



**51TACD2021**

**BETWEEN/**

**APPELLANT**

**Appellant**

**AND**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal against assessments to income tax in relation to the tax year of assessment 2015. The Appellant was a proprietary director who held more than a 15% shareholding in REDACTED. (hereafter referred to as “the company”).
2. The appeal, is pursuant to section 997A of the Taxes Consolidation Act 1997, against a decision of the Respondent to deny a credit for the income tax deducted from the Appellant’s emoluments but not remitted to the Respondent by a company in which the Appellant held a material interest.
3. The amount of tax involved is €20,145.
4. This case is adjudicated without a hearing in accordance with the provisions of Section 949U Taxes Consolidation Act (TCA) 1997 by agreement with the parties.

**Background and Agreed Facts**



5. The Company entered into Examinership on REDACTED. The amount of debt owed by the company in respect of its liabilities in respect of payroll taxes (P35) on that date was €79,468.28.
6. The Respondent has applied the provisions of s 997A TCA 1997 and assessed the Appellant for an amount of tax equal to his personal liability to tax for 2015.
7. The Respondent agreed to the Examiner's proposal that its debt be included in a Compromise Scheme of Arrangement which was subsequently accepted by the Circuit Court on REDACTED.
8. The Appellant was a Director of the company for the tax year 2015. He held a 95% shareholding in the company.
9. The Appellant, in his capacity as a Director of the company is a person to whom Section 997A TCA 1997 applies.
10. The Appellant was in receipt of a salary from the company of €66,086 for the year 2015.
11. It is accepted that in accordance with its obligations under Section 112 TCA 1997 the company did deduct from the Appellant in 2015, PAYE Tax of €16,374 and USC of €3,771 in total €20,145, which is the subject amount of this appeal.

### **Documentation Provided**

12. The parties provided documentation in support of their submissions as follows:
  - a. Circuit Court Order approving the Modified Proposals of the Examiner and the Scheme of Arrangement.
  - b. Details of the Appellant's income and tax/USC deducted for 2015.
  - c. Details of the company's liability to the Respondent at REDACTED.
  - d. Correspondence from the Examiner confirming Circuit Court approval of the Scheme of Arrangement.
  - e. A copy of the relevant legislation (s. 997A TAC 1997) concerning credit in respect of tax deducted from emoluments of certain directors.
  - f. The Respondent provided a copy of advices from counsel dated 20 June 2013 in respect of the merits of a similar case in relation to the interactions of section 24(6) of the Companies Act 1990 and section 997A TCA 1997, in support of its differing views to that of the Appellant.

### **Legislation**



13. Taxes Consolidation Act 1997 (TCA), section 983 defines 'emoluments', as:

*"anything assessable to income tax under Schedule E, and references to payments of emoluments includes references to payment on account of emoluments".*

14. TCA, section 985 provides that:

*"On the making of any payment of any emoluments to which this Chapter applies, income tax shall, subject to this Chapter and in accordance with regulations under this Chapter, be deducted or repaid by the person making the payment notwithstanding that–*

*(a) when the payment is made no assessment has been made in respect of the emoluments, or*

*(b) the emoluments are in whole or in part emoluments for some year of assessment other than that during which the payment is made".*

15. Finance Act 2005 inserted section 997A into the Taxes Consolidation Act 1997 to deny a credit for tax deducted from the emoluments paid to certain directors and employees in the absence of documentary evidence that confirms that the tax deducted from those emoluments was remitted to the Collector-General. The relevant provisions provide:

*"(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 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.”*

16. The appeal procedures are governed by subsection 8 which state:

*“A person aggrieved by a decision of the Revenue Commissioners in relation to a claim by that person for credit for tax deducted from emoluments, in so far as the decision was made by reference to any provision of this section, may appeal that decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of that decision.”*

## **Submissions**

### *Appellant*

17. The Appellant agreed that the Appellant was a director and shareholder of the company.

18. The Appellant submitted that the company went into Examinership on REDACTED and that under the Scheme of Arrangement entered into the Respondent was listed as a preferential creditor and secured preferential creditor in the amount of €12,095.

19. The Appellant submitted that the Respondent agreed to the examiner’s proposals and these proposals were endorsed by the Circuit Court on REDACTED.

20. The Appellant further submitted that the amount of tax assessed by the Respondent represents the PAYE tax and USC deductions from the Appellant’s salary for 2015 in respect of his employment with the company. The Appellant contended that this liability was included in the Scheme of Arrangement which the Respondent did not



object to. In fact the Appellant has pointed out that the Respondent agreed to waive this liability as part of the Examinership Scheme of Arrangement.

*Respondent*

21. The Respondent submitted that the Appellant was a director and shareholder of the company.
22. The Respondent further submitted the details of the company's liability for 2015 in respect of its P35 liability was €219,640 of which €79,468 remained outstanding on REDACTED.
23. The Respondent provided details from the company P35 return for the year 2015 submitted by the Company to the Collector General on 16<sup>th</sup> March 2016. The P35 showed a liability of €219,640.49 and with an amount of €79,468.28 unpaid. Remittances totalling €27,079.65 were subsequently made to the Collector General, leaving an outstanding liability of €52,388.63.
24. The Respondent submitted that the tax remitted in the year of assessment 2015 to the Collector General, €167,251.86, is treated as having been firstly deducted from emoluments of employees in priority to tax deducted from the controlling director, the Appellant, to whom Section 997A applies.
25. The Respondent advised that it had raised an assessment in respect of the personal tax liability (i.e. withdrawing tax credited to the Appellant) of the Appellant, for 2015 in accordance with the provisions of section 997A TCA 1997.
26. The Respondent accepted that, in the case of the Examinership of the Company and relating to the debts of the Company, the Circuit Court made an order on REDACTED regarding the Modified Proposals for a Compromise and Scheme of Arrangement ("the Scheme"). The Company entered into "the Scheme" which included a write down of the Company's Revenue liability per the P35 return for 2015.
27. The Respondent submitted that the Appellant's tax liability in respect of his salary from the Company as controlled by him was not a debt of the Company. A company is accountable for the tax liability of the proprietary director and must therefore remit a sum in respect of the income tax of the proprietary director through the PAYE system, but the said tax liability is not a debt of the company.
28. The Respondent asserted that a company is an inanimate body and can only act through its directors in accordance with the directors' contractual and fiduciary obligations and in accordance with the Companies Act.



29. The Respondent opined that while it will not seek to pursue the written off tax liability of the Company, it cannot treat the sum as having been paid by the director and, therefore, cannot allow a credit to the Appellant in circumstances where it has been written off in the Examinership.
30. The Respondent referred the Revenue Operational Instruction which explains the effect of Section 997A in the following terms:  
*"Section 997A denies "controlling" (as defined) directors and employees a credit for PAYE tax deducted from their remuneration until such time as that tax has been remitted to the Collector General."*
31. The Respondent in support of its different views in the matter of the write off certain company debts submitted the full transcript from an advice in a similar matter dated 20 June 2013 from counsel.
32. The main issues raised in that advice in support of the Respondent's view on the merits of the Respondent's position are as follows:
- a. Counsel provided details of the relevant legislation in relation to the Company law provisions and to section 997A TCA 1997.
  - b. Counsel agreed with the Respondent's view that the provisions of section 997A TCA 1997 are not nullified by a payment made under a Scheme of Arrangement.
  - c. She (counsel) proposed that a plain reading of the relevant sections supports the Respondent's view.
  - d. She outlined her views that the liabilities of a taxpayer are not a debt of the company because of section 997A TCA 1997. The company is accountable for the tax deducted as a debt, but it is not a debt of the company.
  - e. She stated in her advice from 2013 that section 24(6) of the Companies Amendment Act 1990 undoubtable means that Revenue cannot recover the balance of the sum written down by the company. However she went on to contend that this is not the same as obliging Revenue to treat the sum as paid.
  - f. She concluded in quoting from Mr Justice Clarke in *Re Traffic Group* [2003] IR 253 in relation to the particular case in which she was giving advice to the Respondent in 2013.

### **Analysis and Findings**

33. 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. 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 the question of whether a person is connected with another person shall be determined in accordance with section 10.'*

34. I am satisfied, that in cases where there is no Scheme of Arrangement entered into in accordance with the provisions of the Companies Act, that the statutory wording is clear and precise and that there is no ambiguity. As such the interpretative approach to be applied is a literal one taking into account the jurisprudence in relation to the interpretation of taxation statutes based on a long line of authorities including *inter alia*, *Revenue Commissioners v Doorley* [1933] IR 750, *Inspector of Taxes v Kiernan* [1982] ILRM 13, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 and *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449.
35. In the instant case the company was the subject of an Examinership which culminated in the Circuit Court approving the modified proposals of the examiner and confirming the Scheme of Arrangement. It is necessary therefore to consider the implications of the Scheme of Arrangement in relation to whether or not the Appellant continues to have a liability for the tax not remitted by the company in circumstances where the sums due from the company have been compromised by the Scheme of Arrangement.
36. The main argument put forward by the Appellant is that the Circuit Court Examinership effectively resolved most of the liabilities of the Appellant and the company. Therefore, it is necessary to review the terms of the Circuit Court ruling.
37. Examinership is a procedure provided for under the Companies Acts to aid the return to health of a viable but ailing company. Its applicability is reflected well in the facts of this case where the company continued to trade throughout the period of Examinership and was subsequently rescued by an investor enabling it to continue to trade. The agreed Scheme of Arrangement authorised by the Court on REDACTED involved the writing off of certain debts of the company and the writing down of other debts.
38. The instant company Examinership Scheme of Arrangement described the debt due to the Respondent in two classes of creditor as a super preferential creditor in the amount of €12,095 and as a preferential creditor in the amount of €164,987.
39. Clause 10.3.2.1 of the Scheme provided that the super preferential creditor was not impaired and would receive 100% of its debt within 30 days after the Effective Date.



40. Clause 10.3.3.1 of the Scheme provided that the preferential creditors were impaired and would receive 5% of the preferential debt within 30 days after the Effective Date. This clause elaborated further in the matter as follows:

*“The Preferential Creditor shall waive any and all rights and claims of any description whatsoever, subrogated or otherwise, they may have against the Company, howsoever arising including without limitation arising out of any agreements entered into with the Company or otherwise howsoever...”*

41. Clause 13.1 of the Scheme provided:

*“With effect from the Petition Date with respect to the Company, no Creditor or any other party shall have any debt, right or claim of any description whatsoever (including, but not limited to, contingent or prospective claims arising out of any guarantee or indemnity granted in respect of any liability of the Company and claims of which the Company and / or the Examiner are unaware) against the Company arising out of or connected with any contract, engagement, circumstance, event, act or omission of the Company prior to the Petition save as provided in these proposals”.*

42. Clause 13.2.4 Provided:

*“The payments in these Proposals shall be in full and final settlement of all claims and entitlements of each Creditor to which a payment is made”*

43. The Appellant opined that the proposals approved by the Court precludes the Respondent from levying income tax on his income that relates to the PAYE debts written down in the Examinership. The Appellant, in effect, contends that in accepting the Proposals in the Scheme of Arrangement the Respondent cannot seek to resurrect this debt in the use of section 997A TAC 1997 and to do so would be contrary the terms of those proposals.

44. The Respondent submitted, that the Appellant’s tax liability in respect of his salary from the Company as controlled by him was not a debt of the Company at all but merely a debt that the Company was obliged to discharge on behalf of the Appellant.

45. The Respondent submitted that in raising assessments it was simply operating pursuant to the TCA 1997 provisions in accordance with its statutory duties and obligations. On the other hand the Appellant submitted, in effect, that the Respondent, having had their debt written down pursuant to the Examinership process, is prohibited by the Companies Acts from recovering the same debts by way of assessments on the Appellant.

46. The Tax Appeals Commission in its determination (69TACD2020) dated 13 February 2020<sup>1</sup> considered section 24 of the Companies (Amendment) Act, 1990 and in particular

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<sup>1</sup> [https://www.taxappeals.ie/\\_fileupload/Determinations/2020/69TACD2020.pdf](https://www.taxappeals.ie/_fileupload/Determinations/2020/69TACD2020.pdf)





the stipulation contained at section 24(6) that the proposals shall be binding  
*'notwithstanding any other enactment.'*

47. That case involved, amongst other matters, a company that was the subject of an Examinership where a similar Scheme of Arrangement was approved by the High Court. In that case the Respondent had sought to impose an assessment (in accordance with section 997A TCA 1997) on the Appellant in circumstances where the Appellant's controlled employing company had not paid the full amount of PAYE tax due, but had availed of a reduction in its debt under the Scheme of Arrangement.
48. The Commissioner in that case determined that within that appeal, that section 24(6) Companies (Amendment Act) 1990 overrides the provisions of the TCA 1997 even if the latter legislation, on its own, might otherwise allow or oblige the Respondent to raise an assessment on the Appellant. I concur with those findings in the instant appeal.
49. This means that the Respondent is not entitled to raise the assessment for 2015 which has the effect of defeating the Court approved proposals. Accordingly, there is no need to further explore the operation of section 997A TCA 1997 because without the assessments there is no need to bring that section into play.
50. The demonstrable effect of section 997A 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. Because the assessments cannot be raised there is no need for the Appellant to seek a credit for PAYE (deemed) paid by the Company and no need for the Respondent to seek to deny credit under section 997A TCA1997.

### **Determination**

51. I have determined that the assessment for 2015 is incorrect and the assessment should be vacated.
52. As such, this appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

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**CHARLIE PHELAN**  
**APPEAL COMMISSIONER**  
**4 FEBRUARY 2021**

