TAX APPEALS COMMISSION

**96TACD2021**

**BETWEEN/**

**Appellant**

**-and-**

**THE REVENUE COMMISSIONERS**

**Respondent**

## DETERMINATION

[**1**] This appeal relates to section 657 of the Taxes Consolidation Act, 1997 on the averaging of farm profits. The Appellant seeks to rely on section 657(4) to elect to be charged to income tax in 2010 in accordance with section 657(5) meaning being charged to income tax on the basis of the average of profits or gains from farming in the three years ending in that year of assessment. The Revenue Commissioners did not give effect to the election on the basis that the Appellant did not satisfy the requirements in section 657(4)(b) as the Appellant had a loss from farming in 2008.

[**2**] Section 657(4)(b) provides '*This subsection shall not apply as respects any year of assessment where for either of the 2 immediately preceding years of assessment the individual was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*'. It is agreed that the issue is whether the Appellant '*was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*' in 2008.

## Background

[**3**] On 27 January 2016, a Notification of Revenue Audit was issued to the Appellant for 2011, 2012, 2013 and 2014. Subsequent to the notification, it was disclosed to the Revenue Commissioners that the Appellant had erroneously claimed a deduction in the computation of his profits from farming for expenditure incurred by the Appellant on the purchase of Single Farm Payment entitlements in the following amounts:

| | | |
|---|---|---|
| 2010 | Purchase of Single Farm Payment | €26,700 |
| 2011 | Purchase of Single Farm Payment | €62,902 |
| 2012 | Purchase of Single Farm Payment | €20,516 |
| 2014 | Purchase of Single Farm Payment | €11,585 |

[**4**] On 22 August 2016, a Notice of Amended Assessment to Income Tax for 2011, 2012, 2013 and 2014 issued to the Appellant. Subsequent to the amended assessments, the Appellant sought to rely on section 657. On 7 December 2016, a Notice of Amended Assessment to Income Tax for 2010 issued to the Appellant. On 21 December 2016, a Notice of Appeal for 2010 and a Notice of Late Appeal for 2011, 2012, 2013 and 2014 were received by the Tax Appeals Commission. On 25 January 2017, the Revenue Commissioners confirmed to the Tax Appeals Commission that this appeal was a valid appeal.

[**5**] The details of the amended assessments are:

| | | |
|---|---|---|
| 2010 | Notice of Amended Assessment to Income Tax dated 7 December 2016 | Balance Payable €3,389.87 |
| 2011 | Notice of Amended Assessment to Income Tax dated 22 August 2016 | Balance Payable €16,216.76 |
| 2012 | Notice of Amended Assessment to Income Tax dated 22 August 2016 | Balance Payable €17,022.28 |
| 2013 | Notice of Amended Assessment to Income Tax dated 22 August 2016 | Balance Payable €5,606.08 |
| 2014 | Notice of Amended Assessment to Income Tax dated 22 August 2016 | Balance Payable €11,289.72 |

[**6**] The position of the Appellant pertaining to the farming trade for the relevant years was:

| | | |
|---|---|---|
| 2008 | Loss | €47,690 |
| 2009 | Profit | €24,291 |
| 2010 | Profit | €42,171 |
| 2011 | Profit | €63,969 |
| 2012 | Profit | €51,423 |
| 2013 | Profit | €29,829 |
| 2014 | Profit | €39,166 |

[**7**] The Appellant submits that section 657(5) should be applied to adjust the profits from farming in the following manner:

| | |
|---|---|
| 2011 | Profit of €63,969 should be averaged profit of €43,477 |
| 2012 | Profit of €51,423 should be averaged profit of €52,521 |
| 2013 | Profit of €29,829 should be averaged profit of €48,285 |
| 2014 | Profit of €39,166 should be averaged profit of €40,017 |

[**8**] The position of the Appellant regarding capital allowances and losses pertaining to the farming trade for the relevant years was:

| | **Capital Allowances** | **Losses** |
|---|---|---|
| 2008 | -€12,874 | -€38,733 |
| 2009 | -€12,874 (*b/f*)<br>-€11,417 (*2009*) | -€38,733 (*c/f*) |
| 2010 | -€933 (*b/f*)<br>-€11,947 (*2010*) | -€29,291 (*b/f*) |
| 2011 | -€11,638 (*2011*) | -€9,442 (*b/f*) |
| 2012 | -€11,486 (*2012*) | |
| 2013 | -€11,447 (*2013*) | |
| 2014 | -€1,081 (*2014*) | |

[**9**] The difference between the Appellant and the Revenue Commissioners, having regard to the capital allowances and losses, can be shown as:

| | **Appellant** | **Revenue Commissioners** |
|---|---|---|
| **2011** | | |
| Profit | €43,477 | €63,969 |
| *Less* Capital Allowances | -(€11,638) | -(€11,638) |
| *Less* Losses | -(€9,442) | -(€9,442) |
| | **€22,397** | **€42,889** |
| | | |
| **2012** | | |
| Profit | €52,521 | €51,423 |
| *Less* Capital Allowances | -(€11,486) | -(€11,486) |
| *Less* Losses | - | - |
| | **€41,035** | **€39,937** |
| | | |
| **2013** | | |
| Profit | €48,285 | €29,829 |
| *Less* Capital Allowances | -(€11,447) | -(€11,447) |
| *Less* Losses | - | - |
| | **€36,838** | **€18,382** |
| | | |
| **2014** | | |
| Profit | €40,017 | €39,166 |
| *Less* Capital Allowances | -(€1,081) | -(€1,081) |
| *Less* Losses | - | - |
| | **€38,936** | **€38,085** |

**Legislation**

[**10**] The parties agreed that the relevant legislative provisions in this appeal were those operative as at Finance Act, 2010. The legislation reproduced hereunder represents the relevant provisions as at Finance Act, 2010.

[**11**] Section 12 of the Taxes Consolidation Act, 1997 provides:

"***12 The charge to income tax***

*Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below –*

*Schedule C – section 17;*

*Schedule D – section 18;*

*Schedule E – section 19;*

*Schedule F – section 20;*

*and in accordance with the provisions of the Income Tax Acts applicable to those Schedules*."

[**12**] Section 18(1) of the Taxes Consolidation Act, 1997 provides:

"***18 Schedule D***

*(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,*

*(iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and*

*(iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State,*

*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. Profits or gains arising or accruing to any person from an office, employment or pension shall not by virtue of paragraph 1 be chargeable to tax under this Schedule unless they are chargeable to tax under Case III of this Schedule*."

[**13**] Section 65(1) of the Taxes Consolidation Act, 1997 provides:

"***65 Cases I and II: basis of assessment***

*(1) Subject to this Chapter, income tax shall be charged under Case I or Case II of Schedule D on the full amount of the profits or gains of the year of assessment."*

[**14**] Section 81(1) and (2) of the Taxes Consolidation Act, 1997 provides:

"***81 General rule as to deductions***

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

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

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

*...*

*(e) any loss not connected with or arising out of the trade or profession;*

*...*

*(j) any average loss over and above the actual amount of loss after adjustment;*

*..."*

[**15**] Section 381(1) of the Taxes Consolidation Act, 1997 provides:

"***381 Right to repayment of tax by reference to losses***

(1) *Subject to this section, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss*."

[**16**] Section 382(1) of the Taxes Consolidation Act, 1997 provides:

"***382 Right to carry forward losses to future years***

(1) *Where, in any trade or profession carried on by a person, either solely or in partnership, such person has sustained a loss (to be computed in the like manner as profits or gains under the provisions of the Income Tax Acts applicable to Cases I and II of Schedule D) in respect of which relief has not been wholly given under section 381 or under any other provision of the Income Tax Acts, such person may claim that any portion of the loss for which relief has not been so given shall be carried forward and, in so far as may be, deducted from or set off against the amount of profits or gains on which such person is assessed under Schedule D in respect of that trade or profession for any subsequent year of assessment, except that, if and in so far as relief in respect of any loss has been given to any person under this section, that person shall not be entitled to claim relief in respect of that loss under any other provision of the Income Tax Acts*."

[**17**] Section 655(1) of the Taxes Consolidation Act, 1997 provides:

"***655 Farming & market gardening profits to be charged to tax under Schedule D***

*(1) For the purposes of the Tax Acts, farming shall be treated as the carrying on of a trade or, as the case may be, of part of a trade, and the profits or gains of farming shall be charged to tax under Case I of Schedule D*."

[**18**] Section 657(4) and (5) of the Taxes Consolidation Act, 1997 provides:

"***657 Averaging of farm profits***

...

*4 (a) Subject to paragraph (b), where an assessment in respect of profits or gains from farming is made for any year of assessment on an individual,*

*other than an individual to whom subsection (1) applies, the individual may on giving notice in writing to that effect to the inspector within 30 days after the date of the notice of assessment elect to be charged to income tax for that year in respect of those profits or gains in accordance with subsection (5), and –*

*(i) the Income Tax Acts shall apply in relation to the assessment as if the notice given to the inspector were a notice of appeal against the assessment under section 933, and*

*(ii) the assessment shall be amended as necessary so as to give effect to the election so made by the individual.*

*(b) This subsection shall not apply as respects any year of assessment where for either of the 2 immediately preceding years of assessment the individual was not charged to tax in respect of profits or gains from farming in accordance with section 65(1).*

*5 (a) An individual who is to be charged to income tax for a year of assessment in respect of profits or gains from farming in accordance with this subsection shall be so charged under Case I of Schedule D on the full amount of those profits or gains determined on a fair and just average of the profits or gains from farming of the individual in each of the 3 years ending on the date in the year of assessment to which it has been customary to make up accounts or, where it has not been customary to make up accounts, on the 31 December in the year of assessment.*

*(aa) As respects the year of assessment 2001, this subsection shall apply as if in paragraph (a) "74 per cent of the full amount of those profits or gains" were substituted for "the full amount of those profits or gains".*

*(ab) For the purposes of paragraph (a), where an individual makes up annual accounts to a date in the period from 1 January 2002 to 5 April 2002, those accounts shall, in addition to being accounts made up to a date in*

*the year of assessment 2002, be treated as accounts made up to a date in the year of assessment 2001.*

*(b) Any profits or gains arising to, and any loss sustained by, the individual in the 3 years referred to in paragraph (a) in the carrying on of farming shall be aggregated for the purposes of this subsection.*"

**Submissions on behalf of the Appellant**

[**19**] The Appellant referred to three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery – as explained by Lord Dunedin in ***Whitney -v- Inland Revenue Commissioners*** [1926] AC 37. The Appellant submits that there is a difference between 'charged to tax' and an 'assessment'. The Appellant submits that he was charged to tax in 2008 and 2009 regardless of whether an assessment produces a NIL amount. The amount on which the Appellant was charged to tax was computed in accordance with the Tax Acts. The Appellant submits that the words 'profits or gains' in section 65(1) must be given their ordinary meaning and, as a consequence, losses come within section 65(1). Losses are simply negative profits.

[**20**] The Appellant referred to a typed note which the Appellant stated was a determination of a Judge of the Circuit Court given in 2004 in an appeal pertaining to an unrelated taxpayer, wherein the Judge determined that the taxpayer was entitled to elect for the averaging of farm profits for 1997/98 and 1998/99 in circumstances where there was a profit in the year ending 31 December 1995, a loss in the year ending 31 December 1996 and a profit in the year ending 31 December 1997. Having identified the issue between the parties as section 657(4)(b) the typed note states:

"*The* [Taxpayer] *contends that the Inspector of Taxes interprets 'charged to tax' as meaning 'assessed to tax'. I think this is too narrow an interpretation of the Inspectors interpretation and that the phrase is 'charged to tax in respect of profits or gains from farming'. The* [Taxpayer] *submits that the 'charge' to tax is imposed by the Oireachtas and*

*produces the following cases in support of his argument as well as the head note of the Finance Act 1974… These cases identify the three stages in the imposition of a tax, the charging section, the assessment and the methods of recovery and that it is not necessary in all cases for there to have been an assessment. Liability does not depend on assessment liability has been established by statute. The Revenue rely on the loss sustained by the* [Taxpayer] *and the example in Judge Irish Income Tax 2002 supports their argument. The* [Taxpayer] *maintains that in the Revenue's own handbook profits or gains from farming covers the case where there is a loss described as a negative profit and states that the words profits or gains encompasses a loss for two centuries and that a loss is treated as a negative profit. It was open to the Oireachtas to be specific as they were in 1981. In the face of the lack of such specific subsection, in my view the taxpayer is entitled to succeed and should be allowed to exercise the option for income averaging granted to individuals under section 657 of the Taxes Consolidation Act 1997. I am supported in this view by the maxim in Whitney -v- Commissioners of Inland Revenue. The doubt should be resolved in the taxpayer's favour on the well known principle that he is not to be taxed except by clear words… I also consider the purpose of the particular legislation was to allow farmers to attain an equilibrium in tax liabilities and I cannot see how this can be truly attained on the interpretation given to the section by the Revenue Commissioners*."

[**21**] The Appellant submits that the same considerations apply in this appeal. In the documents submitted to the Tax Appeals Commission, the Appellant included the same case-law as referred to in the typed note, namely:

(A) ***Whitney -v- Commissioners of Inland Revenue*** [1926] AC 37
(B) ***W.H. Cockerline & Co -v- Commissioners of Inland Revenue*** 16 TC 1
(C) ***Allen -v- Trehearne (Inspector of Taxes)*** [1938] 2 KB 464
(D) ***Townsend (Inspector of Taxes) -v- Electrical Yarns Limited*** 33 TC 166

[**22**] In the circumstances, the Appellant submits that he was charged to tax in respect of profits or gains from farming in accordance with section 65(1) in 2008 and 2009 and is entitled to elect for the averaging of farm profits for 2010.

**Submissions on behalf of the Revenue Commissioners**

[**23**] The Revenue Commissioners submit that the Appellant has not satisfied the requirements in section 657(4)(b) to make an election for 2010 as the Appellant '*was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*' in 2008, being either of the two immediately preceding years of assessment. The Appellant had a loss from farming in 2008. Consequently, the Appellant was not charged to tax in respect of profits or gains from farming in accordance with section 65(1) in 2008.

[**24**] The Revenue Commissioners submit that being 'charged to tax' differs from being 'chargeable to tax' or a 'chargeable person'. Section 65(1) refers to the '*full amount of the profits or gains*' and this could not be interpreted as referring to losses. The Appellant has been allowed any losses sustained, which have been properly reflected in the amended assessments.

[**25**] The Revenue Commissioners referred to a Revenue Precedent (IT963009) (Origin – RLS Division) which was published on 4 June 1996 and states:

"***Query***

*A farmers trading profits for a year of assessment are nil due to stock relief. Profits arose in the two years prior to that year. Is the farmer entitled to claim income averaging for the year subsequent to the year in which the stock relief was claimed?*

***Decision***

*An individual is not entitled to elect to be charged to tax, for a year of assessment, in respect of farming profits, under Section 657 Taxes Consolidation Act 1997, where the individual was not charged to tax in either of the two immediately preceding years in respect of profits*

*from farming on the current year basis (i.e. in accordance with section 65(1) TCA 1997.) Stock relief is given as a deduction in computing an individuals trading profits. An individual cannot be regarded as being charged to tax in respect of profits if no trading profits arise*."

[**26**] The Revenue Commissioners referred to a Revenue Precedent (GD97084) (Origin – RLS Division) which was published on 20 October 1997 and states:

"***Query***
*Where there is a farming loss but a balancing charge arises is the taxpayer 'charged to tax in respect of profits or gains from farming' for that year for the purposes of section 657(4)(b)?*
***Decision***
*No.*"

[**27**] The Revenue Commissioners referred to a determination of a Judge of the Circuit Court given in 1997 in an appeal pertaining to an unrelated taxpayer, wherein the Judge determined that the taxpayer was not entitled to elect for the averaging of farm profits as the taxpayer had a loss from farming in the immediately preceding years of assessment and therefore '*was not charged to tax in respect of profits or gains from farming*' to satisfy the requirements to elect for the averaging of farm profits. The taxpayer had referred to section 20B(2)(b) of the Finance Act, 1974 (as amended) to support his entitlement to elect for the averaging of farm profits. The Revenue Commissioners had submitted that section 20B(2)(b) applied in respect of those years of assessment subsequent to the year of election for aggregation purposes.

[**28**] In the circumstances, the Revenue Commissioners submit that the Appellant '*was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*' in 2008 and, consequently, does not satisfy the requirements in section 657(4)(b).

**Analysis and Findings**

[**29**] In ***Whitney -v- Inland Revenue Commissioners*** [1926] AC 37 (House of Lords) Lord Dunedin explained that there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. Lord Dunedin stated:

*"…there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay*."

[**30**] This was referred to in the recent Court of Appeal judgment of ***Lee -v- The Revenue Commissioners*** [2021] IECA 18 wherein Murray J. stated:

"***22***. *As explained by Lord Dunedin in Whitney v. Inland Revenue Commissioners [1926] AC 37, at p. 52 there are three stages in the imposition of a tax – the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment particularises the exact sum which a person has to pay in the light of the applicable statutory charge*."

[**31**] In light of the foregoing, it could be said that there is a distinction between 'charged to tax' and an 'assessment'. An appeal to the Appeal Commissioners is an appeal against an assessment which is directed to whether the Revenue Commissioners have properly reflected the statutory charge to tax in the assessment, with the Appeal Commissioners increasing, decreasing or confirming the assessment as appropriate.

[**32**] In this appeal, the issue is whether the Appellant '*was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*'. The Appellant seeks to rely on section 657(4) to elect to be charged to income tax in 2010 '*on a fair and just average of the profits or gains from farming*'. For the purposes of section 657(4)(b), the two immediately preceding years of assessment are 2008 and 2009. It is agreed that there was a loss from farming in 2008 and a profit from farming in 2009.

[**33**] In relation to the interpretation of taxing statutes, O'Donnell J. in the Supreme Court judgment of ***Bookfinders Limited -v- The Revenue Commissioners*** [2020] IESC 60 examined the relevant case-law and concluded:

"***52***. *...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".*

*...*

***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*."

[**34**] Section 65(1) provides '*income tax shall be charged under Case I and II of Schedule D on the full amount of the profits or gains of the year of assessment*'. Section 655(1) provides '*farming shall be treated as the carrying on of a trade*' and '*the profits or gains of farming shall be charged to tax under Case I of Schedule D*'. Tax is charged on the 'full amount' of profits or gains. It is when computing the amount of profits or gains to be charged to tax that section 81(2)(e) provides that no sum shall be deducted for '*any loss not connected with or arising out of the trade or profession*'. Section 382(1) refers to computing a loss sustained in like manner as profits or gains and provides that a person '*may claim any portion of the loss for which relief has not been so given shall be carried forward and, in so far as may be, deducted from or set off against the amount of profits or gains on which such person is assessed under Schedule D*'.

[**35**] If the interpretation of the Appellant that '*charged to tax in respect of profits or gains from farming in accordance with section 65(1)*' in section 657(4)(b) should be interpreted as including losses from farming, then the wording of section 657(5)(b) which specifically refers to '*any profits or gains arising to, and any loss sustained*' [emphasis added] would not be required in determining the full amount of the profits or gains under section 657(5)(a) as losses would come within profits or gains. In my view, the reference to section 65(1) in subsection (4)(b) does not create a distinction between subsection (4)(b) and subsection (5) such as to conclude that subsection (4)(b) must be interpreted as including losses from farming. In my view, the ordinary meaning of 'profits or gains' in section 657(4) by reference to section 65(1) would not include 'loss' and describing a 'loss' as a 'negative profit' does not alter that view. The taxing statutes refer specifically, and separately, to 'profits or gains' and 'loss'.

[**36**] The Appellant referred to the legislative history on the averaging of farm profits. In that regard, Finance Act, 1981 introduced the averaging of farm profits by the insertion of

section 20B in Finance Act, 1974. The corresponding provision to section 657(4)(b) was section 20B(1) which included '*Provided that this subsection shall not apply as respects any year of assessment where for either of the two immediately preceding years of assessment the individual was not charged to tax in respect of profits or gains from farming in accordance with the provisions of section 58(1) of the Income Tax Act, 1967*'. [emphasis added] The corresponding provision to section 657(5)(b) was section 20B(2)(b) which stated '*any profits or gains arising to and any loss sustained by the individual in the said three years in the carrying on of farming shall be aggregated for the purposes of this subsection: provided that this paragraph shall not apply to a loss sustained prior to the 6th day of April 1981, and the said loss shall not be aggregated with profits or gains for the purposes of this subsection*.' [emphasis added] Similar to section 657(4)(b) there was no reference to 'loss' in section 20B(1) in the insertion made by Finance Act, 1981. The entitlement to elect for the averaging of farm profits did not apply if the individual '*was not charged to tax in respect of profits or gains from farming*'. Similar to section 657(5)(b) there was a reference to 'loss' in section 20B(2)(b) in the insertion made by Finance Act, 1981. It is the aggregation computation that refers to losses from farming. The Notes for Guidance on the Taxes Consolidation Act, 1997 (as at Finance Act, 2020) published by the Revenue Commissioners includes the following on section 657(5)(b) '*both profits and losses of the 5 years concerned in the averaging process are aggregated; losses are, in effect, treated as negative profits*'. The reference to 'negative profits' in the publication relates to the aggregation computation. The guidance from the Revenue Commissioners is that for the purpose of the aggregation computation under section 657(5)(b) any losses are subtracted from the profits when computing the '*fair and just average*' rather than including a NIL amount for a year of assessment in which a loss was sustained. This means that fluctuations in the farming trade between profit and loss are captured in the aggregation computation. This is a non-statutory publication produced by the Revenue Commissioners. In an appeal, the Appeal Commissioners are considering the interpretation of the taxing statutes and the words therein.

[**37**] In this appeal, the Appellant had a loss from farming in 2008. In the circumstances, having applied the general principles of statutory interpretation, and being satisfied that there is no ambiguity, I find that section 657(4) does not apply to the Appellant in respect of 2010 as the Appellant '*was not charged to tax in respect of profits or gains from farming in accordance with section 65(1)*' for 2008, being either of the two immediately preceding years of assessment.

**Determination**

[**38**] Based on a review of the facts and a consideration of the documents, materials and submissions of the parties, I determine that the Appellant does not satisfy the requirements in section 657(4) of the Taxes Consolidation Act, 1997 for 2010. This appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

**FIONA McLAFFERTY**
**APPEAL COMMISSIONER**

**28 JUNE 2021**

*The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997.*