

118. Turning to the ***Hochstrasser*** decision, Counsel submitted that it was important to have careful regard to the particular facts in that case. She emphasised that Jenkins L.J. had found that the housing agreement was a collateral agreement and a balanced arrangement, stating that:-

"The housing agreement constitutes a genuine bargain, advantageous no doubt to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals."

119. Similarly, Pearce L.J. stated:-

"If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thereby making him a more contented worker) and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction."

120. Counsel submitted that these passages showed that the housing agreement pursuant to which the payments were made in ***Hochstrasser*** was a stand-alone agreement, outside the contract of employment. Counsel submitted that Lord Radcliffe had accepted in his decision that the case was "*near the borderline*". She submitted that the case was an unusual one and unique because the payments were made pursuant to a separate and collateral agreement, and not under the contract of employment.

121. Counsel for the Respondent accepted that ***Laidler –v- Perry*** was authority for the proposition that the employer's reasons for making a payment were one relevant consideration to be taken into account, and the Appellant had submitted

that its reason was to recognise the hard work and personal achievement of the recipients. However, she submitted that someone who passed their final exams on the second attempt would also have attained a personal achievement and would have put in a great deal of hard work, so these could not be the only reasons for the Appellant making the awards. She submitted that there was a benefit for the Appellant in having a trainee pass the exams at first sitting, because they would not have to incur the cost of paying a trainee while they studied for and sat their repeat exams. She further submitted that other benefits to the Appellant was having a qualified employee who could be charged out to the market at a higher rate and also keeping the Appellant competitive in the recruitment market in circumstances where similar awards were paid by other professional firms. Counsel further submitted that it was telling that the awards continued to be paid and had not been reduced in quantum in 2009 and subsequent years, when salary amounts had been reduced. Counsel further submitted that the Appellant's submission that the payments were made solely in recognition of the recipients' personal achievements was undermined by the fact that different amounts were payable depending on what qualification had been attained.

122. Counsel further submitted that the Appellant had somewhat changed its position in this regard, in that earlier correspondence with the Respondent and the Notices of Appeal had stated that the awards were made "*in respect of success in the passing of certain exams (principally those of the Institute of Chartered Accountants and the Irish Taxation Institute) and attaining the consequent professional designation such as ACA or AITI*" or, more colloquially, getting "*letters behind their name*".

123. Counsel further pointed out that Lord Reid had stated in ***Laidler –v- Perry*** that:-

"There is a wealth of authority on this matter and various glosses on or paraphrases of the words in the Act appear in judicial opinions, including in this House. No doubt they were helpful in the circumstances of the cases in which they were used, but in the end we must always return to the words in the statute and answer the question – did this profit arise from the employment? The answer will be "no" if it arose from something else."

124. Counsel submitted that this was a clear and correct distillation of the applicable test, and it did not need to be further complicated. If you get a payment from your employment, from being an employee, then it is taxable. In the instant appeal, the function, or the most important function, of the contracts of employment was sitting and passing the professional exams. Any payment received in respect of achieving that had to be a payment from the employment.

125. Turning to ***Ball –v- Johnson***, Counsel for the Respondent submitted that the case was clearly distinguishable from the instant appeal because it was not a condition of the employee's contract in that case that he sit and pass the exam. If he did not do so, he would be exhorted to do so and might not be considered for promotion, but it would not disqualify him for employment. In contrast, the Appellant's contracts provided that it was a fundamental term that the employees pass their exams within a stated period, and the contracts would be terminated if the employee did not satisfy this requirement.

126. She further pointed out that the General Commissioners in deciding the appeal at first instance had applied the test enunciated by Lord Radcliffe in ***Hochstrasser*** that "*the sum is assessable if it has been paid to him in return for acting as or being an employee*".

127. Counsel further stated that HMRC in the U.K. had interpreted the ***Ball –v- Johnson*** decision as meaning that an exam award would be exempt from taxation if, *inter alia*, it was made at the discretion of the employer and if it was not part of the employee's duties to sit and pass the exams.

128. Counsel for the Appellant next referred me to ***Brumby –v- Milner*** **51 TC 583**, which she submitted showed a preference for the more straightforward test applied by Lord Radcliffe in ***Hochstrasser***, without the emphasis on the payments being required to be a payment or reward for services. The case concerned an employee profit-sharing arrangement under which payments were made from a trust to certain employees. The trust was wound up and the question for determination was whether the capital payments made in the winding up to the employees arose as a consequence of the winding up or whether they were instead emoluments of the recipients' employment. Russell L.J., giving the judgment of the Court of Appeal, stated:-

> *"The question in any case whether a receipt by an employee is to be regarded for present purposes as "emoluments or profits from" the employment has given rise to a number of judicial attempts to analyse or define or elaborate upon those words. Both sides, however, are at one in accepting the language of Upjohn J approved by the House of Lords in Hochstrasser…*
>
> *"In my judgment", Upjohn J. said, "the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."*
>
> *To this may be added the phrase of Lord Radcliffe in the same case….:*

"The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such." It has been said that it must have been made to him "in his capacity of employee." It has been said that it is assessable if paid "by way of remuneration for his services", and said further that this is what is meant by payment to him "as such." These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the Statute. But it is perhaps worth observing that they do not displace those words. For my part I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee.""

129. In the House of Lords, Lord Wilberforce, having referred to the relevant statutory provisions, stated:-

"The only question in this, and in the many similar cases which come before the courts relating to such payments as cricketers' or footballers' benefits or for Easter offerings, or for housing subsidies, is whether the payment can be said to arise "from" the employment or office. In some instances, as the decisions show, this is not an easy question to answer: here it is plain."

130. Lord Simon of Glaisdale, also affirming the decision in the Court of Appeal, stated as follows:-

"As the argument developed before your Lordships, there appeared to be some danger that the task of interpretation should be focussed, not on the words of the

statute, but on various judicial glosses of those words. What Lord Radcliffe said in Hochstrasser (Inspector of Taxes) v Mayes *is therefore in point:*

> *'In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such". It has been said that it must have been made to him "in his capacity of employee". It has been said that it is assessable if paid "by way of remuneration for his services", and said further that this is what is meant by payment to him "as such". These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words.'*

Lord Radcliffe did not include among the glosses which he thus reviewed a distinction between 'causa causans' and 'causa sine qua non'; though this distinction has had some eminent users in this context, and the concept was strongly pressed on your Lordships on behalf of the taxpayer. It was said that the causa causans of the payment was the decision to wind up the scheme; the taxpayer's employment was no more than its causa sine qua non. The distinction between a 'causa causans' and a 'causa sine qua non' was formerly much used in other branches of the law; but it was found to confuse rather than to illuminate (see Lord Wright in Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd*, cited by Megarry J in* Pritchard (Inspector of Taxes) v Arundale*) and it has been generally abandoned. Causation has been debated by metaphysicians and logicians throughout the recorded history of philosophy; the debate continues, with more sophisticated tools of analysis than the terms 'causa causans' and 'causa sine qua non'. These will rarely if ever assist the law, where they have frequently been used without definition or analysis. 'Causa causans' is*

a tautology. 'Causa sine qua non' seems to have been used in two senses: first, to denote a matter which has had no effect on the situation before the court, but has merely provided a setting for a matter which has such an effect; and, secondly, to denote a matter which has had some effect, but which, other matters having had a more potent effect, it is the policy of the law to disregard. In my respectful submission these terms are of little assistance in solving the problem before your Lordships. But even were I to think that the issue before your Lordships could be determined by outmoded and ambiguous concepts of causation couched in Latin, I would not, with all respect, be prepared to accept the taxpayer's categorisation.

A far less question-begging test was suggested by Lord Radcliffe in Hochstrasser (Inspector of Taxes) v Mayes *and by Lord Reid in* Laidler v Perry (Inspector of Taxes)*. The former case was concerned with a large employer, many of whose employees (including the taxpayer) were required by their service agreements to be prepared to move to new work locations. Their moves might well involve the sale of their houses at a loss. The employer undertook to make good any such loss. The question was whether such compensatory payment was taxable under Sch E. Lord Radcliffe said:*

> *'The essential point is that what was paid to [the taxpayer] was paid to him in respect of his personal situation as a house-owner ... ' If the payment to the taxpayer was not made to him in respect of his personal situation as an employee, in what respect was it paid to him? This question was not answered.*

Lord Reid adopted a complementary approach in Laidler v Perry*:*

'... we must always return to the words in the statute and answer the question—did this profit arise from the employment? The answer will be no if it arose from something else.'

It was conceded that payments to the instant taxpayer from the income of the trust fund arose relevantly from the taxpayer's employment. From what else did the capital payment arise?"

131. Counsel for the Appellant next referred me to ***Hamblett –v- Godfrey*** **59 TC 594**, which considered the taxation of payments of compensation to certain civil servants in exchange for the removal of their right to belong to a trade union. In the High Court, Knox J observed that "*[t]he fundamental principle I take to be that each case has to be tested against the provisions of the Act and the authorities do no more than illuminate those provisions and are not a substitute for them, nor are they to be construed as though they were themselves statutory"*, and cited Lord Radcliffe's decision in ***Hochstrasser*** in support of this point.

132. In the Court of Appeal, Neill L.J. quoted Lord Radcliffe's judgment in ***Hochstrasser*** that a payment "*is assessable if it has been paid to him in return for acting as or being an employee*" and Viscount Simond's judgment that "*the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office.*" Neill L.J. then went to say:-

"Accordingly, if I may adopt the language of Lord Radcliffe in the passage I have referred to, the payment to the taxpayer was made in return for her being and continuing to be an employee at GCHQ, or to use the words of Viscount Simonds, the payment accrued to the taxpayer by virtue of her employment. But in the end I think it is right to base my decision on the wording of the statute.

It is clearly not enough that the payment was received from the employer. The question is: was the payment an emolument from the employment? In other words, was the employment the source of the emolument?

It was argued by counsel for the taxpayer in the course of his cogent submissions that the rights lost by the taxpayer were mere personal rights, and that, indeed, this was a stronger case from the taxpayer's point of view than Hochstrasser v Mayer since the rights given to the employee in that case were part of a composite contract. With respect, I find it impossible to accept this argument. As the Special Commissioners held, the rights had been enjoyed within the employer-employee relationship. The removal of the rights involved changes in the conditions of service. The payment was in recognition of the changes in the conditions of service.

I have been driven to the conclusion that the source of the payment was the employment. It was paid because of the employment and because of the changes in the conditions of employment and for no other reason. It was referrable to the employment and to nothing else. Accordingly, in my judgment, the £1,000 was a taxable emolument."

133. Turning to the decision in ***Shilton –v- Wilmhurst***, Counsel pointed out that Lord Templeman had stated that:-

"The result is that an emolument "from employment" means an emolument which is derived "from being or becoming an employee." The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived "from being or becoming an employee" on the one hand, and an emolument which is attributable to something else on

the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer."

134. Counsel submitted that these decisions supported her argument that the appeal before me should be determined by answering a straightforward question – were the FEAs payments coming from the recipients' employment? She submitted that in answering the question, I had to look to the contracts of employment and see what the obligations of the employees were thereunder. She submitted that the test laid down by Lord Radcliffe was better formulated and easier to apply than that formulated by Upjohn J, and that the subsequent decisions showed that Lord Radcliffe's formulation was to be preferred. She further submitted that even if the awards could only be taxable if they were payments for services, she submitted that this requirement was met on the facts of the appeal.

135. Counsel for the Respondent next turned to the Respondent's alternative argument based on section 118. She submitted that word "*benefits*" in section 118(1)(a)(iv) was quite broad and was intended to be of general application to benefits in kind. She further submitted that the other requirements of subsection (1) were met in the instant case. She submitted that it was clear from the wording of section 118(1)(b) that the section was intended to be a catch-all provision, and was intended to render liable to tax benefits which were not taxable pursuant to section 112. She further submitted that this interpretation was supported by the application of section 5 of the Interpretation Act 2005.

H. Analysis & Findings

136. It is clear from the foregoing that the first issue to be determined in this appeal is whether the FEAs paid by the Appellant were liable to tax under Schedule E pursuant to section 112 of TCA 1997. If I find that they were not, I must then consider the Respondent's alternative argument, which is that they are taxable under Schedule E pursuant to section 118.

137. It is appropriate to record at the outset that I agree with Counsel for the Appellant that the tax treatment by the Appellant (or indeed by other taxpayers) of exam awards other than the final professional exams, or of wedding gratuities, is not relevant to my determination of this appeal. The other awards and gratuities do not form part of this appeal and a difference in their treatment would, if proven, demonstrate at most an inconsistency in the approach taken by the Appellant to their taxation. Such an inconsistency would not be germane to my determining whether the FEAs fall to taxation under Schedule E and so I do not propose to further consider same herein.

138. Similarly, while the Notice of Appeal did advance as one ground of appeal an allegation that the assessments were contrary to the position understood by the Appellant to have been accepted by the Respondent in November 2008, and thereafter acted upon by the Appellant in good faith, that ground of appeal is one which falls outside the jurisdiction of this Commission and was not pursued at the hearing before me. Accordingly, it is not considered further in this Determination.

139. It was submitted on behalf of the Appellant that, on the authority of the judgments of Viscount Simonds in ***Hochstrasser*** (see paragraph 79 *supra*) and Plowman J in ***Ball –v- Johnson*** (see paragraph 94 *supra*) that the burden of proof

in this appeal lay on the Respondent to establish that the FEAs were liable to tax under Schedule E.

140. This submission runs contrary to the long line of authorities in this jurisdiction that the burden of proof rests with the taxpayer in all tax appeals, perhaps most famously expressed by Charlton J in ***Menolly Homes –v- Appeal Commissioners*** **[2010] IEHC 49** at paragraph 20: "*This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland.*" I am also mindful of Charlton J's observation in the same case that "*... I caution myself against the use of case law derived from United Kingdom provisions. That legislation uses different wording and thus seeks to import a different concept. In addition, decisions made by courts in that jurisdiction have introduced procedural rules on hearings on appeal from assessments which should not be thoughtlessly imported as an adjunct to our legislation.*"

141. Having carefully considered the case law to which I was referred by Counsel for the Appellant and the statutory provisions governing appeals in this jurisdiction, I am satisfied that the burden of proof remains on the Appellant in this appeal and I have approached this determination accordingly.

142. Section 112(1) of TCA 1997 provides as follows:-

Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

143. I had the benefit of cogent and able submissions from both parties as to the approach which I should take to interpreting this section and, if I need to, section 118. However, subsequent to the hearing of this appeal, the Supreme Court has delivered itself of two significant judgments concerning the proper interpretation of tax legislation, namely ***Dunnes Stores –v- The Revenue Commissioners*** **[2019] IESC 50** and ***Bookfinders Ltd -v- The Revenue Commissioners*** [**2020**] **IESC 60**.

144. As I have observed in previous Determinations, while both of these decisions contain thorough, detailed and helpful analyses of the previous case law and relevant principles, and while I have carefully considered and applied those analyses in their entirety in reaching the conclusions I have set forth hereunder, I believe a useful summary or overview is that given by McKechnie J in ***Dunnes Stores***, wherein he stated as follows in paragraphs 63 to 65:-

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "*The words themselves alone do in such cases best declare the intention of the lawmaker*" (*Craies on Statutory Interpretation, *7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "*… it is natural to enquire what is the subject matter with respect to which they are used and the object in view" – Direct United States Cable Company –v- Anglo-American Telegraph Company *[1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question* – McCann Limited –v- O'Culachain (Inspector of Taxes) *[1986] 1 I.R. 196, per McCarthy J at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly*

within the Act as a whole, but in some circumstances perhaps even further than that.

Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case, one particular rule rather than another has been applied, and why in a similar case the opposite is also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

145. I note that the foregoing passage was cited with approval by O'Donnell J giving the Supreme Court's decision in ***Bookfinders*** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54 as follows:-

"However, the rest of the extract from the judgement [of McKechnie J] *is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking*

ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."

146. I respectfully agree with and adopt the foregoing passages and have applied same in deciding this appeal.

147. It was common case between the parties that the recipients of the FEAs held "*employments of profit*" within the meaning of section 112 and therefore the key issue for consideration was whether the FEAs constituted "*salaries, fees, wages, perquisites or profits whatever therefrom*".

148. I believe an appropriate starting point for my consideration of this issue is the leading Irish case of ***Wing –v- O'Connell***. While that case was concerned with liability to tax under Schedule D rather than Schedule E, and the Supreme Court was interpreting the Income Tax Act 1918 rather than the current legislation, I believe that the general statements of principle expressed by the Court remain valid and are of assistance in determining the instant appeal.

149. The Chief Justice pithily expressed the question for decision in that case as follows:-

"Now, the sum in question was either a profit of Mr. Wing's vocation or it was a mere gift or present, not a subject-matter of taxation.

By "a mere present" I mean something given without consideration, something not earned by professional services, something not paid for on Mr. Wing's part by professional work."

150. Kennedy C.J. then went on to state as follows:-

"Granting, however, as it may in my opinion be granted, that a payment or present to a professional man, even in the course of the exercise of his vocation, is not a profit or gain of the profession or vocation for the purpose of Case II of Schedule D, if it be a mere gift or present to him as an individual, the personal equation predominating, and does not arise or accrue from the profession or employment, I turn to the facts in this case as stated by the Special Commissioners. I cannot, however, find in the case a fact or a trace of positive evidence of the purely personal reasons, the predominating "personal equation," which would stamp this payment with the character of a mere gift or present, and prevent it from being reckoned as a professional receipt, or emolument. There is no evidence or suggestion that the money was sent to Mr. Wing for any such reason as that he was in ill-health and required change of climate, or that he was tired and needed a holiday, or that he was poor … or had a large family, or that he was well-mannered, or good-looking, or kind to animals; or that he was a paragon of manliness or virtue. The evidence is quite clear. The letter which he received with the cheque requests him to accept it for his "very fine riding of Ballyheron at the Irish Derby.'"

151. The Chief Justice concluded that, notwithstanding that the owner who had engaged Mr. Wing to ride the horse had characterised the payment of £400 as a

"*present*", the payment had accrued from Mr. Wing's exercise of his vocation, saying:-

> *"The profession or vocation of the respondent was to ride horses in races, and he received the present "for his very fine riding" of a race-horse in an important race. The "fine performance" was a feat of jockeyship, and it was as a jockey that it did him the greatest credit. I confess that I can find no evidence that he received this gift upon any consideration other than that of his professional services."*

152. The decision is, of course, binding upon me and I do not believe that the foregoing passage is inconsistent with the submissions of either of the parties to this appeal. I must therefore consider whether the payment of the FEAs was a mere gift or present to the recipients as individuals, the personal equation predominating. I fully accept as correct the submission by Counsel for the Appellant that the possible reasons listed by the Chief Justice for an employer making a mere gift or present cannot be taken as being exhaustive.

153. I was also referred, both in written submissions and in the course of the hearing, to a number of authorities from the United Kingdom and Canada, the most important of which was agreed to be ***Hochstrasser –v- Mayes***. Both parties submitted that I should be guided by the tests expressed by the House of Lords in that decision, but differed as to the wording of the test which I should apply.

154. Counsel for the Appellant submitted that the correct test was that voiced by Upjohn J in the High Court hearing of the case, which was emphatically endorsed and adopted by Viscount Simonds in the House of Lords. Upjohn J concluded as follows:-

"... the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."

155. In contrast, Counsel for the Respondent submitted that the test to be preferred was that expressed by Lord Radcliffe. I note that the latter judge agreed with the conclusions reached by Viscount Simonds and expressly agreed with the reasons advanced for his opinion. However, he expressed the test differently, holding as follows:-

"The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such." It has been said that it must have been made to him "in his capacity of employee." It has been said that it is assessable if paid "by way of remuneration for his services", and said further that this is what is meant by payment to him "as such." These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the Statute. But it is perhaps worth observing that they do not displace those words. For my part I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee."

156. I agree with the parties that the wording of the legislation being considered by the House of Lords is sufficiently similar to section 112 to permit me to find the

judgments of that Court relevant and of assistance in determining this appeal. I would further observe that the formulations of the test used by Viscount Simonds and Lord Radcliffe are consistent with the approach taken by the Irish Supreme Court in ***Wing –v- O'Connell***.

157. It is clear from the later decisions of the English courts that the tests expressed by both Viscount Simonds and Lord Radcliffe have subsequently been adopted and applied in numerous other cases. Counsel for the Respondent submitted that in more recent times, the courts had expressed a preference for the test formulated by Lord Radcliffe, referring me in particular to the decisions in ***Brumby –v- Milner***, ***Hamblett –v- Godfrey*** and ***Shilton –v- Wilmhurst***.

158. While I have carefully considered the replying submission by Counsel for the Appellant that the ***Brumby***, ***Hamblett*** and ***Shilton*** decisions were reached in particular factual contexts (in that in the first, the payments were made to retirees who were no longer in employment, in the second the payments were made in exchange for an abrogation of personal rights, and in the last, the payment was made by the new employer), I agree with Counsel for the Respondent that Lord Radcliffe's formulation of the test is easier to understand and to apply in the instant appeal, particularly as the contracts of employment were training contracts and, as such, imposed different obligations from those to which a qualified accountant might be subject. It is, as Lord Simon of Glaisdale called it in ***Brumby***, a "*far less question-begging test*", albeit he described it as such in contrast to the tests predicated upon a *causa causans* and a *causa sine qua non*.

159. In expressing this view, I should make clear that I do not read the formulations of the test expressed by Viscount Simonds and Lord Radcliffe as being irreconcilable or conflicting. It is clear in my opinion that both Law Lords were in

agreement as to the question that had to be answered in order to decide whether a payment arose from an employment but they offered different wordings as to how the question could best be formulated. In my view, the second element of the test applied by Upjohn J and endorsed by Viscount Simonds ("*was the payment in the nature of a reward for services*") is difficult to distinguish from "*was the payment paid by way of remuneration for his services*", which Lord Radcliffe described as a gloss, albeit one of value in illustrating the idea expressed by the words of the statute.

160. Having carefully considered both ***Hochstrasser*** and the subsequent decisions, I agree with Counsel for the Respondent that it is permissible and appropriate for me to determine this appeal by applying the test used by Lord Radcliffe. Accordingly, I am satisfied that the recipients of the FEAs, as persons having an employment of profit, received the awards "*therefrom*" within the meaning of section 112 if they received the awards for being or acting as employees. I believe that this approach to the interpretation of section 112 is consistent with the principles enunciated by the Supreme Court in ***Dunnes Stores*** and ***Bookfinders***.

161. In considering whether the recipients were being or acting as employees when they passed their final professional examinations at the first sitting, I have carefully reviewed and considered the documentary evidence and the oral evidence before me at the hearing of this appeal. The arguments of the parties in relation to this evidence are set forth at some length above in the section of this Determination dealing with the parties' submissions, and I do not believe it is necessary to repeat them.

162. I believe that the starting point for my assessment of the evidence must be the contracts between the Appellant and its trainee employees. Those contracts were a tripartite arrangement between the employee, the Appellant and the ICAI. They

were expressly stated to be training contracts and the employees were classified as trainees thereunder.

163. While Counsel for the Respondent sought to attach some significance to the absence of a detailed description of a trainee's duties in the contracts, I accept as correct the evidence offered on behalf of the Appellant that the employees would have been aware from the recruitment process that their duties as trainees would go considerably beyond merely studying for and sitting professional exams. I further accept as correct the evidence that trainee employees were required to and did spend very significant amounts of time engaged in work in addition to studying for and sitting their professional exams.

164. The contracts did contain significant detail on what was expected of trainee employees in terms of preparing for, studying for and sitting their professional exams, including the final professional exams the subject of this appeal. In particular, the contracts provided that it was a requirement of the contract that the employee present for all applicable examinations at the first sitting and pass the examinations within a specific timeframe. The contracts further provided that an employee could be dismissed by the Appellant if they failed to satisfy these requirements. However, as Counsel for the Appellant correctly pointed out, such termination was at the discretion of the Appellant and would not occur automatically. It is also appropriate to note that I fully accept his submission that nothing in the contracts or elsewhere imposed an obligation on the trainees to pass their final professional exams at the first sitting.

165. I further accept as correct the evidence that the training contracts allowed the trainee employees significant periods of study leave, both paid and self-funded, in order to prepare for the exams.

166. The contracts were, with the exception of the later **DIVISION B** contracts, fixed term contracts rather than specific purpose contracts. The terms were calculated by reference to the length of time necessary for the trainee employees to achieve their final professional qualifications within the time allowed by the Appellant. I accept as correct the evidence of **WITNESS A** that the change to the **DIVISION B** contracts was, in **WITNESS A**'s understanding, effected for employment law purposes.

167. It is also relevant to note that the contracts make no reference to the payment of FEAs and I accept that the payment of FEAs was, as a matter of law, solely at the discretion of the Appellant. While this is a relevant consideration, it is not in my view determinative.

168. I further accept as correct the evidence of the two employees of the Appellant who testified that they understood that the payment of the FEAs was at the discretion of the Appellant and furthermore that the payment of the FEAs was not something which they believed to be a reward or remuneration for their work for the Appellant but was instead a mark of personal recognition for an exceptional achievement.

169. I accept the submission by Counsel for the Appellant that in addition to the considering the understanding of an employee as to why a payment has been made to them, the authorities establish that it is also appropriate to have regard to the motivation of the employer in making that payment.

170. In this regard, I accept as correct the evidence and submissions on behalf of the Appellant that one aspect of the Appellant's motivation for paying the FEAs was to mark the significant personal achievement and effort of those trainees who succeeded in passing the exams at the first sitting. However, I do not accept that

this was the sole motivation in making the payments. Having carefully considered the evidence, I believe that another equally important reason for making the payments was to ensure that the Appellant was offering the same potential benefits to its employees as other similarly-sized accountancy firms. The Appellant would have been an outlier if it did not offer the potential for its employees to receive exam awards and, had it not done so, it would have been at a disadvantage when it came to recruiting new employees; it was, as **WITNESS A** observed, a competitive market. I believe it is of relevance to this finding that the Appellant continued to pay the FEAs during the difficult economic period following the global financial crisis, and did not reduce their quantum, even at a time when salaries for its employees were being reduced. While the same recipient could not receive an FEA more than twice, and so the payments could not properly be said to be recurrent in relation to a specific employee, I am satisfied on the evidence before me that the making of such payments to eligible recipients had become customary in the sector.

171. Having regard to all of the foregoing factors and findings, I do not believe that the Respondent is correct in its submission that the sole or even primary or core duty of trainee employees under their training contracts was to prepare, study for, sit and pass their professional exams, including the final professional exams. The evidence before me was that their duties extended significantly beyond that obligation.

172. However, I believe that it is correct to say that sitting and passing the professional exams in a timely manner was a key and essential duty imposed on trainees by their employment contracts. This is, in my view, clearly demonstrated by the fact that the contracts set forth *in extenso* the requirements of the Appellant in relation to exam progression by the trainees and by the fact that the Appellant

expressly reserved the right to terminate a trainee's employment if they did not present for and pass the professional exams within the time permitted by the contracts.

173. I accept as correct the submission by the Respondent that if sitting for and passing the professional exams within a specified time was a requirement imposed on the Appellant's employees by their contracts of employment, then meeting that requirement was one of their duties as employees. It was not their sole duty but it was an important one. The mutuality of obligation test identified by Edwards J in ***Minister for Agriculture –v- Barry*** is met on the facts of the instant appeal – the Appellant was obliged to and did provide the necessary training, supports and time to enable its trainees to study, present for and pass their final professional exams and the trainees were in turn required to present for and pass those exams in accordance with and within the time limits stipulated by their contracts.

174. Overall, I am satisfied and find as a material fact that the Appellant's trainees were discharging one of their contractual obligations as employees in presenting for and succeeding in their final professional examinations within the time allowed them by their contracts.

175. The fact that there was no contractual obligation on a trainee to pass a final professional exam at the first sitting does not alter my view in this regard. The contractual duty was to present for and pass the exam, and a trainee who achieved this did so as an employee. A trainee who achieved this at the first sitting did so as a particularly able and hard-working employee, but still in his or her capacity as an employee.

176. Accordingly, I find as a material fact that the payment by the Appellant of the FEAs at issue in this appeal were payments made to its employees for acting as employees, and they therefore meet the test for liability to tax under Schedule E as formulated by Lord Radcliffe. They were not a merely personal present or gift from the Appellant to the recipients; they were paid to the recipients for carrying out one of their duties as employees to a particularly high standard.

177. In reaching this conclusion, I have had careful regard to the numerous judgments to which I was referred by both parties. I do not believe it is appropriate or necessary to set forth a case-by-case analysis of the applicability or otherwise of those decisions; they are, as has been repeatedly observed, very much dependent on their particular facts.

178. It is, however, appropriate for me to touch briefly on the two exam award cases, given their seeming similarity to the issues in the instant appeal. ***Ball –v- Johnson*** was understandably called in aid by the Appellant. I fully accept Counsel for the Appellant's submission that I ought not to have regard to the interpretation of that decision by HMRC in our neighbouring jurisdiction, and I have not done so. However, it is clear from the decision that there was no contractual obligation on Mr. Johnson to sit or pass the Institute of Bankers examinations, nor would a failure on his part to do so have rendered him liable to a termination of his employment. Those factors, in my view, render the facts of that case utterly different to the facts of the instant appeal, and the decision is manifestly distinguishable on that basis.

179. In relation to the decision of the Canadian Supreme Court in ***R –v- Savage***, I agree with Counsel for the Appellant that the wording of the legislation being considered by that Court was so different from the relevant statutory provisions in this jurisdiction that the decision is of no assistance in determining this appeal.

180. For the reasons outlined above, I find that the final exam awards the subject matter of this appeal were payments made to the Appellant's employees which arose from their employment. They are therefore liable to tax pursuant to section 112 of TCA 1997.

181. In light of the foregoing finding, it is not necessary for me to consider and determine whether the final exam awards might be liable to tax pursuant to section 118.

I. Determination

182. Having found that the final exam awards the subject matter of this appeal were liable to tax under Schedule E pursuant to the provisions of section 112(1) of the Taxes Consolidation Act 1997 as amended, I will therefore refuse the Appellant's appeal.

183. I determine pursuant to section 949AK(1)(c) of the Taxes Consolidation Act 1997 as amended that the Notices of Estimation appealed herein should stand.

Dated the 30th of July 2021

MARK O'MAHONY

Appeal Commissioner

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.