18TACD2021

BETWEEN/

APPELLANTS

Appellant

And

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments to income tax in relation to the tax years of assessment 2010 and 2011. The Appellants were directors of REDACTED ('the company') for the years 2010 and 2011, and held a 72% and 19% shareholding respectively in the company.

2. The appeals, are pursuant to section 997A(8) of the Taxes Consolidation Act 1997, against a decision of the Respondent to deny a credit for the income tax deducted from the Appellants' emoluments but not remitted to the Respondent by a company in which the Appellants held a material interest.

3. The parties agreed to having both appeals heard at the same time as the issues for both Appellants are the same.

4. This Appeal was determined by an oral hearing, which took place at the Tax Appeals Commission on 2 October 2020.

Background and Agreed Facts

5. A liquidator was appointed to REDACTED (hereafter referred to as the company) on DATE OF LIQUIDATION.

6. Mr REDACTED was a Director of the company for the years 2010 and 2011. He had a 72% shareholding in the company.

7. Mr REDACTED was a Director of the company for the years 2010 and 2011. He had a 19% shareholding in the company.

8. It is accepted that both Mr REDACTED and Mr REDACTED, in their capacity as Directors of that company are persons to whom Section 997A TCA 1997 applies.

9. It is accepted that Mr REDACTED was in receipt of a salary from the company of €119,260 for the year 2010 and €26,617 for the year 2011.

10. It is accepted that in accordance with its obligations under Section 112 TCA 1997 the company did deduct from Mr REDACTED – in 2010, PAYE Tax of €35,448.58, Income levy €3,283.88 and employee PRSI of €8,776.25, and, in 2011, PAYE Tax of €7,940.26, USC of €1,692.99 and employee PRSI of €1,064.70.

11. It is accepted that Mr REDACTED was in receipt of a salary from the company of €65,523 for the year 2010 and €15,870 for the year 2011.

12. It is accepted that in accordance with its obligations under Section 112 TCA 1997 the company did deduct from Mr REDACTED – in 2010, PAYE Tax of €16,602.29, Income levy €1,310.50 and employee PRSI of €4,602.12, and, in 2011, PAYE Tax of €3,871.24, USC of €921.31 and employee PRSI of €634.84.

13. Mr REDACTED submitted his returns of income (form 11) for 2010 and 2011 on 19 November 2011 and on 20 November 2012 respectively.

14. Mr REDACTED submitted his returns of income (form 11) for 2010 and 2011 on 28 March 2012 and on 20 November 2012 respectively.

15. The amount of Employers Tax that remain outstanding to Revenue by the company are €86,569.85 for 2010, €106,456.17 for 2011.

Legislation

S. 997A TCA 1997

(1)(a)[In this section—

"control" has the same meaning as in section 432;

"ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company.

(b)For the purposes of this section—

(i)a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and

(ii)the question of whether a person is connected with another person shall be determined in accordance with section 10.

(2)This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.

(3)Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies shall be given in any assessment raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.

(4)Where the company remits tax to the Collector-General which has been deducted from emoluments paid by the company, the tax remitted shall be treated as having been deducted from emoluments paid to persons other than persons to whom this section applies in priority to tax deducted from persons to whom this section applies.

(5)Where, in accordance with subsection (4), tax remitted to the Collector-General by the company is to be treated as having been deducted from emoluments paid by the company

to persons to whom this section applies, the tax to be so treated shall, if there is more than one such person, be treated as having been deducted from the emoluments paid to each such person in the same proportion as the emoluments paid to the person bears to the aggregate amount of emoluments paid by the company to all such persons.]

[(6) Where, in accordance with subsection (5), the tax to be treated as having been deducted from the emoluments paid to each person to whom this section applies exceeds the actual amount of tax deducted from the emoluments of each person, then the amount of credit to be given for tax deducted from those emoluments shall not exceed the actual amount of tax so deducted.]

S.432 of TCA 1997

(1) For the purposes of this Part, a company shall be treated as another company's associated company at a particular time if, at that time or at any time within one year previously, one of the 2 companies has control of the other company, or both companies are under the control of the same person or persons.

(2) For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire –

(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company,

(b) such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators (without regard to any rights which such person or any other person has as a loan creditor), entitle such person to receive the greater part of the amount so distributed, or

(c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators.

(3) Where 2 or more persons together satisfy any of the conditions of subsection (2), they shall be taken to have control of the company.

(4) For the purposes of subsection (2), a person shall be treated as entitled to acquire anything which such person is entitled to acquire at a future date or will at a future date be entitled to acquire.

(5) For the purposes of subsections (2) and (3), there shall be attributed to any person any rights or powers of a nominee for such person, that is, any rights or powers which another person possesses on such person's behalf or may be required to exercise on such person's direction or behalf.

(6) For the purposes of subsections (2) and (3), there may also be attributed to any person all the rights and powers of –

(a) any company of which such person has, or such person and associates of such person have, control,

(b) any 2 or more companies of which such person has, or such person and associates of such person have, control,

(c) any associate of such person, or

(d) any 2 or more associates of such person,

including the rights and powers attributed to a company or associate under subsection (5), but excluding those attributed to an associate under this subsection, and such attributions shall be made under this subsection as will result in the company being treated as under the control of 5 or fewer participators if it can be so treated

S 955 TCA 1997

(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding that tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2)[(a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.]

(b) Nothing in this subsection shall prevent the amendment of an assessment —

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),

(ii) to give effect to a determination on any appeal against an assessment,

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid [(notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made)] where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3).

(3) A chargeable person who is aggrieved by an assessment or the amendment of an assessment on the grounds that the chargeable person considers that the inspector was precluded from making the assessment or the amendment, as the case may be, by reason of subsection (2) may appeal against the assessment or amended assessment on those grounds and, if on the hearing of the appeal the Appeal Commissioners determine –

(a) that the inspector was so precluded, the Tax Acts shall apply as if the assessment or the amendment, as the case may be, had not been made, and the assessment or the amendment of the assessment as appropriate shall be void, or

(b) that the inspector was not so precluded, the assessment or the assessment as amended shall stand, except to the extent that any amount or matter in that assessment is the subject of a valid appeal on any other grounds.

(4)(a) Where a chargeable person is in doubt as to the application of law to or the treatment for tax purposes of any matter to be contained in a return to be delivered by the chargeable

person, that person may deliver the return to the best of that person's belief as to the application of law to or the treatment for tax purposes of that matter but that person shall draw the inspector's attention to the matter in question in the return by specifying the doubt and, if that person does so, that person shall be treated as making a full and true disclosure with regard to that matter.

(b) This subsection shall not apply where the inspector is, or on appeal the Appeal Commissioners are, not satisfied that the doubt was genuine and is or are of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax, and in such a case the chargeable person shall be deemed not to have made a full and true disclosure with regard to the matter in question.

(5)(a) In this subsection, "relevant chargeable period" means-

(i) where the chargeable period is a year of assessment for income tax, the year 1988-89 and any subsequent year of assessment,

(ii) where the chargeable period is a year of assessment for capital gains tax, the year 1990-91 and any subsequent year of assessment, and

(iii) where the chargeable period is an accounting period of a company, an accounting period ending on or after the 1st day of October, 1989.

(b)Sections 919(5)(b) and 924 shall not apply in the case of a chargeable person for any relevant chargeable period, and all matters which would have been included in an additional first assessment under those sections shall be included in an amendment of the first assessment or first assessments made in accordance with this section.

(c) For the purposes of paragraph (b), where any amount of income, profits or gains or, as respects capital gains tax, chargeable gains was omitted from the first assessment or first assessments or the tax stated in the first assessment or first assessments was less than the tax payable by the chargeable person for the relevant chargeable period concerned, there shall be made such adjustments or additions (including the addition of a further first assessment) to the first assessment or first assessments as are necessary to rectify the omission or to ensure that the tax so stated is equal to the tax so payable by the chargeable person.

Section. 956 (1) (c)TCA 1997

(c)Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the

period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

Section. 956 (2) (a)TCA 1997

A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to in subsection (1)(c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment.

Evidence – Mr REDACTED, Appellant and former Director of the company

16. Mr REDACTED confirmed he had been a director of the company for 20 years.

17. He outlined his views as to why the company was placed in liquidation in DATE OF LIQUIDATION, which included his view that the new contract type for commercial building contracts introduced in 2008 put sub-contractors such as the company in a weak position when collecting or enforcing payments for work completed.

18. He outlined that these difficulties led to the late receipt of payments and to bad debts from main contractors who themselves were in difficulty due to the financial crash of 2008.

19. Mr REDACTED outlined the financial position of the company at the time of the appointment of the liquidator.

20. He outlined in brief that after taking a cautious approach to collectable debt in the company there was at least €823,000 available to pay creditors.

21. He referred to the directors' estimated statement of affairs as at DATE OF LIQUIDATION which demonstrated that preferential creditors were owed €558,627 at that date.

22. Mr REDACTED submitted in evidence that the outstanding amounts of PAYE/PRSI/USC due from the company for 2010 was €86,569 representing 13.44%, or 7 weeks of the total liability for 2010.

23. He also confirmed that that the outstanding amounts of PAYE/PRSI/USC due from the company for 2011 was €106,456, representing four months liability.

24. Mr REDACTED outlined that the company had paid approximately €10.75m in various taxes over its 20 year existence.

Cross examination

25. In cross examination Mr REDACTED confirmed the dates on which his returns of income for 2010 and 2011 were submitted.

26. He also agreed in cross examination that he had taken credit for the tax deducted by the company in making these returns.

27. In cross examination he stated that he was not aware that the tax credit claimed in his returns was unpaid by the company. He confirmed that he did not check whether or not the tax was paid.

28. The Respondent drew his attention to the legend on the returns of income submitted advising that only tax paid should be entered on the return. Mr REDACTED advised that he was not aware of such a legend on the returns submitted.

29. Mr REDACTED confirmed his shareholding in the company as set out in the agreed facts and accepted that s.997A of the TCA 1997 applied to him as a proprietary director for the years under appeal.

30. The parties agreed not to call the other Appellant and director to give evidence as both parties accepted that Mr REDACTED evidence would replicate exactly what Mr REDACTED had stated in evidence in relation to the company and similarly replicate the evidence of Mr REDACTED in relation to his returns of income albeit personal to Mr REDACTED.

Submissions

Appellant

31. The Appellants' Agent submitted that s.432 TCA 1997 is written in the present tense in stating in (2):

> *For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire*

32. The Agent pointed out that as the parties were in agreement that the tax returns of the Appellants' were submitted after the appointment of the liquidator and accordingly, he submitted that the Appellants had no control over the company as described in s.432 (2) TCA 1997.

33. The Agent further pointed to s.677 (3) of the Companies Act 2014 which states:

> *On the appointment of a liquidator, other than a provisional liquidator, all the powers of the directors of the company shall cease*

34. The Agent further pointed to s.627 of the Companies Act 2014 in relation to a Liquidator's powers under that Act which he submitted effectively gives complete power over the company to the liquidator.

35. In summary, on the issue of control, the Agent submitted that the directors had no control over the company at the time of the submission of their returns and at the time they claimed a credit for the tax deducted (but unpaid) by the company and were accordingly entitled to the deductions so claimed. Accordingly the Agent submitted that the provisions of s.997A TCA 1997 could not be applied to the Appellants.

36. The Agent submitted that the Respondent ought to be precluded from raising the assessments the subject of this appeal because the Appellants' returns contained a full and true disclosure of all material facts necessary for the making of assessments for the years in question.

37. The Agent in a pre-hearing submission relied on the provisions of s.955/956 TCA 1997 in support of his view that the Respondent ought to be precluded from amending the assessments after a period of four years.

38. The Agent submitted the Tax Appeals Commission determination in 30TACD2017 as evidence of the Respondent's inconsistent approach to the use of s.997A TCA 1997 between that case and the case of the instant appeals. In that case the Respondent raised amended assessments to income tax within one month of the liquidation of the company. In the instant appeals the Respondent raised assessment in August 2018 some 7 years after the appointment of a liquidator.

39. The Agent submitted that the directors had no control over the company in 2018 as the company had been wound up at that time.

40. The Agent submitted a number of cases (*Squash Ireland Ltd 8 Feb 2001, Tralee Beef and Lamb, Digital Channel Partners Ltd in voluntary liquidation and La Moselle Clothing Ltd*) in support of his contention that the directors' behaviour was not fraudulent or negligent.

41. The Agent submitted that s.997 A of the TCA 1997 contravened the Companies Act in regard to limited liability as it is the function of the Office of the Director of Corporate Enforcement (ODCE) to punish offending directors and the ODCE were satisfied with the conduct of the Appellants in relation to the company.

42. In support of this the Agent submitted an email from the company liquidator confirming that the ODCE had relieved the liquidator of his obligation to make an application for the restriction of the former directors pursuant to section 150 of the Companies Act 1990.

43. The Agent submitted that the directors had always acted responsibly in paying taxes of €8,167,486 over the lifetime of the company and quoted from Finlay J in the case of Digital Partners Ltd *"that a failure to pay taxes over a limited period of time would not in itself amount to irresponsibility"*

Respondent

44. The Respondent's representative noted the Appellants' agreement to the Statement of Facts as set out at 6 – 15 above.

45. The representative submitted that it is the Respondent's case that the legislative wording in s.997A TCA 1997 on the denial of a credit for tax deducted under PAYE is very clear and unambiguous.

46. The representative submitted that s. 997A TCA 1997 sets out the circumstances in which a person having a material interest in a company is unable to attain a credit for tax deducted by that company which is unpaid.

47. The Respondent's representative submitted that the definition of *"control"* is contained in s.432 of TCA 1997.

48. The representative submitted that the tax claimed by the Appellants in their respective returns for 2010 and 2011 has not been paid and he acknowledged that this has been accepted by the Appellants. On this basis it is the Respondent's position that a credit for the monies deducted from both the Appellants is not available to be offset against their liabilities for 2010 and 2011.

49. The Respondent in addressing the time limits for raising an assessment submitted that there was negligence on behalf of the Appellants in relation to claiming a credit for the tax deducted (but not remitted) by the company.

50. In this the Respondent relied on s.959AD (3) TCA 1997 and submitted that a Revenue Officer had reasonable grounds for believing that a form of neglect had been committed by, or on behalf of the Appellants.

51. The Respondent submitted that at the time of the submission of the Appellants' returns the Appellants were, or ought to have been aware that the P35 PAYE/PRSI/USC annual liabilities for the company were outstanding by the company and that consequently the Appellants had no entitlement to claim any tax credit as a deduction against personal liabilities on their tax returns for 2010 and 2011.

52. The Respondents submitted that the Appellants actions in claiming that tax credit against their personal liabilities amounted to negligence and accordingly provided the vires for raising the assessments outside the four-year time limit imposed in s.959AA TCA 1997.

53. The Respondents submitted that the amended income tax assessments the subject of this appeal were raised directly on the two directors, on foot of the income tax returns made by them in a manner that Revenue believe was insufficient. The Respondent asserted that this insufficiency is an act of negligence.

54. The Respondent addressed the issues raised by the Agent for the Appellants in relation to *"control"* and pointed out that the submission of private individual tax returns is not a

corporate event and is therefore outside the remit of the ODCE to examine or to consider whether these returns were made in a negligent manner or otherwise.

55. The Respondent submitted that the pertinent legislation for *"control"* is contained in s.432 of TCA 1997 and that the fact that the directors lost power and control of the company as defined in s.677 of the Companies Act on the appointment of the liquidator can have no application.

56. The Respondent submitted that the Appellants are individuals to whom s.997S TCA 1997 applies and pointed to the evidence of the Appellants as confirmation of this view.

57. The Respondent, through its representative, further submitted that the cases referred to by the Appellants' Agent were either related to matters in dispute under the Companies Act or the failure of a company to submit a tax return and were not relevant to the instant appeals.

58. The Agent for the Appellants responded to the submissions of the Respondent by reiterating his view that the Appellants had lost *"control"* of the company on the appointment of the liquidator and thus the application of s.997A TCA 1997 was nonsensical and not applicable to the Appellants.

59. The Agent for the Appellants further responded to the Respondent by stating that the issue of negligence was not proven by the Respondent.

Analysis and Findings

60. The Appellants raised the issue of time limits for amending the assessment in submissions to the TAC prior to the hearing and the TAC accepted in the particular circumstances of the appeals, to permit the additional grounds of appeal. The Respondent raised no objection to this and acknowledged that there were two issues to be determined i.e. whether the amended assessments were made out of time and whether s.997A TCA 1997 applied to the Appellants.

Application of s. 997A to the Appellants

61. The Appellants have provided evidence of having claimed a credit for PAYE deducted from their emoluments by the company in making their tax returns for 2010 and 2011.

62. The Appellants have submitted that the control of the company was wrested from them on the appointment of the liquidator in DATE OF LIQUIDATION and their tax returns were submitted at a time when they could not exercise control of the company in accordance with the provisions of the Companies Act.

63. On the other hand the Respondent has pointed out that the Appellants were in *"control"* in accordance with the definition of control in s.432 TCA 1997.

64. Section 997A (2) provides that

> *'This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.'*

Thus the provision applies to proprietary directors.

65. Section 997A(1)(a) provides as follows;

> *'In this section "control" has the same meaning as in section 432;'*

66. Section 997A(1)(b) provides as follows;

> *'(1)(b) For the purposes of this section— a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and 3 the question of whether a person is connected with another person shall be determined in accordance with section 10.'*

67. Section 997A(3) provides:

> *'Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies [shall be given against the amount of tax chargeable in any assessment] raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there*

is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.'

68. The Appellants did not dispute the fact that they were proprietary directors. The Appellants pleaded dissatisfaction with the liquidator of the company who failed to collect all the debtors of the company.

69. The Appellants also pleaded that they had always acted responsibly over the lifetime of the company and had in fact paid substantial sums to the Respondent during the period in which the company traded. The Respondent acknowledged the difficulties faced by the Appellants but stated that it was bound by the legislation in raising the assessment pursuant to s.997A TCA 1997.

70. The Appellants contended that s.997A TCA 1997 contravenes the Companies Act insofar as it is the duty of the ODCE to punish offending directors rather than the Respondent. The ODCE were satisfied with the conduct of the directors of the company.

71. S.997A (3) TCA 1997 provides that *'no credit for tax deducted .... shall be given against the amount of tax chargeable in any assessment raised on the person ... unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General'*.

72. Section 997A (4) TCA 1997 provides: *'Where the company remits tax to the Collector-General which has been deducted from emoluments paid by the company in a year of assessment, the tax remitted for that year of assessment shall be treated as having been deducted from emoluments paid to persons other than persons to which this section applies in priority to tax deducted from persons to whom this section applies'*

73. The assertion that there was an entitlement to claim a credit for the tax deducted from the Appellants' emoluments by the Company notwithstanding that such taxes were not remitted to the Respondent fails to recognise that companies, as inanimate bodies, can only act through the actions of its directors and in accordance with their contractual and fiduciary obligations and powers vested in the board of directors in accordance with the Articles of Association. Furthermore, while tax was deducted from the Appellants' emoluments, a decision was made to employ those funds elsewhere as opposed to the intended purpose of discharging those taxes and therefore favoured another cause or creditor to the detriment of the Respondent.

74. The Appellants have suggested that the ODCE rather than the Respondent has a duty to punish errant directors in regard to limited liability in accordance with the Companies Act and therefore s.997A TCA 1997 contravenes the Companies Act.

75. The demonstrable effect of s.997A TCA 1997 is to deny persons in positions of control and influence over a company's business activities from claiming a credit for unpaid taxes that ought to have been deducted and remitted by such companies to the Respondent. The effect of the section is to secure the payment of taxes from the emoluments derived from such individuals. Therefore, and contrary to the Appellants' assertions, the challenged provision is not superseded by any provisions in the Companies Act whereby any action or inaction of the Office of the Director of Corporate Enforcement (ODCE) implies its satisfaction or dissatisfaction with the directors in relation to company law matters for which the ODCE is responsible. The application of s.997A of the Taxes Consolidation Act 1997 is therefore wholly independent of any action or inaction on the part of the ODCE.

76. For the reasons outlined above, the provisions of s.997A of the Taxes Consolidation Act 1997 do not constitute any kind of punishment or deterrent in relation to the Companies Act. Furthermore in fact, its scope does not serve as a deterrent but a collection mechanism to secure tax arising on emoluments paid to prescribed individuals responsible for discharging the company's liabilities. It ensures that such individuals cannot abdicate the responsibility to pay income tax on their emoluments to an inanimate entity.

77. Section 997A of the Taxes Consolidation Act 1997 was introduced by an Act of the Oireachtas, the effect of which gives statutory authority to deny prescribed individuals from claiming a credit for the income tax deducted from their emoluments but not remitted to the Respondent by companies in which those individuals hold a material interest.

78. The Appellants did not dispute the deficit which arose in relation to the failure of the company to remit income tax in relation to their emoluments for the tax years of assessment, 2010 and 2011. The wording of the statutory provision is clear in that it provides that *'no credit ….. shall be given'* in the circumstances which arise in the within appeals. Thus I do not consider that I have discretion to depart from the clear wording of s.997A TCA 1997 and as a result, I should determine this appeal in favour of the Respondent on the question of the applicability of s.997A TCA 1997 to the instant appeals.

79. I am satisfied that the Respondent is correct in its view that s.997 A TCA 1997 is the appropriate remedy in respect of denying credits for the unpaid tax in circumstances where an amendment is made within the time frame permitted for making enquiries in relation to amending an assessment or outside of that time limit where the return did not contain *a full and true disclosure of all material facts necessary for the making of an assessment*.

80. I am also satisfied that the Respondent is correct in its views if the returns had been "*completed in a fraudulent or negligent manner".*

Time Limits in amending assessments

81. The Respondent has addressed the issue of time limits by referring to s.959AA to s.959 AD TCA 1997. However Section 129 of FA 2012 replaced Parts 39 and 41 of TCA 1997 with effect for accounting periods (of chargeable persons that are companies) beginning on or after 1 January 2013 and in other cases from the 2013 tax year. Parts 39 and 41 continued to apply for chargeable periods before these dates. Accordingly the relevant sections of the TCA in relation to time limits for the instant appeals against assessment to income tax for 2010 and 2011 are contained in the older legislation similar but not exactly the same as referred to in submissions by the parties to these appeals.

82. The Respondent submitted that there was negligence on behalf of the Appellants in relation to claiming a credit for the tax deducted (but not remitted) by the company and relied on s.959AD (3) TCA 1997 for its vires in amending the assessments.

83. The Respondent submitted that a Revenue Officer had reasonable grounds for believing that a form of neglect had been committed by or on behalf of the Appellants.

84. S.955 TCA 1997 provides for the amendment of, and time limit for assessments. It prohibits Revenue from making assessments where a full and true disclosure is made, of all material facts necessary for the making of an assessment for the chargeable period. An assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years.

85. Conversely it permits the amendment of an assessment where a relevant return does not contain a full and true disclosure of the facts referred to above.

86. S.955 (3) TCA 1997 provided an opportunity for chargeable persons to appeal against an assessment or amended assessment on the grounds that the inspector was precluded

from making that assessment or amendment by reason of the four year provision provided in s.955 (2) TCA 1997. In order to avail of the protection of s.955 TCA 1997 in relation to time limits the chargeable person must display that the relevant return contained a full and true disclosure and also make such an appeal against the inspector's entitlement to raise or amend such an assessment.

87. S.956 (1) (c) TCA 1997 prohibited Revenue from making enquiries after the expiry of four years from the end of the chargeable period of the return.

88. S.956 (2) (a) TCA 1997 provided an opportunity for the chargeable person aggrieved by an inspector making such enquiries to make an appeal to the TAC against the making of such enquiries.

89. The Respondent by letters dated 29 August 2018 to both Appellants advised the Appellants that in accordance with s.997A TCA 1997 it was withdrawing the PAYE/USC/PRSI credited to the Appellants. These letters advised the Appellants that amended notices of assessment would issue shortly.

90. The assessments (the subject of this determination) were amended accordingly without any reference to the time limits applicable to the amendment of assessments provided for in s.955 and s.956 TCA 1997.

91. The questions that arise in these appeals in relation to time limits are:

    a. Did the relevant returns in respect of the years of assessment contains *a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable periods?*
    b. Did the inspector have reasonable grounds to believe that the returns were completed in a [fraudulent] or negligent manner?
    c. Were the Appellants afforded the opportunity to appeal the making of enquiries outside of the four-year time limit in circumstances where the Inspector believed the returns were completed in a [fraudulent] or negligent manner?

92. In answer to the first question the Appellants submitted their returns in the belief that the credits claimed thereon in respect of their employing company's deductions would be paid by the liquidator from the surplus assets as set out in the statement of affairs presented on the appointment of the liquidator. I find that the returns made did contain

a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable periods.

93. In answer to the second question I find for the same reason that the inspector has not proven negligence in respect of the tax credits claimed thereon in respect of their employing company's deductions.

94. Negligence is usually described as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

95. The judgment of the Court of Appeal in Stanley-v- Revenue Commissioners [2017] IECA 279 (at para. 42 et seq.) offers some further assistance on the meaning of negligence.

> *42. In my view, the plain and ordinary meaning of the words used in s. 46(2) CATCA demonstrate clearly a distinction between a return, the requirements for which are set forth in s. 46(2)(a), and an assessment which is to be made "on that return" as stated in s. 46(2)(b). The return and the assessment on that return are therefore different things. For the four year time limit to be dis-applied there must be either fraud or neglect (as defined) committed by the tax payer. There is no question of fraud being alleged by Revenue in this case. Neglect has been given a very specific definition in s. 46 (7B)(b) as meaning "negligence or a failure to deliver a correct relevant return (within the meaning given in section 49 (6A) (b)".*

96. The Respondent did not offer evidence from the Revenue Officer who had reasonable grounds for believing that a form of neglect had been committed by or on behalf of the Appellants. Instead the Respondent submitted that a Revenue Officer had reasonable grounds for believing that a form of neglect had been committed by or on behalf of the Appellants

97. In answer to the third question I find that the Respondent denied any opportunity to the Appellants to appeal against the enquiries made in circumstances where the Inspector believed the returns were completed in a negligent manner. The Respondent stated as a matter of fact in the letters to the Appellants that the tax claimed in their returns was unpaid and consequently amended the assessments.

98. In doing so the Respondent denied any opportunity to the Appellants to challenge the Inspector's entitlement to make enquiries, to challenge the efficacy of the Respondent's

view in the matter of whether the returns contained a full and true disclosure of all material facts necessary for the making of an assessment or to challenge the Respondent's views in relation to negligence.

99. Mr Justice Clarke in the Supreme Court considered the matter of sections 955 and 956 TCA 1997 in the case of the Revenue Commissioners v Droog [2016] IESC at paragraphs 4.4 to 4.6 as follows:

> *4.4 However, it is s.955 and 956 of the TCA which are at the heart of the issue which arises on this appeal. Section 955(1) allows an inspector "at any time" to amend an assessment notwithstanding that tax "may have been paid or repaid" in respect of the assessment previously issued. The purpose of that provision would appear to be to ensure that a tax payer could not argue that the fact that they had made a return and had paid tax in accordance with an assessment raised on foot of that return might mean that their tax affairs for the fiscal period concerned were irrevocably finalised.* ***However, s.955(1) is expressly stated to be subject to subs.(2) which is in the following terms:-***
>
> ***"(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and –***
>
> *(i) no additional tax shall be payable by the chargeable person, after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid to the chargeable person after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,*
>
> ***By reason of any matter contained in the return.***
>
> ***b) Nothing in this subsection shall prevent the amendment of an assessment—***
>
> ***(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),***
>
> *(ii) to give effect to a determination on any appeal against an assessment,*

(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(iv) to correct an error in calculation, or

(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."

The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant "facts". In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return. ***There are, of course, the exceptions contained in subs(b)*** *but none of these apply in the circumstances of this case.*

4.5 It is easy to understand the reasoning behind that provision. Where a tax payer has made a "full and true" disclosure of all relevant facts, the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen the amount of tax due after the relevant four year period. It is also of some relevance to note the provisions of subs.(4) which allows for the expression of doubt where a tax payer is unsure as to the law in any particular relevant regard but makes a return to the best of their ability while expressing doubt. Unless that expression of doubt is found to be ungenuine then the person will be regarded as having made a "full and true disclosure" even though it may turn out that their view of the law was wrong. Thus a person who makes an incorrect return, but expresses what is found to be a genuine doubt, will be held to have made an appropriate return thus triggering the time limit but, equally importantly, that facility cannot be abused by ungenuine expressions of doubt.

4.6 Section 956 is also of relevance. Section 956(1)(b) allows an inspector to make inquiries or take action necessary to verify the accuracy of a return. Section 956(1)(b)(ii) allows the inspector, presumably as a result of discoveries which might arise from such inquiries or actions, to amend an assessment but, importantly, that power is expressly stated to be subject to s.955(2) to which reference has already been made and which provides for the time limit. Consistent with that provision is subs.(3) which imposes a time limit on inquiries

and actions outside the four year period unless the inspector has reasonable ground "for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner".

[Emphasis Added]

100. It is also clear from the same Supreme Court judgment, that the section 956(1)(c) test of '*reasonable grounds*' must be established *before* enquiries or actions are made in accordance with s.956. This is clear from the judgment of Clarke J. as he then was, giving judgment on behalf of the Court, at paragraphs 4.7 and 4.8 as follows;

'4.7 …… A person who makes a full and true disclosure and pays their tax on foot of an assessment raised thereon cannot have their tax affairs reopened after four years have elapsed. An inspector is given wide power to inquire into the accuracy of any return but is precluded from engaging in such inquiry outside the four year period unless the inspector has reasonable grounds for believing that the original return was fraudulent or negligent and thus not a full and true disclosure. An inspector is not, therefore, entitled to engage in a purely "fishing" exploration of whether old returns (i.e. returns more than four years previous) were inaccurate but rather is required to have some reasonable basis for considering that the return was fraudulent or negligent before embarking on inquiries. Section 956(2)(a) allows a tax payer who feels that an inspector is making inquiries outside the time limit in circumstances not permitted to appeal to the Appeal Commissioners.

4.8 It follows that, at least in general terms, ss.955 and 956 are designed to prevent the reopening of the tax affairs of a tax payer in respect of the types of tax covered by Part 41 outside of a four year period except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable suspicion exists no ultimate exposure to adverse tax consequences can be placed on the tax payer concerned unless it is ultimately established that the relevant return was in fact not full and true in its disclosure.'

101. Charleton J in the 2016 Supreme Court case of O'Rourke [2016] IESC 2 stated at para. 4 in relation to s. 955 TCA 1997:

> *4. Here, the relevant section requiring analysis is s. 955 of the Act of 1997. This section gives an inspector of taxes the entitlement to raise an assessment and sets a time limit for that once the taxpayer has submitted an apparently valid income tax return. The temporal limitation on this power is coupled with an exception extending the time for raising an assessment indefinitely, but only where it can be established that there is some want in proper disclosure by the taxpayer. While this must be analysed within its proper context, the text thereof operates as the fundamental provision which determines the question in issue on this appeal*.

He went on to state (para. 5):

> *"….for the years of self assessment, s. 955(2)(a) of the Act of 1997 set the period at 6 years, but this period has also since been reduced, in this instance to 4 years. This Court is not concerned with ruling on these time limits, insofar as they may be applicable. That would be a matter, if it is in issue, for the Appeal Commissioners. Under the statute, in the event that a return to income tax was fraudulently or negligently made, these time limits do not apply."*

102. The safeguards of these sections operating together limit the potential for considerable expense and uncertainty for the Appellants where any deficiency in the return still meets the test of a full and true disclosure of all the material facts and where such deficiency may constitute [fraud or] neglect.

103. The Revenue Commissioners, in raising queries in relation to years that are clearly out of time are obliged to consider the implications for the Appellants in engaging the exceptions to the four-year rule contained in both ss. 955 and 956 TCA 1997.

104. In these Appeals the Appellants were denied any opportunity to appeal against the enquiries made in circumstances where the Inspector believed the returns were completed in a negligent manner.

Conclusion

105. I find that the returns made did contain *a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable periods.* Whilst not necessary for the success of these Appeals, in circumstances where the returns contained a full and true disclosure, I find also that the inspector has not displayed as proven, negligence in respect of the tax credits claimed thereon in respect of their employing company's deductions.

Determination

106. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, I have concluded that the Respondent was incorrect in amending the assessments for 2010 and 2011 outside of the time limits contained in ss. 955 and 956 TCA 1997. The Appeals are accordingly allowed.

107. These appeals are hereby determined in accordance with Section 949AK TCA 1997.

CHARLIE PHELAN
APPEAL COMMISSIONER
16 NOVEMBER 2020