AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

112TACD2022

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This determination concerns the Appellant's appeal of a PAYE/PRSI/USC Notice of Estimation of Amounts Due of the Revenue Commissioners ("the Respondent") that issued on 11 December 2018 for the years 2015, 2016 and 2017 ("the relevant tax years") in the amount of €31,680.00. The estimate arose from tax that the Respondent determined was due to it from the Appellant in respect of its provision to its two Directors of benefits in kind in the form of the use of two Land Rover Discovery 4 vehicles.

2. The appeal proceeded by way of oral hearing held in person in the offices of the Tax Appels Commission ("the Commission") on 9 May 2022. In addition to receiving oral submissions, the Commissioner had the benefit of written argument supplied by both parties.

3. At the hearing the Appellant raised a net point against the Respondent's Estimation. This was that a Land Rover Discovery 4 is a vehicle that does not fall within the statutory definition of a "car" under section 121(a) of the Taxes Consolidation Act 1997 (hereafter "the TCA 1997"), with the effect that there was no unremitted tax due to the Respondent. In written argument the Appellant also argued as a secondary point that in estimating the

amount, the Respondent had erred in overstating the "original market value" of the vehicles. No evidence was called at the hearing however regarding their value and this argument was not pursued.

4. In its Notices of Appeal in respect of appeals with reference numbers [redacted] and [redacted] the Appellant also appealed amended assessments to Corporation Tax for the years 2015, 2016 and 2017. The Appellant indicated at the outset of the hearing that it was withdrawing these appeals.

Background

5. The Appellant is a company involved in the [redacted].

6. It is not in dispute that the Appellant made available to its Directors two Land Rover Discovery 4 vehicles for their personal use within the meaning of section 121 of the TCA 1997. These both were equipped with five doors, side windows and rear seats.

7. The Appellant paid tax to the Respondent for a benefit in kind in respect of the Directors' use of the Land Rover Discovery 4 vehicles for the relevant tax years at the rate of 5% of the original market value of the vehicles applicable to "vans" under section 121A(3) of the TCA 1997.

8. On or about 2018 the Respondent opened an intervention in respect of the Appellant's remittal of tax for the relevant tax years. On 11 December 2018 the Respondent issued its Notice of Estimation of Amounts Due of €31,680.03. This was calculated on the application of the rate of 30% of original market value applicable to "cars" under section 121(3) of the TCA 1997. The Appellant duly appealed this decision.

Relevant Legislation

9. Section 121 of the TCA 1997 is entitled *"Benefit of use of car".* Subsection (2) therein provides:-

> *"In relation to a person chargeable to tax in respect of an employment, this section shall apply for a year of assessment in relation to a car which, by reason of the employment, is made available (without a transfer of the property in it) to the person and is available for his or her private use in that year."*

10. Section 121(1)(a) of the TCA 1997 defines a car in the following manner:-

"'*car' means any mechanically propelled road vehicle designed, constructed or adapted for the carriage of the driver or the driver and one or more other persons other than—*

(a) a motorcycle;

(b) a van (within the meaning of section 121A), or

(c) a vehicle of a type not commonly used as a private vehicle and unsuitable to be so used"

Submissions

Appellant

11. The Appellant submitted that a Land Rover Discovery 4 does not fall within the definition of a "car" pursuant to section 121(a) of the TCA 1997, with the consequence that it does not qualify as a benefit in kind chargeable to tax under that section. The Appellant emphasised that notwithstanding that it previously remitted tax to the Respondent for a benefit in kind of the personal use of two vans, it was not contending in the appeal that the vehicles met the statutory definition for a van under section 121A of the TCA 1997. Its fundamental point was that, being neither a van nor a car, they fell outside the statutory framework relating to the taxation of vehicles provided as a benefit in kind and consequently could not give rise to a charge to tax.

12. The Appellant made several points in support of this argument. Firstly, it contended that a Land Rover Discover 4 could not be considered a "road vehicle". In this regard it submitted that to be capable of being so defined a vehicle must be one that's use is "*restricted to…the road"*. The Appellant adduced a variety of facts, statistics and manufacturer claims relating to the toughness of the vehicle to demonstrate the extent of its usability on off-road terrain. It could, for instance, function in temperatures ranging from -40 degrees to +50 degrees centigrade; it had a wading depth of 900 millimetres, could tilt to 30 degrees and ascend a slope with a gradient greater than the ramp in an Olympic ski-jump competition. All of this, the Appellant submitted, showed that it was not restricted to road use in the way that vehicles such as a Toyota Corolla or a Ford Focus were and thus fell outside the statutory definition of a car.

13. Next, the Appellant argued that a Land Rover Discovery 4 was not "*designed for the carriage of a driver*". The Appellant pointed out that the definition of a van under section 121A of the TCA 1997 was a vehicle designed "…*solely or mainly for the carriage of goods or other burden* [emphasis added]*".* Furthermore, the definition of a car under section 286

of the TCA 1997, which provides for increased wear and tear allowance for taxis and cars on short term hire, is a vehicle "…*primarily* *suited to the carriage of passengers and not the conveyance of goods* [emphasis again added]*."* The Appellant contrasted these provisions with the terms of section 121 of the TCA 1997, which contains no words akin to *"designed solely or mainly"* or *"primarily suited"*. The import of this, according to the Appellant, was that in order to be a car a vehicle must be designed with only one purpose in mind, namely the carriage of a driver.

14. To show that the carriage of passengers was not the exclusive purpose of the designers of the Land Rover Discovery 4, the Appellant adverted to its capacity of 1,137 litres behind the second row of seats and 2,406 litres with this row folded down. The latter figure made it 61% more spacious than a VW Golf van, which itself was not designed for the carriage of passengers. Clearly, said the Appellant, a design purpose was the carriage of goods and other material. Moreover, it possess a gross train weight of 6,630 kg, more than twice that of a Ford Focus. Again, this demonstrated a design purpose other than the carriage of persons.

15. Finally, the Appellant submitted that a Land Rover Discovery 4 was *"a vehicle of a type not commonly used as a private vehicle and unsuitable to be so used*". Consequently it was outside the definition of a car by virtue of section 121(1)(a)(c) of the TCA 1997, which excludes such vehicles.

16. In support of this proposition the Appellant referred to the dictionary definition of the word "*commonly"* (usually; very often; frequently). It then furnished the Commissioner with statistics emanating from the Society of the Irish Motor Industry that indicated that in the relevant tax years the sale of Land Rover passenger cars was less than 1% of the total in Ireland. The figures, the Appellant stressed, included all Land Rover models and the share of Discovery 4 models was lower still. A vehicle of such sparse numbers could not be one taken to be *"commonly used"* as required by section 121(1)(a) of the TCA 1997.

17. The Appellant also submitted in this regard that even if it could be said that a Land Rover Discovery 4 was a vehicle of a type commonly used, the test required it to be one that also was "*suitable to be so used".* The Appellant argued that it could not be taken to be suitable to be used as a private vehicle, being large and comparatively cumbersome with a poor turning circle and therefore difficult to park. The Appellant also pointed to the fact that for the purposes of VRT, VAT and insurance, the two Land Rover Discovery 4's in question were treated as "commercial vehicles".

Respondent

18. The Respondent submitted that a Land Rover Discovery 4 of the kind owned by the Appellant and given to the Directors for the relevant tax years for their personal use constitutes a "car" under section 121 of the TCA 1997.

19. The Respondent pointed, firstly, to the fact that the Appellant had taken the view initially that their use was taxable as a benefit in kind, albeit at the lower 5% rate applicable to vans, as defined. It was only after the compliance check and intervention that resulted in the application of the rate of 30% on the original market value that the Appellant adopted the positon that a Land Rover Discovery 4 fell outside the statutory framework altogether.

20. The Respondent argued that they were road vehicles designed and constructed for the carriage of passengers. It further submitted that it could not credibly be said that they were uncommon on the roads. Indeed, this was how they were being used by the Directors personally.

21. The Respondent submitted that the status of the vehicles as commercial vehicles for the purposes of VRT, VAT and insurance was irrelevant to the question of whether the vehicles were "cars" under section 121 of the TCA 1997 and accordingly taxable as a benefit in kind under that provision.

Material Facts

22. The facts material to this appeal are not in dispute:-

- the Appellant provided two Land Rover Discovery 4 vehicles for the personal use of its Directors;
- both vehicles are equipped with five doors, rear windows and rear passenger seats;
- tax on a benefit in kind at the rate 5% on the original market value applicable to vans, as defined under section 121A of the TCA 1997, was paid by the Appellant to the Respondent in respect of the tax years 2015 – 2017;
- the Appellant opened an intervention on or about 2018 and on 11 December 2018 issued a PAYE/PRSI/USC Notice of Estimation of Amounts Due calculating that the Appellant had underpaid tax to it in the amount of €31,680.00.

Analysis

23. The starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests with 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".*

24. In *Perrigo Pharma International Activity Company v McNamara & Ors* [2020] IEHC 152 McDonald J. reviewed the most up to date jurisprudence regarding principles of statutory interpretation, which he summarised at paragraph 74 therein as follows:-

> "*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"*.

25. The relevant legislation in this appeal is section 121 of the TCA 1997. Provisions concerning the "commercial" classification of the vehicles for the purposes of VRT, VAT and insurance are not relevant. In the Commissioner's view section 121 of the TCA 1997 is clear in its meaning. In order to be a "car", the vehicle must be *"a mechanically propelled road vehicle designed, constructed or adapted for the carriage of the driver or the driver and one or more other persons*". The legislation does not impose a requirement, as the Appellant contends, that to be road car a vehicle must be designed only for use on the roads. Likewise, there is nothing in the wording of the provision to suggest that a car must be designed with just a single purpose in mind, namely the carriage of passengers.

26. The Commissioner finds that the variety of facts and statistics highlighted in written submission and during the hearing do not bring a Land Rover Discovery 4 outside the definition of a car. It is doubtless true that it is more rugged and has a greater range of capabilities than, for instance, an average saloon or a hatchback. It may be powerful and have enough grip to tow a sizeable caravan when, to use the Appellant's comparison, a Ford Focus could not do so, or could do so only with difficulty. It may have the internal volume to transport goods that are bulkier than could be accommodated in, for example, a VW Golf. It may be able to ascend a slope steeper than that of an Olympic ski jump. These factors are, however, not relevant to the question of whether a Land Rover Discovery 4 can operate on the roads and was designed by its manufacturer to carry a driver and a passenger or passengers. The question is whether, by design, construction or adaptation, it can. Any person who travels by road or footpath must be aware that it can and does. It would require an extraordinary leap for the Commissioner to conclude that it was not designed to so do. The Commissioner finds that a Land Rover Discovery 4, which vehicle the Directors of the Appellant had the use of for the relevant tax years, is a road vehicle designed for the carriage of driver and passengers and thus meets the essential definition of a car under section 121(1)(a) of the TCA 1997.

27. Section 121(1)(a)(c) of the TCA 1997 has the effect, however, of excluding from the definition of a car vehicles of a type that are both not commonly used as private vehicles and are unsuitable to be so used. The statistics cited by the Appellant regarding the prevalence of the Land Rover Discovery 4 on Irish roads as a private vehicle are not relevant to the question of whether it is of a type that is commonly used as a private vehicle. Plainly, the Land Rover Discovery 4 is a vehicle of a type, sometimes referred to as an SUV with four wheel drive, which one sees frequently in such use. Relative scarcity of a specific model – if indeed the Land Rover Discovery 4 could be said to be scarce at all – does not mean it is of a type that is not commonly used as a private vehicle. Moreover, the Commissioner cannot accept the contention of the Appellant that a Land Rover Discovery 4 is a vehicle that is "unsuitable" for private use. A Land Rover Discovery 4 of the kind used by the Directors of the Appellant possesses all of the essential characteristics for it to be so used. That it may be less manoeuvrable, compact and economical than some other vehicles constituting cars is, again, not a relevant consideration. The Commissioner finds therefore that the vehicles do not fall within the exclusion prescribed in 121(1)(a)(c) of the TCA 1997 and must be considered a "car" under that provision.

28. In view of this finding, the Appellant's contention that there should be no charge to tax under section 121 of the TCA 1997 on the use as a benefit in kind of the two Land Rover Discovery 4 vehicles must fail.

Determination

29. The Commissioner finds that the two Land Rover Discovery 4 vehicles provided to the Directors of the Appellant for their personal use are cars under section 121 of the TCA 1997. The Commissioner determines that the decision appealed whereby the Appellant was assessed to have an amount due to the Respondent in respect of PAYE/PRSI and USC for the years 2015, 2016 and 2017 in the amount of €31,680.03 must stand.

30. This appeal is determined under section 949AL of the TCA 1997. This determination contains full findings of fact and reasons 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.

Conor O'Higgins
Appeal Commissioner
30 June 2022