



79TACD2021

Between/

██████████ AND ██████████

Appellants

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matters under Appeal

1. These matters come before the Tax Appeal Commission as appeals by the Appellants against Amended Assessments to income tax made by the Respondent in respect of both the Appellants for the tax years 2010 to 2014 inclusive.
2. As the first named Appellant and second named Appellant are father and son respectively, and as the same issues arise in both appeals, the Tax Appeals

Commission agreed that both appeals would be heard and determined together.

3. The core issue in these appeals is whether Single Farm Payments paid to the Appellants by the Department of Agriculture during the years under appeal are taxable as income in the hands of the Appellants, as contended by the Respondent, or are instead taxable as income received by a company formed, owned and managed by the Appellants, [REDACTED] Limited (hereinafter referred to as “**the Company**”), as contended by the Appellants.

4. The first named Appellant was assessed by the Amended Assessments to additional income tax under Case IV of Schedule D in the following amounts:-

2010	€66,989.32
2011	€95,864.76
2012	€76,691.84
2013	€75,403.76
2014	€85,144.39

5. The second named Appellant was assessed by the Amended Assessments to additional income tax under Case IV of Schedule D in the following amounts:-

2010	€12,178.00
2011	€22,625.44
2012	€18,895.00
2013	€19,564.52
2014	€19,944.52



6. The Appellants appealed against the Amended Assessments by Notices of Appeal dated the 6th of June 2016.

B. Grounds of Appeal

7. Both Appellants appealed against the Amended Assessments on the following grounds:-

- (a) By virtue of section 959AA of the TCA 1997, the Respondent was not within the statutory time period allowed to amend the Appellants' income tax assessments for the 2010 tax year;
- (b) The income sought to be taxed by the Respondent by the Amended Assessments are Single Farm Payments and these payments have been declared by the Company as income thereof and which is liable to corporation tax. No amended assessments have been raised by the Respondent in respect of the returns made by the Company in respect of these years.
- (c) As it is not possible for an individual to receive a Single Farm Payment when that person is no longer farming, and as the Company was carrying on the farming activity, the Appellants received the Single Farm Payments in a fiduciary capacity as evidenced by the fact that (i) the Appellants did not have an entitlement to the payments under EU Single Farm Payment rules, and (ii) these payments were transferred from the Appellants' bank account to the bank account of the Company.
- (d) The profits/gains of the payments accrued to the Company and not to the Appellants.



C. Background

8. The Appellants have for a number of years farmed lands in [REDACTED], some of which they owned and some of which they rented from other landowners.
9. It appears that in or about 2008, the Appellants decided to carry on their trade through the vehicle of a limited liability company and the Company was incorporated for this purpose on the [REDACTED] 2008.
10. The Appellants are the sole directors of the Company and each owns 50% of the issued share capital.
11. I was furnished with a copy of minutes of a directors' meeting of a company described therein as "[REDACTED]" dated the 14th of November 2008. These minutes referred to "*the proposed acquisition of the business of Mr [REDACTED] & [REDACTED]*" and recorded the following three resolutions:-
- (a) "*That the assets and liabilities, in accordance with the value set out in the attached Statement of Affairs, being part of the business previously carried on by Mr [REDACTED] and [REDACTED] acquired by the Company*";
 - (b) "*That the bank Account under the title: '[REDACTED] Farm Enterprise Account' be transferred into the name of the Company*"; and,
 - (c) "*That the Directors complete the relevant Bank Mandate require to open the aforementioned account under the name of the Company.*"
12. I was also furnished with a second set of minutes of a directors' meeting of "[REDACTED]", also dated the 14th of November 2008. These minutes referred to a proposed transfer of the company's



business, assets and liabilities to an unnamed new company and recorded that the directors had passed the following resolution:-

"That subject to approval of the shareholders, the Company transfer its business, its assets and liabilities, in accordance with the financial values set out in the attached Statement of Affairs forming part of these minutes, to a new Company, which will carry on the trade under the title: [sic] with effect from 14 day of November 2008."

- 13.** I was further furnished with a copy of what was described as "*Minutes of meeting of Directors of the Company*", but which was on its face the minutes of a general meeting, of "[REDACTED]" held on the 14th of November 2008. The minutes recorded that the following Ordinary Resolution was passed by the shareholders:-

"That the Company transfer its business, its assets and liabilities, in accordance with the financial values set out in the attached Statement of Affairs forming part of these minutes, to a new Company, which will carry on the trade under the title: [sic] with effect from 14 day of November 2008."

- 14.** All of the foregoing minutes were signed by the first named Appellant in his capacity as chairman of the respective meetings.

- 15.** I was further furnished with a copy of the minutes of a directors' meeting of a company (which is not named in the minutes but which I take to be the Company) which was recorded as being held on "*June 2009*" [sic].

- 16.** The first resolution passed by the directors was as follows:-



"That (herein referred to as "the Company") [sic] doth with effect from the first day of September 2009 take over the farming activities previously undertaken by [REDACTED] Brothers and to this end the company is....

(A) Agreeable to acquire STOCK on hand as at 1st September 2009 at book value amount;

(B) Agreeable to acquire and is agreeable to dispose of FARM MACHINERY AND EQUIPMENT on hand as at 1st September 2009 at their market value amount;

(C) Agrees to the purchase of GOODWILL of Nil for an amount not exceeding N/A (say N/A Thousand Euro)

In consideration of (A) (B) and (C) above that [REDACTED] are agreeable to the granting to an interest-free loan to the Company; that the said loan to remain unsecured during the currency of the loan period; and that a minimum of 12 (twelve) months' notice must be served on the Company in writing in the event that [REDACTED] seeking a full (or a partial) repayment of the amount due to him to the Company." [sic]

17. The second resolution passed by the directors was as follows:-

"The FARMLANDS AND FARM BUILDINGS be rented to the Company on an annual basis for a period of one years, with the rental amount to be reviewed on each anniversary date herein of:" [sic]

18. The foregoing minutes were signed by the first named Appellant in his capacity as Company Secretary.



19. I was further furnished with a copy of a Licence Agreement dated the 1st of January 2010 which was made between the Appellants, as Licensors, and the Company, as Licensee. The said Agreement recorded as follows:-

“WHEREAS

- 1. The First Licencor [sic] is the beneficial owner of herd number/regs number [REDACTED] entitling the First Licensor to certain Single Farm Payments on an annual basis.*
- 2. The Second Licencor [sic] is the beneficial owner of herd number/regs number [REDACTED] entitling the Second Licensor to certain Single Farm Payments on an annual basis.*
- 3. The First Licencor [sic] and the Second Licencor [sic] have at the request of the Licencee [sic] licensed the use of the Single Farm Payments received by the First Licensor and the Second Licensor the benefit of the Licensee and for the consideration hereinafter appearing.*
- 4. This Licence shall continue until*
 - (i) So long as this Licence shall remain in operation the First Licencor [sic] and the Second Licencor [sic] Licence and authorised the Licencee [sic] to receive the Single Farm Payments payable to the First Licencor [sic] and the Second Licensor until this agreement shall be determined.*
 - (ii) There shall be a fee payable to the First Licencor [sic] and the Second Licencor [sic] payable on an annual basis that shall be mutually agreed between them and in default of agreement by*



an Arbitrator to be appointed in accordance with the terms of the Arbitration Acts.

(iii) For the avoidance of doubt this Agreement is a memorandum in writing of an understanding and confirmation of an oral agreement between the parties hereto as and from 1 January, 2010.”

20. The Appellants’ case is that from September 2009 onwards, all farming activities were carried out through the Company and all sales and purchases were made through the Company. In support of this position, the Appellants furnished me with copies of invoices issued in 2014 by four separate suppliers which were addressed either to the Company or else to “M/s. [REDACTED] [REDACTED] Farm Enterprises”.

21. I note, however, that the Respondent furnished me with copies of four sales invoices issued in 2010 and 2013 to three named purchasers, which were issued in the names of both Appellants or the name of the first named Appellant, and not in the Company name. The Respondent further furnished me with copies of seven purchase invoices issued in 2010, 2011 and 2012; again, these were addressed to either both Appellants or to the first named Appellant personally, and not to the Company.

22. The land being farmed was not transferred into the Company; the Appellants say it was instead rented by them to the Company. I note in this regard that the Company’s abridged financial statements for the period ended [REDACTED] 2013 record in Note [REDACTED] that the first named Appellant rented land to the Company to the value of €25,000, and the second named Appellant rented land



to the Company to the value of €20,000. Both of these rents were said to be *“representing the market value.”*

23. Similarly, the Company’s abridged financial statements for the period ended [REDACTED] 2014 record in Note [REDACTED] that the first named Appellant rented land to the Company to the value of €33,333, and the second named Appellant rented land to the Company to the value of €26,667. Again, both of these rents were said to be *“representing the market value.”*

24. The Appellants say that they included rents received from the Company in their Form 11 returns for the years under appeal and have been assessed to income tax on those rents.

25. I note that among the documents submitted to me by the Appellants was a letter dated the 24th of April 2015, which was addressed to the Head of Taxation in IFAC and which was signed by both Appellants in their capacity as directors of the Company. The letter stated that:-

*“As beneficial owners of the entire shareholding in [REDACTED]
[REDACTED] Ltd we hereby confirm as follows:-*

- 1. That notwithstanding [REDACTED] Ltd are farming lands owned by [REDACTED] and [REDACTED] we acknowledge that [REDACTED] Ltd have no beneficial or other interest in that property.*
- 2. [REDACTED] Ltd acknowledge that [REDACTED] and [REDACTED] are full beneficial and legal owners of all lands registered in their names.*
- 3. [REDACTED] Ltd agree that should this Company cease to exist that any buildings erected on lands owned by*



██████████ and ██████████ will be offered for sale to them at the then market value.”

26. I further note that the said letter was sent to the Head of Taxation in IFAC by a solicitor acting on behalf of the Appellants.

27. Notwithstanding the resolution to enter into a lease and the Licence Agreement, the Appellants and the Company did not inform the Department of Agriculture that the lands formerly farmed by the Appellants were now being farmed by the Company, or that the said lands had been leased by the Appellants to the Company, or that the Appellants’ respective entitlements to receive Single Farm Payments in respect of those lands had been licensed to the Company.

28. Instead, the Appellants continued to claim the Single Farm Payment in their own names during each of the years under appeal and in each of those years the amounts to which the Appellants were entitled as Single Farm Payments were paid by the Department of Agriculture into a bank account in the name of both Appellants. I was furnished with copies of bank statements showing the lodgement to this bank account of Single Farm Payments during 2014. A handwritten note on a Bank Reconciliation Report prepared by the Company’s auditors in relation to the account states:-

“This account is not in company name but is being used by company. Directors have confirmed it is company money. Directors loan sufficient to clear if necessary.”



29. The Appellants' case is that the Single Farm Payments were received and used by the Company and were declared by the Company as income in its Corporation Tax returns for the years under appeal.

D. Evidence given at the hearing

30. I heard evidence from the second named Appellant on behalf of both Appellants at the hearing of these appeals. I found the second named Appellant to be a credible and truthful witness.

31. The second named Appellant gave evidence that the land which had been leased to the Company was used solely for the purposes of growing crops, namely wheat, barley and oats. He testified that although the land being farmed belonged to the Appellants, it was the Company which carried out the farming and which was carrying on a trade.

32. In relation to the fact that certain of the invoices referred to above were in the names of the Appellants personally, and not in the name of the Company, the second named Appellant said that he believed that this was because the Appellants, as directors of the Company, had dealt with merchants and he believed that this may have given rise to some confusion.

33. The second named Appellant further gave evidence that the reason why the Single Farm Payments were kept in the personal names of the Appellants was to protect against a cut in entitlements by reason of convergence measures which were then being considered by the European Union. The second named



Appellant gave evidence that the Company could have lost something in the region of €100,000 if the Appellants' Single Farm Payment entitlements had been formally transferred to the Company.

- 34.** In relation to the rent received by the Appellants from the Company in respect of the lands being farmed, the second named Appellant gave evidence that he and the first named Appellant had agreed to rent the land at a low price in order to keep the Company in a strong financial position.
- 35.** In cross-examination, the second named Appellant confirmed that the Company had never applied for a herd number. He said that it was unnecessary for the Company to apply because the Appellants had effectively applied for it on behalf of the Company.
- 36.** In relation to the Company renting lands from the Appellants, the second named Appellant gave evidence that there was no written lease in being. He testified that they would not have entered into a formal lease agreement because they didn't think it was necessary. In relation to the rent payable in respect of the lands, the second named Appellant gave evidence that he and the first named Appellant "*only took out whatever rent we needed*" from the Company.
- 37.** The second named Appellant further testified that the Appellants did not deem it necessary to inform the Department of Agriculture of the fact that they were claiming the Single Farm Payments on behalf of the Company. He reiterated that the Appellants had wanted to offset any cuts in payments from the European Union in order to protect the Company. He further repeated that he



and his father had applied for the Single Farm Payments on behalf of the Company, and not in their own right.

38. In relation to the fact that the payments from the Department of Agriculture had been paid into a bank account in the personal names of the Appellants, the second named Appellant gave evidence that the bank account was now the Company's bank account and was used only for the Company's business.

39. In relation to the Licence Agreement dated the 1st of January 2010, the second named Appellant testified that he could not remember when he had signed it.

40. I further heard evidence on behalf of the Appellants from Mr. [REDACTED], who is an Agricultural Adviser for IFAC.

41. Mr. [REDACTED] has a BSc and a Master's degree in Agriculture and had, at the time of the hearing, worked for the previous [REDACTED] years in an Agri-Support role with IFAC.

42. He gave evidence that, technically, you can farm land without a herd number. He further testified that, in order to qualify for Single Farm Payments, you do not need to own the land being farmed; you simply need to use the land for farming. He further stated that it was his opinion that you do not need to have a formal lease in order to farm land.

43. Mr. [REDACTED] further gave evidence in relation to convergence measures which were being considered during the years under appeal. He said that there was a move to try and get farmers to payment levels which would have approximated to something in the region of €250 per hectare. He confirmed that there would have been a reduction in the overall quantum of Single Farm



Payments received if the Appellants had formally transferred their entitlements to the Company.

44. In cross-examination, Mr. [REDACTED] testified that “*the farm is being maintained by the two lads.*”

E. Relevant Legislation

45. The relevant portions of section 18 of the Taxes Consolidation Act 1997 as amended (hereinafter referred to as “**TCA 1997**”) provide as follows:-

(1) The Schedule referred to as Schedule D is as follows:

SCHEDULE D

1. *Tax under this Schedule shall be charged in respect of –*

(a) the annual profits or gains arising or accruing to –

(i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,

(ii) any person residing in the State from any trade, profession or employment, whether carried on in the State or elsewhere...

and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specially exempted from tax,

in each case for every one euro of the annual amount of the profits or gains.

...



(2) Tax under Schedule D shall be charged under the following Cases:

Case I – Tax in respect of –

(a) any trade

...

Case IV – Tax in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule...

46. The relevant portions of section 959AA of TCA 1997 provide as follows:-

(1) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period –

(a) an assessment for that period, or

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

shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered...

(2) Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period –

(a) where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,

...



(c) to take account of any fact or matter arising by reason of an event occurring after the return is delivered...

47. Although the foregoing section is the one that was referred to in the written submissions of both the Appellants and the Respondent, given that the Appellants allege that the Respondent is time-barred in relation to the 2010 Amended Assessment, I believe that the relevant statutory provision is section 955 of TCA 1997 (which applies to years of assessment prior to 2013), the relevant portions of which provide as follows:-

(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding the tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and



(ii) *no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return.*

(b) *Nothing in this subsection shall prevent the amendment of an assessment –*

(i) *where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),*

...

(iii) *to take account of any factor matter arising by reason of an event occurring after the return is delivered...*

F. Submissions of the Appellants

48. As part of their submissions, the Appellants furnished me with a useful and helpful report which had been prepared by Mr. [REDACTED] and which gave an overview of the Single Farm Payment scheme. The portions of that report which I found to be of relevance to these appeals are set forth hereunder:-

1. Key Definitions

“Direct payment” shall mean any payment granted directly to farmers under the Single Payment Scheme, the Grassland Sheep Scheme, the Burren Farming for Conservation Programme, the Protein Aid Scheme and the Dried Fodder Scheme.



“Farmer” shall mean a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law, whose holding is situated within Community territory, as defined in Article 299 of the Treaty, and who exercises an agricultural activity.

“Agricultural activity” shall mean the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition as established under Article 6 of Regulation (EC) No. 73/2009. Applicants are required to be a holder of a registered herd/tillage number or have applied to the Local DVO for herd/tillage number on or before 15th May [of the relevant year].

2. Background to Single Farm Payment

The Single Farm Payment Scheme pays farmers for the land that they manage or own. The scheme was introduced in 2003 with the first payment made in 2005. The scheme ceased on the 31st December 2014.

The Single Farm Payment Scheme pays to each farm a fee per “entitlement”. An entitlement value is different for every farmer. It is based on the actual direct subsidies a farmer claimed in the years 1999, 2000 & 2001 – average payment over these three reference years divided by actual hectares farmed in 2003 was the method in calculating the base value per “entitlement”.



Entitlements are the farmer's "right" to claim. In order to gain these rights, farmers had to make a successful claim during the first year of the scheme in 2005 or purchase them from another farmer.

In order for farmers to qualify for payments under the scheme, they have to follow certain conditions and rules:

- Their holdings must be at least 0.3 hectare (changed to min holding size of 1.0 hectare and min land parcel size 0.1 hectare for claim year 2010 and onward) and used for an agricultural activity;*
- They must meet Cross Compliance standards (environment, food safety and animal health and welfare law (and good practices)).*

3. Key dates for Single Farm Payment Scheme

All Single Farm Payment Scheme payment applications must be made by the 15th May. Amendments will be accepted up until the 31st May.

Transfers/leases (the movement of the payment by lease, rent, sale, gift, inheritance, merger/partnership) must be submitted by the 15th May to the Department of Agriculture.

4. Who is Eligible to Get Paid Single Farm Payment Scheme

In order to receive or make a Single Farm Payment application a farmer must submit a single farm payment application before the 15th May. To claim the direct payment under the Single Payment Scheme,



all of the hectares of land declared by a farmer to support their claim (owned, rented-in and leased-in) must be subject to an agricultural activity by them for a period from the beginning of the year until after 31st May [of the relevant year] or for a period before 31st May 20XX to 31st December [of the relevant year].

As per Single Payment Scheme guidelines land must be deemed “eligible” in order for a farmer to receive a payment. Land used for “non” agricultural purposes is not eligible for claiming Single Farm Payment.

[The Department of Agriculture Guidelines for the Single Farm Payment Scheme provide that:-]

In order to draw down payment in respect of Single Farm Payment entitlements, you must have an “eligible hectare” to accompany each entitlement. In this context an “eligible hectare” is land that is used for an agricultural activity and includes land used to grow cereals, oilseeds, short rotation coppice, miscathus sinesis, protein crops, sugar beet, maize, fodder beet, turnips, mangolds, kale, vegetables, potatoes, grass for silage or hay or grazing.

For lands to be eligible, a number of further conditions have to be complied with, namely:

- 1. The land must be used and managed by the applicant. The land must be suitable for and compatible with the farming enterprise;*



[2-6. Are agricultural issues regarding welfare and good farming practices;]

7. There must be evidence of an agricultural activity being conducted throughout the parcel, otherwise the unused part of the parcel may be found to be ineligible. This can arise when the stocking rate is too low.

5. Declare all your land

Farmers are legally required to declare ALL of their land that will form part of their holding for a period including 31st May [of the relevant year], excluding any land that you have leased OUT or rented OUT for any period that included 31st May [of the relevant year]. The person declaring the land on the Single Payment application will be held responsible for any noncompliance with the Statutory Management Requirements under Cross Compliance or any failure to maintain the lands declared in Good Agricultural and Environmental Condition for the period 31st January to 31st December [of the relevant year]. Lands declared as agricultural land must be maintained as such until 31st December [of the relevant year] unless afforested – under the Afforestation Aid Scheme. Any change in the status of declared agricultural lands must be notified in writing to the Single Payment unit of the Department of Agriculture.

6. The Leasing of Single Farm Payments



Single payment entitlements may only be transferred/leased to another farmer in the same Member State. The transferor and transferee must apply to transfer entitlements by completing the Transfer of Entitlement application form. This must be submitted by the 15th May.

All lands declared including leased land must be available to the transferee on the 31st May of the scheme year in question and must remain as eligible land for the full calendar year. The lease/rent for a number of entitlements will only be permitted if accompanied by the lease/rent of an equal or greater number of nett hectares of eligible land. Leased/Rented entitlements will revert to the transferor following expiry of the lease/rental agreement.

49. The Appellants submitted that the Single Farm Payments were the Company's income as it was the Company that was entitled to the Single Farm Payment. The Company had declared this income in its annual Corporation Tax returns and had paid the tax arising on same.

50. In relation to the lease of lands by the Appellants to the Company, the Appellants noted that the Respondent contended that good corporate governance required all dealings between a farmer and his company to be at arm's length and to pass the "*commerciality test*". The Appellants did not disagree with this but submitted that it was concerned with a farmer receiving a benefit from the company, and not *vice versa*. They submitted that there was nothing to stop a farmer from giving a gift to his own company or giving something at an undervalue to his own company.



51. While the Respondent contended that a rent or lease had to be at market value, the Appellant submitted that there was no income tax restriction on an asset being rented at an undervalue, although there was an assumption that it is computed at arm's length. Therefore, the Appellants contended that rent does not have to be paid by a company to the farmer at market value. There is no transfer pricing legislation for individuals.
52. The Appellants further made submissions in relation to the duties imposed on company directors and company secretaries. While they fully accepted that these duties were extensive and onerous, they submitted that the Appellants had fully discharged all of those duties and had at all times acted in the best interests of the Company.
53. The Appellants submitted that the Single Farm Payment entitlements during the relevant years had been returned by the Company for corporation tax purposes. Furthermore, the Company's accounts had been signed off by the Appellants as directors, noting that they were signing and acknowledging that the Company was the entity entitled to the Single Farm Payment income by declaring it annually. Therefore, the Appellants contended that under company law, the Company was the entity that had been submitting/recognising the income annually and they had therefore met the necessary company law requirements.
54. The Appellants further directed me to the provisions of section 18(1) of TCA 1997, and in particular emphasised that it provides that "*tax under this section shall be charged in respect of the annual profits or gains arising or accruing to any person residing in the State from any kind of property whatsoever, whether situated in the State or otherwise.*"



55. The Appellants submitted that in order to avail of the EU Single Farm Payment Scheme, a farmer must be exercising an “agricultural activity”. As the Appellants were no longer a “farmer” undertaking an “agricultural activity” for the purposes of the Single Farm Payment Scheme, they were not entitled to receive the Single Farm Payments for the periods in question.
56. The Appellants submitted that in the instant appeals, it was the Company that had the entitlement to the Single Farm Payment and the Appellants were simply drawing the Single Farm Payments on behalf of the Company in a fiduciary or representative capacity. They submitted that this was further evidenced by the fact that the funds were lodged into a bank account that was returned as part of the Company’s tax returns.
57. In support of this submission, the Appellants referred me to the decision in ***Morley –v- Tattersall [1938] 22 TC 51*** and submitted that the judgment of the Court of Appeal was authority for the proposition that a payment cannot be a trading receipt unless the trader had a legal entitlement to receive it at the time of receipt. They submitted that they did not have a legal right to receive the income from the Single Farm Payments but the Company, being a farmer engaging in agricultural activity, did have such a legal entitlement.
58. The Appellants further referred me to the decision in ***UBS AG –v- Revenue and Customs Commissioners [2013] BTC 1, 525*** and submitted that this was authority for the proposition that “*a present right to a present payment*” was a useful working definition of “*entitled.*”
59. The Appellants further referred me to the decision in this jurisdiction in ***O’Coindealbháin –v- Gannon [1986] IR 154***, where a barrister appointed to the High Court wrote to solicitors who had formally instructed him, stating



that he did not desire to receive any fees but that they could, if they wished, pay them to a company which was owned and controlled by close family members. The High Court held that he was liable to income tax on the fees which were paid to the company. It was he who had the right to receive the fees on foot of the services which he had rendered.

60.The Appellants submitted that they as individuals had no entitlement to receive the Single Farm Payments and that they therefore passed the funds received on to the Company. They submitted that they were acting on behalf of the Company in a form of fiduciary capacity and drew the payments in their own name but on behalf of the Company. They submitted that I should take the view that there was a constructive trust between the Appellants and the Company, with the Company being at all times entitled to receive the Single Farm Payments. They submitted that if the Company had been declared insolvent, it could have been pursued for the Single Farm Payments received.

61.The Appellants further submitted that the income to be included in an individual's income from all sources, within the meaning of TCA 1997, is only the income to which he is entitled. In cases where an individual is required to act in a fiduciary or representative capacity, he is not required to return this income as part of his income tax return.

62.In conclusion, the Appellants submitted that the Company was farming the lands and it was the Company that was beneficially entitled to the moneys received from the Department. The Respondent had registered the Company for VAT as a farmer and therefore recognised that the Company was farming. The rules governing Single Farm Payments state that the payments are made to a person carrying on an agricultural activity, and therefore the Appellants



submitted that it was the Company that was assessable, and not the Appellants.

G: Submissions of the Respondent

- 63.** The Respondent referred me to the provisions of section 18 of TCA 1997 and submitted that a payment entitlement to a Single Farm Payment is a chargeable asset and a charge to tax under Schedule D arises in respect of the annual profits or gains arising to any person from any kind of property whatsoever.
- 64.** The Respondent submitted that the Appellants had payment entitlements to Single Farm Payments but they were not trading, as the Company was carrying on the farming trade. Therefore, the Respondent submitted that the Appellants were liable to income tax on the Single Farm Payments under Case IV of Schedule D, and not under Case I. The Respondent submitted that the Appellants were not required to be farming the land directly.
- 65.** The Respondent further submitted that income tax under Case IV of Schedule D is computed on the full amount of the profits or gains arising in the year of assessment. It submitted that the transfer of the monies received by the Appellants to the Company was a disbursement of the income earned. It was not an expense incurred in earning the income and was not deductible. It was further submitted that the transaction was not an arm's length transaction as no service was rendered by the Company in return for the money.



- 66.** The Respondent further submitted that before receiving a payment under the Single Farm Payment scheme, each farmer must first establish a payment entitlement. This involves farmers making an application to the Department of Agriculture. Having acquired a payment entitlement, a farmer becomes entitled to a Single Farm Payment for each year if he complies with the terms of the scheme for that year. Those terms are, in essence, that each payment entitlement held by the farmer must be matched with an eligible hectare of land that is at the farmer's disposal for a minimum of 10 months, and that the farmer must comply with statutory management requirements and the relevant EU regulations.
- 67.** The Respondent further submitted that Single Farm Payments are liable to tax as income. They will be taxed under either Case I or Case IV of Schedule D, depending on the circumstances. Where a farmer holds a payment entitlement and receives a single payment, while not engaged in a trading activity, such payments are taxable under Case IV.
- 68.** It was further submitted that payment entitlements linked to the requirement to occupy land may only be leased from one person to another if the lease also transfers an interest in land. In those circumstances, income received in respect of the land will be taxed under Case V, while income received in respect of the payment entitlements will be taxed under Case IV as miscellaneous income. The cost of acquiring a payment entitlement will not be allowed as a deduction for income tax, being expenditure of a capital nature. I was referred to the Respondent's Tax Briefing 61 in support of these submissions.
- 69.** The Respondent submitted that the Appellants were the beneficial owners of the herd numbers under consideration, and that this entitled them to certain



Single Farm Payments on an annual basis. They applied for those payments in their own names and the payments were received by them and lodged to their own bank account for the years in question. However, the payments had been returned by the Company for tax purposes for the years in question.

70. The Respondent submitted that in order to have the Single Form Payments considered the income of the Company, the Appellants needed to register the herd numbers and entitlements in the name of the Company. As this had not been done, it was the Respondent's position that as the Appellants had applied for, received and lodged the payments to their bank account, they were the liable and accountable persons for those monies.

71. In relation to the 2010 Licence Agreement between the Appellants and the Company, the Respondent submitted that there was no evidence that the annual fee payable under the Agreement for the use of the Single Form Payments had in fact been paid by the Company. It was further submitted that this agreement was not an arm's length transaction.

72. The Respondent further directed me to the decision in ***Dolan -v- K [1944] IR 470***, where the Supreme Court found that a professed nun in receipt of a salary as a teacher who paid that salary over to her Order was liable to pay income tax on the salary because she received it before paying it over. The mere fact that a taxpayer does not apply his income for his own benefit does not excuse him from paying tax on it.

73. The Respondent also drew my attention to the fact that it had now amended the Corporation Tax Assessments in relation to the Company so as to reflect the Respondent's view that the Single Farm Payments were taxable in the hands of the Appellants, and not in the hands of the Company.



H: Analysis and Findings

74. I accept as correct the evidence of the Appellants that they had formed the intention no later than 2008 to transfer their farming business to a limited liability company established for that purpose. I further accept that the Company was the corporate vehicle they caused to be incorporated for the purposes of carrying on the trade.
75. While there are, at a minimum, certain inaccuracies and infelicities in the Company secretarial documentation which was furnished to me, having considered all of the evidence submitted I am satisfied on a balance of probabilities basis, and I find as a material fact, that the Appellants transferred the stock, farm machinery and equipment and the goodwill of their farming business to the Company with effect from the 1st of September 2009.
76. I further find as a material fact that from the 1st of September 2009 onwards, the farming trade formerly carried on by the Appellants was thereafter carried on by the Company. While the Respondent properly drew my attention to purchase and sales invoices in the names of the Appellants personally rather than in the name of the Company, I accept as correct the Appellants' explanation that this occurred as a result of clerical errors or misunderstandings on the part of the Company's purchasers and suppliers. I further note that the Respondent's written submissions are expressly premised on the fact that the Company was carrying on the farm trade during the years under appeal.



77. I am further satisfied that it was the intention of the Appellants at and around the time that their farming business was being transferred to the Company to lease to the Company the farmlands and farm buildings necessary for the Company to carry on the farm trade. It appears to me from the directors' meeting minutes described in paragraphs 15 to 17 inclusive *supra* that the second resolution passed by the directors records that the lease intended to be granted was to be a periodic tenancy from year to year. While the minute of the resolution could be interpreted as being an agreement to grant a lease for a year certain, the reference to "*annual basis*" and "*anniversary date*" means, in my view, that the Appellants and the Company intended the lease to be continued on a year-to-year basis.

78. I have had greater hesitation in coming to the conclusion that the lease from year to year which the parties intended was in fact granted. While the Respondent drew my attention to section 51 of the Land and Conveyancing Law Reform Act 2009, I do not believe that section to be relevant to the issues for determination in these appeals. The section deals with the enforceability of a contract for the sale or other disposition of land; it does not concern the actual grant of an interest in land. The relevant statutory provision governing the latter aspect of a conveyance remains section 4 of Deasy's Act, which does not apply to leases granted from year to year or for a lesser period.

79. As the lease which the Appellants intended to grant was either from year to year, or possibly for a year certain (which is a lesser period than from year to year – see Wylie, *Irish Land Law*, 5th ed. at para. 19.16), I find that there was no legal requirement for it to be made by executed deed or note in writing. Accordingly, while the absence of a formal lease agreement in the instant appeals might be considered unusual, and was certainly less than ideal from a



corporate governance and good conveyancing perspective, it does not of itself mean that a lease was not granted.

80. The two key factors which have persuaded me that a lease was granted by the Appellants to the Company are the fact that (a) the Company's audited financial statements for at least two of the years under appeal recorded that the Appellants were receiving rent from the Company and specified the amounts, and (b) the rent received by the Appellants was recorded on their Form 11 returns and they suffered income tax thereon. These factors are, in my view, persuasive contemporaneous evidence of the existence of a lease.

81. I also note in this regard that a nominal account prepared by the Company's auditors for 2013 recorded both Appellants as being among those persons from whom the Company was renting land, and further recorded that the rent became due to them on the 31st of August 2013; this is, in my view, consistent with a lease from year to year being granted on the 1st of September and the annual rent payable falling due on the last day of each yearly term.

82. While I note that the audited financial statements record that the rents payable to the Appellants represented the market value, it is clear from the evidence that the lands were, in fact, rented at an undervalue. This was effectively conceded in the Appellants' written submissions and the second named Appellant accepted in the course of his oral evidence that he and his father kept the rents low in order to keep the Company's finances healthy, and only 'took out' as much rent as they needed.

83. The Appellants submitted that there was no provision in the tax legislation which operated to prevent land from being rented at an undervalue. I am not persuaded that the renting of land at an undervalue could not have



consequences for tax purposes. However, it is not necessary for me to reach a conclusion on this point because I am satisfied that rent need not be paid by a tenant at full market value in order for the relationship of landlord and tenant to be validly created. I accept as correct the Respondent's submission that a lease between the Appellants and the Company would not have been negotiated on an arm's length basis; again, however, this does not mean that a valid lease did not exist.

84. The evidence which has most caused me to question whether or not in fact a lease existed between the Appellants and the Company is the letter written by the Appellants and sent by their solicitor to the Head of Taxation in IFAC, which is discussed in paragraphs 25 and 26 *supra*. The statement therein that the Company had "*no beneficial or other interest*" in the lands owned by the Appellants and being farmed by the Company, and that the Appellants were the "*full beneficial and legal owners*" of those lands is manifestly inconsistent with the Company holding a leasehold interest in those lands.

85. However, I must have regard to the fact that the letter was written in April of 2015, and therefore relates to a period of time which falls after the years under consideration in the instant appeals. I have also had regard to the fact that the Respondent made no submissions in relation to this letter or its potential significance, and the second named Appellant was not cross-examined in relation to its contents.

86. Overall, having considered the totality of the evidence before me on this issue, I am satisfied on a balance of probabilities basis that the Appellants did grant the Company a lease from year to year, commencing on the 1st of September 2009, and that this lease continued on a year to year basis throughout the periods relevant to these appeals, and I so find as material facts.



87. Finally, I am satisfied and find as a material fact that the Appellants granted the Company a licence to use their Single Farm Payment entitlements by the Licence Agreement dated the 1st of January 2010. In reaching this finding, I have had regard to the fact that the agreement could have been more happily worded; for example, clause 3 refers to the Company being granted the “*use of the Single Farm Payments received by the First Licensor and the Second Licensor*” but clause 4(ii) authorises the Company to receive those payments. Nonetheless, I am satisfied on the evidence that what was licensed to the Company was the Appellants’ Single Farm Payment entitlements.

88. I have also had regard to the Respondent’s submission that there is no evidence of any payments having been made by the Company to the Appellants as consideration for the grant and continuance of the licence. I also note that the Licence Agreement is of indefinite duration. However, I am satisfied that neither of these factors precludes the existence of a valid licence as a matter of law.

89. Having found that the Company (a) had acquired the stock, farm machinery, equipment and goodwill of the Appellants on the 1st of September 2009, (b) had been granted a lease of the Appellants’ lands on a year to year basis on the same date, (c) was carrying on the farming trade formerly carried on by the Appellants from the 1st of September 2009 onwards, and (d) had been granted a licence of the Appellants’ Single Farm Payment entitlements, I must now consider whether the Company was, as contended by the Appellants, entitled to receive the Single Farm Payments arising from those entitlements.

90. It follows from my findings as aforesaid that the Company was a “*farmer*” and was carrying on “*agricultural activity*” within the meaning of Article 2 of EC



Regulation 1782/2003. I note that Article 33(1) of the Regulation provides that *“Farmers shall have access to the single payment scheme if ... (c) they have received a payment entitlement from the national reserve or by transfer”* [emphasis added].

91. Article 46 of the Regulation is entitled *“Transfer of payment entitlements”* and paragraph 2 thereof provides that:-

“Payment entitlements may be transferred by sale or any other definitive transfer with or without land. In contrast, lease or similar types of transactions shall be allowed only if the payment entitlements transferred are accompanied by the transfer of an equivalent amount of eligible hectares.”

92. Consistent with this, paragraph 13 of the Department of Agriculture Guidelines provides in relation to the transfer of entitlements that:-

“A specific application form for the Transfer of Entitlements, including transfer by inheritance, along with the detailed rules, is available from the Transfer of Entitlement Section... The closing date for Transfer applications is 17 May...”

93. Further details are contained in paragraph 25 of the Guidelines, which provides that:-

“Single Payment entitlements (Standard and Standard (NR)) may only be transferred to another farmer within the Republic of Ireland. The closing date for the receipt of completed applications to transfer entitlements for the [relevant year] scheme year is 17 May. The application form to transfer entitlements is available on the Department’s website www.agriculture.gov.ie.



As entitlements are not attached to any specific land, they may be transferred from one farmer to another using one of the following methods as appropriate;

- *Inheritance*
- *Sale*
- *Gift*
- *Lease*
- *Partnership*
- *Milk Production Partnership*
- *Scission (division of partnership)*
- *Change of Legal Entity*
- *Change of Registration Details of herd-number*

All transfers, except those via lease, are processed ‘without land’ even in those cases where land forms part of the overall transaction.

Entitlements that are being leased to another farmer however must be accompanied by an equal or greater number of hectares of eligible land. Leased/rented entitlements will revert to the transferor on expiry of the lease/rental agreement.”

94. I further note in this regard that paragraph 2 of the Department of Agriculture Guidelines provides that “*Applicants are required to be the holder of a registered herdnumber or have applied to the Local DVO for a herdnumber on or before 17 May [of the relevant year].*” The Appellants accepted that the Company was not at any time during the years under appeal the holder of a registered herdnumber.



95. I believe that the Company would have been *prima facie* entitled to be registered by the Department as the transferee of the Single Farm Payment entitlements owned by the Appellants. While paragraph 25 of the Department's Guidelines does not expressly state that entitlements may be transferred by a licence, they do envisage them being transferred by a form of "rental" other than a lease. I believe that a licence of entitlements is a "*similar type of transaction*" to a lease within the meaning of Article 46(2) of the Regulation. Given that I have found that the Company had taken a lease of the Appellants' lands on and from the 1st of September 2009, I accept that the licence of the Single Farm Payment entitlements was accompanied by a lease of an equal number of hectares of eligible land.

96. However, notwithstanding that the Company may have been entitled to be registered as transferee, neither it nor the Appellants took any steps to effect such a registration. The second named Appellant candidly accepted that this was a conscious and deliberate decision as a formal transfer of the payment entitlements to the Company would have resulted in a reduction in the amount of payments actually received.

97. While I understand the rationale for the Appellants' decision, and note the Appellants' argument that as the Company ultimately received a higher level of income, they were discharging their duty to act in the best interests of the Company, the effect was that the Company was never registered as the transferee or holder of the Appellants' Single Farm Payment entitlements and the Company was never the holder of a registered herd number.

98. I therefore find that the Company was never entitled in law to receive the Single Farm Payments paid by the Department of Agriculture to the Appellants during the years under appeal.

99. The entitlement to receive Single Farm Payments was at all material times registered in the name of the Appellants. Such an entitlement enables the holder to apply for a payment from the Department each year during the currency of the scheme. The Appellants duly applied for such payments and received them from the Department. It appears that the Appellants were not entitled as a matter of law to receive the payments which they did; the payments which they received were made as a result of the Appellants knowingly submitting incorrect information to the Department.

100. I note in this regard that paragraph 2 of the Department Guidelines states *inter alia*:-

"Declare all your land. You are legally required to declare ALL the land that will form part of your holding on 31 May, excluding any land that you have leased OUT or rented OUT for any period that includes 31 May..."

101. The Appellants clearly did not comply with this requirement. Equally, they held themselves out to the Department as being the farmers using the eligible land to which the entitlements related, notwithstanding that they had ceased to personally farm the land as and from the 1st of September 2009.

102. Notwithstanding that the Appellants were not entitled to receive the Single Farm Payments which were made by the Department during the relevant years, it was common case between the parties that those payments



were made by the Department to the Appellants. I find as a material fact that the payments were received by the Appellants.

103. The Appellants urged me to find that their receipt of these payments was solely and exclusively in a fiduciary capacity, and that the monies were received by them on a constructive trust for the Company. However, the same argument was expressly rejected by the High Court and Supreme Court in *Dolan -v- K* and I am satisfied that it cannot succeed in these appeals.

104. I accept as correct the submission by the Respondent that the Single Farm Payments received by the Appellants were income received by the Appellants, notwithstanding the existence of the Licence Agreement. I further accept as correct the submission that the payment by the Appellants of the Single Farm Payments was, for income tax purposes, a disbursement of income which they had received.

105. I have found as a material fact that the Appellants ceased to carry on their trade as farmers as and from the 1st of September 2009. However, I accept as correct the submission by the Respondent that the Appellants' Single Farm Payment entitlements were chargeable assets for tax purposes.

106. Section 18(1)(a)(i) of the TCA 1997 provides that a charge to tax under Schedule D arises in respect of the annual profits or gains arising or accruing to any person residing in the State from any kind of property whatever. Section 18(2) provides that tax under Schedule D shall be charged under Case IV in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule.



- 107.** I find that, notwithstanding that the Appellants were not entitled as a matter of law to receive the Single Farm Payments which were made by the Department of Agriculture during the years under appeal, they received them as a matter of fact. I further find that those payments constituted annual profits or gains arising from property situated in the State.
- 108.** I am therefore satisfied that the Appellants were correctly assessed by the Respondent to income tax under Case IV of Schedule D in respect of the payments which they received under and by virtue of the Single Farm Payment scheme during the years under appeal.
- 109.** Finally, I turned to consider the Appellants' argument that the Respondent was not entitled to raise an Amended Assessment for 2010 outside the 4-year time limit imposed by section 955 (or section 959AA, as referred to by both parties to these appeals) of TCA 1997.
- 110.** I find as a material fact that the Appellants did not include in their Form 11 returns for 2010 the payments which they had received from the Department of Agriculture under the Single Farm Payment scheme. While I understand that they may have had a genuine belief that this was income of the Company which they were not obliged to return, I have found above that the payments were received by the Appellants and were profits or gains arising from their property.
- 111.** Accordingly, I find that the returns submitted by the Appellants for 2010 did not make a full and true disclosure of all material facts necessary for the making of an assessment for that chargeable period. The Respondent was therefore entitled pursuant to section 955(2)(b)(i) to amend the 2010 income tax assessments outside the 4-year time limit.



I. Determination and Conclusion

112. For the reasons set forth above, my findings can be summarised as follows:-

(a) I find the following as material facts:-

- (i)** the Appellants transferred the stock, farm machinery and equipment and the goodwill of their farming business to the Company with effect from the 1st of September 2009;
- (ii)** the Appellants ceased to carry on their trade as farmers as and from the 1st of September 2009;
- (iii)** from the 1st of September 2009 onwards, the farming trade formerly carried on by the Appellants was thereafter carried on by the Company;
- (iv)** the Appellants granted the Company a lease of their lands from year to year, commencing on the 1st of September 2009, and this lease continued on a year to year basis throughout the periods relevant to these appeals;
- (v)** the Appellants granted the Company a licence to use their Single Farm Payment entitlements by the Licence Agreement dated the 1st of January 2010;
- (vi)** the Company never held a registered herd-number and was never registered as the transferee of the Appellants' Single Farm Payment entitlements;
- (vii)** the Single Farm Payments which were made by the Department of Agriculture during the years under appeal were made by the



Department to the Appellants and were received by the Appellants;
and,

(viii) the Appellants did not include in their Form 11 returns for 2010 the payments which they had received from the Department of Agriculture under the Single Farm Payment scheme.

(b) The Company was never entitled in law to receive the Single Farm Payments paid by the Department of Agriculture to the Appellants during the years under appeal.

(c) The Single Farm Payments received by the Appellants were income received by the Appellants, notwithstanding the existence of the Licence Agreement.

(d) The payment by the Appellants of the Single Farm Payments to the Company was, for income tax purposes, a disbursement of income which they had received.

(e) Notwithstanding that the Appellants were not entitled as a matter of law to receive the Single Farm Payments which were made by the Department of Agriculture during the years under appeal, they did receive them and those payments constituted annual profits or gains arising from property situated in the State within the meaning of section 18(1) of TCA 1997.

(f) The returns submitted by the Appellants for 2010 did not make a full and true disclosure of all material facts necessary for the making of an assessment for that chargeable period and so the Respondent was entitled pursuant to section 955(2)(b)(i) of TCA 1997 to amend the 2010 income tax assessments outside the 4-year time limit.



113. I therefore refuse the Appellants' appeals and determine pursuant to section 949AK(1) of the Taxes Consolidation Act, 1997 that the amended assessments stand.

MARK O'MAHONY
APPEAL COMMISSIONER
26 February 2021

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

