



16TACD2021

BETWEEN

[APPELLANT]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

Appeal

[1] This is an appeal against a determination of the Revenue Commissioners made on 22 November 2016 that the provision of living accommodation to the Appellant by his employer is chargeable to income tax as a benefit-in-kind under section 118 of the Taxes Consolidation Act, 1997.

[2] This appeal is adjudicated without a hearing in accordance with section 949U of the Taxes Consolidation Act, 1997.

Background

[3] The Appellant is employed by the [redacted] (hereinafter '[redacted]') as a [redacted] to the [redacted] (hereinafter '[redacted]'). He is paid a gross basic salary of €38,000 to €40,000 per annum. He was provided with [redacted] (hereinafter 'the





[redacted] accommodation') by the [redacted] for the duration of his employment. The [redacted] accommodation is a residential property occupied by the Appellant and one other person. The other person occupying the [redacted] accommodation has lived at the [redacted] accommodation since before the [redacted] acquired the property in 1975.

[4] According to the Annual Financial Report for the year ended 31 December 2018 for the [redacted], the [redacted] is a charitable trust governed by a Trust Deed. The charity is registered with the Charities Regulatory Authority ([redacted]) and registered with the Revenue Commissioners as being established for charitable purposes ([redacted]). The [redacted] is governed by the [redacted]. The [redacted] covers an area of [redacted] kilometres of the [redacted] of Ireland and extends inland over [redacted] kilometres. The area covered by the [redacted] is [redacted] km square. The objective of the charity is to promote the advancement of the [redacted] by enabling the [redacted] to fulfil his [redacted] responsibilities.

[5] The Appellant presented a Fixed Term Contract – Terms and Conditions of Employment signed by the Appellant on 1 August 2014 and signed on behalf of the [redacted] on 25 August 2014. The contract provides '*This statement of your main terms and conditions of employment with the [redacted] is given in accordance with the Terms of Employment (Information) Acts 1994 and 2001.*' The contract includes the following clauses:





1.	Job Title	<p>You will be employed as a [redacted] to the [redacted] and report to the [redacted] for the fixed term set out below in which capacity you will be required to perform all acts, duties and obligations as outlined in your job description (which may be revised from time to time) or as discussed with you. You may be required to undertake other duties from time to time as the [redacted] may reasonably require.</p> <p>You are required at all times to comply with our rules, policies and procedures, as may be amended from time to time. A copy of these will be given to you and will be bound by all amendments notified to you in writing.</p>
2.	Commencement of Employment	<p>Your employment will commence on 25th August 2014 (the 'Commencement Date') and shall be for a fixed term of two years ending on the 19th August 2016 subject to the provisions of this agreement for earlier termination. Your employment with any previous employer does not count as part of your continuous period of employment.</p> <p>The Unfair Dismissals Acts 1977 to 2007 shall not apply to a dismissal consisting only of the expiry of the fixed term of this contract without its being renewed.</p>
3.	Work Location	<p>You will initially be located at the [redacted]. However, the [redacted] reserves the right to locate you at any location within the [redacted]. You may be transferred to any department of the [redacted] at any time (without compensation) by the giving of reasonable notice by the [redacted], which, in any case shall not be less than two weeks.</p>
7.	Normal Hours of Work	<p>Your normal hours of work will be 35 hours per week exclusive of lunch breaks (1 hour per day). Your normal working week will be 5 days, Monday to Friday. Starting and finishing times are as notified to you by the [redacted] and may vary according to the needs of the [redacted]. Some Sunday work will be required as well as flexibility for evening and weekend hours.</p> <p>You may be required to work such additional hours as may be necessary for the proper performance of your duties for which you will receive no additional remuneration. Where possible you will be notified in advance.</p>





8.	Overtime	<p>You may be required to work additional hours from time to time.</p> <p><u>Overtime is at the discretion of the [redacted] and must be authorised in advance.</u></p> <p>Overtime is generally compensated on a time for time basis.</p>
9.	Accommodation	<p>You will be provided with accommodation at [redacted] for the duration of the fixed term herein. The provision of any such accommodation is entirely at the [redacted] discretion and subject to the terms and conditions set out in the schedule hereto.</p> <p>You acknowledge and accept the [redacted] right to deduct from your salary any benefit in kind tax payable in respect of the provision of accommodation.</p> <p>For the avoidance of any doubt the provision of accommodation to you by the [redacted] shall not in any way interfere with the [redacted] entitlement to terminate your employment in accordance with the terms of this Agreement. You acknowledge and accept that in the event your employment is terminated for whatever reason you will immediately be required to vacate any accommodation provided to you by the [redacted].</p>

[6] The schedule attached to the contract describes the Accommodation Policy:

Accommodation Policy
The [redacted] will provide accommodation to you on a discretionary basis during the period of your employment with the [redacted].
The provision of accommodation by the [redacted] is dependent upon you continuing in employment with the [redacted] and will cease once your employment is terminated for whatever reason.
By signing your Contract of Employment with the [redacted], you give the [redacted] your express consent to deduct from your salary an amount in respect of accommodation provided by the [redacted], including any benefit-in-kind tax levied by the Revenue Commissioners.
The [redacted] reserves the right to re-allocate different accommodation to you at any time and for any reason.



General conditions relating to the provision of accommodation

The accommodation provided to you by the [redacted] must be maintained in a reasonable and serviceable condition at all times. If you abuse or neglect the accommodation provided to you, you will be responsible for any costs incurred in returning the accommodation to the condition that existed when it was provided to you. Damage to property may be considered a disciplinary offence to be dealt with in accordance with the [redacted] Disciplinary Procedures. Furthermore, damage to property may constitute a criminal offence.

No receptions or parties are permitted in [redacted] accommodation or in any garden or common areas attached thereto except with the express prior permission of the [redacted].

[redacted] accommodation cannot be used for any activities which are dangerous, offensive, noxious, noisome, illegal or which are, or may become, a nuisance or annoyance to the [redacted] or the owner or occupier of any neighbouring property or are contrary to the [redacted] ethos.

No alterations to [redacted] accommodation are permitted without the consent of the [redacted].

No pets are permitted in or on [redacted] accommodation.

You must comply with any other regulations or rules laid down from time to time by the [redacted] in respect of the provision of [redacted] accommodation.

Visitors

[redacted] accommodation is provided for you only. While friends and family members are permitted to visit, no third party is entitled to reside in the accommodation provided to you without the express permission of the [redacted].

Access codes and/or key/gate fobs should never be given to an outside party.

The [redacted] reserves the right to limit the number of visitors to the accommodation provided to you.

Security

You are responsible for your own security and the security of your visitors at all times.

You are also responsible for your own belongings and property and the property and belongings of your visitors. The [redacted] takes no responsibility for any property stolen or damaged on, in or from the accommodation provided to you by the [redacted]. In this regard, you are responsible for insuring your own belongings and property.

Notification to the [redacted]

You are responsible for notifying the [redacted] of any problems or emergencies which may arise, including any breakdowns of facilities, equipment or the telephone line.

The [redacted] MUST be notified immediately in the event that any of the emergency services are required to attend the accommodation provided to you by the [redacted]. Emergency services include the Garda Siochana, the Fire Brigade, the Ambulance Service or a doctor (attending to persons in circumstances other than a routine house call).





Smoking

Smoking is prohibited in all [redacted] accommodation.

Breach of Policy

Any breach of this policy will be dealt with in accordance with the [redacted] Disciplinary Policy. Repeated or serious breaches may result in dismissal and/or the withdrawal of accommodation by the [redacted].

Withdrawal of Accommodation

Accommodation may be withdrawn by the [redacted] with or without notice:

- Where you are not using [redacted] accommodation:
 - For the purpose for which it is provided
 - On an irregular basis only
 - At all
- Where you are one of your visitors engages in anti-social behaviour;
- Where you are in serious persistent breach of this policy and/or any other agreements relating to the provision of [redacted] accommodation;
- Where you or one of your visitors damages any [redacted] accommodation including any property contained in or on such premises; or
- On termination of your employment with the [redacted].

[7] In a communication from the Revenue Commissioners to the Appellant in August 2016 it is stated:

“I consider the provision of the accommodation by your employer is subject to benefit in kind. It may be desirable for both you and your employer to reside very close to your place of employment but I do not see it as a requirement, for your duties as a [redacted] to live in accommodation provided by your employer.

I cannot accept that your duties meet the criteria of ‘the better performance test’ as the role of a [redacted] could not be seen as being required to live in accommodation provided by your employer ‘in accordance with a practice, which, since before 30 July 1948, has commonly prevailed in trades of the class in question.”

[8] In a communication from the Revenue Commissioners to the Appellant dated 22 November 2016 it is stated:





“Further to our telephone conversation earlier today I wish to confirm that after consultation with our head office I am not in a position to exempt you from BIK in relation to your accommodation. You may still appeal this decision and information on how to submit an appeal can be found on www.taxappeals.ie.”

[9] A Notice of Appeal was received by the Tax Appeals Commission on 30 November 2016.

Legislation

[10] Insofar as relevant, section 116 of the Taxes Consolidation Act, 1997 provides:

“116. Interpretation (Chapter 3)

(1) *In this Chapter –*

“business premises”, in relation to a body corporate, includes all premises occupied by that body for the purpose of any trade carried on by it and, except when the reference is expressly to premises which include living accommodation, includes so much of any such premises so occupied as is used wholly or mainly as living accommodation for any of the directors of the body corporate or for any persons employed by the body corporate in any employment to which this Chapter applies;

“business use”, in relation to the use of an asset by a person, means the use of that asset by the person in the performance of the duties of the person’s office or employment;

...

“employment” means an employment such that any emoluments of the employment would be assessed under Schedule E, and references to persons employed by, or employees of, a body corporate include any person who takes part in the





management of the affairs of the body corporate and is not a director of the body corporate;

“premises” includes lands;

“private use” in relation to an asset, means use of the asset other than business use.”

[11] Insofar as relevant, section 118 of the Taxes Consolidation Act, 1997 provides:

“118. Benefits in kind: general charging provision

(1) *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 this 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 incurred 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 a payment in respect of expenses, and income tax shall be chargeable accordingly.

(2) *Subsection (1) shall not apply to expense incurred by the body corporate in or in connection with the provision for a director or employee in any of its business premises of any accommodation, supplies or services provided for the director or employee personally and used by the director or employee solely in performing the duties of his or her office or employment.*





(3) *Subsection (1) shall not apply to expense incurred by the body corporate in or in connection with the provision of living accommodation for an employee in part of any of its business premises which include living accommodation if the employee is, for the purpose of enabling the employee properly to perform his or her duties, required by the terms of his or her employment to reside in the accommodation and either –*

- (a) *the accommodation is provided in accordance with a practice which since before the 30th day of July, 1948, has commonly prevailed in trades of the class in question as respects employees of the class in question, or*
- (b) *it is necessary in the case of trades of the class in question that employees of the class in question should reside on premises of the class in question; but this subsection shall not apply where the employee is a director of the body corporate in question or of any other body corporate over which that body corporate has control or which has control over that body corporate or which is under the control of a person who also has control over that body corporate.”*

[12] Insofar as relevant, section 120 of the Taxes Consolidation Act, 1997 provides:

“120. *Unincorporated bodies, partnerships and individuals*

(1) *This Chapter shall apply in relation to unincorporated societies, public bodies and other bodies as it applies in relation to bodies corporate and, in connection with this Chapter, the definition of ‘control’ in section 116(1) shall, with the necessary modifications, also so apply.”*

Submissions on behalf of the Appellant

[13] The Appellant submits that the [redacted] accommodation, which has been owned by the [redacted] since 1975, was provided to him by the [redacted] under the terms of a Fixed Term Contract. The [redacted] accommodation is situated outside the [redacted] grounds on a road in the vicinity of the [redacted].





[14] The submission of the Appellant on the application of section 118(3) to the expense incurred by the [redacted] in providing the [redacted] accommodation to him can be gleaned from his letters to the Revenue Commissioners dated 19 February 2016 and 29 August 2016 wherein it is stated:

19 February 2016

"I write following a phone conversation with a member of staff from your office on January 29th. My enquiry relates to accommodation which was assigned to me at the commencement of my current position in August 2014. To date my employer has not deducted the tax due to 'an administrative oversight'. My purpose in writing is to seek clarification on the matter of payment of said tax, as I note from your website that there are certain conditions which exist, whereby an individual will not be liable for the payment of BIK tax. As I currently stand I am [redacted] to the [redacted]. Below I have outlined some of the duties which I undertake beyond the normal 9-5 of office hours:

- (1) *It is a regular part of my role to provide out of office hours support to the [redacted], typically early mornings, evenings and weekends working on administration, functions, meetings, greeting visitors, and looking after resident guests. Some duties can often be required with very short notice.*
- (2) *I am listed primary contact for [redacted] in the event of alarms going off or in the event of an emergency, (eg) [redacted].*
- (3) *I am required to provide backup to the [redacted] during any absences and to assist the [redacted] with [redacted] at weekends.*
- (4) *I am listed, solely because of my location, as a contact for the [redacted] in the event of a [redacted].*
- (5) *I am often required to be available at short notice to assist the [redacted] in the event of unforeseen circumstances or emergencies.*





The house in which I currently live is located across the road from the [redacted]. It is not actually possible for me to live in [redacted] as it caters for the [redacted] of the [redacted]. As such, I am located in the closest possible accommodation to my place of work.

It is my hope that the outlined duties will be accepted to meet with the 'better performance test' as per your website."

29 August 2016

"Many thanks for your letter of August 4th, and I note your decision that BIK is payable on the above named property. I write now to lodge an appeal to this decision on the following ground:

'The Better Performance Test' – as per Revenue website it is accepted that the 'better performance test' is met where –

- *the employee is required to be on call outside normal hours, and*
- *the employee is in fact frequently called out, and*
- *the accommodation is provided so that the employee may have quick access to the place of employment.*

In my role of [redacted] (which differs to that of a [redacted] to a [redacted] for instance) – the above outlined conditions apply to me. The 'on call' nature of [redacted] as outlined in previous correspondence, lists as a duty that I am a contact person for [redacted]. This duty cannot be realistically fulfilled if I live any distance from my place of work. The same applies to gaining access to the grounds for the Emergency Services or in instances where individuals find themselves locked into the grounds following meetings or while using the grounds for [redacted]. The grounds surrounding [redacted] and [redacted] are used as a [redacted]. It is the view of the [redacted] General Manager, [redacted], that an individual must live adjacent to [redacted] and [redacted]. This is necessary from a health and safety point of view for reasons outlined above. In terms of security and liaising with





the Gardai it is again, in the view of [redacted] not only desirable but necessary, to have a staff member adjacent to the grounds given that frequent incidents occur here, which require Garda intervention. And finally given the nature and role of the [redacted], the General Manager is mindful of the [redacted]. My location allows me to be present in [redacted] within one minute of receiving a call in the event of an emergency should the need arise. [redacted] can be contacted by phone (direct) on [redacted] or by e-mail [redacted].

These situations, as required by the above named test are regular events and they certainly can fall outside of normal hours – and have always been a part of the [redacted] duties.

The practice as instituted on 30 July 1948 allows for circumstances whereby individuals are exempt from payment of Benefit in Kind, and it is my belief that the conditions as outlined on your website are adequately met in this particular circumstance.”

[15] In support of his appeal, the Appellant submitted a letter from the Human Resource Manager of the [redacted] dated 31 May 2016 wherein it is stated:

“[redacted] is employed as the [redacted] to the [redacted]. The contract of employment enclosed was drawn up in August 2014. However [redacted] duties and responsibilities have unexpectedly increased and evolved during this contracted time.

[redacted] was asked to reside at [redacted] which is 100 metres from the [redacted] to ensure the proper performance of his duties.

Because of the location of the [redacted] accommodation he is listed as the contact person for the [redacted] to allow for [redacted]. He is also listed as the contact person in the event of alarms going off and is the person who will give access to emergency services to enter the grounds and [redacted] when necessary. [redacted] is also required to open up





and close the building, particularly when the [redacted] is away as some [redacted] offices are based in the [redacted] and are operational throughout the year.

The duties also require [redacted] to cover the absences of the [redacted] and to provide assistance at evenings and weekends at such ceremonies.

There is also an expectation that the [redacted] will provide assistance to the [redacted] at short notice and give support outside normal office hours which includes being available to assist at functions, look after staying guests and attend meetings.”

[16] In further support of his appeal, the Appellant submitted a letter from the General Manager of the [redacted] dated 29 August 2016 wherein it is stated:

“I am writing this letter to support the appeal of [redacted] against a Benefit in Kind income tax assessment.

[redacted] is employed as a [redacted] to the [redacted]. His duties are outlined in his appeal letter.

He is required to live in very close proximity to [redacted] which is both the office and [redacted] of the [redacted]. He is on call 24 hours a day when the [redacted] is in [redacted] in order to provide [redacted] for the [redacted]. The [redacted] lives on his own and given his [redacted] must have [redacted]. We have had two incidents in recent times with intruders. [redacted] is the contact person with An Garda Siochana. [redacted] grounds also provide 24 hour access for [redacted]; there is no other convenient [redacted]. [redacted] is the contact person for the emergency services.

Consequently it is a condition of his employment that [redacted] lives in [redacted] adjacent to [redacted]. He occupies a house owned by the [redacted] in the immediate vicinity of [redacted] which is what we insist in order for him to fulfil his responsibilities.”





[17] The Appellant submits that the work of the [redacted] is not confined to normal hours of work. The work of the [redacted] is a continuing activity on a 24/7 basis. The Appellant submits that the nature of an 'on call' position is that it is unforeseen and his 'on call' duties could not properly be performed from a location other than the [redacted] accommodation. The Appellant submits that his 'on call' duties are principally managing the calls of an out of hours pager service. In addition, there are occasions when he may respond to e-mails outside his normal hours of work at the [redacted] accommodation or work from home when the landline from the [redacted] is transferred to the [redacted] accommodation.

[18] Based on the foregoing, the Appellant submits that the [redacted] accommodation enables him properly to perform his duties as [redacted] to the [redacted].

[19] The Appellant submits that the [redacted] accommodation is in part of the business premises of the [redacted]. The Appellant submits that given the nature of his duties and the performance of those duties at the [redacted] accommodation outside his normal hours of work, the [redacted] accommodation becomes the business premises of the [redacted] during those times.

[20] The Appellant submits that the [redacted] accommodation was provided in accordance with a practice which since before 30 July 1948 has commonly prevailed for [redacted] to the [redacted]. The Appellant submits that from the 1880's to the present day the [redacted] to the [redacted] has been required to reside at accommodation provided by the [redacted] and describes the arrangements as:

- [redacted] – resided at [redacted].



The Appellant submits that the requirement to reside at accommodation provided by the [redacted] is limited to a specific class of employee, namely the [redacted] to the [redacted], and that no other employee of the approximately [redacted] employees in the employment of the [redacted] is required by the terms of employment to reside in close proximity to the [redacted].

[21] In summary, the submission on behalf of the Appellant is that the expense incurred by the [redacted] in providing him the [redacted] accommodation falls within the exception in section 118(3) as the [redacted] accommodation is in part of the business premises of the [redacted], the Appellant is required to reside at the [redacted] accommodation for the purpose of enabling the Appellant properly to perform his duties particularly having regard to the nature of his extended duties which have evolved since the Fixed Term Contract was signed in August 2014 and the [redacted] accommodation was provided in accordance with a practice that has commonly prevailed since before 30 July 1948 of providing living accommodation to the [redacted] of the [redacted].

Submissions on behalf of the Revenue Commissioners

[22] The Revenue Commissioners submit that the Appellant has not adduced evidence to demonstrate that he comes within section 118(3) and more particularly the 'better performance test'. The term 'better performance test' is used in a Tax and Duty Manual published by the Revenue Commissioners titled 'Benefit-in-Kind – Provision of Free or Subsidised Accommodation'. The relevant paragraph in the Tax and Duty Manual states:

"A taxable benefit will not arise where an employee (but not a director) is required by the terms of his or her employment to live in accommodation provided by the employer in part of the employer's business premises so that the employee can properly perform his or her duties ('better performance test'), and either –





- *the accommodation is provided in accordance with a practice which, since before 30 July 1948, has commonly prevailed in trades of the class in question as respects employees of the class in question, or*
- *it is necessary, in the particular class of trade, for employees of the class in question to live on the premises.*

It is generally accepted that the 'better performance test' is satisfied where –

- *the employee is required to be on call outside normal hours;*
- *the employee is in fact frequently called out; and*
- *the accommodation is provided so that the employee may have quick access to the place of employment.*

Examples of categories of employees who generally meet the 'better performance test' include:

- *managers or night care staff in residential or respite centres (where such centres are not nursing facilities);*
- *governors and chaplains in prison;*
- *caretakers living on the premises (where they are in a full-time caretaking job);*
- *student nurses engaged in grant funded diploma programs under the auspices of the Department of Health/Health Authorities; and*
- *au pairs who are required by the terms of their employment to 'live in' and who are 'on call'.”*

[23] The Revenue Commissioners acknowledge that the Appellant has provided evidence from the [redacted] that his duties have been extended since the Fixed Term Contract was signed in August 2014. However, the Revenue Commissioners submit that the Appellant has failed to discharge the burden of proof that he is required to reside at the





[redacted] accommodation, and not elsewhere, in order properly to perform his duties. The Revenue Commissioners submit that the Appellant has failed to adduce evidence to satisfy the 'better performance test' particularly on the frequency with which he may have been called out and the reason for being called out. The Revenue Commissioners submit that while it may be desirable for the Appellant, as [redacted] to the [redacted], to reside in close proximity to his place of work, there is no evidence that because of the [redacted] accommodation the Appellant was better able to perform his duties, but rather it was more convenient for the Appellant to get to his place of work.

[24] The Revenue Commissioners submit that in order to qualify under section 118(3) the accommodation provided must be part of the business premises of the employer. Business premises is defined in section 116 as being a premises which is occupied for the purposes of the trade. The Revenue Commissioners submit that given the [redacted] accommodation is a dwelling and not part of the place of business of the [redacted], the accommodation could not fall within the definition of business premises. The Revenue Commissioners submit the position of [redacted] to an [redacted] does not fall within section 118(3)(a) or (b).

Analysis and Findings

[25] Section 118(1) is a general charging provision wherein any expense incurred by a body corporate in connection with the provision of living accommodation for an employee in an employment is chargeable to income tax as income of the employee. Section 118(2) and section 118(3) describe circumstances when the general charging provision in subsection (1) does not apply meaning the expense is not chargeable to income tax.

[26] Section 118 refers to a 'body corporate'. This must be given meaning and it is not satisfactory for the Revenue Commissioners to submit that regardless of whether the [redacted] is a body corporate or not, given the [redacted] is making payments of emoluments, section 118 applies. It must be shown that the [redacted] comes within the





terms of section 118 for the provision to apply. In the Annual Financial Report for the year ended 31 December 2018 for the [redacted], there is a reference to employees and the payment of emoluments (including taxable benefits in kind). This shows that the [redacted] is making payments of emoluments to persons having or exercising an office or employment. Section 2 of the Charities Act, 2009 defines ‘charitable trust’ as meaning ‘*a trust (a) established for a charitable purpose only, (b) established under a deed of trust that requires the trustees of the trust to apply all of the property (both real and personal) of the trust in furtherance of that purpose except for moneys expended in the management of the trust, and (c) none of the property of which is payable to the trustees of the trust other than in accordance with section 89.*’ It defines ‘body’ as including, ‘*in relation to a trust in respect of which there is only one trustee, that trustee*’. Section 120 refers to Chapter 3 of Part 5 applying to ‘unincorporated societies, public bodies and other bodies’. Chapter 3 of Part 5 includes section 118. In the circumstances, the [redacted] is a body making payments of emoluments which are assessable to income tax under Schedule E and section 118 applies to the [redacted]. The [redacted] accommodation was owned by the [redacted] and provided by the [redacted] for use by the Appellant. The Appellant did not make payments for the accommodation, in the nature of rent or otherwise, to the [redacted]. This means the expense incurred by the [redacted] in connection with the provision of the [redacted] accommodation to the Appellant comes within the charge to income tax in section 118(1).

[27] It is observed that in the Fixed Term Contract under ‘Accommodation’ it is stated ‘*You acknowledge and accept the [redacted] right to deduct from your salary any benefit in kind payable in respect of the provision of accommodation*’. The Fixed Term Contract describes the terms and conditions of employment agreed between the Appellant and the [redacted]. It is further observed that in the Accommodation Policy it is repeated ‘*By signing your Contract of Employment with the [redacted], you give the [redacted] your express consent to deduct from your salary an amount in respect of accommodation provided by the [redacted], including any benefit-in-kind tax levied by the Revenue Commissioners*’. Furthermore, in the letter from the Appellant to the Revenue





Commissioners dated 19 February 2016, the Appellant states that, in relation to the [redacted] accommodation, '*To date my employer has not deducted the tax due to 'an administrative oversight'.*'

[28] Notwithstanding, the issue in the appeal is whether, on the facts and proper construction of section 118, the benefit of the living accommodation provided to the Appellant falls outside the charge to income tax in section 118(1) by reason of the living accommodation falling within section 118(3).

Section 118(3)

[29] In light of the submissions made by the Appellant, the constituent elements of section 118(3) to be considered in this appeal for the expense incurred by the [redacted] in providing living accommodation to the Appellant not to be chargeable to income tax under subsection (1) may be summarised as:

- (i) Was the [redacted] accommodation in part of any of the business premises of the [redacted]?
- (ii) Was the Appellant required by the terms of his employment to reside in the [redacted] accommodation for the purpose of enabling the Appellant properly to perform his duties?
- (iii) Was the [redacted] accommodation provided in accordance with a commonly prevailing practice existing since before 30 July 1948 in respect of [redacted] to [redacted] in [redacted]?

[30] In accordance with the principle enunciated by the Supreme Court in *Revenue Commissioners -v- Doorley* [1933] IR 50 on the exemption from tax, the Appellant must bring himself '*within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable*' to be entitled to avail of section 118(3).





Business Premises

[31] The Revenue Commissioners submit that the [redacted] would not be considered, for the purposes of the Taxes Acts, as carrying on a trade. This means that section 118(1) would bring the expense incurred by the [redacted] in providing the [redacted] accommodation to the Appellant within the charge to income tax, however, section 118(3) would not fall for consideration in relation to the [redacted] as subsection (3) refers to 'business premises', which is defined as premises occupied by a body for the purpose of carrying on a trade. It is noted that section 208 of the Taxes Consolidation Act, 1997 refers to trades carried on by a charity and an exemption of trading profits for those profits which are applied to the purposes of the charity. Section 208 and section 208A of the Taxes Consolidation Act, 1997 define 'charity' as meaning '*any body of persons or trust established for charitable purposes only*'. This is not an exhaustive definition of 'charity' and serves for illustrative purposes. Therefore, to exclude the [redacted] from the definition of 'business premises' solely on the general submission that the [redacted] would not be considered as carrying on a trade may not prevail in the absence of establishing the facts pertaining to the [redacted]. It is noted that in the Annual Financial Report for the year ended 31 December 2018 for the [redacted] there are references to income from trading activities. In the circumstances, I will proceed to consider whether section 118(3) applies to the expense incurred in providing the [redacted] accommodation to the Appellant.

[32] The Appellant may perform duties of his employment at his [redacted] accommodation, however, this does not mean that the [redacted] accommodation is a business premises as defined in section 116. Section 118(3) refers to '*business premises which include living accommodation*'. The [redacted] accommodation is living accommodation. However, there is no evidence that the [redacted] accommodation is a 'business premises which include living accommodation' as there is no evidence that a trade was being carried on by the [redacted] at the [redacted] accommodation. The [redacted] accommodation is a residential property. The [redacted] accommodation is situated outside the [redacted] grounds on a road in the vicinity of the [redacted]. A person





who is not an employee of the [redacted] also occupies the [redacted] accommodation. The Fixed Term Contract describes the terms and conditions of employment agreed between the Appellant and the [redacted]. The Fixed Term Contract describes the 'Work Location' as the [redacted]. Under 'Normal Hours of Work' the contract describes the requirement for flexibility for evening and weekend hours for which no additional remuneration will be received. The Accommodation Policy makes no reference to any trade-related matters being carried on at the accommodation.

[33] In all the circumstances, I find the [redacted] accommodation was not in part of any of the business premises of the [redacted].

Required for Proper Performance of Duties

[34] Section 118(3) refers to the employee being required by the terms of his or her employment to reside in the accommodation for the purpose of enabling the employee properly to perform his or her duties. This means the Appellant must demonstrate that residing in the [redacted] accommodation, and not elsewhere, enables him properly to perform his duties as [redacted] to the [redacted]. It is the relationship between the accommodation provided and the duties performed that is examined. It is acknowledged that the Appellant's duties have been extended since the Fixed Term Contract was signed in August 2014. The evidence adduced by the Appellant describes the unpredictable nature of the extended duties but provides no specific details on the real-time performance of those duties for a particular period.

[35] There have been references to a 'better performance test'. The term is used in a Tax and Duty Manual published by the Revenue Commissioners. The source of the words 'better performance' may be traced to the UK provision of section 33 of the Finance Act, 1977 which refers to '*where the accommodation is provided for the better performance of the duties of his employment.*' This wording does not appear in section 118(3). It is important that a consideration of whether section 118(3) applies is by reference to the





wording of the section, namely '*for the purpose of enabling the employee properly to perform his or her duties*'. It can be a distraction to shorthand the wording in the legislation.

[36] Given the geographical location of the [redacted] as described in the Annual Financial Report for the year ended 31 December 2018 it is feasible that other living accommodation may be available to the Appellant which would enable the Appellant properly to perform his duties. In that regard, it is relevant that the Fixed Term Contract refers to the provision of accommodation to the Appellant being at the discretion of the [redacted] and to the Appellant being required to vacate any (rather than specific) accommodation provided by the [redacted] on termination of his employment. The Accommodation Policy refers to the [redacted] reserving the right to re-allocate different accommodation to the Appellant at any time and for any reason. It is noted that the previous [redacted] to the [redacted] performed his duties while residing at [redacted].

[37] In all the circumstances, I find the Appellant has not demonstrated the requirement to reside in the [redacted] accommodation, and not elsewhere, to enable him properly to perform his duties.

Commonly Prevailing Practice

[38] As regards a commonly prevailing practice, the questions arising from section 118(3)(a) and (b) are: (i) what is the class of trade in question? and (ii) what is the class of employee in question? The Appellant submits that the commonly prevailing practice must be considered from the viewpoint of a [redacted] to the [redacted]. In my view, section 118(3) must be more broadly construed particularly having regard to the use of the plural of 'trade' and 'employee' by reference to the 'class in question'. In this appeal, the relevant class of employee is [redacted] to a [redacted] and the relevant class of trade is a [redacted].





[39] As regards evidence of a commonly prevailing practice, it is instructive to consider the judgment in *Vertigan -v- Brady* [1988] STC 91. Mr Vertigan was considered a 'key worker' in the horticultural business in which he was employed. In that case, in terms of whether it was customary for employers to provide living accommodation for employees, the court had the benefit of reports from the Ministry of Agriculture, Fisheries and Food, a working paper published by the Tavistock Institute of Human Relations and oral evidence from two expert witnesses. This case related to a statutory provision worded differently than section 118. For instance, section 33 of the Finance Act, 1977, which was at issue in *Vertigan*, refers to '*where the accommodation is provided for the better performance of the duties of his employment, and his is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees..*'.

[40] However, evidence in the form of reports, working papers and expert witnesses would equally provide a basis to prove that a practice commonly prevailed. There is no similar evidence in this appeal. There is a narrative from the Appellant that since 1880 the practice commonly prevailed that the [redacted] to the [redacted] was provided with accommodation. It is observed that before [redacted] the [redacted] to the [redacted] resided in the [redacted], rather than in separate accommodation outside the [redacted] grounds on a road in the vicinity of the [redacted].

[41] In all the circumstances, I find the Appellant has not demonstrated that the [redacted] accommodation was provided in accordance with a commonly prevailing practice existing since before 30 July 1948 in respect of [redacted] to [redacted] in [redacted].

Determination

[42] In appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove, on the balance of probabilities, that the relevant tax is not payable. In the High Court judgment of *Menolly Homes Limited -v- The Appeal*





Commissioners and The Revenue Commissioners [2010] IEHC 49 (at paragraph 22) Charleton J. stated: “*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*”. I find, on balance, the Appellant has not discharged the burden of proving that the expense incurred by the [redacted] in connection with the provision of the [redacted] accommodation to the Appellant comes within section 118(3). The Appellant has not brought himself ‘*within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable*’ to be entitled to avail of section 118(3).

[43] For the reasons outlined above, I determine that the determination of the Revenue Commissioners made on 22 November 2016 that the provision of living accommodation to the Appellant by the [redacted] is chargeable to income tax as a benefit-in-kind under section 118 of the Taxes Consolidation Act, 1997 shall stand. The appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

28 OCTOBER 2020

