TAX APPEALS COMMISSION

76TACD2021

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The issue in this appeal is to determine whether the business of the Appellant consists of or includes the carrying on of a profession or the provision of professional services within the charge to tax pursuant to Taxes Consolidation Act 1997 (TCA) section 441.

2. In forming the conclusion that the Appellant was within the charge to tax in accordance with TCA, section 441, the Respondent raised Amended Notices of Assessment on 31st March 2016 as follows:

Year Ended	**Amount Assessed**
31 October 2012	€10,190
31 October 2014.	€48,048
Total	€58,238

3. Appeals against the assessments were lodged on 6 April 2016

Legislation

4. The surcharge provisions are now contained in TCA, section 441 and imposes a tax of 15% on an amount equivalent to 50% on the undistributed professional income derived by a "*service*

company" and a separate surcharge of 20% in respect of such a company's undistributed investment and estate income. A "service company" is defined in subsection (1) as:

> *(a) a close company whose business consists of or includes the carrying on of a profession or the provision of professional services,*
>
> *(b) a close company having or exercising an office or employment, or*
>
> *(c) a close company whose business consists of or includes the provision of services or facilities of whatever nature to or for –*
>
> *i. a company within either of the categories referred to in paragraphs (a) and (b),*
> *ii. an individual who carries on a profession,*
> *iii. a partnership which carries on a profession,*
> *iv. a person who has or exercises an office or employment, or*
> *v. a person or partnership connected with any person or partnership referred to in subparagraphs (i) to (iv);*
>
> *but the provision by a close company of services or facilities to or for a person or partnership not connected with the company shall be disregarded for the purposes of this paragraph*

5. Subsection 2 provides that a company is not to be regarded as a "service company" where the principal part of a company's income which is chargeable to corporation tax under Cases I and II of Schedule D and Schedule E is not derived from –

> *(a) carrying on a profession,*
>
> *(b) providing professional services,*
>
> *(c) having or exercising an office or employment,*
>
> *(d) providing services or facilities (other than providing services or facilities to or for a person or partnership not connected with the company) to or for any person or partnership referred to in subparagraphs (i) to (v) of subsection (1)(c), or*
>
> *(e) any 2 or more of the activities specified in paragraphs (a) to (d), the company shall be deemed not to be a service company."*

2. As such to come with the charge to tax pursuant to TCA, section 441 it is necessary that the principal part of a service company's income must be derived from the *"carrying on of a profession or the provision of professional services."*

Material Findings of Fact

6. Evidence was given by [redacted] on behalf of the Appellant and [redacted], the expert witness for the Respondent.

Evidence of Appellant's Witness

7. Based on [redacted] evidence, I have made the following material findings of fact

(a) After graduating from [redacted] and completing a Master's degree in [redacted] from [redacted], [redacted] was employed as a research assistant in [redacted] assisting [redacted] on consultancy work for government agencies. [redacted] had tried to conduct the work through [redacted] but due to bureaucratical issues, a decision was taken to set up a private company, [redacted] to work on a specific [redacted] project. After completing that project in 1996, [redacted] joined an English consulting group working in [redacted]. In 1998, [redacted] asked [redacted] to restart the company but ultimately a decision was taken to set a new company, the Appellant, to engage in similar type projects.

(b) The Appellant's main activity is in the implementation and delivery of [redacted]. While its main client is [redacted], it has also worked for the [redacted] and other international bodies such as [redacted].

(c) The Appellant is engaged in most types of public policy apart from transport infrastructure, climate/environment, audit and similar activities. It has no clients in Ireland and none of its services are delivered in Ireland.

(d) The Appellant has two directors and a core group of eight staff all of whom are permanent employees. Notwithstanding that there are no specific educational requirements, the directors and staff have various third level qualifications in public administration; public finance; politics, education, international relations and economics. The members of the team are not required to be specialists in any particular discipline and the main requirement of staff/directors is an ability to deal with a varied mix multi-disciplinary projects. Staff require both intellectual and technical skills.

(e) Staff recruitment is based on a proven ability to work in the project based country, previous relevant experience or having some connection with an administrative body or in the designated country. It is necessary that staff demonstrate a knowledge of the country's internal workings or have a network of useful connections.

(f) Specific external experts are engaged for an array of projects. In a specific [redacted] project, the Appellant engaged a representative from the Respondent to provide a commentary on Irish tax collection systems for the purposes of comparing the Irish tax procedures to those of the [redacted] system.

(g) A core team of staff tender for and thereafter manage projects. Freelance contractors (the Contractors) deliver the service on the ground. The Contractors are engaged for the currency of the project but are separate from the Appellant.

(h) The Appellant has in essence two main roles namely to take part in tendering process and thereafter to ensure the proper management of the contracts and deal with problems as they arise. The core team prepare the tenders for the work principally for [redacted], oversee the implementation of the relevant project and thereafter monitor the outcomes to ensure compliance with the project specifications.

(i) The tendering process involves a review of the terms of reference and identifying the key project requirements and thereafter identify consortium partners who might be appropriate for that project in that particular country, researching issues that exist in that country, recruiting the experts and agreeing their fees. Experts work in specific locations to perform the 'on the ground' functions.

(j) The 'Key experts' play the leading role in the implementation of the project on the ground

(k) To enable the Appellant to adhere to its contractual obligations, the experts report to the Appellant on a day to day basis and write a report every six months.

(l) The Appellant has no control over the terms of reference of each project which are set by [redacted]. The Appellant is required to implement those terms and has no independent role in advising [redacted] as to the nature and terms of reference of the project itself.

(m) The Appellant is the only Irish company engaged in such work. The tendering processes of most international donors differentiate tenders aimed at sole traders from those aimed at firms. As such, it is not possible for a sole trader to tender for many of the tendered projects.

(n) Neither [redacted] nor any member of his staff are members of the Institute of Management Consultants and Advisors or the Chartered Management Institute.

(o) [redacted] accepted in cross examination that the Appellant was providing services in a professional manner.

Contract

8. The contract dated [redacted] was between [redacted] and the Appellant described as the "Consultant", in consortium with 2 other named parties. Under the heading 'Structure of the contract' the Appellant was required to "*carry out the services on the terms and conditions set out in this contract"*. The "*maximum contract value*" was stated to be [redacted]. Selective extracts of the contract for the "[redacted]" consisting of 250 pages was opened at the hearing as follows:

(a) Article 4.4 of the General Conditions states:

"The consultant shall be responsible for the acts, default and negligence of its subcontractors and their experts, agents or employees as if they were the acts, defaults or negligence of the consultant, its experts, agents or employees."

(b) The Appellant pursuant to Article 12 was required to

12.1 Indemnify, protect and defend the contracting authority, its agents and employees from and against all actions, claims, losses or damage arising from any act or omission by the consultant in the performance of the services, including violations of laws and so forth or rights of thirds parties…

12.2 At its own expense the consultant shall indemnify, protect and defend the contracting authority, its agency and employees from and against all actions, claims losses or damages arising out of the consultant's performance of the contract."

(c) Annex II, attached to the Contract, is entitled 'Terms of Reference". At paragraph 4.2 of that document under the heading 'Specific activities' the Appellant undertook*, inter alia*, to:

- review the institutional structure;

- assist with the feasibility study on the establishment of an advisory council on the development of tourism and resorts;
- undertake, establish, develop, form teams, provide support and provide logistical support;
- Develop standards for new professions, (ie guides, mini hotel owners et cetera) required by the Resort and Tourism Sector to facilitate their incorporation into the national job classification structure.

(d) Paragraph 6.1.1 outlined the role of 'Key experts' and provides

"All experts who have a crucial role in implementing the contract are referred to as key experts.

A significant presence in [redacted] *of the key experts during the entire project duration is considered essential for the success of this project. No working days outside* [redacted] *can be invoiced to the contracting authority except for cases of the approved...abroad. For non-key experts the minimum percentage time to be spent in* [redacted] *will be decided by the contracting authority ….."*

….

The Consultant's team leader will be in charge of the day-to-day implementation of the project activities under the supervision of the EU Project Manager."

(e) The requisite qualifications and skills of the 'Key Expert 1' are also set out to include inter alia:

- University Graduate Degree or above in Economics, Management, International Development, Marketing or other relevant discipline.
- Excellent coordination and communication skills
- Good skills in drafting technical and financial reports.
- Fluency in English, including effective spoken presentation report writing abilities.
- Fluency in [redacted] "is a must."
- ….
- At least ten years of professional experience in TA projects for institution capacity building and private sector development.
- Proven experience as a team leader in similar complex technical assistant projects in the area of tourism development will be considered an advantage.

- ….
- A minimum of 10 years' professional experience in international tourism development with a focus on sustainable tourism planning and policy formulation, project design and implementation and management of technical assistance projects

(f) Correspondingly the candidates described as 'Key Expert 2' and 'Key Expert 3' must have university graduate degrees, fluency in English and [redacted], a good command of [redacted] and a minimum of 10 years and 7 years post qualification experience respectively.

(g) The Contract also stipulated that:

"It is advisable that the team leader and other key experts will be assisted by a number of experts who will be suitably qualified and capable to provide the necessary skills and knowledge required under the following indicative headings."

(h) Attached to the [redacted] contract was the Curriculum Vitae of the 'Team Leader', a Ms. T. As noted by the Respondent, Ms T has an MSc in Political Sciences; a Degree in Spatial Planning; a Bachelor Degree in Higher Bulgarian Studies; a Certificate of European and Environment Law; a Certificate of European Law; a Certificate of International Relations and an ability to read, speak and write in English, Russian, Greek, Bulgarian, Macedonian, Serbian,

Invoice

9. An interim invoice relating to the [redacted] project dated 25th October 2012 was opened at the hearing. The invoice consisted of the following 3 items of charge:

Fees	€[redacted]
Incidental Expenses	€[redacted]
Expenditure Verification	€[redacted]
Total	€[redacted]

10. The fees relate to the amount charged for the experts and the Appellant's margin. The incidental expenses refers to items such as study visits and the expenditure verification is the cost audit of the expense claims.

The projects

11. In respect of each project, a separate team of independent contractors was assembled. The requirements of the project dictated the composition of that team and the skills which will be required to carry out the project. The team comprises of a mix of contractors and a local team in the development country depending on the requirements of the project.

[redacted]

12. The project in [redacted] related to tourism development and to provide assistance to the government of [redacted] in [redacted] as detailed below:

    (a) [redacted] is one of the most important tourism destinations in [redacted] and the biggest tourism designation in the [redacted]. During the transition process, economic life became very difficult and the whole tourism infrastructure collapsed.

    (b) The health resort sector was specifically identified as many people from all parts of [redacted] go there for its sanatoriums and health spas.

    (c) The work involved working with the Ministry of Finance to create systems to monitor and evaluate structural fund programmes specifically tourism development which was considered to be a priority for the government of [redacted].

    (d) The Appellant worked with a local university to help to build up the curriculum to improve the quality of the training for hotel staff and other tourism workers. A structure was set up to assist university lecturers to create and sustain programmes similar to those operating in European universities and ways in which the [redacted] universities could adapt.

    (e) There was also a requirement to work with the Ministry for Tourism to assist in procuring interested parties with a view to bringing those parties together to create an agreed plan.

    (f) A programme was also set up to improve signposting as certain parts of the population wanted the signs in [redacted] while others wanted them to be in [redacted].

[redacted]

13. The [redacted] project also related to tourism. [redacted] is a divided country with 3 separate ethnic connections. There was historic friction between the ethnic groups to the extent

that the groups would not sit together in the same room. Therefore the project involved a process of bringing the groups together, notwithstanding their own separate administrative structure, as set out below:

(a) In an attempt to encourage co-operation, the ethnic groups were brought to Ireland on a study tour to demonstrate how 2 separate legal administrative entities working together could promote Ireland as an island and as a destination overall. As a consequence, Ireland became an interesting case study as there were some parallels.

(b) As such a programme had to be devised to identify something that the groups had in common. A specific tourism project was identified which involved the repair of a cable car which had been destroyed in the war. [redacted] had undertaken to invest if the groups could agree on how it should be operated and who would be responsible.

(c) A feasibility study was undertaken to establish what needed to be done to rebuild the cable car, agree the management and ownership. As part of the process it was necessary to get all parties in a room together.

(d) To achieve that objective, it was necessary to engage expert consultants on the ground to help the diverse ethnic people to work together. Those experts had a contract with the Appellant to undertake work specified in the terms of reference associated with that project. The project became a lever to bring the different parties successfully together and the cable car is working to this day, some eight years later.

(e) The experts are often European, sometimes Irish and sometimes local and recruited through a system of databases where people who are interested in this kind of work put their curriculum vitae into a system to make themselves available to all the companies around Europe.

[redacted]

14. The project in [redacted] was concerned with regional development which involved working with the Ministry of Economy to build up the regions, to train regional officers, to prepare regional development plans and to deliver better public services to the regions as detailed below:

(a) The project had several parts which initially involved working with the Central Ministry to create systems to support the regions. The example of the European structural funds was used to demonstrate the concept of a 'central pot of money' adopted by European regions in applying for funds based on submitted plans and proposals. It was therefore suggested to the Ministry that this would be a good way for them to organise, promote and support their own regions based on the European example.

(b) Social protection offices were created and a system devised to enable residents apply for a passport online as a citizen of [redacted] has the right to receive a passport within 28 days of application. The purpose of the project was to make service delivery more effective in the remote and economically deprived regions.

(c) The project involved extensive training of regional officials to prepare local development plans and to create structures which allowed the local government to consult with all the different interested parties about economic questions. Structures were also set up that involved NGOs, business associations, other interested groups, to come together to facilitate a discussion about what was needed in the region.

(d) A large portion of the population were army veterans who had special entitlements such as pensions. Many veterans were poor and did not have the ability to attend their local office to apply for their special pension. Therefore systems were put in place to enable pensions to be paid which required a mobile service office that would go from village to village one day per month to make itself available for citizens in those places. Other services included the facility for applying for passports or make a complaint

(e) There was one local region which was previously a science city as it was connected with the nuclear industry with trained scientists but had since collapsed resulting in significant unemployment. A project commenced to identify some international experience that might be helpful to address the issue of mass unemployment of highly trained individuals.

[redacted]

15. The project in [redacted], an exclave separated from the rest of [redacted], was set up to support the regional government to improve its governance of the region and involved a public service delivery, compatible with EU requirements. The project involved design protocols to identify new kinds of projects that could be more efficient such as setting

up online terminals in different parts of the region where a citizen could apply for various kind of services or make a complaint. The specifications were agreed with the government and the services were located in a public building such as libraries or in the entrance halls of local administration buildings. Public servants were trained on economic aspects of development and strategies to be used in promoting business.

Evidence of Respondent's Expert Witness

16. Based on [redacted] evidence, I have made the following material findings of fact:

(a) [redacted] is the [redacted] of the [redacted] an academic in the area of consulting since 2002 with extensive ties with the consulting industry. She is an Academic Fellow of the [redacted] which is the global body for the Management Consulting profession;

(b) The management consultancy industry is very fragmented with several large firms and a substantial number of very small to medium sized consulting firms specialising just in one particular area of consulting in areas such as financial advisory consulting or digital transformation;

(c) The profession of consulting emerged from the accountancy profession who were brought into firms to delve into the finances and to identify what was happening in the organisation. The industry evolved into strategic advisory services as the people engaged in such services knew the company and its operations and therefore were in a good position to advise on how to improve business.

(d) A key component of management consulting is to leave the client better off than it was as the client should have learned something from that engagement. In the Appellant's case, that was certainly true as it provided systems for better public service infrastructure.

(e) One of the widely recognised challenges within the consulting profession is that it does not have the same structure as the accounting or legal professions as there is no clear framework of academic qualifications to practise as a management consultant.

(f) Most management consultancy firms are unregulated, unlicensed, not covered by any EU code of practice, not required to be a member of any professional body and its employees / directors are not required to have any pre-determined academic qualifications. This is due to a lack of regulation, qualifications etc. in the global

management consultancy industry. However this is not unique to the Appellant and therefore does not exclude it from the practice of management consultancy.

(g) The Appellant's description of its main business activity as the "implementation and delivery of the [redacted]" meets the definitions of management consultancy as per Milan Kubr's 1996 publication, 'Management Consulting: A Guide to the Profession' and therefore the Appellant engaged in activities that fit the accepted definitions of consultancy services.

(h) The Appellant directly and indirectly employed qualified individuals who acted as consultants by advising, implementing and delivering solutions for their client organisations, and it also referred to its employees as consultants and expert advisers on its website.

(i) The Appellant's use of a panel of independent experts in its engagements is a common practice among consulting firms and hence does not exclude the Appellant from the practice of management consultancy.

(j) Based on the evidence of [redacted], the work performed by the Appellant was not different from what other consulting firms were doing. There are firms that do similar work, including some of the bigger firms. Some of the bigger firms have Government and Public Sector practices;

(k) The Appellant is very good at running daunting and complex projects in very challenging locations and environments. It builds ups expertise in a particular area and uses it to help clients with those types of projects.

(l) Based on [redacted] oral evidence, she was satisfied that the Appellant helped its clients to achieve organisational purpose and objectives.

(m) The management consulting company, [redacted], also implemented systems to avail of digitally delivered services including passport applications for certain Irish Government agencies. Furthermore, the Appellant's work on making E-learning more available within universities is another function of many management consulting firms.

(n) After hearing [redacted] evidence, [redacted] had strengthened her opinion that the Appellant was engaged in management consultancy and that it was engaged in the profession of Management Consulting and the provision of consultancy services specifically in

context of the examples given by [redacted] in his evidence. She could immediately think of firms in Ireland who are providing very similar services for their clients.

(o) Finally [redacted] was of the view that persons who had "*achieved a level of both educational qualification and experience and … apply that to their practice"* were engaged in a profession.

Report of Respondent's Expert

17. The following is a summary of the main contents and findings of [redacted] report as the Expert witness for the Respondent:

(a) The following definition of Management Consultancy is provided by Consultancy.uk as:

> *"advisory and/or implementation services to the (senior) management of organisations with the aim of improving the effectiveness of their business strategy, organisational performance and operational processes".*

(b) Most of the practitioners engaged in management consultancy are unregulated, unlicensed, not covered by any national or EU code of practice and not required to be a member of any professional body. Those employed in management consultancy are not required to have any pre-determined academic qualifications. However this situation is likely to change in the future should the introduction of the Chartered Management Consultant qualification progress as planned.

(c) Until the Chartered Management Consultant qualification is introduced across the industry, anyone can call themselves a management consultant. However the following characteristics help to distinguish management consultants from other professionals:

- consultants provide expert advice in a particular area of business that the client organisation lacks or is unable to provide for itself;
- the management consultant acts independently, and has no formal connection to the client nor any conflict of interest. Hence s/he is able to offer a new perspective on the client's organisation;
- consultants act in a professional capacity, charging fees for their services, and

- according to the IMC, consultants share common competencies, namely Business, Technical and Value & Behaviour competencies.

(d) The Appellant used the terms such as 'consultants' and 'consultancy' on its website, and it incurred 'consultancy / professional fees'. Furthermore it was categorised as providing management consultancy activities by a number of independent company information providers using the Standard Industrial Classification (SIC). Likewise, the biographies of its employees on the website list attributes and competencies that are closely aligned to those in the ICMCI Competence Framework, like its employees' sectoral knowledge and experience, the firm's client focus and their assignment management and planning skills. There are also numerous references to Appellant's 'experts' and 'expertise'.

(e) No particular qualification is required of the Appellant's employees, nor are they required to be specialists. Many consulting firms, apart perhaps from the 'top tier' strategy consulting firms McKinsey, Bain & Co and Boston Consulting Group, tend to hire mainly MBAs from top tier universities.

(f) Despite the fact that the Appellant's employees are not required to have a particular qualification, its website nevertheless lists the team members' qualifications - mostly Masters Degrees and Doctorates. The employees are described as experts in their discipline of study who deliver sectoral expertise gained via their academic qualifications and practical experience.

(g) Milan Kubr's 1996 publication, 'Management Consulting: A Guide to the Profession', offers a useful look at why companies use the services of consultants.

(h) The Appellant's main business activity is the "implementation and delivery of the external development policy of [redacted]" and delivers development programmes of global institutions such as the [redacted] and [redacted]. Hence the firm's activities are very much aligned to the purposes of consulting as detailed by Kubr, i.e. helping [redacted] to achieve its organisational objectives via the effective implementation of key programmes.

(i) In addition to using its own consultants, the Appellant used a panel of experts, who are independent of the company and its employees, to deliver expertise to client organisations.

(j) The practice of using panels of external subject matter experts is common in the consulting industry. For example, [redacted] use a pool of experts outside of its own organisation to provide specialist expertise.

Appellant's Submissions

18. The principles of statutory interpretation as applied to tax legislation are well established and have been considered in a number of cases. The principal canon of construction for statutes is that the words of the statute are to be given their literal meaning. This approach was described by Henchy J. in *Inspector of Taxes v Kiernan* [1981] IR 117 at p.121:

> *"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole…"*

19. In the *Kiernan* case, the Supreme Court held that there were three basic rules of interpretation at p. 121 and 122 :

> *"First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning.*
>
> *Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…*
>
> *Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use."*

20. The second point reflects the well-established principle of statutory interpretation that a legislative provision imposing or authorising the imposition of any form of penal or taxation liability must be strictly construed.

21. In *McGrath v. McDemott* [1988] I.R. 258, Finlay C.J. stated at p. 275:-

"The function of the courts in interpreting a Statue of the Oireachtas is strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the Statute involved, or even of other Statutes expressed to be construed with it. The courts have not got a function to add to or delete from expresses statutory provisions so as to achieve objectives which to the courts appear desirable."

22. McCarthy J. in the case of *Texaco (Ireland) v. Murphy* [1991] 2 I.R. 449 commented at p. 456:

"Whilst the court must, if necessary, seek to identify the intent of the legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning".

23. In *Revenue Commissioners v Doorley* [1933] IR 750 Kennedy J. stated at p. 765.

"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms,…for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is,…as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament…".

24. In *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 Rowlatt J. said at p. 71

"It is urged that in a taxing Act, clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim , which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

25. The recent judgement of the Supreme Court in *Bookfinders* [2020] is now considered to be the bible of statutory interpretation of taxation legislation. In a row back from his judgment in the O'Flynn case, O'Donnell J. observed that his previous decision in *O'Flynn Construction:*

39. *…. shows that these broad arguments about the approach to interpretation are perhaps best pursued when not conducted in the abstract, but rather should be addressed by reference to the words of a particular statute and the facts of a particular case. This case also illustrates the fact that there is often a mismatch between the lofty principles that are said to be in conflict and the reality of the dispute. It is worth emphasising that the starting point of any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation.*

…..

42. *It is clear that my observations on the issue of statutory interpretation in the O'Flynn case were obiter. On reflection, they were, I think, unnecessary, incautiously expressed, and made without the benefit of opposing arguments. In particular, I think it was wrong to use the loaded word "purposive" and to further suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. There has been a tendency to set the debate as one between two rather extreme positions: one, a purposive or teleological approach akin to that employed in the field of European law, and in which words and text are of lesser importance than the apparent objective of the legislation; and, at the other extreme, an approach where the only focus of the inquiry, and the question of interpretation, is conducted almost by microscopic analysis of words set upon a transparent slide and stripped of all their context and where, if any ambiguity can be detected, the provision must be given an interpretation favourable to the taxpayer, however unrealistic that interpretation may be.*

43. *It is open to doubt that s. 5 of the Interpretation Act permits quite the wide-ranging purposive interpretation to give effect to the presumed objective of the drafters or those who adopted the legislation that is sometimes advocated. Rather, it refers to a construction "that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole". To that extent, s. 5 is more rooted in the statutory text than the most liberal teleological interpretive approaches. But even so, s. 5(2) undoubtedly distinguishes between general legislation and that which relates to "the imposition of a penal or other sanction", to which the approach in s. 5 does not apply. It appeared noteworthy that the Act did not refer to penal or revenue statutes. That is a common phrase in the law generally, and particularly in the context of statutory interpretation. Thus, in Kiernan, Henchy J. at p. 122 of the report, stated the then-applicable principle in this way:-*

> *"[i]f a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language." (Emphasis added).*

26. O'Donnell J. proceeded to consider the approach to be taken in statutory interpretation:

> 46. *However, that should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*
>
> 47. *It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes. Thus, in Doorley, Kennedy C.J. in his dissenting judgment, relied upon by the appellants in this case, quoted the passage in the speech of Lord Cairns in Partington v. Attorney General (1865) L.R. 4 H.L. 100, 122, to the effect that if Revenue, seeking to recover the tax, could not bring the subject within the letter of the law, then the subject was free, however apparently within the spirit of law the case might otherwise be. However, Kennedy C.J. continued immediately to say that "this dictum does not mean, however, that the ordinary rules applied to the interpretation of statutes are not to be applied to the interpretation of taxing statutes, as has often been pointed out". He quoted the judgment of Lord Russell of Killowen L.C.J. in Attorney General v. Carlton Bank [1899] 2 Q.B. 158:-*
>
> > *"In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part, I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same,*

whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as the intention is to be gathered from the language employed, having regard to the context in connection with which it is employed."

48. *Kennedy C.J. also quoted with approval the judgment of Horridge J. in Newman Manufacturing Company v. Marrable [1931] 2 K.B. 297, that the judge was entitled to, and ought to, "look at the object of the section" (emphasis added) when construing the provision. At p. 765, Kennedy C.J. concluded that:-*

> *"[t]he duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e., within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of taxing Acts to which I have referred". (Emphasis added).*

Indeed, the decision in Doorley is itself a good illustration of the sometimes nuanced nature of statutory interpretation and a warning against seeking to reduce that process to a small number of selected quotations from judgments, taken in the abstract. There, the majority (Fitzgibbon and Murnaghan JJ.) took a literal reading of the statutory language, while Kennedy C.J. adopted an interpretation which required reading the statutory language subject to an implied limitation to Ireland, which he considered was implicit in the structure of the Act.

51. *In this regard, it is worth noting dicta on the matter from a number of different cases. In Kiernan, Henchy J. at p. 121 said that:-*

> *"[a] word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein". (Emphasis added).*

In McGrath, Finlay C.J. said at p. 276 that:-

> *"[t]he function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it.". (Emphasis added).*

In Texaco (Ireland) Ltd v Murphy [1991] 2 I.R. 449, 456, McCarthy J. said that:

> *"[w]hilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning". (Emphasis added).*

52. *The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation. But some degree of uncertainty or lack of clarity is almost inevitable, and the principles of statutory interpretation are designed to assist in achieving clarity of communication. As long ago as 1964, in C.K. Allen, Law in the Making, (Oxford: Oxford University Press, 7th ed., 1964), the 7th edition of a textbook which had spanned the golden age of strict literal interpretation, Professor C.K. Allen observed at p. 349 that:-*

> *"common experience tells us that it is impossible to devise any combination of words, especially in the form (which all laws must take) of a wide generalisation, which is absolutely proof against doubt and ambiguity. So long as men can express their thoughts only by the highly imperfect instrument of words, an automatic, irrefragable certainty in the prescribed rules of social conduct is not to be attained".*

It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed "strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".

53. *In the relatively recent case of Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 (Unreported, Supreme Court, McKechnie J., 4th June, 2019), McKechnie J. (who, it might be observed, was the author of the dissenting judgment in O'Flynn) delivered a judgment in relation to the application of difficult to construe provisions of the Tax Acts. I agree fully with what he said there, and which merits an extensive quotation (para. 62):-*

> 62. *In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.*
>
> 63. *As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet &Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*
>
> 64. *Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from*

this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

65. *When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.*

66. *Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (Cork County Council v. Whillock [1993] 1 I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate: therefore, if on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail.*

67. *....*
68. *....*

69. *Aside from the provisions of s. 5 of the 2005 Act, but in a closely related context, there is the case, cited by both parties of Inspector of Taxes v. Kiernan [1981] I.R. 117. It is a case of general importance, where the Court was called upon to determine whether the word "cattle" in s. 78 of the Income Tax Act 1967, could be read as including "pigs". Henchy J. in his judgment made three points of note. The first of these he stated as follows:*

> *"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."*

The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in Unwin v Hanson [1891] Q.B. 115 at 119, who said :-

> *"If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."*

The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-

> *"Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."*

70. *The point first made is of common application: a provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended. The second point does not appear relevant in that although the Regulations refer to "any shop, supermarket, service station or other sales outlet", those even with an intimate knowledge of the business conducted therein, including of course the goods and products on offer would not necessarily, indeed not at all, have an understanding of what a plastic bag is for the purposes of the Regulations. In any event, the phrase is statutorily defined and effect must be given to that. The third is designed to prevent the fresh imposition of a liability where such a burden could only be achieved by an interpretation not reasonably open, by the standard principles of construction above mentioned.*

71. *Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal*

interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected. An example is Kellystown Company v. H. Hogan, Inspector of Taxes, [1985] I.L.R.M. 200, a case involving potential liability for corporation profit tax: Henchy J. speaking for this Court at p. 202 of the report, said:-

> *"The interpretation contended for by Kellystown, whilst it may have the merit of literalness, is at variance with the purposive essence of the proviso. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail."*

72. *Finally, could I mention the following passage from McGrath v. McDermott, [1998] I.R.258, at 276:*

> *"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."*

54. *It will be noted that, at para. 68, McKechnie J. suggests that he will come back to the question of s. 5 of the Interpretation Act, but in the event, the judgment does not do so. I think it is to be inferred that he would not have considered it appropriate to have recourse to that section in the interpretation of taxation statutes. In any event, for the reasons set out above, I am satisfied that s. 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes. However, the rest of the extract from the judgment is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in*

doubt as to the imposition of a liability that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

27. Whilst the foregoing cases set out some useful principles in relation to statutory interpretation, the Courts have set out certain criteria in relation to what constitutes a "*profession*" and each case will turn on its own particular facts.

Meaning of "Profession" and "Professional Services"

28. The words "profession" and "professional services" are not defined for the purposes of TCA, section 441. TCA, section 1 simply defines "profession" as including vocation. In the circumstances, it was submitted that the words must be given their ordinary or colloquial meaning and each case will turn on its own set of facts. This is the approach set down by Henchy J. in the Supreme Court decision in *Inspector of Taxes v Kiernan* [1981].

29. The statutory provisions in this appeal are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the words "profession" and "professional services" should be given the meaning which an ordinary member of the public would intend them to have when using it ordinarily. Therefore the words "professional services" must be interpreted in the light of the meaning of a "profession" and cannot be looked at separately from the meaning of "profession".

30. This is based on the well-accepted principle of interpretation that a word should be construed *noscitur a sociis*, that is to say that the interpretation of a word or phrase is affected by the words with which it is grouped.

31. Traditionally the term "profession" was used to refer to the learned professions such as a lawyer, doctor, or an architect. This type of meaning is maintained and reflected by the Revenue Commissioners in their Tax and Duty Manual on this topic at Part 13-02-06 August 2018 which lists the following as coming within the definition of a profession:

- Accountant
- Actor
- Actuary
- Archaeologist
- Architect

- Auctioneer/Estate Agent
- Barrister
- Computer programmer
- Dentist
- Doctor
- Engineer
- Journalist
- Management Consultant
- Optician
- Private School
- Quantity Surveyor
- Solicitor
- Veterinary Surgeon.

32. It was submitted that the Appellant was clearly not carrying on a "profession" or providing "professional services" within the meaning of any of the categories listed above. In any event, the Revenue's list of "professions" has no basis in law and, as is clear from the case law discussed further below, each case must be looked at on the basis of its own facts.

33. The Revenue Commissioners also state that the following activities are generally not considered to constitute the carrying on, of a profession:

- Advertising Agents
- Auctioneers of livestock in a cattle mart
- Insurance brokers
- The operation of a retail pharmacy
- Public relations companies
- Stockbrokers.

34. It was submitted that in categorising the nature and activities of the company a clear distinction must be drawn between the very specific reference to a "profession" in TCA, section 441 and the Appellant which clearly provided "excellent" or "high quality" or "exceptional" services to its customers. It was accepted that the Appellant, similar to many other businesses, is a highly successful company in its own field, but that does not necessarily mean that it is carrying on a "profession" or providing "professional services" within the meaning of TCA, section 441.

35. The nature of the work carried out by the Appellant must be considered. Its personnel do not carry out the projects, rather the company assembles a team of suitably qualified contractors who were suitably qualified to carry out the specific project concerned and the requirements can vary considerably from project to project.

Relevant Case Law relation to profession

36. In the UK case *Commissioners of Inland Revenue v Maxse* 12 TC 41 it was held, in the Court of Appeal, that the taxpayer was both exercising the profession of a journalist and editor, in respect of which he was entitled to exemption from Excess Profits Duty and carrying on the business of publishing a magazine, in respect of which he was assessable to duty, that the profits of such profession and business were separable for Excess Profits Duty purposes, and that, in arriving at the profits of the publishing business, a reasonable allowance must be made for his professional services as editor of and contributor to the magazine. Scrutton LJ at 61 cautioned against propounding:

> *"a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me, as at present advised, that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production, or sale, or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions the Church, Medicine and Law. It has now, I think, a wider meaning."*

37. *Carr v Inland Revenue Commissioners* - [1944] 2 All ER 163 was concerned with whether an optician was liable to excess profits tax. The appellant in *Carr* was a qualified optician whose profits were derived for the most part by fees charged for advice and for prescribing appliances to alleviate defective sight. The Special Commissioners held that the appellant was carrying on a profession and not a business with the Court of Appeal ultimately holding that there was evidence upon which the Commissioners could find that the appellant was carrying on a profession and their finding on that point could not be disturbed on appeal.

38. In highlighting the difficulty in defining the word profession, Du Parcq LJ stated at 166:

"It seems to me to be dangerous to try to define the word "profession," as Scrutton LJ realised. There are a good many cases about which almost everybody would agree. Everybody would agree, I should think, that when you find a business, however extensive and however distinguished in some ways it may be, which consists merely of selling property, whether real or personal, that is not a profession. It is necessary to add the word "merely," since a sculptor, for instance, may be said to be selling goods. I know there may be a question whether one can regard the contract in that case as a contract for sale, but, if it is not a contract for sale, it may be described as a contract to do work and labour, and there, again, everybody would agree as a general rule that a man who earns his money merely by doing work and labour, without more, is carrying on a trade and not a profession. Again the word "merely" has to be inserted to guard against it being thought that many people are not carrying on a profession who at the same time may be said to be doing work or labour. I think that everybody would agree that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications who would not be said by anybody to be carrying on a profession.

…

There are professions today which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number, the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations, I care not what word you use in relation to them, may in the future acquire the status of professions. It must be the intention of the legislature, when it refers to a profession, to indicate what the ordinary intelligent subject, taking down the volume of statutes and reading the section, will think that "profession" means. I do not think that the lawyer as such can help him very much".

39. In the binding High Court judgment in *Mac Giolla Mhaith (Inspector of Taxes) v Cronin & Associates Ltd* 3 ITR 211, McWilliam J. was required to determine whether an advertising company was carrying on a profession or providing professional services within the charge to tax pursuant to the TCA, section 441 as it is now. In coming to his judgment, it was observed that the President of the Circuit Court had made the following facts:

a) no education or other qualification was required,
b) there is no code of practice governing or controlling advertising agencies,
c) membership of the Institute is not compulsory and over one third of advertising agents are not members,
d) the Institute has no disciplinary function,
e) advertising agencies advertise their own businesses, and
f) in the course of their advertisements they freely disclose who are their customers.

40. In determining the issue, McWilliam J. at page 7 confirmed that:

" it was a question of fact for the President of the Circuit Court to decide whether the taxpayer was carrying on a profession of providing professional services or not, but, in order to reach his decision, it was necessary for him, as it is necessary for this court, to try, if it is possible, to decide what is the meaning of the phrases "carrying on a profession" and "the provision of professional services" as used in s 155 [sic] *when taken in conjunction with the provision in the 1967 Act that the expression "profession" includes "vocation".*

This is the sole issue in the case. On this question, the statutes themselves give no assistance. Nor are the cases to which I have been referred very helpful on the issue and none of them deal with the word "vocation". Indeed, most of them are concerned with the specific distinction between professions and trades or businesses rather than a consideration of a profession in any general context.

I do not accept an argument made on behalf of the taxpayer that the inclusion of the expression "vocation" must mean something narrower than the expression "profession" and, therefore, cannot add anything to it. In construing any document, consideration should be given to each provision on the basis that it was inserted with the intention of effecting some purpose. It seems obvious to me that its inclusion was not intended to restrict the meaning of the expression "profession" but rather to enlarge it. What it does do or what it was intended to do by way of enlargement is another matter.

Nor do I agree with the argument made on behalf of the inspector that the use of the terms "profession" and "professional" in the memorandum of association of the institute is very significant. It is not in any way conclusive and I take the view that its significance on this issue is minimal. It may be relevant to consider what the institute thought of the status of its members but no person can become something that he is

not merely by saying so. It is purely a question of fact for the court to decide what is the status or standing of any person however he may choose to describe himself.

In Carr v CIR Du Par LQ, 2 AER 163 at page 166, adopting a view expressed by Scrutton LJ, in CIR v Maxse 12 TC 41 stated "it seems to me to be very dangerous to try to define the word "profession" and, on the same page, he said "ultimately one has to answer this question, would the ordinary man, the ordinary reasonable man, the man, if you like to refer to an old friend on the Clapham omnibus, the man, if you like to refer to an old friend on the Clapham omnibus, say now, in the time in which we live, of any particular occupation, that it is properly described as a profession?" It seems to me that this approach should also be adopted to the word "vocation". Not having any evidence from the occupants of the Clapham omnibus, I have turned, as I think I am entitled to turn, to some modern dictionaries."

41. As there was significant uncertainty as to the specific type of income that the Oireachtas had intended to tax, McWilliam J. concluded on page 9:

"I am left in the position that the statute has provided a conundrum which I cannot solve. If the addition of the word "vocation" does include all occupations, callings, businesses, habitual employments and professions, it seems unnecessary to have the word "profession" at all. The word "profession" even as extended by the word "vocation" must have some limitations. Similarly, it must have been intended to effect some extension but, as I cannot guess what this extension was intended to be, I am not in a position to say that the inference drawn by the President of the Circuit Court was not correct."

42. Therefore in the *Cronin & Asscociates* case, the company carried on business as an advertising agency providing ideas on advertising materials and methods for its customers and supervised the production of materials and the employment of a variety of specialist agencies which produce such material. Similarly, in the present case, the Appellant employs a variety of specialists to implement the various projects under its supervision.

43. Similarly, in the present case there are no particular educational or other qualifications required to work for the Appellant. There was no code of practice governing the activities of the company or of its employees and there was no "Institute" or regulation governing its activities. The Appellant was made up of a range of individuals with varied skills and experience with no specific professional qualifications to deliver the services provided. It was the experience and reputation gained by the senior management team over a number of years that had allowed it to undertake the work concerned.

44. The interpretation of TCA, section 441 was also considered in a decision of the Tax Appeals Commission by Commissioner Cummins in which it was observed at paragraph 5:

> *"This is a complex appeal because of the differing nature of the constituents of the Appellant's income in 2012 and 2013 that need to be examplicated.*
>
> *….*
>
> *"It is also complicated because the meaning of 'profession' and 'professional services' is not defined in statute."*

45. Similarly in a 2016 First Tier Tribunal (FTT) decision in *The Association of Graduates Careers Advisory Service*, TC05309, the FTT considered whether the exemption from VAT applied to an association whose primary purpose was the advancement of a particular branch of knowledge, or the fostering of professional expertise, connected with the past or present professions or employments of its members."

46. In undertaking that task the FTT was required to put itself in the place of the ordinary reasonable man. As Pill J. described it in his decision *in Institute of Leisure and Amenity Management v Customs & Excise Commissioners* [1998] STC 602, the FTT had to *"form a judgment upon the question as the spokesperson of the ordinary reasonable man, with his experience of life and everyday affairs*".

47. At paragraph 48 of the decision, the FTT observed:

> *"The courts, however, have resisted the temptation to adopt a prescriptive list of factors. It is clear that some factors are more important in some cases rather than others and that the absence of one or more factors may or may not be determinative."*

48. Having reviewed the related case law, the FTT stated:

> *87.* "*From our review of the case law, we would identify the following factors as being of material importance to the identification of a profession.*
>
> *88. As an initial point, it is clear that all intellectual professions (as opposed to aesthetic professions) require a specialist skill. That skill has to have sufficient coherence to constitute a single subject matter, but has to be capable of broad*

application (see Institute of Chartered Shipbrokers (VAT Decision 15033)). A technical skill which is narrowly focussed in terms of the skill itself or the industry to which it is applicable is not consistent with the character of a profession (see, for example, Institute of Leisure and Amenity Management at page 607, Association of Payroll and Superannuation Administrators (1992) (VAT Decision 7009), Institute of Legal Cashiers and Administrators (VAT Decision 12383), and Association of Reflexologists (VAT Decision 13078)).

89. *Whilst there is no absolute requirement for qualifications (see Institute of Chartered Shipbrokers (VAT Decision 15033) and the judgment of Scott LJ in Carr v Inland Revenue Commissioners at page 165), the ability to obtain relevant qualifications will be important in demonstrating that an occupation is carried on with an appropriate level of expertise and, in some cases, the requirement to obtain a given qualification or accreditation has been seen as an important feature of a profession (see British Association for Counselling (VAT Decision 11855) and Institute for Information Security Professionals v HMRC [2009] UK FTT 365).*

90. *The existence and application of some form of code of ethics and/or professional conduct is also an important factor. The code of ethics and professional standards may or may not be enforced by an appropriate professional body and may be a detailed code or general principle of ethical conduct (see Institute of Chartered Shipbrokers) but some means, formal or informal, of maintaining the integrity of the occupation is required.*

91. *There are other principles that we derive from the case law.*

92. *First, as very basic principle, it is clear that whether or not an occupation is regarded as a profession is distinct from whether or not the members of that occupation act in a professional, as opposed to amateur, manner.*

93. *Second, as can be seen from the above, the categories of profession are not closed. It is quite possible that over time certain occupations that would not previously have been regarded as professions will come to be regarded as professions under this test (see the passage from the judgment of Du Parcq LJ in Carr to which we refer at [80]).*

94. *Third, it is not necessary for all persons who carry on a particular occupation to be doing so as a professional. In Carr, Scott LJ (at page 165) specifically distinguished the universal proposition that opticians in general carry on a*

profession from the question of whether a specific taxpayer carried on that profession. In a similar way, in British Association for Counselling, the VAT Tribunal concluded that accredited members of the Association carried on counselling as a profession, but unaccredited members did not. Also, in Institute of Chartered Shipbrokers, the VAT Tribunal commented that the Tribunal was unsure whether an unqualified or inexperienced person engaged in shipbroking would necessarily be described as a shipbroker.

95. *We find this a difficult case, but on balance, we have concluded that the provision of careers advice is not a recognized profession (or perhaps, more accurately, not yet a recognized profession) within the meaning of item 1(c) of Group 9. In reaching that conclusion, we have taken into account the following factors.*

96. *While some careers advisers do acquire a broad spectrum of knowledge which permits those practitioners to specialize to some extent, not all practitioners who would describe themselves as careers advisers practice at that level. There is a range of expertise covering those who operate at a more administrative level to those who provide career guidance and counselling at an expert level.*

97. *….*

98. *Nor, in this case, is the element of coherence to be found in any level of qualification or accreditation. Although it is not an essential requirement for an occupation to be a profession that it is necessary to gain an appropriate qualification before being entitled to practice, we do regard some form of qualification or accreditation as an important aspect. The existing qualifications for careers advice act to validate the particular expertise of those who obtain them; they do not define a group of persons who could be regarded as professionals. There is no accepted qualification or accreditation required for acting as a careers adviser whether as a graduate careers adviser or otherwise.*

99. *We also regard an important aspect of a profession that there is some form of code practice or code of ethics which is adhered to by its practitioners. As we understand it, the code of practice promulgated by AGCAS is a code of standards imposed upon its service members and not upon the individual members. It is the service members who enforce standards and ethical practices of their employees. There is no separate disciplinary code or procedure applying outside their contract of employment with the relevant careers services."*

49. The FTT's decision is therefore a useful decision in setting out what is meant by profession and professional services. Furthermore criteria mirror the criteria set out in *Cronin.*

50. The Respondent's own guidance states that stockbrokers, insurance brokers, public relations companies are not carrying on a profession. Again it is of no insult to anybody to say that they are not carrying on a profession. It is simply a reflection of whether a particular activity is recognised as being a profession.

51. In the present case the Appellant effectively makes "arrangements" for the provision of the services required by [redacted] rather than providing those services directly itself.

52. In a VAT case *Christiane Urbing-Adam and Administration de l'enregistrement et des domains* (C-267/99) the Court of Justice considered the appropriate rate of VAT to be applied to the professional transactions carried out by the taxpayer. The case is of relevance in the context of the reference to "the liberal professions" as was set out as follows in the Sixth VAT Directive:

> *"Services supplied by authors, artists, performers, lawyers and other members of the liberal professions, other than the medical and paramedical professions, in so far as these are not services specified in Annex B to the second Council Directive of 11 April 1967".*

53. The question for the Court was whether the liberal professions mentioned in the Sixth Directive included an activity such as that of a managing agent of buildings in co-ownership.

54. With a view to providing guidance to the referring court, the CJEU emphasised certain factors which characterise the liberal professions, within the meaning of Annex F(2) to the Sixth Directive noting at para 39:

> "*As the Commission has pointed out in its written observations, the liberal professions mentioned in that provision are activities which, inter alia, are of a marked intellectual character, require a high-level qualification and are usually subject to clear and strict professional regulation. In the exercise of such an activity, the personal element is of special importance and such exercise always involves a large measure of independence in the accomplishment of the professional activities."*

55. In another VAT case *Maatschap M.J.M. Linthorst, K.G.P. Pouwels en J. Scheren c.s. v Inspecteur der Belastingdienst/Ondernemingen Roermond* (C-167/95) the ECJ held that

the services of a veterinary surgeon did not fall within "those provided by a 'Consultant'" within the meaning of art 9(2)(e) of EC Directive 77/398.

56. The relevant provisions of art 9 of the Sixth Directive were as follows:

> 1. *The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.*
>
> 2. *However: ...*
>
> *(c) the place of the supply of services relating to ... valuations of movable tangible property [the third indent], work on movable tangible property [the fourth indent] shall be the place where those services are physically carried out ...*
>
> *(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides ... - services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information [the third indent] ..."*

57. In the course of its decision the ECJ stated at p. 1295

> *"However, I do not think that the legislator, by that indent, intended to enumerate a catalogue or establish a genus or class of activities corresponding to those of the traditional notion of liberal professions. An interpretation which seeks to compare the myriad of possible forms of modern consultancy work with the social and intellectual prestige – based generally on high standards of educational attainment and strict regulation of ethical and professional behaviour – of the traditional liberal professions would strain considerably the language of the indent. There is no class of activity in the catalogue which is "similar" to the normal, activities of a veterinary surgeon, and, in my opinion, no common element other than the unsatisfactory notion of liberal professions can be identified to which those activities would be assimilated".*

58. The foregoing cases actually reinforce and re-iterate to a large extent the points made in the *Cronin* case.

59. It is submitted that the Appellant does not fit within the foregoing meaning and description of a "profession" or a profession's provision of "professional services".

Dictionary Definitions

60. In the *Kiernan* case Henchy J. stated at p.122:

> *"Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed.*

61. It was submitted that the meaning of "profession" has not changed over time and that resort need not be had to dictionaries to establish its meaning. However, without prejudice to that argument, in the event that it is considered that there is some doubt as to the meaning of "profession" the following definitions of "profession" are relevant:

> Oxford English Dictionary
>
> *"A job or career that needs training and a formal qualification."*
>
> *"A body of people engaged in a profession."*
>
> Collins Dictionary
>
> "*A profession is a type of job that requires advanced education or training."*
>
> Cambridge Dictionary
>
> *"Any type of work that needs special training or a particular skill, often one that is respected because it involves a high level of education"*

62. As outlined above, the Appellant is not aligned with any particular "profession" and its staff/directors are not required to have any particular formal training or qualifications. In the circumstances it was submitted that the company does not come within the meaning of a "profession" nor did it provide "professional services" under TCA, section 441.

63. It is further well-accepted that the interpretation of a statute involves giving effect to the intention of the Legislature. Therefore regard should be had to the plain intention as expressed by the Act as a whole.

64. TCA, Section 441 was designed to counter avoidance of tax arising from the non-distribution of income of certain close companies carrying out professional activities which would otherwise attract income tax at the higher rate. The Revenue's Notes for Guidance on Section 441 states at Part 13 - Notes for Guidance Finance Act 2018 Edition:

> *"This section is designed to counter avoidance of tax arising from the diversion into close companies of income (usually arising from professional activities) which would otherwise attract income tax at the higher rate. The device consists of the setting up of a company for the purpose of carrying on a profession, providing professional services or holding an office or employment. It may also take the form of the setting up of a company controlled by persons engaged in a profession, etc for the purpose of carrying on a business of providing services or facilities for those persons. The profits of the company are withheld from distribution and therefore bear tax at the company tax rate rather than at the personal tax rates to which the profits, if distributed, would be liable in the hands of the shareholders. As these shareholders usually are liable at rates of personal tax which exceed the company tax rate the non-distribution results in loss of tax revenue. The section counters this method of tax avoidance by imposing a surcharge…"*

65. In a document signed by P. Jordan of the Corporation Tax Unit of the Revenue Commissioners on 7 April 2011 (document furnished as part of an internal technical review which had been requested by the Appellant's agent), he makes reference to an earlier set of Notes for Guidance which also set out the thinking behind the enactment of section 441 – is a company being set up in order to avoid tax?

66. The facts in the present case are wholly different from the foregoing situations and there is no question of the Appellant having been set up in order to avoid tax. The creation of the company allowed it to compete for larger tenders in the business of [redacted] (almost all of which are either awarded to private companies, major charities/NGOs or government institutions). Had the Appellant not incorporated, there would have been no practical possibility for it to compete in these tenders. It was submitted therefore that the Appellant was clearly not set up for the avoidance of tax but simply for the purposes of being able to operate in this particular field of business.

"Professional Qualifications"

67. Directive 2005/36/EC on the recognition of professional qualifications ensures the recognition of professional qualifications and the free movement of professionals within the EU. The professions falling under the directive are nurses, midwifes, doctors (general practitioners and specialists), dental practitioners, pharmacists, architects and veterinary surgeons. The Directive was transposed into Irish law by Regulations enacted in 2008 (S.I. No. 139 of 2008).

68. It is submitted that the foregoing descriptions provide further evidence of what is to be understood by the meaning of a "profession" and "professional services".

Conclusion

69. A company does not carry on a profession rather it is the employees or the individuals within the company who do so. However the company can provide the professional services.

70. In carrying on a business of organising large scale projects generally on behalf of the European Union, it was necessary to use the skills and ability of its managers/employees to carry on the business in question but that does not necessarily mean that the business is carrying on a profession or providing professional services.

71. The Appellant submitted that there is a distinction in the work performed by its core staff and the consultant's experts on the ground and therefore the consideration of whether TCA, section 441 applies to the Appellant must be considered in context of the work undertaken by the core staff.

72. The evidence given by [redacted] accepted that there is no clear framework of academic qualifications to practice as a management consultant. There is no standardised qualifications. There is no requirement to be a member of a professional body and it is unregulated and there is no regulatory body. [redacted] further concluded:

> *"Most management consultancy firms are unregulated, unlicensed, not covered by any EU code of practice, not required to be a member of any professional body and its employees and directors are not required to have any predetermined academic qualifications. This is due to a lack of regulation, qualifications et cetera in the global management consultancy industry. This is not unique to* the Appellant *and therefore does not exclude it from practice of management consultancy."*

73. The work of the Appellant is unregulated, not covered by any national or EU code of practice, not required to be a member of any professional body, its employees/directors are not required to be a member of any professional body nor are those employees/directors are required to have any pre-determined academic qualifications and in recruiting staff significant weight is placed on practical experience in addition to any educational qualifications the prospective employee may have.

74. There is no guidance in the TCA, section 441 as to the meaning of the 'carrying on of a profession' or the provision of 'professional services'. The only assistance is TCA, section 2 which provides that a profession includes a vocation but again that is not particularly helpful.

75. In context of interpreting those phrases, it was submitted that in the carrying on of a profession, the meaning of professional includes the meaning of a profession. As such the word profession informs the meaning of professional services in accordance with the principle of statutory interpretation *noscitur a sociis* which prescribes that words are known from their associates and statutory words are liable to be affected by other words with which they are associated. So the interpretation of a word or a phrase is affected by words within which they are grouped. It is not possible to provide a professional service within the meaning of TCA, section 441 unless you are part of a profession.

76. The legislature was exercising an abundance of caution to cover all aspects of the carrying on of a profession or the provision of professional services. Therefore the Respondent's submission that the word professional has any wider meaning than that associated with the carrying on of a profession was incorrect.

77. Having regard to all of the foregoing, it was submitted that the Appellant did not come within the ambit of TCA, section 441 and it was therefore not liable for the close company surcharge imposed by the Respondent.

78. It was submitted that "profession" and the provision of "professional services" relates to individuals who are "members" of a profession and belong to a category of persons who are experts in a particular field.

79. Finally, in the absence of prescriptive legislation, the presumption of doubtful penalisation should be invoked. As such penal statutes are construed strictly in favour of the party who is going to be subject to the penalty. In other words if there are two meanings to the word professional, one meaning that the services are carried out as part

of a recognised profession and the alternative is some broader meaning, the meaning to be adopted is the meaning which avoids the penalty.

Respondent's Submissions

80. TCA, section 441 pertains to surcharges on the undistributed income of service companies and was introduced to prevent counter avoidance of tax arising from the diversion into close companies of income (usually arising from professional activities) which would otherwise attract income tax at the higher rate, i.e. the setting up of a company for the purpose of carrying on a profession, providing professional services or holding an office or employment. It may also take the form of the setting up of a company controlled by persons engaged in a profession, etc for the purpose of carrying on a business of providing services or facilities for those persons.

81. The profits of the company are withheld from distribution and therefore bear tax at the company tax rate rather than at the personal tax rates to which the profits, if distributed, would be liable in the hands of the shareholders. As these shareholders usually are liable at rates of personal tax which exceed the company tax rate the non-distribution results in loss of tax revenue. The section counters this method of tax avoidance by imposing a surcharge of 15 per cent on 50 per cent of the company's undistributed professional and service income and a surcharge of 20 per cent on the company's undistributed investment and estate income.

82. As such, both parties agree that the legislation was created to capture situations where individuals organise their affairs through the mantle of a corporation to provide professional services

83. A "close company" is defined by TCA, section 430 as one under the control of 5 or fewer participators or under the control of participators who are directors (however many such directors there may be).

84. Pursuant to TCA, section 433(1) a "participator" is a person having a share or interest in the capital or income of a company and also includes:

    - persons holding present or future rights to share capital, voting rights, loan capital (excludes ordinary bank loan);
    - persons holding rights to share in any distribution by the company;
    - persons holding rights to share in any premium on redemption of loan capital; and
    - persons holding any other rights under which the person could secure that present or future income or assets of the company could be applied directly or indirectly for the person's benefit.

85. The Appellant had two directors and a "core group of eight staff", all of whom are permanent employees. From the provisions of TCA, Part 13, Chapter 1, it is clear that the Appellant was a close company and there is no issue between the parties in this regard.

86. Section 441(1) provides that subject to Section 441(2), a "service company" means:

> *(a)* "a *close company whose business consists of or includes the carrying on of a profession or the provision of professional services,*
> *(b) a close company having or exercising an office or employment, or*
> *(c) a close company whose business consists of or includes the provision of services or facilities of whatever nature to or for –*
>
> > *(i) a company within either of the categories referred to in paragraphs (a) and (b),*
> > *(ii) an individual who carries on a profession,*
> > *(iii) a partnership which carries on a profession,*
> > *(iv) a person who has or exercises an office or employment, or*
> > *(v) a person or partnership connected with any person or partnership referred to in subparagraphs (i) to (iv);"*
>
> *but the provision by a close company of services or facilities to or for a person or partnership not connected with the company shall be disregarded for the purposes of this paragraph.*

87. Section 441(2) provides that where the principal part of a company's income which is chargeable to corporation tax under Cases I and II of Schedule D and Schedule E is not derived from –

> (a) carrying on a profession,
> (b) providing professional services,
> (c) having or exercising an office or employment,
> (d) providing services or facilities (other than providing services or facilities to or for a person or partnership not connected with the company) to or for any person or partnership referred to in subparagraphs (i) to (v) of subsection (1)(c), or
> (e) any 2 or more of the activities specified in *paragraphs (a)* to *(d)*, the company shall be deemed not to be a service company.

88. The correct approach to the interpretation of tax statutes is in *Doorley v Revenue Commissioners* [1933] IR 750 Kennedy CJ held (at page 765):

"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms,…for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is,…as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament…"

89. Indeed, in the old case of *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, Rowlatt J said:

"in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

90. The term "*the carrying on of a profession or the provision of professional services* is not limited or shaped by the use of the term provision of service as an alternative and likewise the use of the "*term provision of professional services*". The two terms expressly used in the legislation is a conjunction providing for alternatives.

91. The provision of a professional service is wider than the concept of carrying on a profession where in circumstances where it would be readily recognised that the professions of law and medicine involve the carrying on of a profession, although it is an evolving and wider concept.

92. The language used in the TCA, section 441 is very clear and there is no requirement to consider whether the language is oblique or slack. A literal interpretation is paramount and if there is oblique or slack language then a purposive approach would be necessary but that does not arise here. As such the issue to determine is whether the ordinary, reasonable man would consider that the Appellant was carrying on a profession or involved in the "*provision of professional services"*.

93. There are multiple other authorities in support of these propositions, some of which are relied on by the Appellant in its Outline Arguments. There is no ambiguity in the wording of TCA, section 441 such that any other principle of statutory interpretation is required.

94. The Appellant cites the decision of *O'Flynn Construction,* a decision which was solely concerned with the anti-avoidance provision contained in TCA, section 811. The question of statutory construction of taxing statutes has arisen on numerous occasions. In *Gaffney v Revenue Commissioners* [2013] IEHC 651, the High Court's judgment records

that the Revenue agreed that the principles applicable to the construction of tax statutes are those set out in *Doorley* and *Kiernan* [1981], and no mention was made of the Supreme Court's judgment in *O'Flynn Construction*.

95. In the High Court's judgment in *Bookfinders v Revenue Commissioners* [2013] IEHC 651, Keane J expressly applied the principles of interpretation as summarised in *Gaffney*. The principles set out in *Gaffney* have also been cited with approval by the High Court in *Fennell v Creedon* [2015] IEHC 711. In *Minister for Justice, Equality and Law Reform v Devine* [2015] IECA 182, the Court of Appeal held that: *"…it is well established that such Statutes must be construed strictly in order to give the benefit of the doubt to the individual as against the State…The application of the presumption beyond criminal statutes was emphasised by O'Higgins J*. [in *Mullins v Harnett* [1998] 4 IR 426] *when he said: 'Penal statutes are not only criminal statutes, but only statutes that impose a detriment'. The application of strict construction to taxation Statutes was confirmed in Inspector of Taxes v. Kiernan [1982] I.L.R.M. 13."*

96. The Supreme Court itself has twice recently been presented with instances where the interpretation of tax statutes was required, and in neither case was an *O'Flynn Construction*-type approach taken. Indeed, in one of those cases, *McNamee v Revenue Commissioners* [2016] IESC 33, Laffoy J referred to O'Donnell J's findings summarised above in the following terms: *"The following observations of O'Donnell J. in Revenue Commissioners v. O'Flynn Construction Company Limited as to the construction of s. 86 are pertinent to the construction of s. 811."* Mitchell, *The interpretation of tax statutes: O'Flynn construction five years on* (2016) (29(4)) Irish Tax Review, 117-121 observes: "*O'Donnell J's comments in O'Flynn Construction as to the abolition of the rule of strict construction are limited to the interpretation of s811 itself*."

97. In *Bookfinders* [2020], Mr. Justice O'Donnell clarified that ultimately it is a literal interpretation that prevails and a purposive approach may still be necessary depending on the circumstances.

98. In all the circumstances, this is a case where there is no reason whatsoever to depart from the literal approach and, indeed, no reason has been provided in the Appellant's Outline Arguments that would justify such a departure to a purposive approach.

Nature of the Appellant's business

99. The Appellant used both internal and external experts in the provision of the services. The persons engaged by the Appellant were labelled as experts and advertised in all of its online material. Indeed the very contract that it entered into with [redacted] is predicated

on these people being experts, having third level education and/or significant experience.

100. Some of the profiles of the CVs of people who were recommended by the Appellant as part of the tenders had Phds, MBAs MAs. They were all highly qualified, have third level educations and multiple languages with significant experience in extremely complicated matters. These experts had dealt with very complicated issues in pre accession countries and had enhanced learning, provided training, gave advice, conducted analysis, surveys and research, project managed, planned and implemented changes in working with the public sector. [redacted], in his evidence, described himself as an international development consultant and accepted in his evidence that the work undertaken by the Appellant required intellectual skill and technical skill.

101. The Appellant had lucrative contracts in the realm of €2 million however one particular contract was worth €6 million. The contract put in evidence was in excess of €3 million which was not in the world of mediocrity.

102. It made no difference whether the experts were internal or external. The Appellant used both. It had its employees who are based in [redacted] and who may or may not be involved in particular tenders as they arise. Those profiles were set out on the website. However the Appellant also recruited from panels of experts for particular projects depending on their qualifications and expertise. That is neither here nor there in terms of the question to be determined as it is necessary to engage in how the Appellant conducted itself. Ultimately the Appellant was engaged in the provision of professional services of the highest calibre.

103. The Appellant was described as involved in consultancy work, whether it was [redacted] describing himself individually, the Appellant in terms of its material on its website but also in the contract. So the definition of the Appellant for the purposes of the contract with [redacted] was as a consultant. Even on the website in addition to [redacted] conceding in evidence that there was a requirement for intellectual skills and technical skills, throughout the material on the website there are repeated references to the work being highly skilled and the highly skilled nature of the team.

104. [redacted] in cross examination confirmed that the Appellant had to act with due care, skill and diligence, to provide its best professional practice. There were obligations for there to be no conflicts of interest, that it must be independent in the delivery of the services.

105. What [redacted] expected from the Appellant was the delivery of a professional service and the word professional appears on a number of occasions. It required it to operate with

due care, skill and diligence, to have no conflicts of interest, to be independent and to provide an indemnity.

106. The contract required an obligation to engage in professional secrecy, fluency in language and have at least ten years post qualification professional experience.

107. The Appellant advertised itself on the basis that it provides the institutional support to each project as it goes along and engaged actively in the project in excess of commissioning a panel of experts as it was involved in making sure that each project is successful.

108. In support of the assertion the management consultancy is a profession, the Respondent relied on the following extracts from the leading academic commentary on management consultancy by Milan Kubr "Management Consulting, a Guide to the Profession" Fourth Edition, published by International Labour Office, Geneva:

Page xiii:

"This book is the result of a collective effort and reflects the experience and knowledge of the international consulting profession."

Page xvi

"However management consulting is a dynamic and rapidly changing sector of professional services."
.....
"As a professional service sector management consulting also interacts closely with other Professions."
.....
"*The borders between professions are shifting, professional firms merge or split, and new models and techniques of service delivery emerge."*

Page xviii

"*The main purpose of this book is to contribute to the upgrading of professional standards and practices in management consulting and to provide information and guidance to individuals and organizations wishing to start or improve consulting activities. The book is an introduction to professional consulting."*

Page 4:

"We regard the two approaches as complementary rather than conflicting. Management consulting can be viewed either as a professional service, or as a method of providing practical advice and help. There is no doubt that management consulting has developed into a specific sector of professional activity and should be treated as such."

"*We start by reviewing the basic characteristics of management consulting. The key question is: What principles and approaches allow consulting to be a professional service that provides added value to clients?"*

Page 9:

"A practitioner who does management consulting for a living has to charge a fee for all the work done for clients. Consulting firms are sellers of professional services and clients are buyers. In addition to being professional service organizations, consulting firms are also businesses."

Page 10:

"Following this short discussion of the basic characteristics of management consulting, we offer the following definition:

"Management consulting is an independent professional advisory service assisting managers and organizations to achieve organizational purposes and objectives by solving management and business problems, identifying and seizing new opportunities, enhancing learning and implementing changes."

109. The services performed by the Appellant conformed completely with the above definition. It was clear that the Appellant was engaged in the provision of management consultancy services which are professional services. Its staff are highly skilled in the delivery of the service that they give to their clients.

110. Chapter 6 of Kubr's work is entitled , 'Professionalism and Ethics in Consulting' and considers management consulting as a profession, the professional approach, professional associations and codes of conduct, certification and licensing, legal liability and professional responsibility. What is clear is that because of the fact there is no mandated regulation of the profession, the question has arisen as to whether it can be classed as a profession. It is quite clear that Kubr regarded management consulting as a profession and lists all the various indicia that apply to management consulting. Even if

involvement in one of the regulatory bodies is voluntary he deals with everything from ethics to conflicts of interest, independence and insurance in that chapter and sets out why management consulting is a profession.

111. Therefore the assertions made by the Appellant that there was mandatory criteria in determining the existence of a profession were erroneous.

112. The ordinary reasonable man when looking at the question of whether management consulting is a profession would have regard to the very high level of education, qualifications and experience of the people involved in the implementation of this highly skilled and technical intellectual service. As such, taking everything into account, the man on the Clapham omnibus or the ordinary, reasonable man would look at the activities of the Appellant and consider that it is involved in the provision of professional services.

113. [redacted] was very clear in her evidence that everything that she had heard [redacted] say in evidence is what in her experience management consultants do and everyone who was involved in management consultancy or who had analysed it, whether academically or in a voluntary or regulatory fashion concluded that management consultants are a profession and are involved in the provision of professional services.

114. Whether a professional service is provided is a question of fact in every case. The Appellant's principal activity is providing a consultancy service to [redacted] and other international organisations. The Appellant provided advice on the implementation and delivery of external development policy set down by the EC for various countries in Europe and the developing world.

115. The Appellant was a professional services company and therefore subject to TCA, section 441 on retained earnings. It was not accepted that "*profession*" and "*professional services*" carry an identical meaning. Indeed, if they did, TCA, section 441 would not contain both terms as alternatives, e.g., "*includes the carrying on of a profession **or** the provision of professional services*". It was submitted that "*professional services*" is clearly broader than "*profession*" by its own terms.

116. In Tax Briefing 48, the Respondent stated that each case should be examined with regard to its own particular facts and the question of degree is important. In that document, the following are professions fall within the provisions of TCA, section 441:

- Accountant

- Actor *(Davies vs. Braithwaite)*
- Actuary
- Archaeologist
- Architect *(Durant v CIR)*
- Auctioneer/Estate Agent
- Barrister *(Seldon v Croom-Johnson)*
- Computer programmer
- Dentist
- Doctor
- Engineer
- Journalist *(CIR v Maxse)*
- **Management Consultant**
- Optician *(CIR v North and Ingram)*
- Private School
- Quantity Surveyor
- Solicitor
- Veterinary surgeon. (emphasis added)

117. The following have been held not to be professions:

- Insurance Broker *(Durant v CIR)*
- Photographer *(Cecil v CIR)*
- Stockbroker *(Christopher Barker & Sons v CIR)*
- Advertising Agents *(MacGiolla Mhaith v Brian Cronin & Associates)*
- Professional Gambler *(Graham v Green)*

118. A management consultant is a person or company that gives professional advice about how to run a company or organisation more effectively, like the Appellant.

119. Without prejudice to the foregoing, as above, each case should be examined on its own merits having regard to existing case law and the Manual does not purport to be exhaustive nor is it binding (as each case will depend on its own facts). The Appellant's principal activity was providing a consultancy service to [redacted] and other international organisations. The company provides advice on the implementation and delivery of external development policy set down by the EC for various countries in Europe and the developing world. As such, it comes within the definitions set out in TCA, section 441.

120. Without prejudice to the foregoing, factors indicative of a profession were espoused in the case of *CIR v Maxse* [12 TC 41] as being a requirement for purely intellectual skill (e.g. doctor) or manual skill controlled by an intellectual skill (e.g. sculptor).

121. The judgment in *MacGiolla Maith (Inspector of Taxes) v Cronin* can be distinguished as in that case Mr. Justice McWilliam had to consider whether the decision of the lower court was not obviously wrong to the extent that he was unable to find any error in the approach taken by the lower court or something that was glaringly obviously flawed in the decision such that it would warrant an intervention from the High Court. However the failure of the High Court to intervene in the decision of the lower court does not give an endorsement of the finding of the lower court or the criteria that were taken into consideration by it. It is a decision where the High Court said that it was a difficult question and that it was a conundrum that he could not solve. So with the greatest respect to Mr. Justice McWilliam, it is not a decision which provides great elucidation on the approach to be taken in determining this appeal and it is certainly not prescriptive by any means. So the *Cronin* judgment is of limited value but the case does recognise that what we understand to be a profession is an evolving concept and changes over time.

122. Another important feature of the *Cronin* case is that it was heard in 1984 at a time the management consultancy profession was in its infancy. Ms. K in her evidence provided a background to evolvement of the management consultants originally from the accountancy profession brought in to companies and businesses to give independent advice to assist in developing organisations and improving their skills leading to the formation of the profession of management consulting in its own right.

123. In any event, the qualifications of the directors and employees of the Appellant included doctorates and a myriad of professional qualifications. The work that the Appellant carried out was plainly highly skilled by its very nature.

124. The European cases on the Sixth Vat Directive are also of no assistance in circumstances where the cases pertain to the concept of "*liberal professions*", which is not a term that is in issue herein. Likewise, the concept of "consultant" within the meaning of EC Directive 77/398. Nonetheless, these authorities are not unhelpful to the Respondent's position in this appeal. For example, the quotation at paragraph 39 (if it could be considered applicable to this appeal) would encapsulate the activities and skills of the Appellant.

125. The First Tier Tribunal Tax decision in *Career Guidance Counsellors* is not a binding precedent. That case was concerned with career guidance counsellors and therefore a different factual pattern. However career guidance counsellors would not be considered to be engaged in professions or carrying on professional services.

126. An important aspect of a profession is that there is some form of code of practice which is adhered to. However just because there are no codes set out by the organisation does not mean that it is not involved in management consultancy.

127. The provision of professional services is not delimited by the fact that it is in the same sentence as carrying on a profession. The use of the alternative "or" entitles a consideration whether it is carrying on a profession. However the legislation is clear that there is no oblique or slack language used, that the ordinary reasonable person, if grappling with this question, would be able to understand what the concept of the delivery of a professional service really is.

128. Management consulting has been defined by Ms. K. Her expert report was confined to the question of whether the Appellant was engaged in the work of management consulting.

129. The Appellant was engaged in the provision of professional services in the work that requires highly skilled intellectual technical services. The manner in which it conducts itself is consistent with how a professional would act. In other words it acted with independence, integrity undertaken with due skill, care and diligence. It had professional indemnity insurance, at least for the last five or six years as a requirement from one of its clients. Even, according to [redacted] evidence, it gave indemnities. As Ms. K said, management consultants have been sued for their negligent services just like a professional can be for the delivery of their services.

130. Regulation is voluntary at the moment but that is not determinative in favour of the Appellant. There are bodies who are endeavouring to set standards of the profession and that there is a whole division within UCD.

131. The fact that management consultants may not need actual qualifications to engage management consultancy is not something that is considered to be the provision of a special service.

132. On this basis, it was submitted that the Respondent's approach is correct and the amended assessments should be upheld.

Overview

133. As noted by the Respondent, TCA, section 441 prevents the avoidance of tax arising from the diversion into close companies of income usually derived from professional

activities which would otherwise attract income tax at the higher rate, a matter not disputed by the Appellant.

134. In this regard, the issue in this appeal is one of statutory interpretation in determining whether the Appellant was *"a close company whose business consists of or includes the carrying on of a profession or the provision of professional services*" falling within the charge to tax in accordance with TCA, section 441.

Analysis

135. The recent Supreme Court judgments in *Bookfinders* [2020] and in *Dunnes Stores* [2019] confirm that the approach to be taken in the interpretation of taxation statutes is that as espoused in the seminal judgment of Henchy J. in *Kiernan* [1981]. In referring to page 122 of the judgment in *Kiernan*, O'Donnell J. confirmed in *Bookfinders* [2020] at para 43 that:

> *"[i]f a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language." (Emphasis added)."*

136. However, O'Donnell J. cautioned:

> 47. *" that should not be understood to mean that the interpretation of tax statutes cannot have regard to the purpose of the provision in particular, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on the basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation.*
>
> 48. *It is noteworthy from the outset, and even during a period associated with the strictest construction of revenue law, that the courts have recognised that the purpose of the provision, if discernible, is a helpful guide towards its interpretation, and indeed that the ordinary tools of statutory interpretation do apply to taxation statutes."*

137. In the recent *Dunne Stores* [2019] judgment, McKechnie J. stated at para 66 that a court cannot speculate as to meaning and:

> *"cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate"*

138. In highlighting the importance of the principles espoused in *Kiernan* [1981], McKechnie J. confirmed at 69:

> *"Henchy J. in his judgment made three points of note. The first of these he stated as follows:*
>
> > *"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."*
>
> *The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in Unwin v Hanson [1891] Q.B. 115 at 119, who said:-*
>
> > *"If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."*
>
> *The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-*
>
> > *"Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation*."

139. In addressing instances of whether recourse to a literal interpretation would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature, McKechnie J. at paragraph 71 relied on the following passage from the another judgment of Henchy J. in *Kellystown Company v. H. Hogan, Inspector of Taxes,* [1985] I.L.R.M. 200, at p. 202:

> *"The interpretation contended for by Kellystown, whilst it may have the merit of literalness, is at variance with the purposive essence of the proviso. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail."*

140. Finally in the recent judgment in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, McDonald J., from his review of the most up to date jurisprudence, confirmed at paragraph 74:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> (a) *If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
>
> (b) *Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
>
> (c) *Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*

(d) *Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

(e) *In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

(f) *Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

(g) *Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".*

141. In light of such principles the interpretation of TCA, section 441 can now be considered.

142. The Appellant submitted that companies do not carry on a profession rather it is the employees or the individuals within the company who do so. I agree with that submission and derive support from the judgment of Rowlatt J in *William Esplen, Son and Swainston Ltd v CIR* (1919), 2 KB 731 when stating at 734:

> *"The question is whether the company is carrying on a profession within the meaning of s 39, para (c) of the Finance (No 2) Act, 1915. In my opinion the company is not carrying on the profession of naval architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual. There can be no professional qualifications except in an individual. A company such as this can only do a naval architect's work by sending a naval architect to its customers to do what they want done."*

143. The Appellant also argued that the words "*professional services*" must be interpreted in the light of the meaning of a "*profession*" and cannot be looked at separately. This is based on the well-accepted principle of interpretation that a word should be construed *noscitur a sociis*, that is to say that the interpretation of a word or phrase is affected by the words with which it is grouped.

144. The Respondent submitted that the term "*the carrying on of a profession or the provision of professional services"* is not limited or shaped by the use of the term "*provision of professional services*". The two terms expressly used in the legislation is a conjunction providing for alternatives.

145. Having considered the parties' submissions, I am more inclined to accept the Appellant's submissions specifically in light of the fact that a company cannot carry on a profession. As such the term "*professional services*" is required to be interpreted as a derivative of and dependent upon the meaning of "*profession*". Furthermore and as noted by the Appellant, the principle of *noscitur a sociis* is relevant which requires that a word is to be recognised by its associates. That principle establishes that a word or phrase is not to be construed as if it stood alone but in the light of its surroundings.

146. In a Court of Appeal of Singapore in *Public Prosecutor v Lam Leng Hung and others* - [2018] 4 LRC 54, the Court set out the jurisprudential history of the *noscitur a sociis* principle at para 108:

> *"Viscount Simmonds in the House of Lords decision of A-G v Prince Ernest Augustus of Hanover [1957] 1 All ER 49 at 53 provided a useful and vivid summation of the*

noscitur a sociis principle: '[W]ords, and particularly general words, cannot be read in isolation; their colour and content are derived from their context.' Diplock LJ (as he then was) in the English Court of Appeal decision of Letang v Cooper [1964] 2 All ER 929 at 937 remarked that the noscitur a sociis principle may be applied only if one 'know[s] the societas to which the socii belong'—in other words, the nature of the intended society (or societas) can only be gathered from the words used. Shortly put, the principle emphasises the relevance and importance of context in determining the intended meaning of a word or phrase."

147. Therefore the meaning of "*profession"* in TCA, section 441 would be redundant and indeed irrelevant in its application to activities carried on by a company. I am therefore of the view that the intention of the Oireachtas for using the word "*profession*" is to give context and meaning to the term "*professional services*" as one could identify "*the societas to which the socii belong".* As such, I am satisfied that the use of the word "*profession*" serves in effect as an adjective to describe "*professional services*" in TCA, section 441.

148. Having concluded that the term "*professional services*" is dependent upon the meaning of "*profession*" and not as the Respondent submitted a conjunction providing for alternatives, it is necessary to consider whether the Appellant was providing "*professional services*" as envisaged by TCA, section 441.

149. In her evidence, [redacted], the expert for the Respondent, opined that a person was engaged in a *"profession*" where that person had "*achieved a level of both educational qualification and experience and … applied that to their practice."* There can be no criticism of [redacted] definition which probably reflects the evolving meaning of the word and indeed is likely to be a view shared by the ordinary citizen. However and as is clear from the Respondent's Guidance Notes, not all companies whose activities are performed by persons with a high level of education and experience are considered to be within the charge to tax pursuant to TCA, section 441, such as:

(a) Advertising Agents
(b) Auctioneers of livestock in a cattle mart
(c) Insurance brokers
(d) The operation of a retail pharmacy
(e) Public relations companies
(f) Stockbrokers.

150. It is clear that most if not all occupations listed in the Respondent's Guidance Notes involve "*a level of both educational qualification and experience"* and therefore engaged

in services that could be considered as providing professional services but yet are excluded from a charge to tax in accordance with TCA, section 441.

151. Furthermore and as noted by the Respondent, the Courts have determined that the following activities conducted by companies were not engaged in a "*profession*":

(a) Insurance Broker *(Durant v CIR)*
(b) Photographer *(Cecil v CIR)*
(c) Stockbroker *(Christopher Barker & Sons v CIR)*
(d) Advertising Agents *(MacGiolla Mhaith v Brian Cronin & Associates)*
(e) Professional Gambler *(Graham v Green)*

152. The difficulty in ascribing a meaning to the word "*profession*" was considered in *Mac Giolla Mhaith (Inspector of Taxes) v Cronin & Associates Ltd* 3 ITR 211, where McWilliam J. was required to determine whether an advertising company was carrying on a profession or providing professional services and within the charge to tax pursuant to the TCA, section 441 as it is now. In referring to certain authorities and indeed an assortment of dictionaries, the learned judge said at page 218:

> "*Having read these meanings, I am left in the position that the statute has provided a conundrum which I cannot solve. If the addition of the word "vocation" does include all occupations, callings, businesses, habitual employments and professions, it seems unnecessary to have the word "profession" at all. The word "profession" even as extended by the word "vocation" must have some limitations. Similarly, it must have been intended to effect some extension but, as I cannot guess what this extension was intended to be, I am not in a position to say that the inference drawn by the President of the Circuit Court was not correct*"

153. On concluding on the matter, McWilliam J. at page 7 observed that:

> *"In Carr v CIR Du Par LQ, 2 AER 163 at page 166, adopting a view expressed by Scrutton LJ, in CIR v Maxse 12 TC 41 stated "it seems to me to be very dangerous to try to define the word "profession""*

154. Furthermore, in declining to overturn the decision of the Circuit Court, McWilliam J. confirmed the following findings of fact:

(a) no education or other qualification was required for those engaged in advertising;
(b) there was no code of practice governing or controlling advertising agencies;

(c) membership of the institute is not compulsory and over one third of advertising agents are not members;
(d) the Institute of Advertising Practitioners had no disciplinary function;
(e) advertising agencies advertised their own businesses, and
(f) in the course of their advertisements, adverting agents freely disclosed who are their customers.

155. As such, the jurisprudence highlights the difficulty and indeed the judicial reluctance to prescribe a meaning to the word "*profession*" leading to McWilliam J.'s conclusion "*that the statute has provided a conundrum which I cannot solve."*

156. Furthermore, the findings of facts by the Circuit Court, as considered by McWilliam J., highlight the following important factors in the identification of a "*profession"*:

(a) A requirement for an educational qualification;
(b) A code of practice governing members of the profession, and
(c) A disciplinary function imposed by a governing body

157. Correspondingly, similar characteristics of a "*profession*" were also identified by the FTT in *The Association of Graduates Careers Advisory Service*, TC05309.

158. In an article entitled 'What is a Profession' published by the British Dental Journal, Volume 223 No.5, September 8, 2017, a retired dental practitioner, university lecturer and compliance consultant, a Mr Aukett, considered whether dentistry was a profession as the representation on General Dental Council consisted of a majority of lay people and as a consequence dentists had lost the individual autonomy to manage the dentist/patient relationship. That article makes reference to a speech by Lord Benson in a debate in the House of Lords in 1992 in which the following distinguishing characteristics separate a profession from 'just another job':

(a) *"Rules and standards over and above norms required by law;*
(b) *A membership which is independent in thought and outlook but which subordinates;*
(c) *its private interests in favour of support for the governing body;*
(d) *Disciplinary action if standards are not practised, and*
(e) *Leadership."*

159. Professor Sande L. Buhai, Clinical Professor, Loyola Law School Los Angeles, in defining a "*profession*" in an article published in the Fordham Urban Law Journal, Volume 40, Number 1, March 2016, concluded:

> *"Each profession provides a service that requires specialized education and the exercise of independent judgment. They all have substantial expertise that reveals the disparities in the information available to the professional and the client, and therefore the client's ability to trust the professional is essential. Each requires its professionals to put someone else's interests ahead of their own and therefore requires an ethos different from business's standard profit maximization norm. Such an ethos supports internalized codes of conduct and occupational self-regulation. Finally, they all have duties to the public in addition to duties to their individual clients."*

160. In considering the definition of a "*profession*', Professor Buhai not only highlighted the requirement for a code of conduct and self-regulation but added a public interest dimension that would have been traditionally associated with the "*learned professions*" of church, medicine and law.

161. Therefore the defining characteristics of a "*profession"* as confirmed by the jurisprudence and indeed academic debate includes a regulating entity with the ability to impose governance and regulation on its members and the power to sanction its members for prescribed breaches of its rules and regulations.

162. In her evidence, [redacted] provided a background to the evolvement of management consultants that had originated initially from the accountancy profession leading to the formation of the profession of management consulting in its own right. As such, it is understandable that some management consultants could be regarded as exercising a profession if the services were performed by accountants regulated by a governing body. However, if reliance was placed on [redacted] reasonable definition of "*profession*" as applying to an individual who has "*achieved a level of both educational qualification and experience and …* [the ability] to *apply that to their practice"*, the services supplied by the Appellant would fall within the charge to tax pursuant to TCA, section 441.

163. As adduced in evidence by [redacted], not only were the Appellant's employees highly educated university graduates, they also had the ability to speak several languages. Correspondingly the external consultants engaged by the Appellant also had third level educational qualifications, were multi-linguistic and technically competent to deal with the most difficult assignments involving significant diplomacy. It is therefore clear that the services provided by the Appellant, pursuant to its contractual commitments are composite of both the Appellant's own staff and indeed those of the engaged external consultants and that it provided "*professional services*" as considered in its most generic sense.

164. However, [redacted] confirmed that neither the Appellant nor any of its employees were members of a professional representative or regulatory body. Furthermore none of its employees were required to be specialists in any particular discipline as the main requirement of staff and directors was an ability to deal with a varied mix of multi-disciplinary projects. Therefore based on the evidence before me, the absence of any professional or supervising authority governing the professional conduct of the Appellant's staff and external consultants distinguishes the Appellant's internal and external personnel from other professionals engaged in a "*profession*".

165. The Appellant argued that in the absence of prescriptive legislation, the presumption of doubtful penalisation should be applied. As noted by McKechnie in *Dunnes Stores* [2019] at paragraph 69:

> *"the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-*
>
> > *"Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."*

166. The principle against doubtful penalisation was also confirmed by O'Donnell J. in *Bookfinders Ltd.* [2020] when stating at paragraph 54:

> *"It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."*

167. As highlighted by McWilliams J. in *Cronin & Associates*, there was a failure of the Oireachtas to specifically prescribe the targeted activities that should fall within the

charge to tax in accordance with TCA, section 441. As is also clear from the jurisprudence, the English courts have also been reluctant to provide a definition of the word "*profession*".

168. Notwithstanding the difficulty in attempting to establish the intention of the Oireachtas in imposing a charge to tax pursuant to TCA, section 441 on "*professional services",* there are other statutory provisions that define "*professional services*". Finance Act 2017, section 10 inserted section 128F into the TCA as a measure to support small and medium enterprises to attract and retain key employees by providing an advantageous tax treatment on share options. That section provides that the qualifying company must carry on a "*qualifying trade*" other than "*excluded activities*" which include, *inter alia*, the provision of "*professional services*" statutorily defined as:

> (a) "*services of a medical, dental, optical, aural or veterinary nature,*
> (b) *services of an architectural, quantity surveying or surveying nature, and related services,*
> (c) *services of accountancy, auditing, taxation or finance,*
> (d) *services of a solicitor or barrister and other legal services, and*
> (e) *geological services;"*

169. Furthermore TCA, section 520, the interpretation section for TCA, Chapter 1 of Part 18 dealing with "*payments in respect of professional services by certain persons*" defines "*professional services*" to include: –

> (a) *services of a medical, dental, pharmaceutical, optical, aural or veterinary nature,*
> (b) *services of an architectural, engineering, quantity surveying or surveying nature, and related services,*
> (c) *services of accountancy, auditing or finance and services of financial, economic, marketing, advertising or other consultancies,*
> (d) *services of a solicitor or barrister and other legal services, and*
> (e) *geological services*

170. While TCA, section 128F is more definitive in the type of "*professional services*" prescribed by the Oireachtas to be excluded from availing of the share option tax incentive, both it and TCA, section 520 give the reader a clear understanding of the legislative intent.

Conclusion

171. The academic commentary and jurisprudence confirm the difficulty in attempting to ascribe a meaning to the word "*profession*". Furthermore in the absence of a statutory definition of "*profession*", it is difficult to establish the legislative intent of TCA, section 441 as it relies on a word, as observed by Scrutton LJ in *Maxse,* traditionally "*confined to the three learned professions the Church, Medicine and Law."*

172. I therefore have a difficulty in determining whether the Appellant's staff and indeed the external consultants were engaged in a "*profession*". My difficulty is compounded by imprecise statutory drafting, the understandable judicial reluctance to define "*profession"*, academic commentary on the need for a supervising entity, a public interest requirement and indeed the assortment of other occupations providing professional services by highly educated and experienced professionals that are not considered by the Respondent to be liable to tax in accordance with TCA, section 441. Furthermore I am not satisfied that there is sufficient demarcation that separates the activities of the Appellant from those of advertising and public relations consultants.

173. Unlike TCA, section 441, the Oireachtas has provided clarity in defining "*professional services*" in TCA, section 128F to exclude certain classification of taxpayers from availing of tax driven share options arrangements. Correspondingly the provisions of TCA, section 520 are clear and unambiguous in the imposition of the obligation to withhold tax on payments made to a specific category of taxpayers.

174. As such, the jurisprudence and academic commentary highlight the difficulty in defining a "*profession"*. Furthermore the jurisprudence on statutory interpretation explicitly requires that in the interpretation of an ambiguously worded taxation statute, the words *"should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".*

175. I have attempted to establish the intention of the Oireachtas in determining the type of activities on which an additional burden of tax should be imposed on companies deriving income from "*professional services*" pursuant to TCA, section 441. Therefore, based on my review of all relevant documentation, the evidence and submissions of the parties, my understanding of the word "*profession*" involves not only a certain educational requirement, relevant experience, a public interest dimension but also some form of regulatory control over persons engaged in the profession. As such and in the absence of a formal educational structure to qualify the Appellant's staff and external consultants to perform their work and the lack of accountability and regulation by a supervising regulating entity leads me to conclude that the Appellant was not engaged in a "*profession*" or in the "*provision of professional services*" as envisaged by TCA, section 441.

176. I am therefore satisfied that the Appellant should not be exposed to such a tax as "*there is looseness or ambiguity attaching to"* the words "*profession*" and "*professional services*". As such, to impose such a tax based on "*oblique or slack language"* would be contrary to the principles espoused in *Kiernan* [1981]*, Dunnes Stores* [2019] and *Bookfinders* [2020].

Determination

177. While the purpose of TCA, section 441 is to prevent certain prescribed activities from incorporating to avail of the lower incidence of tax, I am satisfied that the Appellant was not set up to avoid tax. It is clear from [redacted] evidence that the Appellant was set up to replace a previous structure created for the purposes of avoiding institutional bureaucracies. Furthermore I was also satisfied that a corporate structure was necessary to enable the Appellant compete for the high end international and European projects. However, as noted by the Respondent, there is no equity in tax and therefore the absence of an intention to avoid the tax is not sufficient to be excluded from a charge to tax.

178. My understanding of the word "*profession*", based on my review of all relevant documentation, the evidence and submissions of the parties, involves not only a certain educational requirement, relevant experience, a public interest dimension but also some form of regulatory control over persons engaged in the profession. Therefore the absence of a formal educational structure to qualify the Appellant's staff and external consultants to perform their work and the lack of accountability and regulation by a supervising regulating entity leads me to conclude that the Appellant was not engaged in a "*profession*" or in the "*provision of professional services*" as envisaged by TCA, section 441.

179. Furthermore, in the absence of clear and precise wording, the difficulty for academics and the judiciary to define the meaning of "*profession*" and the insufficient demarcation that separates the activities of the Appellant with those pursued by advertising and public relations consultants who are not liable to tax under TCA, section 441, I am not satisfied that the Appellant is liable to tax pursuant to TCA, section 441 on income derived from its professional services. Therefore to determine that the Appellant was liable to tax pursuant to TCA, section 441 would be an "*unfair imposition of liability by the use of oblique or slack language."*

180. In this regard and in accordance with TCA, section 949AK, the amended assessments raised on the Appellant on 31st March 2016 in respect of periods ended 31st October 2012 and 31st October 2014 should be reduced to nil.

Conor Kennedy
Appeal Commissioner
12th March 2021

No request was made 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 as amended.