AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

106TAD2022

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") against a Notice of Estimation of Amounts issued by the Revenue Commissioners ("the Respondent") for the years 2013, 2014, 2015 and 2016. The total liability raised was in the amount of €46,768.

2. In January 2018, an audit of the Appellant's books and records commenced in relation to certain travel and subsistence ("T&S") expenses incurred by the Director of the Appellant. Thereafter, in August 2018, the Respondent wrote to the Appellant to inform it that "*travel, subsistence and entertainment expenses included in the accounts for 2013 – 2016 have been deemed to be a non-allowable expense"* and that expenses were incurred as a result of the Director's personal circumstances.

3. The Respondent argues that it does not accept that the location at which the administration of the intermediary is carried out and its books kept, whether at the registered office of the intermediary or at the Director's home, does not constitute the normal place of work of the Director of an intermediary.

4. Prior to the hearing taking place remotely on 27 May 2022, there has been ongoing engagement between the Director of the Appellant and the Respondent in relation to the matters under appeal. The parties confirmed that as a result of the ongoing engagement between them, the amount of tax at issue now is in the amount of €20,700.

Background

5. The Appellant is a limited liability Company, incorporated in October 2012. [redacted] is the Director of the Appellant. For the periods in question, the Appellant was engaged in the provision of specialist IT consultancy services to Financial Service Providers in the United Kingdom ("UK").

6. In October 2012, the Appellant commenced providing consultancy services to a UK Financial Service Provider from the Appellant's registered offices in Ireland. The work commenced, following the Appellant entering into a contract with [redacted] entitled "*Terms of Assignment of Consultants via a Limited Company Contractor and Self Billing Agreement*". Such an agreement is commonly known as an "agency agreement" with the Appellant being an intermediary engaged to provide services to the Financial Service Provider ("the client") by a relevant consultant. The relevant consultant in this appeal being the Director of the Appellant and the Financial Service Provider being the client in the UK.

7. The contract sets out the provision of services, in particular at 2.1 it states "*this agreement governs all assignments for the provision of services by the Relevant Consultant to the Client*". In addition, the agreement sets out that the "*minimum rate of remuneration the Employment Business reasonably expects to achieve….is 500GBP per day plus expenses 200GDP per day*". All invoices for work carried out by the Appellant for an assignment are billed to the Employment Business. Further, it is a condition of the contract that the Company undertakes an IR35 Assessment every six months or less. IR35 is legislation introduced in the UK to redefine relationships between contractors and companies. The Director confirmed that such an assessment took place and the Appellant was deemed to be outside the provisions of IR35.

8. In August 2017, the Appellant was selected by the Respondent for a "*profile interview to examine risk areas*". On 25 January 2018, following initial meetings with the Appellant, the Respondent undertook a comprehensive audit of the Appellant relating to Corporation Tax, PAYE/PRSI/USC and VAT for the years 2013, 2014, 2015 and 2016.

9. The Appellant argues that the normal place of work for the Appellant's employees is its Irish office in [redacted] and that part of the agreement with the client was that the provision

of services relating to the assignment were to be carried out from its office in Ireland. The Appellant maintains that employees were not required or obliged to attend client sites and that any travel that ensued, was solely for the purposes of the Director engaging with stakeholders at meetings and advancing future business, which proved successful.

10. The Respondent submits that it raised assessments on the basis that the Director was "*not entitled to claim expenses for travel from his home to the airport, parking at the airport and the cost of the flights from Ireland to the UK*". The Respondent maintains that in order for the Director to provide the services required, he took frequent trips to the UK, as he was obliged at times to be on site. The Respondent maintains that the normal place of work of an intermediary is the premises of the intermediary's client and not the Appellant's registered office, which was the home office of the Director. The Respondent relies on Tax Briefing No 03 of 2013, in that regard.

11. On 4 September 2018, the Respondent raised an Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT) Notice of Estimation of Amounts Due and on 16 October 2018, the Appellant duly appealed to the Commission.

Legislation and Guidelines

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

13. Section 112 of the Taxes Consolidation Act 1997, Basis of assessment, persons chargeable and extent of charge, provides:-

> *(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*
>
> *(2) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.*

14. 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.

15. Section 117 of the Taxes Consolidation Act 1997, Expenses allowances, provides:-

(1) Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.

(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her.

16. Section 118(1) of the Taxes Consolidation Act 1997, Benefits in kind: general charging provision, provides:-

(a) Subject to this Chapter, where a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of-

(i) living or other accommodation,
(ii) entertainment,
(iii) domestic or other services, or
(iv) (other benefits or facilities of whatever nature, and

(b) apart from this section the expense would not be chargeable to income tax as income of the director or employee then, sections 112, 114 and 897 shall apply in relation to so much of the expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount of the expense had been refunded to the director or employee by the body corporate by means of a payment in respect of expenses, and income tax shall be chargeable accordingly.

Submissions

Appellant

17. The Director of the Appellant gave evidence that the whole process of audit and the subsequent appeal, has had a hugely negative effect on him and his family and that he will proceed to wind up the Appellant Company once this appeal has concluded. He stated that he has been made to feel like a criminal, with the exception of [redacted] of the Respondent, who listened to him.

18. He gave evidence that throughout his career, he has worked in the financial services industry, on major transformation and migration programmes for banks all over the world. He stated that he worked closely with a number of Chief Executive Officers ("CEOs") and Heads of Technology, which led to a suggestion that he provide consultancy services to financial services providers, given the particular experience that he had in the market.

19. He stated that in October 2012, the Appellant was incorporated and he entered into an agreement with [redacted] in the UK to provide consultancy services to a large UK bank. He put forward that the client was aware of his reputation in the market and permitted him to undertake the work from the Appellant's office in Ireland. He mentioned that he had made the decision to base himself in Ireland, due to his young family. He stated that he set up an office at his home in [redacted], which was a fully functioning office and capable of being securely locked, due to the confidential nature of the work he was carrying out on banking systems.

20. He submitted that in 2012, the banking sector had changed significantly and was in flux, with changes happening almost weekly. He put forward that once the assignment commenced, it was clear that there was going to be a global programme of work and that he would be engaging with over 200 stakeholders, many of whom were very senior in the banking industry. He stated that it was entirely possible for him to provide the services from his offices in [redacted] However, he put forward that it was necessary to travel to the UK for weekly meetings in order to be there physically, rather than remotely. He stated that this was with a view to engaging with stakeholders face to face at meetings, relationship management, reputational management, reassurance and with future business in mind. He submitted that stakeholders were grateful for his physical presence at meetings, due to the significant changes taking place at that time. He made reference to "affidavits" from colleagues in the Industry, submitted in support of his arguments.

21. He submitted that his presence in the UK resulted in repeat business for the Appellant. However, it was not part of the agreement that he was required to work in the UK and it

was always the case that services could be provided from Ireland. He mentioned that he has not disclosed any agreement with the client as it is in the form of a programme of works, which is confidential and the subject of a non-disclosure agreement, given the nature of his work.

22. He stated that the Appellant was assessed by an independent company as to its IR35 status and that it was determined that the Company does not fall within IR35. He stated that when present at the client site, he used hot desks or other secure areas if there was no desk available. He stated that the normal rate of pay for such agreements with [redacted] was £500 per day. However, the client agreed with [redacted] that it would be prepared to pay the standard £500 per day with a top up of £200 per day as expenses, given that the services would be provided from Ireland. He said payment was structured that way, in order that to maintain the normal rate of pay for such a contract. Invoices show that the amount of £700 per day was invoiced by the Appellant.

23. He maintained that his normal place of work was his home office in [redacted] and not the client site in the UK. He argued that the case law referenced by the Respondent does not apply to his situation, as he does not need to travel from his home to work.

Respondent

24. Ms. [redacted] and Mr. [redacted] made submissions on behalf of the Respondent.

25. Ms. [redacted] made submissions in relation to the inquiries that took place by the Respondent and the subsequent audit. She mentioned that a member of the Respondent attended at the home office of the Appellant, to see if the office was fit for purpose. She submitted that the Director was not permitted to claim expenses from his home to the airport, parking at the airport and the cost of flights from Ireland to the UK. She stated that the Appellant was providing services to a UK client exclusively and that this involved frequent trips to the UK by the Director, as he was required on site at times. She argued that travel expenses incurred by the Director on the journey from his home to his normal place of work or vice versa were not incurred in the performance of the duties of that office or employment, as provided for under section 114 of the TCA 1997.

26. Ms. [redacted] referred to the number of trips made to the UK during the period namely, 2013-54, 2014 – 45, 2015 – 42 and 2016 – 40. The Director agreed that this was an accurate reflection of the travel that took place over the requisite period. She argued that a substantial part of the Director's week was spent in the UK and accordingly, this is his normal place of work.

27. Reference was made to the applicable legislative provisions and to the following case law in support of the Respondent's arguments:- *Ricketts v Colquhoun* [1926] A.C. 1, *Bennett v Revenue Commissioners* [2007] STC (SCD) 158, *Elderkin v Hindmarsh* [1988] STC 267, *SP O'Broin (Inspector of Taxes) v Mac Giolla Meidhre* [1957] IR 98 and *Kirkwood v Evans* [2002] STC 231. Reference was also made to the Appeal Commissioner's Determination in 20TACD2018 and to the Respondent's Tax and Duty Manual Part 01-05-06 entitled "*Tax treatment of the reimbursement of expenses of travel and subsistence to office holders and employees*".

28. Ms. [redacted] argued that the burden of proof is on the Appellant to show that the tax is not payable and she maintained that the normal place of work of a Director of an intermediary is the premises of the intermediary's client. Therefore, expenses claimed for travelling from the Director's home in [redacted] to the UK are not allowable.

Material Facts

29. The Appellant is an Intermediary Company established to provide specialist IT services to Financial Service Providers.

30. The Director is the only employee of the Appellant.

31. The Director made the following number of trips to the client in the UK during the requisite period namely, 2013- 54, 2014 – 45, 2015 – 42 and 2016 – 40. This is agreed by the parties.

32. The average duration of each of the trips taken by the Director to the UK, for the period October 2012 to September 2015, were two days per week, with the exception of a number of weeks in October 2012, and mid March to mid July 2013, when the duration of trips were for 3 days per week.

33. The Director travelled to multiple locations in the UK during the requisite period including, Edinburgh, Birmingham and various locations in London.

34. The home office of a Director of an intermediary is capable of being the normal place of work.

Analysis

35. 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 Ltd v Appeal Commissioners and another,* [2010] IEHC 49, 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".*

36. The central issue to be determined is the location of the Director's normal place of work i.e. the home office in [redacted] or the client site in the UK. The Director maintains that the normal place of work was his home office in [redacted]. The testimony of the Director was that he was engaged on the basis of the Appellant and its employees being located in Ireland and that the provision of services would take place from Ireland. However, on commencement of work, such was the situation, that it was necessary to frequently attend meetings at the client site. He stated that his presence on site was also to ensure repeat business for the Appellant, which it did.

37. The Director submitted a number of UK cases relating to intermediary companies and IR35, in addition to correspondence from a number of the colleagues in the UK, which he described as "Affidavits". The Commissioner has considered all of this documentation and is grateful to the Appellant for submitting same.

38. Notwithstanding this, the Respondent maintains that an intermediary's normal place of work is the client site and in this particular appeal, the Director spent a considerable proportion of time working in the UK. Thus, it is clear that the normal place of work was the client site and not the Appellant's home office. Having examined the Appellant's records, the Respondent states that it found expenses that were not capable of being allowed, having regard to the normal place of work being the client site in the UK.

39. In determining this appeal and whether the Appellant was "*necessarily obliged*" to incur the expense of travel in the performance of its duties, the Commissioner has considered the various authorities referred to above as accurately reflecting the scope of the general rule under section 114 of the TCA 1997.

40. Section 117 of the TCA 1997 provides that travel and subsistence ("T&S") expenses paid by a company to its directors shall be treated as perquisites of the office or employment of those directors and subject to tax in accordance with section 112 of the TCA 1997. However, there remains a corresponding entitlement to claim deductions against these deemed perquisites, for the very same T&S expenses, incurred necessarily in the performance of the duties of the office or employment pursuant to section 114 of the TCA 1997.

41. The general rule as provided for in section 114 of the 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., at page 4, made the following observations in respect of travel expenses:-

    "..they must be expenses which the holder of an office is necessarily obliged to incur - that is to say, obliged by the very fact that he holds the office and has to perform its duties - and they must be incurred in - that is, in the course of - the performance of those duties.

    The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them".

42. Further, Viscount Cave, L.C. in disallowing subsistence payments, 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."*

43. In the case of *SP Ó Broin v Mac Giolla Meidhre*, Teevan J. quoted the following words of Lord Blanesburgh in relation to the operation of the general rule in *Ricketts v Colquhoun* as follows:-

    "it says "if the holder of an office' – the words be it observed are not 'if any holder of an office' – 'is obliged to incur expenses in the performance of the duties of the office' – the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective. The deductible expenses do not extend to those which the holder has to incur mainly, and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition"."

44. As is clear from the passage in *Ricketts v Colquhoun* quoted above, it is a strict requirement for the allowance of a deduction under section 114 of the 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.

45. This interpretation is endorsed in subsequent jurisprudence opened by the Respondent. To this extent and as noted by Vinelott J. in *Elderkin v Hindmarsh* [1988] STC 267 at page 270, the UK equivalent of section 114 of the TCA, is so stringent "*that in many, if not in most, cases the subsection gives the taxpayer little or no relief*".

46. The Respondent referred to its publications with regard to the payment of T&S expenses and a person's normal place of work. Based on a detailed consideration of the jurisprudence, the Respondent submits that the travel expenses incurred by the Appellant, in relation to the Director travelling from his home to his place of work namely, the client site in the UK, are ordinary commuting expenses and are not deductible under section 114 of the TCA 1997. The Respondent argues that a normal place of work is where you carry out substantially all of your duties.

47. From the testimony of the Director, a significant amount of work was due to be undertaken at the Appellant's office in Ireland. However, once the assignment commenced, the Director spent a considerable amount of time travelling to the UK. When attending the client site, the Director would use a "hot desk" meaning that he was not assigned a particular location within the client site.

48. The case of *Ricketts v Colquhoun* appears to be the cornerstone of case law invoked by the Respondent. This case does not rest easily with modern day employee work practices such as the use of technology, remote hubs and working from home. Neither does it rest easily with the circumstances in this particular case. In *Ricketts v Colquhoun* the situation was that of a directly employed employee travelling from home to his employer's workplace to carry out the tasks of employment. In the current appeal, we have a situation where there is no contractual relationship per se between the Appellant and the client. The evidence was that when the Director arrives at the client site he is not an employee, he has no entitlement to a fixed place within the physical infrastructure or management organisation. He uses a transient "hot desk" and is acting on behalf of the Appellant to fulfil a contract with [redacted] In the Commissioner's view, it would be incorrect to say that his place of work is the client site in the sense understood in the case of *Ricketts v Colquhoun*. The Commissioner accepts as credible the evidence of the Director that the programme of work or services cannot be disclosed for reasons of confidentiality.

49. The Commissioner has considered the Respondent's Tax and Duty Manual 05-01-06, paragraph 4.9 entitled "*Reimbursement of travel and subsistence expenses by intermediaries*" and in particular paragraph 4.9.2 entitled "*Place of work*" which states

> "*Revenue does not accept that the location at which the administration of the intermediary is carried out and its books kept (whether this is at the registered office of the intermediary or at the directors home) constitutes a normal place of work of the director/employee".*

50. The Commissioner is of the view that this approach is understandable where a person's home is simply that, i.e. their home. However, there are situations where a person's home is the main place of work and that is not negated by the fact that the building also functions as the person's home. In the modern working environment, there are many cases in which a person's home may be the main place of work. The position adopted by the Respondent in this regard, does not recognise the changes in working patterns which modern technology has facilitated in recent years. Accordingly, the Commissioner is satisfied that the Appellant does not fail in this appeal simply because the office of the Appellant happens to be located at the Director's home.

51. Determining a person's normal place of work is a question of fact that must be considered on the specific circumstances of each case. Turning to the facts of this appeal, the Commissioner is satisfied that the Appellant has on balance shown that the expenses were incurred in accordance with the provisions of section 114 of the TCA 1997, in that the Director was necessarily obliged to incur the expenses of travelling in the performance of the duties of the employment.

52. The Commissioner notes that the Director made trips to the UK each week for the majority of the year. In fact, the number of trips agreed by the parties for each year was in or around forty trips per year. Nevertheless, the evidence suggests that the average duration of each of the trips taken to the UK, for the period October 2012 to September 2015, were two days per week, with the exception of a number of weeks in October 2012, and mid March to mid July 2013 when the duration of trips were for 3 days per week. Having regard to the duration of the trips for the requisite period, it seems that for the majority of the working week, 3 of 5 days, the Director was working from the Appellant's office in [redacted]

53. In addition, the evidence suggests that there were a tranche of expenses claimed for travel in the UK to various locations while the Director was in the UK and that he did not remain at one client site while there. This is consistent with the Director having access to "hot desks" when required to log into the network. The evidence suggests that the Director travelled to multiple locations in the UK during the requisite period including, Edinburgh,

Birmingham and various locations in London. The Commissioner accepts that this is consistent with the evidence that the Director's normal place of work is not the client site in the UK.

54. The Commissioner found the evidence of the Director credible, that the contract was negotiated on the basis of the Appellant undertaking the delivery of the project from Ireland and that once the programme of works commenced, the Director felt it necessary to travel to the UK to attend various meetings with stakeholders. The evidence of the Director that he was very senior in his role and a specialist in his filed is unchallenged and the Commissioner accepts the Director's evidence that in the performance of his duties at that level, stakeholder engagement, reassurance, reputational management and client engagement were vital and even more so at that particular time, given that the banking sector was in turmoil. The Commissioner accepts that there was some expectation of face to face meetings with stakeholders rather than just remote meetings or phone calls. The Commissioner has had regard to the three "affidavits" submitted by the Appellant in support of his appeal which mention the Director being senior in his role and that he could undertake the core responsibilities of the contract from his office in Ireland.

55. Accordingly, the Commissioner is of the view that the Appellant has shown on balance that the normal place of work of the Director was his the office in [redacted] not the client site in the UK and that the travel expenses were necessarily incurred in the performance of the duties of the employment, as required by the legislative provisions.

Determination

56. As such and for the reasons set out above, the Commissioner determines that the Respondent was incorrect to refuse to apply the provisions of section 114 of the TCA 1997 in relation to the travel expenses incurred by the Director and the assessment should be reduced to nil.

57. 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
21 June 2022