



**32TACD2021**

**APPELLANT**

**APPELLANT**

**V**

**REVENUE COMMISSIONERS**

**RESPONDENT**

**DETERMINATION**

**Introduction**

1. This is an appeal against a Notice of Estimation of Amounts Due dated 5<sup>th</sup> February 2019 raised against **APPELLANT** ('Company') for PAYE/PRSI/USC ('PAYE taxes') in the following amounts and covering the following periods:

Year Ended 31 December 2013	€4,469
Year Ended 31 December 2014	€5,782
Year Ended 31 December 2015	<u>€2,015</u>

<b>Total</b>	<b><u>€12,266</u></b>
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2. The PAYE taxes assessed arise in respect of certain payments made by the Company to its directors for travel and subsistence ('T & S') expenses. The Respondent is of the view that the expenses identified were not 'wholly and exclusively laid out or expended for the purpose of the trade or profession' as provided for under section 81(2) TCA 1997. As a result the Respondent submits that these T & S payments should be treated as taxable payments to the directors attracting PAYE taxes.
3. The Appellant asserts that the expense payments made by the Company were incurred 'wholly and exclusively' for the purpose of the trade and that no PAYE taxes arise for the directors on these amounts.
4. The Appellant submits that the core issue is whether or not the T & S expenses paid to directors, as a result of travel expenses incurred by them when meeting suppliers and travelling abroad on promotion/business development activities on behalf of



the company, are subject to income tax through PAYE. Revenue are of the opinion that these T & S expenses are not “wholly and exclusively for the purposes of trade” and are therefore disallowable, and furthermore the expense payments are subject to PAYE.

5. In arriving at the estimates the Respondent has applied PAYE taxes on the net amounts of the disputed payments.
6. This appeal was heard by remote hearing by the Tax Appeals Commission (“TAC”) on 4 November 2020.

### **Background**

7. The Appellant is a company which **RETAIL TRADE** from its shop located at **IRISH BRANCH**. The Appellant also provides **SERVICE TRADE** at **REDACTED**.
8. An Audit Letter issued on 13/01/2017, the scope of which covered accounting periods Year ending 28/02/14, 28/02/15 and 29/02/16 and tax heads Corporation Tax, VAT and PREM. (PAYE etc.) The Audit commenced on 06/02/2017 and entailed an examination of the books and records of the company.
9. The Appellant’s two directors are husband (**REDACTED**) and wife (**REDACTED**). Both directors were resident in Ireland during the period under audit.
10. The Appellant showed ‘Travel and Subsistence’ expenses in its accounts for periods Year Ending 28/02/14, 28/02/15 and 29/02/16, some of which related to its two directors.
11. The Respondent examined these records and found that while some expenses were in order and correctly related to the business, other expenses by the directors included extended foreign trips abroad to **Country A,B,C,D** Australia, Bali, Azores and London.
12. The Respondent sought an explanation from the Appellant. The Appellant asserted that the foreign expenses related to the prospective setting up of a branch of their Irish operation in **Country A** and also the possibility of importing a line of jewellery from **Country B** for sale in their Irish Operations.
13. The Respondent is of the view that the expenses identified were not ‘wholly and exclusively laid out or expended for the purpose of the trade or profession’ as



provided for under Section 81(2) Taxes Consolidation Act (TCA), 1997 and as such viewed these items instead as payments to the directors attracting PAYE/PRSI/USC.

14. Therefore, the Respondent calculated the PAYE/PRSI/USC and issued the Notice of Estimation of Amounts Due for the relevant periods.

## **Legislation**

The relevant legislation is set out in **Appendix 1**.

## **Evidence**

15. One of the Company's directors, **DIRECTOR A**, gave sworn evidence at the Hearing held remotely at the Tax Appeals Commission on 4 November 2020.
16. Extracts of the submissions made by both the Appellant and Respondent are set out in **Appendix 2**.

## **Factual Background:**

17. The Appellant is a company which **RETAIL TRADE** from its shop located at **IRISH BRANCH**. The Appellant also provides **SERVICE TRADE** at **REDACTED**.
18. An Audit Letter issued on 13/01/2017, the scope of which covered accounting periods Year ending 28/02/14, 28/02/15 and 29/02/16 and tax heads Corporation Tax, VAT and PREM. (PAYE etc.). The Audit commenced on 06/02/2017 which entailed an examination of the books and records of the company.
19. The Appellant's two directors are husband (**REDACTED**) and wife (**REDCATED**). Both directors were resident in Ireland during the period under audit.
20. The Appellant showed 'Travel and Subsistence' expenses in its accounts for periods Year Ending 28/02/14, 28/02/15 and 29/02/16, some of which related to its two directors.

21. The Respondent examined these records and found that while some expenses were in order and correctly related to the business, other expenses by the directors included extended foreign trips abroad to **Country A, B, C and D**. For some of these trips, - 13, 20, 25, or 30 x overnights subsistence were claimed along with flights and hotel costs. Another trip to the **Country C** by one of the directors is referred to in company records as "**REDACTED**". Other expenses by the directors included extended trips to **IRISH LOCATIONS**.
22. The Respondent sought an explanation from the Appellant regarding the various T & S payments. The tax agent and the directors indicated that the foreign expenses related to the possibility of setting up a second business outlet in **Country A** and also the possibility of importing jewellery from **Country B** for the **IRISH BRANCH** shop. The tax agent and the directors indicated that the trips within Ireland related to 'Pre-Sales' and stock management.
23. The Respondent noted that the Appellant's directors had photo images of family events, social events and holidays posted on social media corresponding with the dates of the foreign trips abroad.
24. The Respondent noted that one of the directors was a partner in a separate business '**REDACTED**' which is registered separately and that some of the extended Irish trips claimed were for overnights to **REDACTED**.
25. The Respondent noted from company records that goods were usually delivered by the suppliers to the shop premises in **IRISH BRANCH**, yet there were a number of extended overnight claims to suppliers in **IRISH LOCATIONS**.
26. The Respondent noted from records that for some of the trips to suppliers within Ireland, a 5 hour subsistence rate was claimed, yet for other similar trips 1-3 overnight rates were claimed for trips to the same suppliers.
27. The Respondent is of the view that the expenses identified were not 'wholly and exclusively laid out or expended for the purpose of the trade or profession' as provided for under section 81(2) Taxes Consolidation Act (TCA), 1997 and as such viewed these items instead as payments to the directors attracting PAYE/PRSI/USC.
28. Therefore, the Respondent calculated the PAYE/PRSI/USC and issued Notice of Estimation of Amounts Due for the relevant periods.



## Analysis

29. The Notices of Estimation of Amounts Due issued on the 05 February 2019 are underpinned by the Respondent's belief that (a) the expenses identified were not 'wholly and exclusively laid out or expended for the purpose of the trade or profession', a requirement of section 81(2) Taxes Consolidation Act (TCA), 1997 set out above and (b) that the Appellant was obliged to deduct and pay PAYE/PRSI/USC in accordance with Income Tax (Employment) (Consolidated) Regulations 2001 (as amended) in relation to such payments made to its directors.
30. In this appeal, the T & S expenses can be classified based on certain attributes that may impact upon whether the expenses should be treated as being incurred wholly & exclusively for the purpose of the trade. The most pertinent classification distinctions that can be drawn are as follows:
- Vouched and un-vouched T & S expenses
  - Domestic and foreign trips
  - Current trade activities and potential future trade activities
  - Domestic trade activities and foreign trade activities
31. Vouched T & S expenses relate to payments to the directors for vouched actual accommodation and flight costs in Ireland and abroad. Un-vouched T & S expenses relate to subsistence and mileage expenses paid to the directors at the Revenue approved rates for trips within Ireland and abroad.
32. Based on the submissions made prior to the hearing and witness testimony by the director, **DIRECTOR A**, I established the following material findings of fact:
33. The expenses in dispute can be categorised between 'Pre-Sales' and 'Future Trade – Scoping' activities. Pre-Sales refers to activities relating to the current trade in existence in Ireland (retail and **SERVICE TRADE**) and involves visits to suppliers' showrooms, dealing with product stocking issues, trade terms, etc. This included new product range stocking, including jewellery for the current trade and included both trips in Ireland and abroad. Pre-Sales also involved an element of travel for 'research' type purposes, to keep up with the latest innovations in **REDACTED** equipment and **REDACTED** and investigating how other Irish and international **REDACTED** were operating.

34. 'Future Trade – Scoping' refers to activities relating to the potential opening of a new branch of the business in **Country A** and involved scoping activities, in **Country A**, such as visits to local councils, letting agents, other shop outlets and **SERVICE TRADE**, visits to suppliers to assess up to date **REDACTED** technology / equipment, etc.
35. The Appellant stated that the purpose of some of the trips to **Country A** involved a mix of both 'Pre-Sales' and 'Future Trade –Scoping' activities.
36. The parties have agreed the list of expenses, upon which the PAYE taxes were calculated by the Respondent. My analysis of these expenses, based on the attributes noted above is set out below:

## **APPELLANT**

### **Expenses Analysis**

		Pre-Sales		Future Trade - Scoping		
		Vouched	Un-	Vouched	Un-	Total
		€	vouched	€	vouched	€
			€		€	
<u>Year 2013</u>						
Ireland		201	2,913			3,114
Overseas	Country D		293			293
	Country A	768	529	2,304	1,586	5,187
		969	3,735	2,304	1,586	8,594
<u>Year 2014</u>						
Ireland			2,419			2,419
Overseas	Country A	389		1,166	4,027	5,581
	Country B	1,278	829			2,107
	Country C	198	815			1,013
		1,865	4,063	1,166	4,027	11,120
<u>Year 2015</u>						
Ireland			1,046			1,046
Overseas	Country A				2,904	2,904
		0	1,046	0	2,904	3,950
		2,834	8,844	3,470	8,517	23,664

### **PAYE taxes - Charge to Tax**

37. The Respondent submitted that the PAYE taxes arise pursuant to section 81(2) TCA 1997 and in accordance with the PAYE Regulations. The Appellant also agreed that the 'core' issue to be determined, pursuant to section 81(2)(a), was whether the T & S expenses were incurred "wholly and exclusively laid out or expended for the purpose of the trade or profession".

38. It should be noted that section 81(2) is only prescriptive in respect of “computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D”, and it says nothing of any PAYE tax consequences that might arise on expenses that are deemed to be non-deductible under this section.
39. Contrary to what the parties submit, it is the case that the relevant potential charge to PAYE tax, for the T & S expenses in this appeal, arises pursuant to sections 112, 114, 117 and 118 TCA 1997, and not pursuant to section 81(2) TCA 1997.
40. The ‘Notice of Estimation of Amounts Due’ in this appeal, relates to PAYE taxes only. The TAC has been asked to determine whether the Notice of Estimation of Amounts Due should stand and not whether a corporation tax deduction should be allowed for the T & S expense payments made.
41. Whether or not the payment of the T & S expenses by the Company to the directors falls within the charge to tax is prescribed by sections 112, 117 and 118 TCA 1997 subject to the question of whether there is a statutory entitlement to deduct prescribed expenses against the directors’ income in accordance with section 114 TCA 1997.
42. Section 117 TCA 1997 provides that T & S expenses paid by a company to its directors shall be treated as perquisites of the office or employment of those directors and subject to tax in accordance with section 112 TCA 1997. However, there remains a corresponding entitlement to claim deductions against these deemed perquisites, for the very same T & S expenses, that were incurred wholly, exclusively and necessarily in the performance of the duties of the office or employment pursuant to section 114 TCA 1997.
43. As noted in Maguire, *Irish Income Tax: 2020*, at para. 10.202;

*“If applied strictly, TCA 1997, s 117 would require all payments in respect of expenses of any kind paid to a director or employee to be included in his gross emoluments chargeable under Sch E and to leave it to the individual to claim (and agree with the inspector) his appropriate expenses deduction (if any) in each year. In practice, the Revenue Commissioners are generally prepared to accept that payments made by the employer that are no more than direct reimbursement of vouched expenses actually and necessarily incurred in the performance of the duties may be disregarded and PAYE accordingly need not be applied to such payments (SP IT/2/07). Round sum payments including car allowances (as opposed to acceptable or approved mileage payments: see*



*below) are however to be treated as gross emoluments and are accordingly subject to PAYE.*

*The Revenue Commissioners' practice in respect of mileage allowances is set out in their Manual Part 05-01-06. There the Revenue Commissioners state that they will accept two types of flat rate schemes of reimbursement in respect of allowable business journeys, where the employee bears all of the expenses concerned, namely:*

- *(a) a flat rate up to, but not exceeding, the current schedule of civil service mileage rates; (see below); and*
- *(b) a flat rate based on any other schedule of rates and related conditions of travel and subsistence which do no more than reimburse the employee for actual expenditure necessarily incurred."*

44. In this appeal it was not disputed that all round sums (un-vouched) were paid in accordance with Revenue Published guidelines.
45. The deeming provisions contained in section 117 TCA 1997 treat the payment of expenses by a body corporate to any of its directors or employees as a perquisite for the purposes of section 112 TCA 1997 notwithstanding that no personal benefit may have been derived.
46. As a consequence of how the charge to tax is prescribed in the legislation, in this appeal, it is only necessary to determine whether the Appellant has an entitlement to claim a deduction for the T & S expenses pursuant to section 114 TCA 1997.
47. Having heard the credible testimony of the Witness **DIRECTOR A** and the submissions made in writing and at the hearing, I have concluded that in respect of all the "Pre-Sales" vouched expenses for 2013, that are in dispute in this appeal, the directors were *"necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed"*, as provided for under section 114 TCA 1997.
48. I have made a similar conclusion for the years 2014 and 2015 in respect of all the "Pre-Sales" vouched expenses in dispute in this appeal.

49. I have concluded that some of the future scoping expenses incurred by the company related to the prospect of establishing a branch operation in **Country A** and these are legitimate expenses of the company and were incurred wholly and exclusively for purposes of the trade of the company. I am also satisfied that where those costs were incurred wholly and exclusively for the purposes of the company's trade, they also meet the provisions of section 114 TCA 1997 and therefore, allow the directors not to be taxed as emoluments, on the reimbursement of these expenses.
50. However, I am not satisfied that all of the expenses relating to the **Country A** trips were wholly and exclusively incurred for the purposes of the company's trade and do appear on the balance of probabilities to include certain family-related and personal costs.
51. For the year 2013, I have estimated that 75% of the Australia costs relate to the scoping exercise and I have treated 50% percent of those reimbursed un-vouched costs as not qualifying for a deduction under section 114 TCA 1997. I regard the vouched costs for **Country A** for that year to be allowable as family/personal costs were already excluded.
52. For year 2014, I regard reimbursed unvouched expenses under the heading "**Country A - APPELLANT** business – scoping" as 100% relating to the scoping exercise for a new branch in **Country A** and not related to Pre-sales. I have disallowed 50% of these expenses under section 114 TCA 1997. I regard the vouched costs for **Country A** for that year to be allowable as family/personal costs were already excluded.
53. For the year 2015 I regard reimbursed unvouched expenses under the heading "**Country A - APPELLANT** business – scoping" as 100% relating to the scoping exercise for a new branch and not related to Pre-sales. Based on the submissions from both parties to this appeal, coupled with the witness statements made by a director of the company, I am not satisfied that the scoping exercise extended into the year 2015 on any realistic basis, so for that reason I will disallow all of the unvouched expenses relating to the scoping exercise in Australia for this year.
54. In year 2014, **DIRECTOR B** acted as an unpaid coach to the Irish national **REDACTED** team. This role was a mixture of profiling for the company and the director and at the same time there was an element of pro bono service to the **REDACTED**. Expenses were incurred by the company in funding a trip for the director with **REDACTED** to the



**Country C** for a **REDACTED** competition. I have allowed 25% of all costs relating to this trip and disallowed 75%.

55. I have set out in **Appendix 3** a summary of the disallowed expenses. As a corollary, all the remaining expenses in dispute are in my view allowable.

56. In this appeal only the PAYE implications of the expenses in dispute were put before me. I was not asked to consider the impact of these expenses on the corporation tax due by the company. Neither was the basis of calculation of the PAYE estimates for each year 2013, 2014 and 2015 put forward for determination. This appeal related to PAYE assessments raised by the Respondent. The matter before me for determination was whether certain expenses paid to the directors should be treated as emoluments and whether these expense payments should be subject to PAYE and payable by the Company.

### **Determination**

57. Based on the above conclusions, I determine the following:

- that the disallowed expenses giving rise to the PAYE estimate under section 117 TCA 1997 and raised by the Respondent for year 2013 should be reduced from €8,594 to €793.
- that the disallowed expenses giving rise to the PAYE estimate under section 117 TCA 1997 and raised by the Respondent for year 2014 should be reduced from €11,120 to €2,773.
- that the disallowed expenses giving rise to the PAYE estimate under section 117 TCA 1997 and raised by the Respondent for year 2015 should be reduced from €3,950 to €2,904.
- that the estimates of PAYE taxes due for the years 2013, 2014 and 2015 should be amended to reflect the reduced disallowed expenses.

58. This appeal is therefore determined in accordance with TCA, section 949AK TCA 97.

**Paul Cummins**  
**Appeal Commissioner**  
*Designated Public Official*

**13 January 2021**

## Appendix 1

Section 81(1) and 81(2) TCA 1997 deals with the general rules as to deductions from trading income and provides as follows:

*(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.*

*(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—*

*(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;”*

*(b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession;*

Income Tax (Employments) (Consolidated) Regulations, 2001 (S.I. No. 559 of 2001) (hereafter ‘PAYE Regulations’) provides, inter alia, as follows:

*28(1). Within 14 days from the end of every income tax month the employer shall remit to the Collector-General all amounts of tax which he or she was liable under these Regulations to deduct from emoluments paid by him or her during that income tax month, reduced by any amounts which he or she was liable under these Regulations to repay during that income tax month.*

Section 112(1) TCA 1997 provides, inter alia, as follows:

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

(2) In this subsection, “emoluments” means anything assessable to income tax under Schedule E.

Section 114 TCA 1997 deals with the deductibility of expenses for Schedule E purposes and reads as follows:

*“Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed”.*

Section 117 TCA 1997(1) provides:

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

Section 118(1) TCA 1997 contains the general charging provisions for benefits in kind and provides:

- (a) Subject to this Chapter, where 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.*



## Appendix 2

Submissions – Appellant **Redacted**

Submissions – Respondent **Redacted**

## Appendix 3

<b>APPELLANT</b>											
<b>Expenses Analysis</b>											
		Pre-Sales		Future Trade - Scoping		Total	Allow		Disallow		Total
		Vouched	Un-vouched	Vouched	Un-vouched		Vouched	Un-vouched	Vouched	Un-vouched	
		€	€	€	€	€	€	€	€	€	€
<b>Year 2013</b>											
Ireland		201	2,913			3,114	201	2,913			0
Overseas	<b>COUNTRY D</b>		293			293		293			0
	<b>COUNTRY A</b>	768	529	2,304	1,586	5,187	3,072	1,322		793	793
											0
		969	3,735	2,304	1,586	8,594	3,273	4,528	0	793	793
<b>Year 2014</b>											
Ireland			2,419			2,419		2,419			0
Overseas	<b>COUNTRY A</b>	389		1,166	4,027	5,581	1,554	2,014		2,014	2,014
	<b>COUNTRY B</b>	1,278	829			2,107	1,278	829			0
	<b>COUNTRY C</b>	198	815			1,013	50	204	149	611	760
											0
		1,865	4,063	1,166	4,027	11,120	2,882	5,465	149	2,625	2,773
<b>Year 2015</b>											
											0
											0
Ireland			1,046			1,046		1,046			0
Overseas	<b>COUNTRY A</b>				2,904	2,904		0		2,904	2,904
											0
		0	1,046	0	2,904	3,950	0	1,046	0	2,904	2,904
		2,834	8,844	3,470	8,517	23,664	6,155	11,039	149	6,322	6,470

