AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

105TACD2022

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") in relation to a P21 Balancing Statement issued by the Revenue Commissioners ("the Respondent") for the year 2020.

2. The Appellant sought to have the sum of €587, the rental cost of his apartment, treated as an expense, as he was working from home during the pandemic between March and December 2020. The Appellant sought to deduct the rental cost as it was "*money wholly, exclusively and necessarily*" incurred by him in the performance of his employment duties, in accordance with the provisions of section 114 TCA 1997.

3. However, the Respondent has refused to allow the deduction under section 114 TCA 1997 and on 29 January 2021, the Appellant duly appealed to the Commission. The hearing of the appeal took place on Tuesday, 7 June 2022. The Commissioner heard evidence and submissions from the Appellant and submissions from the Respondent, who was represented by Counsel.

Background

4. The Appellant lived with his partner in Dublin, in rented accommodation, from November 2019. The rent in relation to his apartment was €2,000 initially and €1,800 per month thereafter, having moved accommodation. The Appellant and his partner divide equally the cost of the apartment.

5. During March 2020, due to the Covid-19 Pandemic, the Appellant's employer required him to work from home as the employer's offices remained closed to most employees (with the exception of IT staff which maintain the facilities and later access was granted to those with extenuating circumstances which prevented them from working from home). The Appellant submits that "*this was in line with HSE guidance to "work from home unless your work is an essential service which cannot be done from home*"". The Appellant states that he worked from the spare bedroom in the apartment, part of which he converted into a home office.

6. In January 2021, the Appellant filed his Form 12 Income Tax return and sought to have the sum of €587 of the rental cost of his accommodation treated as an expense in accordance with the provisions of section 114 TCA 1997, as he was working from home between March and December 2020.

7. On 19 January 2021, the Respondent wrote to the Appellant to query what the expense related to. The Appellant responded on the same date to outline that the expense related to a portion of his rent which he was claiming as an expense, due to being required to work from home.

8. On 27 January 2021, the Respondent wrote to the Appellant and stated that "…*for the purpose of e-working, the expenses that Revenue is willing to consider as wholly, exclusively and necessary in the performance of employment duties are electricity, heat and broadband"*. The Respondent argues that "*the Appellant was required to rent the apartment to meet his own personal need for accommodation whether he was working remotely or not. Given his own need to have somewhere to live, his rental costs cannot be said to have been wholly and exclusively incurred by him in the performance of his duties*".

9. The Respondent refused the Appellant's claim for a portion of his rent and issued a Statement of Liability dated 28 January 2021, which the Appellant duly appealed. The Appellant also appealed the denial of a claim in relation to medical expenses incurred. However, on 19 February 2021, a refund was made by the Respondent in relation to that claim. In addition, a claim for a portion of the electricity, heat and broadband costs was

allowed by the Respondent and has been resolved. Accordingly, this appeal relates to the rental cost of accommodation only.

Legislation and Guidelines

10. The legislation relevant to this appeal is as follows:-

11. Section 114 of the Taxes Consolidation Act 1997, General rule as to deductions, provides:

> *"Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."*

Submissions

Appellant

12. The Appellant gave evidence that he is employed with [redacted]. He stated he resides in Dublin, in an apartment with his partner and the rent for the apartment initially was in the amount of €2,000, having been reduced to the amount of €1,800, when he and his partner moved to a different apartment. He mentioned that in March 2020, his employer closed their offices due to the Covid-19 pandemic.

13. He stated that from this date he commenced working from home until in or around December 2020. He made reference to page 24 of the bundle of documents and an update from his Employer providing information and guidance to employees about a mandatory work from home policy until further notice.

14. He mentioned that during August 2020, it was possible for categories of employees to return to the office, based on certain criteria. However, he did not fall within the criteria prescribed by his employer and that his employer did not deem him an essential worker to return to the office, despite him perhaps being classed as such, by government guidance.

15. Reference was made to section 114 TCA 1997 and the "wholly, exclusively and necessarily" test. He argued that where a definitive proportion of an expense has been paid for the purposes of employment, then that part should not be disallowed simply because the entire expense was not incurred, wholly and exclusively for the purposes of employment. Reference was also made to a dual purpose in terms of a claim for

expenses. He gave evidence around the methodology he used to calculate the rental expense. He said he calculated the sum having regard to the total sum due by him for rent for the period being €9,700 and based on the days and hours worked in the portion of the apartment he used as a home office, which he described as in or around 11%. He submitted that the decisions of *Wildborne v Luker* [1951] 33TC 46 and *Caillebotte v Quinn* [1975] 50 TC 222 support his argument that costs can be split and apportioned.

16. In relation to the word "necessarily" reference was made to the decision of *Pabari v Secretary of State for Work and Pensions & Another* [2005] 1 ALL ER 287. Reference was also made to the decisions of *Owen v Pook* 45 TC 571 and *Kirkwood v Evans* [2002] STC 231. He said that the decisions support his position, namely that it was necessary for him to work from home during the requisite period. He mentioned the Respondent's Tax and Duty Manual Part 05-02-20, in particular paragraph 2.2 entitled "*Necessarily incurred in the performance of duties*" in support of his claim for expenses and submits that he falls within the criteria outlined in the Manual. He highlighted that necessarily means that the duties of the office or employment could not be performed without incurring the expense. He stated that in order for him to connect to broadband and to plug in his laptop, he was required to have an electricity supply. He submitted that the Respondent permits dual split purpose expenditure in both business and private use relating to electricity, heat and broadband and that it meets the statutory test as provided for in section 114 TCA 1997.

17. Under cross-examination, he stated that the square footage of the previous apartment was in or around 62 m² and the current apartment measures in or around 82 m². He stated that the apartment has two bedrooms, the second bedroom being a box room and he made reference to photographs submitted to illustrate his desk and working area in the room. He mentioned that the main purpose of the room during working hours is an office, but that on occasion, it is used as a guest bedroom. When asked a number of questions in relation to the percentages claimed, it was put to him that the methodology he relied on is unknown. However, he did not agree that that was the case and argued that the room has a dual purpose.

Respondent

18. Counsel for the respondent made the following legal submissions:-

    (i) Section 114 TCA 1997 is clear and unambiguous. That any money expended must be done so "wholly, exclusively and necessarily" in the performance of the duties of the employment and that this the starting point for consideration of the Appellant's claim.

(ii) Reference was made to the decision of *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("Perrigo"), and the dicta of McDonald J., in particular the summary of the fundamental principles of statutory interpretation at paragraph 74, in particular to paragraph (g) of that summary and the approach to be taken to statutory interpretation.

(iii) Reference was made to the decision of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49 ("*Menolly Homes*"), and that the burden of proof is on the taxpayer in any tax appeal before the Commission.

(iv) Reference was made to the decision of *Ricketts v Colquhoun* [1924] 10 TC 118 and *Lomax v Newton* [1953] 1 WLR 1123 which dealt with the equivalent provision in England and that the rules are notoriously rigid in terms of a claim for expenses.

(v) Reference was made to the decision of the *HMRC Commissioners v Banerjee* [2009] 80 TC 205 and that any duality of purpose is fatal to the satisfaction of the exclusivity requirement.

(vi) The claim of dual purpose is misconceived and the legislation does not support a claim of dual-purpose. Section 114 TCA 1997 is clear and unambiguous and must be interpreted strictly in accordance with the rules of statutory interpretation. A dual purpose cannot satisfy the provisions of section 114 TCA 1997, namely the wording, "wholly and exclusively".

(vii) The Appellant's argument is that the expenses incurred are essential to the performance of the employment. However, the expenses incurred are not in the performance of the employment. That is an important distinction.

(viii) The first purpose of the Appellant's accommodation is to live and reside in Dublin and was referred to by the Appellant in his evidence.

(ix) The decisions referred to by the Appellant can be distinguished on their own particular facts and have no application to the within appeal.

(x) There is no methodology in respect of the computation submitted. In addition, there are no floor plans or valuations to support the Appellant's calculations.

Material Facts

19. The Commissioner makes the following material findings of fact:-

(i) The Appellant is an employee and emoluments received are subject to tax in accordance with the PAYE system under Schedule E.

(ii) The Appellant was required to work from home from March 2020 to December 2020 due to the Covid-19 Pandemic.

(iii) The Appellant engaged in working from home, from a bedroom in his apartment, which he used as a home office and on occasion, as a guest bedroom.

(iv) During the period March to December 2020, the Appellant's apartment had a dual purpose, such that it was his home and the place where he worked.

Analysis

20. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes*, at para. 22, Charleton J. stated

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".*

21. The central issue to be determined is: was the expense the Appellant incurred in renting his apartment, an expense incurred "*wholly, exclusively and necessarily*" in the performance of the duties of his employment. The Appellant is seeking to obtain a relief from the imposition of tax and therefore, it is incumbent on the Appellant to demonstrate that the falls squarely within the provisions of section 114 TCA 1997.

Statutory Interpretation

22. Before addressing the competing arguments, the appropriate starting point is to consider section 114 TCA 1997 and to identify the approach which the Commissioner is required to take in relation to the interpretation of taxation statutes. The principles are well settled and in the recent judgment *Perrigo*, McDonald J., from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation 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. 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".

23. The Commissioner is satisfied that Section 114 TCA 1997 is clear and unambiguous. The Commissioner has considered the principles set out in *Perrigo,* in particular principle (g) which states "….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…"*

24. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. In addition, section 114 TCA 1997 provides an exemption to the liability to pay that tax. Therefore, the exemption must be strictly construed.

Section 114 TCA 1997

25. With the aforementioned approach in mind, the Commissioner has considered the clear and cogent arguments of both parties. In addition, the Commissioner has considered the various authorities referred to by the parties to this appeal.

26. The general rule as provided for in section 114 TCA 1997 is longstanding, being in all material respects identical to that prescribed in the Income Tax Act 1918 and, before that, the Income Tax Act 1853. In *Ricketts v Colquhoun,* Viscount Cave L.C., observed at page 134 as follows:-

"*A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.*

27. As is clear from the decision in *Ricketts v Colquhoun,* it is a strict requirement for the allowance of a deduction under section 114 TCA 1997, that there be an objective obligation arising from a duty that necessitates a taxpayer to incur an expense. This rules out

expenses that arise from decisions that are *"personal*" to a taxpayer. This is confirmed in the decision of *Lomax v Newton* wherein Vaisey J. considered the equivalent provision in England and stated at page 1125

> *"…I would observe that the provisions of rule 9 Sch. E are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively incurred in the performance of the relevant official duties."*

28. The decision of *Nolder v Walters* [1980] 15 TC 380 also confirms the strictures of the nature of expense deductibility.

29. Duality of purpose, in the context of employment expenses, has been considered on a number of occasions and more recently in *HMRC Commissioners v Banerjee*, an authority relied on by the Respondent, Henderson J in the High Court of England and Wales stated

> *"The critical requirements […] are two in number. First, the obligation to incur the expenditure must be an objective necessity imposed by the duties of the employment itself, in the sense that (as Donovan LJ said in Brown v Bullock, loc. cit.) 'irrespective of what the employer may prescribe, the duties themselves involve the particular outlay'. Secondly, the expenditure must be incurred in the actual performance of the duties of the employment, and it must be wholly and exclusively so incurred.*
>
> *Wrapped up in this second requirement are a number of important distinctions. Expenditure which is not incurred in the actual performance of the taxpayer's duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible. Again, any duality of purpose is fatal: that is the force of the word 'exclusively'."*

30. The case to which Henderson J. referred, *Brown v Bullock,* [1961] 1 WLR 1095, concerned a claim made by a bank manager who was required by his employer to join a London club at his own expense for the purpose of entertaining customers. In dismissing the bank manager's appeal against refusal, Donovan L.J. held:-

> *"The test is not whether the employer imposes the expense, but whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay*.

31. The Appellant argues that it was necessary for him to work from home during the requisite period and that he had no alternative choice, as his employer had closed the offices of his employment. In relation to the rental costs for the period at issue, he argues that where a part or portion of an expense has been expended, wholly or exclusively, for the purposes

of the employment, that part or portion should not be disallowed on the ground that the entire expense is not laid out or expended, wholly and exclusively, for the purposes of the employment. Further, expenses incurred for a dual purpose, for example working from home, "*where the pattern of usage lends itself to a statistical approach, a reliable calculation of the allowable amount can be obtained*". The Commissioner notes the influential English decisions relied on by the Appellant in this regard. The Commissioner listened to the testimony of the Appellant, in relation to his calculations and breakdown of working hours and space involved in the area from which he works from home, namely 11% of the total area of the apartment. Moreover, the Commissioner notes the Appellant's argument that "*the Respondent having accepted that it considers electricity, heat and broadband as meeting the "wholly, exclusively and necessarily" test for the duration of the Covid-19 Pandemic*" appears to accept that these expenses, which have a dual usage/purpose, namely, part employment and personal, are capable of meeting the "wholly and exclusively" test.

32. The Commissioner cannot accept the Appellant's argument that a portion of his rental costs for the period, were *"wholly, exclusively and necessarily"* incurred in the performance of his duties of employment. The Commissioner is satisfied that any duality of purpose is fatal to a claim where the requirement is that an expense be incurred, wholly and exclusively, in the performance of an employee's duties of employment. As Henderson J. found in *HMRC Commissioners v Banerjee,* the use of the word "*exclusively*" in this context demands that there be just one purpose, namely the actual performance of the duties in question. The Commissioner finds that this additional purpose of being the Appellant's home, which is distinct from the actual performance of the duties of the employment, means that the expense incurred is outside the ambit of what is deductible under section 114 TCA 1997 and accordingly, is fatal in terms of his claim. The Appellant is required to rent his apartment so that he has somewhere to live and the expense incurred in so doing has a purpose outside of any duties he may be required to perform in his employment, namely, to provide him with shelter and a place to eat and sleep. This purpose continues to exist after the Appellant's employment duties end on a day or at the weekend.

33. Even if the Appellant's argument in relation to apportionment were to succeed, the Appellant would have to show that any expenditure was incurred in the performance of the duties of that employment, as opposed to enabling him to perform the duties. There is no evidence to suggest that the Appellant rented the apartment for the purposes of performing his duties of employment. Rather, the apartment was his home which he shared with his partner, this was its primary purpose, and a purpose that existed both prior to and subsequent to the period March 2020 to December 2020. Again, the Commissioner is

persuaded by the dicta of Henderson J. in *HMRC Commissioners v Banerjee* that "*Expenditure which is not incurred in the actual performance of the taxpayer's duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible".*

34. The Commissioner has considered the Appellant's arguments in relation to apportionment of expenses and the ability to make a claim for a proportion of electricity, heat and broadband. The allowance is expressly provided for in section 3 of the Finance Act 2021 which commenced on 1 January 2022. Section 3 inserts a new section 114A TCA 1997 and having regard to the explanatory memorandum which accompanies the statute, it is clear that the intention of the Oireachtas was to provide for income tax relief for remote working, in the form of a tax deduction, allowing employees who work from his or her residential premises, claim 30 per cent of the cost of electricity, heating and broadband, apportioned on the basis of the number of days worked from his or her residential premises during the year. Prior to this the TCA 1997 did not permit a tax deduction for remote working and deductions were provided for on a concessionary basis only as per the Respondent's Tax and Duty Manual, Part 05-02-13 entitled *"e-Working and Tax*" (October 2020). The Commissioner is satisfied that should the Oireachtas have intended to permit a deduction for the cost of rental or mortgage payments, it would have done so expressly in the Finance Act 2021.

35. Accordingly, the Commissioner is satisfied that the expense incurred is outside the ambit of what is deductible under section 114 TCA 1997. For that reason, the Appellant's appeal must be refused.

Determination

36. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and the Respondent was correct not to apply the provisions of section 114 TCA 1997 in relation to the rental costs incurred by the Appellant for the period March to December 2020.

37. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax.

38. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal

on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Claire Millrine
Appeal Commissioner
21st June 2022