70TACD2021

BETWEEN/

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against amended assessments to income tax raised by the Respondent on 20 July 2017, in respect of the tax years 2008 to 2015 inclusive.

2. The amended assessments disallow trading losses claimed by the Appellant in his tax returns for the tax years of assessment 2008 to 2015, pursuant to section 381 of the Taxes Consolidation Act 1997, as amended ('TCA 1997'). The trading losses deducted total €168,120.

3. The Appellant claimed an entitlement to the losses arising from a trade of land development over the period 2005-2015. Although planning permission was not obtained, nor was a planning application submitted, nor was the land zoned for residential use, the Appellant deducted loan interest in his trading accounts which generated losses. The Appellant deducted these losses in his tax returns in accordance with section 381 TCA 1997.

4. The Respondent's position was that that no trade was in existence or operation over the period 2005-2015 and that the Appellant was not entitled to deduct trading losses. Alternatively, the Respondent submitted that any expenses incurred constituted pre-trading expenses which were not available for offset against other income in accordance with section 82(3) TCA 1997. The Appellant duly appealed.

Background

5. The Appellant is a [redacted] by profession. Originally from [redacted] he lived and practiced in [redacted] for many years, returning to practice in Ireland in 1999, when he set up a practice in [redacted].

6. In 2005, the Appellant purchased a 4.5 acre site at [redacted], at a cost of €330,000. The Appellant's position was that he purchased the site with a view to building and developing houses on the land for resale. The land was zoned for agricultural use at the time of purchase.

7. The cost of the site, namely €330,000, was funded by a loan advanced to the Appellant by [redacted] Bank on 3 March 2005. The loan was advanced at a rate of 4.706% and was interest only in nature. The terms and conditions of the loan provided for full capital repayment of the term of the loan within five years, on 7 February 2010. The loan documentation did not expressly characterise the loan as either commercial or residential but described the purpose of the loan as '*property related*'. The collateral for the loan was the site in respect of which the loan was advanced.

8. Professional fees incurred by the Appellant included Stg£4,700 on 28 June, 2005, in relation to [redacted] Limited for house design and planning application and €17,025 on 13 January, 2006, in relation to [redacted] described in the invoice as a deposit and explained by the Appellant as an advance.

9. On or about 2007, in light of the downturn in the economy, the Appellant made the decision to put the development on hold until market conditions improved. The Appellant continued to pay interest on the loan advanced. The loan was renegotiated and extended in June 2010.

10. From the date of acquisition of the land in 2005, to the date of hearing of this appeal in June 2019, no application for planning permission was formally submitted to [redacted] County Council and thus no planning permission was obtained. The land at all times remained zoned for agricultural use.

11. While the project did not generate income, the Appellant claimed interest payable on the loan as an expense of the trade of land development. He deducted the resulting losses from his other income pursuant to the provisions of section 381 TCA 1997.

12. The Appellant did not claim losses in his original 2005, 2006 and 2007 tax returns, nor did he register for VAT in respect of the trade. Having placed the land development project on hold in 2007, the Appellant claimed losses pursuant to section 381 TCA 1997, for the first time in respect of the tax year of assessment 2008.

13. The Appellant's explanation for not claiming the losses (as set out in his agent's letter of 28 January 2015) was that the Appellant's [redacted] practice was significantly profitable at the time and his trade in land development was an ancillary trade that did not require much time or input. The same reason was provided for not registering for VAT. In correspondence with the TAC post hearing, the correspondence on behalf of the Appellant provided that: *'Losses were not claimed in 2005, 2006 and 2007 as the Appellant at that time had forgotten to make the new tax agent aware at the time of preparation of the tax returns for those years that payments and trading losses relating to the site were applicable in the periods in question*. *The Appellant had changed tax agent for the 2006 tax year.'*

14. The losses attributable to the tax years of assessment 2005, 2006 and 2007 were included by the Appellant in his return for 2009. For the 2009 income tax year, the Appellant's income tax return showed an overpayment of tax for that tax year of assessment, in the sum of €14,873.29.

15. The overpayment was noted by the Respondent in correspondence dated 13 January 2011. The Respondent requested trading accounts for the site development by way of verification. The information was provided by the Appellant. No further correspondence was received from the Respondent and a repayment of tax in the sum of €14,873.29 was subsequently processed by the Respondent and issued to the Appellant in 2011.

16. The Appellant's position was that on the basis of this correspondence and the repayment of tax in 2011 for the tax year of assessment 2009, the Respondent had accepted that the Appellant was entitled to claim losses pursuant to section 381 TCA 1997, arising from his trade of land development.

17. By audit notification letter dated 1 July 2013, the Appellant was notified of an audit of his tax affairs which commenced in 2013. The audit gave rise to a queries in relation to deduction of the site development costs and an exchange of correspondence ensued. By letter dated 25 July 2014, the Respondent raised the following queries:

> *'The site was purchased in 2005 but losses were not claimed until 2008. Why were there no claims for losses in 2005, 2006 or 2007?*
>
> *Why didn't* [redacted] *register for VAT as a property developer and reclaim the input credits?'*

18. Having not received a response to this letter, the Respondent wrote to the Appellant's agent on 12 January 2015 requesting a response. The Appellant responded under cover of letter of 28 January 2015 as follows;

'The original plan when I first purchased the four and a half acre site was to build a few large, good quality houses which would attract upmarket buyers re-locating out of [redacted]. I was motivated by a very successful development in [redacted], where eight houses had been built over a period of about two years. There were subsequently sold for one to two million each.

After exploring the options, we eventually chose the [redacted] company, [redacted] because of their innovative design, efficiency and reliability.

I obtained 100% initial financing from [redacted] (site + stamp duty). Once permission for one house was obtained, I would apply for further financing and have the house completed within six months and sold fairly quickly. Depending upon the interest in the first house, we would choose the design of the remaining houses (i.e. bigger, smaller). If I managed to build and sell three houses, I could have expected a profit of €500,000 to €2,000,000. My [redacted] practice was going well at the time so I could afford to carry the finance costs in the (expected) short term.

The intention initially was that [redacted] would handle the planning application. However, it soon became evident that neither they, nor myself, having recently returned from twenty five years abroad, were qualified enough to deal with [redacted] County Council planning authorities. We then engaged a local agent, [redacted] who had been recommended to us by other developers. He undertook the task for an initial fee of 6,000 euro. After two years, when he saw that no further funding was forthcoming, he announced planning could not be obtained until a large sewage treatment facility, then under construction in [redacted] was completed.

The sewage works were eventually completed. However, by then, the financial climate had changed, the bank had ceased funding and the housing market had done into a severe downturn.

During the time when [redacted] was seeking permission for the planned development, I was concentrating on my own job and also negotiating to buy [redacted] ... I only closed one deal because the [redacted] landscape began to change noticeably in 2008 (prior to the general crash). In 2009 [redacted] collapsed, incomes plummeted, getting progressively worse each year since.

The recent strength in property values raises hope that I may yet succeed with the site development, possibly on a more modest scale.

Yours sincerely,

Dr. [redacted]

In his agent's letter of 28 January 2015, the following response is provided:

'There were no claims for losses in 2005, 2006 and 2007 for a couple of reasons. The first was that [redacted] *practices were significantly busier and more profitable in those years than in recent years… Accordingly, the* [redacted] *development was an ancillary trade and didn't involve a significant time input from him at that stage. It was also a period of change for him from an accounting perspective. As a result, the losses were omitted from the returns for those years. When he realised the omission it was corrected as quickly as possible from a tax and accounting perspective. The non registration for VAT arose for the same reason. If the development had progressed at the level and timeframe originally envisaged there is no doubt that he would have registered for reclaim of inputs.'*

19. On 23 June 2017, the Respondent wrote to the Appellant's agent stating his intention to withdraw the loss relief claimed for the tax years of assessment 2008 to 2015. The letter provides:

'Dear Sir,

I refer to previous correspondence in this case and apologise for the delay in contacting you.

Neither the documentation nor information supplied provide evidence of trade. Therefore the losses claimed as a Site Developer are not allowable. Loss relief claimed will be withdrawn and revised assessments will issue shortly in accordance with the figures attached. Interest and penalty calculations are included.'

20. On 4 July 2017, the Respondent furnished the Appellant with a schedule of revised calculations for all tax years from 2008 to 2015, disallowing losses claimed for those tax years of assessment namely, €168,120, on the basis that there was no evidence of a trade.

Legislation

21. The relevant legislation is contained in section 3, section 381, section 955, section 959AA and section 82 of the Taxes Consolidation Act 1997, as amended, relevant excerpts of which are set out below.

Submissions *in brief*

Existence of a trade

22. The Appellant submitted that for the relevant tax years of assessment he was carrying on a trade or an adventure in the nature of a trade, as a land developer.

23. The Respondent submitted that the Appellant was not carrying on a trade of land development for the relevant tax years of assessment. The Respondent submitted that even if pre-trading expenses were incurred, such expenses were not available for offset against other income in accordance with section 82(3) TCA 1997.

Limitation period for the raising of assessments

24. The Appellant submitted that at all times he made a full and true disclosure of all material facts necessary for the making of an assessment for each chargeable period. As a result, the Appellant submitted that the Respondent was not permitted to raise assessments beyond the four year statutory limitation period contained in section 955(2)(a) TCA 1997 and section 959AA TCA 1997.

25. The Respondent submitted that all assessments should be allowed to stand and that the assessments raised beyond the four year statutory period were raised in accordance with section 955(2)(b)(i) on the basis that the Appellant's returns did not contain a full and true disclosure of all material facts.

Evidence

26. The Appellant gave evidence in support of his appeal. He confirmed that he was a [redacted] by profession, having graduated in 1974. Originally from [redacted], he stated that he lived and practiced in [redacted] for many years, returning to practice in Ireland in 1999, when he set up a practice in [redacted]. He stated that the housing market was beginning to take off around this time.

27. In 2005, he bought a 4.5 acre site in [redacted] on land that was zoned agricultural. The cost of the site, namely €330,000, was funded by a loan advanced to the Appellant by [redacted] The loan was advanced at a rate of 4.706% and was an interest only loan. The terms and conditions of the loan provided for full capital repayment of the term of the loan within five years, on 7 February 2010. The loan documentation did not expressly characterise the loan as either commercial or residential but described the purpose of the loan as '*property related*'. The collateral for the loan was the site in respect of which the loan was advanced.

28. While the loan covered the site cost only, the Appellant stated that there was a verbal understanding between he and the bank that once he started building, the bank would finance construction.

29. The Appellant stated that the development would comprise three to five houses and he engaged [redacted] to build houses on the land. He estimated that the first house would cost approximately €800,000 to build and he stated that he hoped to sell for approximately €1.5m. He stated that if the first property sold as planned, there would be less borrowing for

the second property and no borrowing requirement for subsequent properties. He stated that he did not plan to move into the houses himself as he could not afford to do so. He stated that he had no plans to farm the land or to live on the land.

30. The Appellant paid an advance of €17,025 to [redacted] on 31 January 2006. The Appellant stated that [redacted] provided a planning application to him. The Appellant also paid approximately €4,700 to [redacted] Limited in relation to planning matters. A local planning agent was recommended to the Appellant and instructed by him. The agent charged a fee of €3,000 upfront with a further €3,000 on submission of the planning application. The Appellant stated that he paid another €1,000 to fine tune matters in the application. The Appellant stated that the land was never rezoned and the planning application was not submitted to [redacted] County Council.

31. The Appellant stated that his [redacted] practice ran into difficulty around the time of the economic crash in December 2008, that the income of the practice reduced substantially and that he bought out his partner. When asked by the Respondent how this affected the development plans, he stated that the development did not proceed.

32. At hearing in 2019, he confirmed when asked, that no planning permission had yet been obtained but he stated that the market was changing, that he had recently spent funds in relation to the property and that he hoped to build one large house on the property in the near future. He stated that he intended to sell the house and that he had no plans to live in the house.

33. When asked why he had not registered for VAT in relation to the intended trade, the Appellant stated that the thought had never occurred to him. He stated that he had an accountant but that he changed accountants and he did not discuss it with his accountant. When asked whether he deducted the planning costs he confirmed that he did not. When asked who arranged finance with the Bank he stated that he arranged finance with the Bank.

He confirmed that the site was used as collateral for the loan. He stated that if got planning permission in 2019, he could have the house built and sold within a year and he stated that he had €100,000 in place to finance the venture.

34. During cross-examination, he was asked about facilities on the land. He confirmed that there were no sewerage facilities on site. When asked whether there were water mains, he stated that he had sunk a small well. He stated that he had no written agreement with building contractors but that there were verbal agreements. He confirmed that he had not advertised the development. He stated that he had not sold the land as he would not now recover his money.

Analysis

35. Although the Appellant did not succeed in constructing houses on the land, or in obtaining planning permission to do so, he stated that he acquired the land with a view to building and selling houses to turn a profit and in this regard, he relied on the commercial term of the loan advanced for acquisition of the site and in particular the requirement that the loan was to be repaid in full within a period of five years.

36. However, the project ran into difficulty at an early stage with planning and rezoning issues. The economic crash of 2008 further impacted the project and also the Appellant's personal finances. By his own admission, and as set out at page two of his statement of case and page three of his outline of arguments, on or about 2007, the Appellant made the decision to place the development on hold pending improved market conditions.

37. In order to establish that his losses were trading losses and that these losses were deductible pursuant to section 381 TCA 1997, the Appellant must establish that he was carrying on a trade.

38. As regards the question of whether the Appellant was carrying on a trade, the Appellant bears the onus of proof to establish that he was engaged in a trade of land development for the relevant tax years of assessment. It is not sufficient to merely assert that one is engaged in a trade, there must be credible evidence to support that contention.

39. While the outline of arguments of the Appellant referred to and contained an analysis of the '*badges of trade'* identified in 1954 by the Royal Commission on the Taxation of Profits and Income, the Appellant placed considerable reliance on the relatively recent High Court case of *Revenue Commissioners v O'Farrell* [2018] IEHC 171. The Appellant submitted land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development and that as a result, the Appellant herein commenced trading when he purchased the land in 2005.

40. The *O'Farrell* case came before the High Court by way of case stated pursuant to section 941 TCA 1997, from a determination of the Appeal Commissioners. The Respondent taxpayer in *O'Farrell* was the owner of a chain of formal wear shops. He also owned a portfolio of investment properties which generated a substantial annual rental income. On 21 February, 2005, the taxpayer entered into an agreement to purchase number 28 Shrewsbury Road, Ballsbridge, Dublin 4 for the sum of €7,600,000 with the intention of developing properties on the site for resale.

41. In total, the taxpayer secured three loans totalling €11 million from Allied Irish Bank in relation to the purchase and development of the properties. The sanction letter from the bank dated 14th February, 2005, stated that the facilities were to be repaid from the sale of the two properties within two years of the date of the loan.

42. The taxpayer made three attempts to obtain planning permission to develop the Shrewsbury Road site however, the only successful application was the final application in 2009, which

was an application to build one single house on the site. No physical development works ever took place on the site from the date of its acquisition by the taxpayer.

43. The Respondent taxpayer claimed losses pursuant to section 381 TCA 1997, in relation to his trade of land development. The Revenue Commissioners claimed that his purchase of the property was not a trade or an adventure in the nature of a trade but an investment or a capital matter. Alternatively, the Revenue Commissioners claimed that if the Respondent's activities were deemed to be trading then the Respondent had never in fact commenced the trade of land development.

44. The Appeal Commissioner determined that the Respondent had been carrying on a trade as a land developer and that the trade had commenced on the date of the agreement to purchase the property on 21 February, 2005. The Revenue Commissioners appealed to the High Court.

45. The Revenue Commissioners relied on the case of *Spa Estates v O'hArgain*, an unreported judgment of Kenny J. delivered 20th of June 1975. In considering the *Spa Estates* judgment, the Court set out the facts of *Spa Estates*, noting the case was a complex one at the core of which were schemes and arrangements for the avoidance of tax. Ultimately, the Court found that the judgement of Kenny J. in *Spa Estates* did not preclude the finding of the Court in *O'Farrell,* namely, that the taxpayer's activities in *O'Farrell* constituted an adventure in the nature of a trade and that the taxpayer was entitled to the losses claimed.

46. In *O'Farrell,* the High Court adopted the principles in *Mansell v Revenue and Customs Commissioners* [2006] STC (SCD) 605, (paragraphs 88-94) as a fair summary of the law.

47. In *Mansell*, the UK Revenue and Customs Commissioners accepted that the purchase of certain options to buy land for development as a motorway service station, was an adventure in the nature of a trade. The matter at issue was the date of commencement of the trade. The

taxpayer contended that the trade commenced when he identified the relevant lands and began negotiations to acquire an option to purchase them or, alternatively, at a later date when he concluded heads of agreement for the purchase of the options. However, the Revenue and Customs Commissioners argued successfully that there was no operational activity in relation to the trade until an enforceable option agreement. It was held in that case that: *'operations did not begin with the agreeing of the heads of terms because nothing was acquired, nothing was expended or risked, nothing was ventured and nothing won until at the earliest, the time the option agreements were made.'*

48. The principles in *Mansell* are set out as follows;

> *89……..First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.*
>
> *90. Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.*
>
> *91. Third: it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced. It is tempting to say that a trade commences only when the first sale is made. In normal everyday usage one would say that a person starts trading when he becomes entitled to money from his first customer. But, for the following reasons, it does not seem to me that making the first sale is necessarily the earliest time when a' trade is…..commenced' ….*
>
> > *(a) there is a small but fine distinction between 'trading starting' and a trade being commenced, which may make everyday usage a pilot slightly out of its home waters;*
> >
> > *(b) the comments made by Lord Millet in Khan v Miah [2001] 1 All ER (Comm) 282 [2001] 1 All ER 20 tend to suggest that selling the first meal is not the earliest time when trading starts; and*

(c) for these purposes the extended definition of trade affects the question. The question becomes; when did the trade, manufacture, adventure or concern in the nature of trade start? In normal usage, an adventure in trade might start before the 'trading' started. An adventure normally starts when the adventurer leaves home, or the merchant first charters his ship rather than when the first monster is killed or the cargo is brought back home and sold.

92. I note that it is possible that for the linguistic reasons noted in para (c) above, there may be somewhat different considerations relevant to when a trade such as buying and selling flowers commences from those relevant to when an adventure in the nature of a trade may commence.

93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services; the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.

94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed will constitute operational activities is sufficient. At that stage no operational risk has been undertaken; no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.'

49. On the application of those principles to the facts of *O'Farrell*, Murphy J. at paragraph 41 of the judgment stated;

> *'The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. Having secured finance from the bank both for the purchase of the property and for the cost of development, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. On the Mansell principles that was an operational activity being "dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk." (Mansell Para 93) On the facts and the principles applied in Mansell, the respondent was engaged in the trade of land development and began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land.'*

50. At paragraph 43, Murphy J concluded:

> '*Some developers may be builders, others are not. Some developments are large scale, some are small scale. Either way, land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development.'*

51. The question which arises in this appeal is whether it can be said that the trade of land development begins when the developer purchases the land for the purposes of development if the land is at that time, zoned for agricultural use and if planning permission is neither obtained nor sought in relation to that land over a prolonged period.

52. In support of the Appellant's submission that he intended to carry on a trade, there is the loan agreement dated 3 March 2005, from [redacted]. The loan was advanced at a rate of 4.706% and was interest only in nature. The terms and conditions of the loan provided for full capital repayment of the term of the loan within five years, on 7 February 2010. The loan documentation did not expressly characterise the loan as either commercial or residential but described the purpose of the loan as '*property related*'. The collateral for the loan was the site in respect of which the loan was advanced.

53. However, while the Appellant may have intended on developing the land at the time of drawdown of the loan, no trade of land development is lawful or possible in the absence of planning permission for the said development. In this appeal, having purchased the property in 2005, the Appellant has not submitted an application for planning permission and has not obtained planning permission either in the twelve year period to the raising of the assessments in July 2017, nor in the additional two year period to the hearing of the appeal in June 2019.

54. Moreover, as the zoning designation of the land is agricultural and not residential, the Appellant's proposed development would require a change of use and while a change of use might be achievable, it cannot be assured.

55. In *O'Farrell*, there was no doubt about the viability of developing the site purchased. The site comprised prime residential property which had an established residence situated on it and the taxpayer was successful in an application for planning permission in relation to the site albeit for one and not two residences.

56. In addition to planning, there are other differences in this appeal. In *O'Farrell,* the Bank had agreed in writing to finance the construction of the development. This is addressed at paragraph 41 of the judgment, as follows;

> *'41. ….. The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. Having secured finance from the bank both for the purchase of the property and for the cost of development, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. ….. the respondent was engaged in the trade of land development and began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land.'*

57. In this appeal, there is no written agreement from the Bank to finance the construction of the development. The Appellant in evidence stated that there was a verbal understanding between he and the bank, that once he started building, they would finance the construction. He stated in evidence that he had €100,000 in place to finance the venture. There was no independent evidence in support of the verbal understanding and no confirmation on behalf of the Bank that this was the case. However, even if the bank had been willing, construction and development was conditional on the acquisition of planning permission and the Appellant was never in a position to proceed with construction as planning permission was not obtained, nor was an application submitted, nor was the land rezoned.

58. Another factual difference was that Mr. O'Farrell was a home owner and his family home was situated on the same road as the proposed development. In this appeal, the Appellant's evidence was that he resided in rental accommodation in Ireland for the tax years under appeal. He stated that in his view, renting was more economical and that one could rent a better property than one could buy. The Revenue Commissioners submitted that the Appellant intended to build on the land with a view to residing there. The Appellant in evidence stated that this was not his intention and that he was unable to afford to do so. The Appellant insisted that his intention was to develop properties on the land for resale and to turn a profit.

59. At hearing, when questioned about facilities on the land, the Appellant confirmed that there were no sewerage facilities on site. When asked whether there were water mains, he stated that he had sunk a small well. He stated that he had no written agreement with building contractors but that there were verbal agreements. He confirmed that he had not advertised the development.

60. The *O'Farrell* case is authority for the proposition that land development is an adventure in the nature of trade and that the adventure begins when the developer purchases the land for the purpose of development. However, in the absence of planning permission in circumstances where the land was zoned agricultural and required a change of use, it is

clear that no development in this appeal could lawfully proceed at any point since the land was purchased in 2005. The facts of this appeal are not on all fours with *O'Farrell* because the absence of planning permission during the tax years of assessment 2008 to 2015, posed a fixed impediment to the commencement of construction and development on the land, in those years and beyond. As at the date of the hearing of the appeal in June 2019, a planning application had yet not been submitted and the prospect of future development on the land remained unchanged.

61. For the reasons set out above, I determine that the Appellant was not conducting a trade of land development during the tax years of assessment 2005 to 2015. In light of this determination, the Respondent's submission in relation to 82(3) TCA 1997, does not arise for consideration.

Limitation period for the raising of assessments

62. Section 129 and schedule 4 of the Finance Act 2012 replaced Parts 39 and 41 of the Taxes Consolidation Act 1997, with a new Part 41A. However, Parts 39 and 41 continue to apply for chargeable periods prior to 2013. Section 129 FA 2012 provides;

> *(1)The Principal Act is amended in the manner and to the extent specified in Schedule 4.*
>
> *(2)The Principal Act is amended by deleting Parts 39 and 41.*
>
> *(3)Subject to subsections (4) and (5), this section takes effect on and from 1 January 2013.*
>
> *(4)This section applies—*
>
> > *(a)in the case of a chargeable period (within the meaning of section 321(2) of the Principal Act) which is an accounting period of a company, as respects chargeable periods that start on or after 1 January 2013, and*

(b)in a case other than that referred to in paragraph (a), as respects the year of assessment 2013 and subsequent years of assessment.

(5)This section does not affect the application of the provisions of the Principal Act, which are amended or deleted by this section, as respects chargeable periods prior to those referred to in subsection (4).

63. The assessments in respect of the tax years of assessment under appeal namely, 2008 to 2015 were raised on 20 July 2017. Of these, the assessments in respect of 2015, 2014, 2013 and 2012 were raised within the four year statutory period and within time in accordance with sections 959AA and 955(2)(a) TCA 1997.

64. Section 959AA TCA 1997 provides:

(1) 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 —

(a)an assessment for that period, or

(b)an amendment of an assessment for that period,

shall not be made by a Revenue officer 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.

65. Section 955(2)(a) which applies in respect of the tax year of assessment 2012, provides as follows;

(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 the 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.'

Thus the assessments to income tax in respect of the tax years of assessment 2012, 2013, 2014 and 2015, having been raised within the four year statutory periods pursuant to section 959AA and section 955(2)(a) TCA 1997, were raised within time. On the basis of my finding that the Appellant was not carrying on a trade of land development, I determine that these assessments to income tax shall stand.

Assessments raised outside of the four year statutory period

66. In relation to the tax years of assessment 2008 to 2011, the relevant provision is section 955 TCA 1997, as contained in Part 41 TCA 1997, as amended. The returns for these tax years of assessment have been raised outside the four-year statutory period contained in section 955(2)(a). As a result, it will be necessary for the Respondent to show that the four year statutory limitation period regarding the raising of assessments and amended assessments is dis-applied.

67. Section 955(2)(a) provides as follows;

> *(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 the 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.'*

68. In order to dis-apply the four year rule, the Respondent must meet the conditions set out in sub-section 955(2)(b) TCA 1997. The Respondent relied on section 955(2)(b)(i) which provides that the four year rule may be dis-applied '*where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a)*'.

69. The Appellant submitted that even if on appeal it was determined that the development activity did not constitute a trade, the provisions of section 955(2)(b)(i) TAC 1997 have nevertheless *not* been invoked because in his returns the Appellant at all times made a full and true disclosure of all material facts necessary for the making of an assessment for each chargeable period.

70. The position is that in order to dis-apply the four-year rule in section 955(2)(a), the legal test in s.955(2)(b)(i) (the sub-provision being relied upon) must be met.

71. In this appeal the Appellant asserted in his returns that he was carrying on a trade in relation to which he claimed losses in accordance with section 381 TCA 1997. This claim was made in eight successive tax returns covering eleven tax years of assessment in circumstances where

no application for planning permission was ever submitted by or on behalf of the Appellant in respect of the proposed development and where the land itself was at all material times, zoned for agricultural use.

72. In 2007, the Appellant made the decision to put the development on hold pending improved market conditions. However the Appellant, in 2008, for the first time in his tax return claimed a deduction for trading losses pursuant to section 381 TCA 1997. In his 2009 tax return, the Appellant claimed trading losses in respect of 2009 and also back-claimed trading losses in respect of 2005, 2006 and 2007.

73. The deduction of trading losses in 2009 which related to four individual tax years of assessment (2005, 2006, 2007 and 2009) and which showed an overpayment of tax in the sum of €14,873.29 was queried by the Respondent in correspondence dated 13 January 2011. The letter requested that the Appellant furnish trading accounts in relation to the site development. The trading accounts were furnished by the Appellant and the repayment of tax in the sum of €14,873.29 was processed by the Respondent and returned to the Appellant.

74. In this regard, the Appellant's statement of case provides as follows; *'Consequently, on the basis of the evidence available to* [redacted] *namely the correspondence ….. and the subsequent repayment by the Collector General of the income tax overpayment for 2009, his understanding of the matter was that the Revenue Commissioners had reviewed his treatment of the development site interest costs and had implicitly agreed with them, certainly up to and including the 2009 tax year.'*

75. Having received the repayment of income tax in 2011, the Appellant proceeded to claim the deduction for trading losses for the tax years of assessment 2011, 2012, 2013, 2014 and 2015. The deduction was claimed in circumstances where by his own admission, the project had been placed on hold in 2007, no planning application had been submitted to [redacted] County

Council and no expenditure was being incurred in those years in relation to construction or development.

76. The Appellant's submission suggests that he relied on the repayment received in 2011 as a permission or verification of sorts, to continue claiming trade losses pursuant to section 381.

77. This may be an apposite time to refer to the jurisdiction of the Tax Appeals Commission, as discussed in a number of Irish cases, namely; *The State (Whelan) v Smidic [1938] 1 I.R. 626, Menolly Homes Ltd. v The Appeal Commissioners [2010] IEHC 49, the State (Calcul International Ltd.) v The Appeal Commissioners III ITR 577, Stanley v The Revenue Commissioners* [2017] IECA 279 and *Lee v Revenue Commissioners* [2021] IECA 18.

78. As is clear from the authorities, the jurisdiction of the Tax Appeals Commission is confined to the determination of the amount of tax owing by a taxpayer based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. It does not extend to the provision of equitable relief nor to the provision of remedies available in judicial review proceedings.

79. In the Court of Appeal decision of *Stanley v the Revenue Commissioners*, Peart J. at paragraph 33 stated:*'The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.'*

80. I should point out that the Respondent put it to the Appellant during cross-examination, that he had not deducted the costs of [redacted], [redacted] or the local planning agent as part of the trading losses claimed pursuant to section 381 TCA 1997. Section 381(1) provides:

> *Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such*

repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.

81. It is clear from the wording of section 381 TCA 1997, that loss relief under this provision is not automatic and that a taxpayer must opt to claim the losses if he or she wishes to avail of the relief. The taxpayer in this appeal did not claim these expenses as part of the trading losses however, his omission in this regard does not amount to a default in the disclosure of material facts per the provisions of section 955 TCA 1997.

82. The Appellant's returns for 2008-2015, deduct losses pursuant to section 381 TCA 1997 based on a view taken by the Appellant that he was carrying on a trade of land development for the tax years of assessment, 2005-2015 or, that he was carrying on an adventure in the nature of such a trade.

83. The entitlement to claim deductions for trading losses arises only where there is a trade in existence and operation for the relevant tax years of assessment and where losses are generated in that trade. In this case, by his own admission, the Appellant placed the project on hold in 2007 yet proceeded for the first time in 2008, to claim a deduction for trading losses. He subsequently claimed deductions up to and including 2015 and back-claimed deductions for 2007, 2006 and 2005.

84. The Appellant claimed that he treated the repayment of tax he received in 2011, as confirmation by the Respondent that he was entitled to continue claiming the deductions but that argument does not explain why trading deductions were claimed prior to 2011. This is particularly so given the circumstances, namely, that the project had been placed "*on hold*" by the Appellant in 2007. In addition and significantly, no construction works took place nor could take place because of the fact that no planning application was submitted at any point in 2005-2019 and this was so in circumstances where the land was zoned for agricultural use. While the Appellant did not go as far as suggesting that the assessments were *ultra vires* the

powers of the Respondent, the Tax Appeals Commission, being a creature of statute, is confined in its jurisdiction to the determination of the tax due and owing on assessments which does not extend to the provision of equitable relief nor to the provision of remedies available in judicial review proceedings.

85. The question of whether a trade exists is a mixed question of law and fact and in completing a return, a taxpayer must do his best to make a full and true disclosure of all material facts necessary for the making of an assessment. However by 2008, when the Appellant first filed a return claiming section 381 losses, the facts upon which the Appellant relied in support of the existence of a trade were materially deficient. By his own admission the project had been placed on hold in 2007 and in short, no progression of the project took place in the years that followed up to and including 2019. Crucially, in circumstances where the land was zoned for agricultural use and required a change of use for development and construction to proceed, no planning application was ever submitted to [redacted] County Council.

86. In claiming a deduction for losses based on the operation of a trade which never in fact commenced, I determine that the Appellant filed returns which did not '*contain a full and true disclosure of the facts'* as required by section 955(2)(b)(i) TCA 1997. As a result, the four year rule in section 955(2)(a) is dis-applied and the assessments raised in respect of 2005-2011 are within time pursuant to section 955(2)(b)(i) TCA 1997.

Determination

87. For the reasons set out above, I determine that the Appellant was not carrying on a trade of land development during the tax years of assessment 2005 to 2015 and I determine that the amended assessments raised in respect of the tax years of as 2008 – 2015 shall stand. This appeal is determined in accordance with section 949AK 1997.

COMMISSIONER LORNA GALLAGHER

23th day of February 2021

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.