



22TACD2021

BETWEEN/

**REDACTED**

**Appellant**

AND

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

### **Introduction**

1. This is an appeal against assessments for income tax for the Years 2011, 2012.
2. The amount of tax concerned is €6,578.
3. This Appeal was determined by an oral hearing, which, due to Covid 19 restrictions, took place remotely by electronic means on 24 November 2020.

### **Background**

4. The Appellant's spouse **NAME REDACTED**, was a partner in a trading partnership, for a number of years as at 1 January 2011.
5. The Appellant was jointly assessed with his wife **NAME REDACTED** for the years 2008 to 2010 and had submitted income tax returns as such up to and including the year 2010.
6. The Appellant applied for separate treatment for tax purposes on 3 July 2013.

7. The partnership cancelled its tax registrations with effect from 30 April 2011 on the basis that it had ceased trading.
8. The Respondent took the view that the partnership was still trading and assessed each of the partners to income tax.
9. The Respondent raised income tax assessments the subject of this appeal in accordance with the Taxes Consolidation Act 1997 (TCA 1997) as follows:

2011 €3,477

2012 €3,101

## Legislation

### 10. Sections of the Taxes Consolidation Act 1997 (TCA 1997)

#### S954 TCA 1997 Making of assessments

*(1) An assessment shall not be made on a chargeable person for a chargeable period at any time before the specified return date for the chargeable period unless at that time the chargeable person has delivered a return for the chargeable period, and an assessment shall not be made at a time when the making of the assessment is precluded under section 955(2).*

*(2) Subject to subsection (3), an assessment made on a chargeable person for a chargeable period shall be made by the inspector by reference to the particulars contained in the chargeable person's return.*

*(3) Where –*

*(a) a chargeable person makes default in the delivery of a return for a chargeable period, or*

*(b) the inspector is not satisfied with the return which has been delivered, or has received any information as to its insufficiency,*

*nothing in this section shall prevent the inspector from making an assessment in accordance with section 919(4) or 922, as appropriate.*

*(4)(a) Where as respects a chargeable period the inspector is satisfied that a chargeable person has paid all amounts of tax which, if the inspector were to make an assessment on the chargeable person for the chargeable period, would be payable by*



*the chargeable person for the chargeable period, the inspector may elect not to make an assessment on the chargeable person for the chargeable period and, where the inspector so elects, he or she shall give notice of the election to the chargeable person, and the amounts paid by the chargeable person shall be deemed to have been payable in all respects as if the inspector had made the assessment.*

*(b) Subject to section 955(2), nothing in this subsection shall prevent an inspector from making an assessment on the chargeable person for the chargeable period at any time after the giving of the notice of election under this section.*

*(5) Where an inspector makes an assessment –*

*(a) under either of the provisions referred to in subsection (3) in default of the delivery of a return, or*

*(b) in circumstances where the chargeable person has calculated the amount of tax which will be payable by that person on foot of an assessment and the inspector does not at the time of the making of the assessment disagree with the tax as so calculated,*

*it shall not be necessary to set out in the notice of assessment any particulars other than particulars as to the amount of tax to be paid by the chargeable person.*

*(6) Notwithstanding subsections (1) to (5) but subject to section 955(2), where a chargeable person has delivered a return for a chargeable period, the chargeable person may by notice in writing given to the inspector require the inspector to make an assessment for the chargeable period and the inspector shall make the assessment forthwith.*

*(7) Nothing in this section shall prevent an inspector from making an assessment in accordance with –*

*(a) section 977(3) or subsection (2) or (3) of section 978, as appropriate, and, notwithstanding sections 952 and 958, tax specified in such an assessment shall be due and payable in accordance with section 979,*

*(b) subsection (5) or (6), as appropriate, of section 980 and, notwithstanding sections 952 and 958, tax specified in such an assessment shall be due and payable in accordance with section 980(10), or*

*(c) section 1042 and, notwithstanding sections 952 and 958, tax specified in such an assessment shall be due and payable in accordance with section 1042.*



S922 TCA 1997 Assessment in absence of return

(1) In this section, “information” includes information received from a member of the Garda Síochána.

(2) Where the inspector does not receive a statement from a person liable to be charged to income tax, the inspector shall to the best of his or her information and judgment, but subject to section 997 ), make an assessment on that person of the amount at which that person ought to be charged under Schedule E.

(3) Where-

(a) a person makes default in the delivery of a statement in respect of any income tax under Schedule D or F, or

(b) the inspector is not satisfied with a statement which has been delivered, or has received any information as to its insufficiency,

the inspector shall make an assessment on the person concerned in such sum as according to the best of the inspector’s judgment ought to be charged on that person.

S1094 TCA 1997 Tax clearance certificates in relation to certain licences

(1) In this section-

[“the Acts” means—

(a) the Customs Acts,

(b) the statutes relating to the duties of excise and to the management of those duties,

(c) the Tax Acts,

[(ca) Parts 18A, 18B, 18C and 18D,]

(d) the Capital Gains Tax Acts,

(e) the Value-Added Tax Acts,

and any instruments made thereunder;]

“beneficial holder of a licence” means the person who conducts the activities under the licence and, in relation to a licence issued under the Auctioneers and House Agents Act, 1947, includes the authorised individual referred to in section 8(4), or the nominated individual referred to in section 9(1), of that Act;



*“licence” [means a licence, permit or authorisation], as the case may be, of the kind referred to in-*

*(a) the proviso (inserted by section 156 of the Finance Act, 1992) to section 49(1) of the Finance (1909-1910) Act, 1910,*

*(b) the further proviso (inserted by section 79(1) of the Finance Act, 1993) to section 49(1) of the Finance (1909-1910) Act, 1910,*

*(c) the proviso (inserted by section 79(2) of the Finance Act, 1993) to section 7(3) of the Betting Act, 1931,*

*(d) the proviso (inserted by section 79(3) of the Finance Act, 1993) to section 19 of the Gaming and Lotteries Act, 1956,*

*(e) the proviso (inserted by section 79(4)(a) of the Finance Act, 1993) to subsection (1) of section 8 of the Auctioneers and House Agents Act, 1947,*

*(f) the proviso (inserted by section 79(4)(b) of the Finance Act, 1993) to subsection (1) of section 9 of the Auctioneers and House Agents Act, 1947 (an auction permit under that section being deemed for the purposes of this section to be a licence),*

*(g) the proviso (inserted by section 79(4)(c) of the Finance Act, 1993) to subsection (1) of section 10 of the Auctioneers and House Agents Act, 1947,*

*[(h) Section 101 of the Finance Act, 1999*

*(j) section 93, 116 or 144 of the Consumer Credit Act, 1996*

*(k) subsection (2A) (inserted by section 106 of the Finance Act, 2000) of section 62 of the National Cultural Institutions Act, 1997*

*(l) subsection (1A) (inserted by section 172 of the Finance Act, 2001) of section 2 of the Intoxicating Liquor (National Concert Hall) Act, 1983,*

*(m) subsection (3) (inserted by the Finance Act, 2002) of section 122 of the Finance Act, [1992],*

*(n) subsection (1A) (inserted by the Finance Act, 2002) of the Finance (1909-10) Act, [1910,]*

*(o) section 21 of the Intoxicating Liquor Act, [2003, and]*

*(p) section 1 of the Intoxicating Liquor (National Conference Centre) Act 2010;*

*[“Market value”, in relation to any property means the price which such property might reasonably be expected to fetch on a sale in the open market on the date on which the property is to be valued;]*



*“specified date” means the date of commencement of a licence sought to be granted under any of the provisions referred to in [paragraphs (a) to (o)] of the definition of “licence” as specified for the purposes of a tax clearance certificate under subsection (2);*

*“tax clearance certificate” shall be construed in accordance with subsection (2).*

*(2) Subject to subsection (3), the Collector-General shall, on an application to him or her by the person who will be the beneficial holder of a licence due to commence on a specified date, issue a certificate (in this section referred to as a “tax clearance certificate”) for the purposes of the grant of a licence if-*

*(a) that person and, in respect of the period of that person’s membership, any partnership of which that person is or was a partner,*

*(b) in a case where that person is a partnership, each partner,*

*(c) in a case where that person is a company, each person who is either the beneficial owner of, or able directly or indirectly to control, more than 50 per cent of the ordinary share capital of the company,*

*has or have complied with all the obligations imposed on that person or on them by the Acts in relation to-*

*(i) the payment or remittance of the taxes, interest and penalties required to be paid or remitted under the Acts, and*

*(ii) the delivery of returns.*

*(3) Subject to subsection (4), where a person (in this section referred to as “the first-mentioned person”) will be the beneficial holder of a licence due to commence on a specified date and another person (in this section referred to as “the second-mentioned person”) was the beneficial holder of the licence at any time during the year ending on that date, and-*

*(a) the second-mentioned person is a company connected (within the meaning of section 10 as it applies for the purposes of the Tax Acts) with the first-mentioned person or would have been such a company but for the fact that the company has been wound up or dissolved without being wound up,*

*(b) the second-mentioned person is a company and the first-mentioned person is a partnership in which-*

*(i) a partner is or was able, or*

*(ii) where more than one partner is a shareholder, those partners together are or were able,*



*directly or indirectly, whether with or without a connected person or connected persons (within the meaning of section 10 as it applies for the purposes of the Tax Acts), to control more than 50 per cent of the ordinary share capital of the company, or*

*(c) the second-mentioned person is a partnership and the first-mentioned person is a company in which-*

*(i) a partner is or was able, or*

*(ii) where more than one partner is a shareholder, those partners together are or were able,*

*directly or indirectly, whether with or without a connected person or connected persons (within the meaning of section 10 as it applies for the purposes of the Tax Acts), to control more than 50 per cent of the ordinary share capital of the company,*

*then, a tax clearance certificate shall not be issued by the Collector-General under subsection (2) unless, in relation to the activities conducted under the licence, the second-mentioned person has complied with the second-mentioned person's obligations under the Acts as specified in subsection (2).*

*(3A) Where –*

*(a) the first-mentioned person will be the beneficial holder of a licence due to commence on a specified date on foot of a certificate granted or to be granted under section 2(1) (as amended by section 23 of the intoxicating Liquor Act, 1960) of the Licensing (Ireland) Act, 1902,*

*(b) the second-mentioned person was the beneficial holder of the last licence issued prior to the specified date in respect of the premises for which the certificate referred to in paragraph (a) was granted, and*

*(c) the acquisition of the premises by the said first-mentioned person was for a consideration of less than market value at the date of such acquisition,*

*then subsection (3) shall apply as if-*

*(i) the reference to the year ending on that date were a reference to 5 years ending on that date, and*

*(ii) the reference to the activities conducted under the licence was a reference to the activities conducted by the second-mentioned person under the last licence held by the said person prior to the specified date.*

*(4) Subsection (3) shall not apply to a transfer of a licence effected before the 24th day of April, 1992, or to such transfer effected after that date where a contract for the sale or lease of the premises to which the licence relates was signed before that date.*





*(5) An application for a tax clearance certificate under this section shall be made to the Collector-General in a form prescribed by the Revenue Commissioners or in such other manner as the Revenue Commissioners may allow.*

*(6) Where an application for a tax clearance certificate under this section is refused by the Collector-General, he or she shall as soon as is practicable communicate in writing such refusal and the grounds for such refusal to the person concerned.*

*(7)(a) Where an application under this section to the Collector-General for a tax clearance certificate is refused, the person aggrieved by the refusal may, by notice in writing given to the Collector-General within 30 days of the refusal, apply to have such person's application heard and determined by the Appeal Commissioners; but no right of appeal shall exist by virtue of this section in relation to any amount of tax or interest due under the Acts.*

*(b) A notice under paragraph (a) shall be valid only if-*

*(i) that notice specifies*

*(I) the matter or matters with which the person is aggrieved, and*

*(II) the grounds in detail of the person's appeal as respects each such matter,*

*and*

*(ii) any amount under the Acts which is due to be remitted or paid, and which is not in dispute, is duly remitted or paid.*

*(c) The Appeal Commissioners shall hear and determine an appeal made to them under this subsection as if it were an appeal against an assessment to income tax and, subject to paragraph (d), the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law) shall apply accordingly with any necessary modifications.*

*(d) On the hearing of an appeal made under this subsection, the Appeal Commissioners shall have regard to all matters to which the Collector-General is required to have regard under this section.*

*(8) A tax clearance certificate to be issued by the Collector-General under this section may—*

*(a) be issued in electronic format, and*

*(b) with the agreement in writing of the applicant, be published in a secure electronic medium and be accessed by persons authorised by the applicant to do so.*





*(9) A tax clearance certificate shall be valid for the period specified in the certificate.*

## **Submissions**

### *Appellant*

11. The Appellant's agent submitted that the assessments should be cancelled as the partnership ceased on 30 April 2011.
12. The Appellant's agent submitted that the assessments should be displaced as the Appellant had, subsequent to the issue of the assessments, submitted returns for these years in order to make an appeal.
13. The Appellant's agent submitted that it was self-evident that the partnership had ceased as the Appellant's spouse's partner in the partnership, for the period of the assessments had availed of maternity benefit and job seekers allowance.
14. The Appellant's agent submitted that the Respondent had failed to turn up for a scheduled meeting on September 5, 2013 but subsequently re-registered the partnership and each partner for all taxes and raised the instant assessments on the Appellant as assessable spouse.
15. The Appellant's agent submitted that the public house was operated by a third party called **NAME REDACTED** (described as the investor) from 1 May 2011 and it is he who should be assessed for income tax for 2011 and 2012.
16. The Appellant's agent submitted that the Respondent had taken a view that the Appellant as assessable spouse for **NAME REDACTED** was an assessable party for income tax and not a nominee for the investor. The Appellant's agent submitted that **NAME REDACTED** function changed on 30 April 2011.

### *Respondent*

17. The Respondent submitted that the Appellant's spouse was a partner in the partnership which was engaged in a public house business known as the **NAME**



**REDACTED.** The partnership was formed by two partners, including **NAME REDACTED**.

18. The Respondent submitted that the application for separate treatment made in 2013 could not be backdated to exclude **NAME REDACTED** from assessment as the assessable spouse for 2011 and 2012.
19. The Respondent submitted that the partnership was trading in the **NAME REDACTED** licensed premises up until June 2013.
20. The Respondent submitted that the publican's licence was renewed in the name of the partnership for the years ending 30 September 2011, 30 September 2012 and 30 September 2013.
21. The Respondent submitted that the partnership comprising the Appellant's spouse and another person declared turnover of €198,656 and €201,942 in its application for renewal of the publican's licences expiring on 30 September 2011 and 30 September 2012 respectively.
22. The Respondent submitted copies of signed applications and copies of the actual cheques for payment, for publican's licences on behalf of the partnership. These applications were made to the Respondent in the years 2010, 2011 and 2012.
23. The Respondent submitted that these applications were signed by **NAME REDACTED** in respect of the 2011 application on 1 November 2010 and by **NAME REDACTED** for the 2012 and 2013 applications on 4 October 2011 and 15 October 2012 respectively.
24. The Respondent submitted that the Appellant's spouse was in fact a partner in the partnership and actively trading up to June 2013.
25. The Respondent submitted the assessments are correctly chargeable, were raised in accordance with the best judgement of the Inspector and done so in the absence of full information, taking into consideration the turnover figures supplied by the Appellant's spouse in her applications for publican's licences.



## Analysis

26. The Appellant's agent has asserted that the partnership was not in business at all after 30 April 2011. However, the Appellant has provided no evidence to support the assertion that the partnership ceased on this date.
27. The Appellant's agent suggested that, as one partner had availed of maternity benefit and job seekers benefit during the assessment years, she could not have been in partnership running a public house.
28. The Appellant's agent asserted that the partnership ceased to trade on 30 April 2011 and that the participation of the partners in the trade of the public house changed at that time, as an investor had commenced operating the public house.
29. The Appellant's agent offered no evidence in support of this contention.
30. The Respondent has provided evidence of the Appellant's spouse acting as a partner in the partnership having applied for and obtained publican's licences for the periods of the assessments the subject of this appeal.
31. The documents presented by the Respondent in support of its assertion that the partnership was trading, display signed applications for publican's licences by the partners and include copies of the cheques made payable to the Revenue Commissioners in respect of these applications.
32. The Respondent has also provided a copy of a letter from the Appellant's agent, enclosing a cheque on behalf of the partnership, displaying the Appellant's spouse's name in the title, in part payment of the publican's license for one of the years.
33. The Respondent has based the assessments the subject of this appeal on the turnover figures supplied in the publican's licences renewal applications made by the partnership in which the Appellant was a partner.
34. I find that the estimated tax liability arising as a consequence of computing a share of the estimated profit was made in accordance with the best judgement of the Inspector, done so in the absence of full information, is fair and consistent, taking





account of the turnover declared by the partnership in its application for publican's licences in the years of assessment.

## Conclusion

35. The determinations that can be made by an Appeal Commissioner are those delineated in sections 949AK and 949AL of TCA 1997. Those provisions confine the Appeal Commissioners to making a determination in relation to the assessments, decisions, determinations or other matters which are the subject matter of the appeal actually before the Appeal Commissioners. The jurisdiction of the Appeal Commissioners is confined to interpreting tax legislation and ensuring that the Revenue Commissioners have complied with that legislation.
36. In appeals before the Tax Appeals Commission, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the assessments to tax are incorrect.
37. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 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.'*
38. The onus in this appeal rests on the Appellant and the question is whether the Appellant has shown that his spouse did not trade as a partner and therefore he is not liable to income tax for the years of assessment, 2011 and 2012.
39. The Appellant has failed to discharge the onus of proof required to substantiate his claim that his spouse was not a partner in the partnership and not trading for the years of the assessments. On the contrary the Respondent has provided contemporaneous evidence from its records of the partnership including the spouse of the Appellant having applied for, paid for and being granted a publican's licence for the period of the assessments.
40. I find that the Appellant is not entitled to separate treatment [from his spouse] for income tax for the years 2011 and 2012 in the absence of making a valid election for separate treatment for these years.





## **Determination**

41. For the reasons set out above, the Appellant has failed to discharge the onus of proof and is thereby unable to succeed in this appeal. As a result, I determine that the income tax assessments the subject of this appeal, shall stand.

42. This appeal is hereby determined in accordance with section 949AK TCA 1997.

**CHARLIE PHELAN**  
**APPEAL COMMISSIONER**  
**9 DECEMBER 2020**

