AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

137TACD2022

Between

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeals Commission (hereinafter "the Commission") as an appeal against assessments to Income Tax raised by the Revenue Commissioners ("the Respondent") on 5th November 2019 and 6th November 2019.

2. The assessments covers the tax years 2014 and 2015 and the Income Tax due on the assessments amount to €7,453 for 2014 and €45,988 for 2015. The Appellant is appealing those assessments in accordance with section 933 (1) (a) Taxes Consolidation Act 1997 ("TCA 1997").

Preliminary issue

3. The appeal proceeded by way of remote hearing held on 5th July 2022. The Appellant was represented at the hearing by his tax advisors and the Respondent was represented by Counsel. At the commencement of the hearing the Commissioner was informed that the Appellant (not in attendance) was advised by his medical consultant that he was not in a position to attend the appeal hearing but had indicated that he was agreeable for the appeal to proceed. Upon questioning by the Commissioner, the Appellant's agent informed

the Commission that it was unlikely that the Appellant would ever be in a position to give evidence to the Commission or assist the appeal as his medical condition caused severe memory lapses. Having been informed that the Appellant's agent was under instruction from a third party for the appeal to proceed, the Commissioner adjourned the hearing momentarily for the Appellant's advisor to get confirmation from the Appellant's next of kin that it was in order for the appeal to proceed. The Appellant's next of kin confirmed this position.

4. The Commissioner then asked the Respondent if they had any concerns with the appeal proceeding absent the Appellant but with the consent of his next of kin. The Respondent stated that while section 949AA TCA 1997 ordinarily requires the appeal to be struck out owing to non-attendance by the Appellant, in the circumstances they were satisfied that the appeal should proceed and the hearing commenced accordingly.

Background

5. The Appellant incorporated his business in [redacted] and traded as a draper under the name [redacted] ("the company"). Both the Appellant and his wife were the original directors and shareholders in the company. In 2012, the Appellant transferred his shares to his daughter, resigned as a director of the company and appointed his daughter in his place. Although, he had no shareholding or formal office holding within the company post 2012, the Appellant continued to work in the company full-time and retained full and exclusive control of the company from the ordering of stock to recording the company's sales of the business by hand. The Appellant was assisted in the running of the operations by two part-time staff over whom he exercised control. The Appellant's daughter lived overseas and had no active part in the running of the company's business and while his wife retained her small shareholding and directorship with the company, she had no input into the day-to-day running of the company's business.

6. The Appellant previously informed the Commission (see below) that he was required to continue working in the company's business, as this was a condition required for him to receive payments from his pension scheme. He further advised that he was not an employee of the company since 2012 and did not receive any salary or other payments for the provision of his services to the company.

7. The company was subject to an intervention by the Respondent in or around 2017 which resulted in the issuance of notices of assessment for VAT for the tax years 2014 in the sum of €12,062 and 2015 in the sum of €18,138.72. In addition, the Respondent issued notices of assessment to the company for PAYE/PRSI/USC ("PREM") in the sum of €53,453 for the tax years 2014 and 2015.

8. Those assessments to VAT and PREM were appealed by the company to the Commission on the 13th March 2018 and that appeal was heard on 27th November 2019.

9. The Commissioner who heard that appeal issued the appeal determination on 9 January 2020 under TAC reference 62TACD2020, a copy of which is available on the Commission's website – www.taxappeals.ie/en/determinations.

10. In that determination, the Commissioner upheld the VAT assessments with the variation that the mark-up used in computing the additional unrecorded sales which gave rise to the VAT assessments be reduced from that which had been used by the Respondent in calculating the additional sales, 105% to a lower figure of 98%. The effect of this adjustment was that the VAT sought by the Respondent, €30,200 was reduced pro-rata by 7% to reflect a revised lesser VAT liability.

11. However, the Commissioner did not uphold the assessments to PREM in the sum of €53,453 and ordered that those assessments be vacated. While the Commissioner determined that there were additional unrecorded sales during 2014 and 2015 which gave rise to the issuance of the VAT assessments, the Commissioner was not satisfied that these unrecorded sales gave rise to a PREM liability under the PAYE system to the company. In so finding, the Commissioner relied on the distinction as set out in determination 29TACD2019 (also available on the Commission's website) between the broader category of taxable emoluments from an office or employment, which give rise to a liability to income tax and the narrower category of emoluments paid by the employer, which come within the PAYE regime. While the Commissioner was not satisfied that the unrecorded sales came within the latter category, she concluded that the unrecorded payments may have fallen within the former. The issue to be determined by the current Commissioner is therefore whether unrecorded sales arose in the company in 2014 and 2015, and if so whether these unrecorded sales give rise to an income tax liability on the Appellant?

12. In advance of the company's appeal being heard, the Respondent issued protective notices of assessment for 2014 and 2015 to the Appellant on 5th and 6th November 2019 essentially seeking the Income Tax on the unrecorded sales of the company which they deemed had been appropriated to the Appellant.

13. In advance of issuing the 2014 and 2015 assessments to the Appellant, the Respondent wrote to the Appellant on the 4 November 2019 and advised as follows:

"*Dear Mr* [redacted]*,*

I wish to notify you that your 2014 and 2015 Form 11 income tax return has been selected for an audit.

It is Revenue's belief that you have undeclared your income arising from undocumented cash withdrawals from [redacted] *Ltd and following on from the PAYE assessments raised for same we are now raising assessments through your Form 11 to reflect this income for the years 2014 and 2015.*

Revenue recognise that the assessments raised will be vacated should [redacted] *Ltd be successful in their appeal against the PAYE assessment.*

If you wish to appeal against the assessment to which the notice refers, you must do so within 30 days after the notice by completing a Notice of Appeal form to the Tax Appeals Commission (TAC).

Yours etc."

14. The Appellant who was not in agreement with the notices of assessment, exercised his right of appeal to the Commission on 16 December 2019. The appeal was accepted as a late appeal by the Commission on the grounds that the Appellant had awaited receipt of the company's determination since it was material to the within appeal.

Legislation and Guidelines

15. The following legislation is relevant to this appeal.

Section 58 TCA 1997 – Charge to profits or gains from unknown or unlawful source

(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made—

(a) the source from which those profits or gains arose was not known to the inspector,

(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or

(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains.

…

shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as "miscellaneous income", and in respect of such profits and gains so assessed—

…

Section 112 TCA 1997 - Basis of assessment, persons chargeable and extent of charge.

(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) (a) In this section, "emoluments" means anything assessable to income tax under Schedule E.

(b)Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purposes of subsection (1):

(i) if in the year concerned the office or employment has never been held, the emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and

(ii) if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held.

…

Section 811C TCA 1997

(4) (a) Where a person submits any return, declaration, statement or account or makes any claim which purports to obtain the benefit of a tax advantage arising out of or by reason of a tax avoidance transaction, a Revenue officer may at any time deny or withdraw the tax advantage.

(b)Without prejudice to the generality of paragraph (a), it shall be a lawful exercise of the powers conferred by that paragraph to do one or more of the following acts, and accordingly that paragraph shall be read as permitting, for

the purposes of that paragraph, a Revenue officer to do each of the following acts, namely to—

(i) make or amend an assessment,

(ii) allow or disallow in whole or in part any credit, deduction or other amount which is relevant in computing tax payable, or any part of such credit, deduction or other amount,

(iii) allocate or deny any credit, deduction, loss, abatement, relief, allowance, exemption, income or other amount, or any part thereof,

(iv) recharacterise, for tax purposes, the nature of any payment or other amount.

(c) In paragraph (b) a reference to the doing of an act includes a reference to the making of an adjustment.

d) Where any adjustment is made or act is done to deny or withdraw a tax advantage, relief shall be afforded from any double taxation which would, or would but for this paragraph, arise by virtue of any such adjustment made or act done pursuant to this subsection.

(5) *(a) For the purposes of this subsection, 'alternative assessment' means an assessment—*

(i) not being an assessment made pursuant to subsection (4), and

(ii) the effect of which is to withdraw or deny, in whole or in part, any tax advantage.

(b)Where a Revenue officer makes or amends an assessment to withdraw or deny a tax advantage pursuant to this section, it shall be lawful for a Revenue officer to make or have made or to amend or have amended an alternative assessment.

(c) No appeal shall lie against an assessment made pursuant to this section or an alternative assessment on the grounds that a Revenue officer has made or amended an assessment pursuant to this section, or an alternative assessment, as the case may be.

(d)Where an assessment is made pursuant to this section and an alternative assessment is made, then only one such assessment shall, by agreement with the person on whom the assessment and the alternative assessment were

made or by way of determination on appeal, as the case may be, become final and conclusive.

Section 949AN TCA 1997

(1) Subject to subsection (2), in adjudicating on and determining an appeal (in this section referred to as a "new appeal"), the Appeal Commissioners may—

(a) have regard to a previous determination made by them in respect of an appeal that raised common or related issues,

…

(2) Where the Appeal Commissioners wish to act in accordance with subsection (1), they shall—

(a) send a copy of the previous determination referred to in that subsection to the parties in a way that, in so far as it is possible, does not reveal the identity of any person whose affairs were dealt with on a confidential basis during the proceedings concerned (being proceedings that were not held in public),

(b) request that each of the parties submit arguments to them within 21 days after the date of the request in relation to why it would not be appropriate to have regard to the previous determination in determining the new appeal,

…

Section 986 TCA 1997 – Regulations

(1) The Revenue Commissioners shall make regulations with respect to the assessment, charge, collection and recovery of income tax in respect of emoluments to which this Chapter applies or of income tax for any previous year of assessment remaining unpaid, and those regulations may, in particular and without prejudice to the generality of the foregoing, include provision—

(a) for requiring any employer making any payment of emoluments to which this Chapter applies, when that employer makes the payment, to make a deduction or repayment of tax calculated by reference to such rate or rates of tax for the year as may be specified and any reliefs from income tax appropriate in the case of the employee as indicated by the particulars on the revenue payroll notification supplied in respect of the employee by the Revenue Commissioners;

(c) for the production to and inspection by persons authorised by the Revenue Commissioners of wages sheets and other documents and records for the purpose of satisfying themselves that tax in respect of emoluments to which this Chapter applies has been and is being duly deducted, repaid and accounted for;

(d) for the collection and recovery, whether by deduction from emoluments paid in any year or otherwise, of tax in respect of emoluments to which this Chapter applies which has not been deducted or otherwise recovered during the year;

(e) for appeals with respect to matters arising under the regulations which would not otherwise be the subject of an appeal;

(f) for the deduction of tax at the standard rate and at the higher rate in such cases or classes of cases as may be provided for by the regulations;

(g) for requiring any employer making any payment of emoluments to which this Chapter applies, when making a deduction or repayment of tax in accordance with this Chapter and regulations under this Chapter, to make such deduction or repayment as would require to be made if the amount of emoluments were the emoluments reduced by the amount of any contributions payable by the employee and deductible by the employer from the emoluments being paid and which—

> *(i) by virtue of section 471 are allowed as a deduction in ascertaining the amount of income on which the employee is to be charged to income tax, or*
>
> *(ii) by virtue of Chapter 1, Chapter 2 or Chapter 2A of Part 30 are for the purposes of assessment under Schedule E allowed as a deduction from the emoluments;*

(j) for treating persons who are not employers as employers in such cases or classes of cases as may be provided for by the regulations;

(k) for the collection and recovery, to the extent that the Revenue Commissioners deem appropriate and the employee does not object, of tax in respect of income other than emoluments to which this Chapter applies, which has not otherwise been recovered during the year;

(l) for the collection and recovery, from the employee rather than from the employer of any amount of tax that the Revenue Commissioners consider

should have been deducted by the employer from the emoluments of the employee;

(m) for requiring any employer making any payment of emoluments to which this Chapter applies to provide, within a prescribed time, and on such form as the Revenue Commissioners may approve or prescribe, information in relation to payments of emoluments (including emoluments in the form of notional payments) and tax deducted from such emoluments, and such other information or documents as the Revenue Commissioners deem appropriate,

(o) for requiring every employer who makes a payment to which this Chapter applies to an employee to notify the Revenue Commissioners within the period specified in the regulations of the employee particulars specified in the regulations.

(1A) Regulations under this section may also contain such incidental, supplemental or consequential provisions as appear to the Revenue Commissioners to be necessary or expedient—

(a) to enable persons to fulfil their obligations under this Chapter or under regulations made under this section, or

(b) to give effect to the proper implementation and efficient operation of the provisions of this Chapter or regulations made under this section.

(2) Regulations under this section shall apply notwithstanding anything in the Income Tax Acts, but shall not affect any right of appeal which a person would have apart from the regulations.

(3) (a) Revenue payroll notifications shall be prepared by the Revenue Commissioners with a view to securing that in so far as may be practicable the total tax payable for the year of assessment in respect of any emoluments is deducted from the emoluments paid during that year.

(b)In paragraph (a), any reference to the total tax payable for a year shall be construed as a reference to the total tax estimated to be payable for the year in respect of the emoluments, subject to a provisional reliefs from income tax and subject also, if necessary, to making an addition to that estimated amount (including a nil amount) for amounts remaining unpaid on account of income tax for any previous year of assessment and to making a deduction from that estimated amount for amounts overpaid on account of any such income tax.

(4) Notwithstanding any other provision of this section, when stating on a revenue payroll notification an amount in respect of reliefs from income tax the amount may be rounded up to a convenient greater amount and stated accordingly, and, as respects the amount of tax which is not deducted in the year of assessment as a result of such statement, the adjustment appropriate for its recovery shall be made in a subsequent year of assessment.

…

(6A) Notwithstanding any other provision of this section, where the Revenue Commissioners are satisfied that it is unnecessary or is not appropriate for an employer to comply with any of the regulations made under subsection (1) they may notify the employer accordingly.

(7) Every regulation made under this section shall be laid before Dáil Éireann as soon as may be after it is made and, if a resolution annulling the regulation is passed by Dáil Éireann within the next 21 days on which Dáil Éireann has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Submissions

Appellant

16. The Appellant's agent opened the Respondent's letter of 4th November 2019 which stated that they, the Respondent, would vacate the income tax assessments raised on the Appellant in the event that the company was successful in its appeal against the PREM assessment. The Appellant's Agent stated that as there was nothing unambiguous in that statement and as they were of the view that the Respondent was not successful in the company's appeal, then the Respondent was bound by this correspondence and as such required to vacate the assessments raised on the Appellant.

17. The Appellant's agent stated that the Appellant made significant withdrawals from his pension scheme in 2014 and 2015 and lodged these into the company by means of a loan. They stated that the fact the Appellant was required to lodge funds into the company, and additional factors such as the fact that the company's debt increased by some [redacted] throughout 2014 and 2015 and the two pat-time staff had their working hours reduced was indicative that the company was not performing financially. The Appellant's agent alleged that as the company was financially struggling, then it was unrealistic that the company had any unrecorded sales, particularly the sum of *circa* €135,000 which the Respondent alleged it had received.

18. While the Appellant's agent denied that any unrecorded sales existed, they submitted that as it was the Respondent's case that the unrecorded sales existed, it was for the Respondent to establish that unrecorded sales had in fact occurred. Furthermore, they submitted that if unrecorded sales were so proven the burden of proof was on the Respondent to establish that the Appellant had received or benefitted from those unrecorded sales.

19. Further, or in the alternative, the Appellant's agent submitted that section 986 (1) (l) TCA 1997 only permits unpaid tax to be collected from an employee in circumstances where the employer failed to pay the necessary tax. They submitted that as the Appellant was not an employee and his former company was not his employer, and that this had been confirmed by the Commissioner who heard the Appellant's former company's case, then the Respondent could not collect any tax due from the Respondent as the liability rested with the company.

20. The Appellant's agent concluded their submissions by stating that it had not been established that the Appellant had control of the company or that he had received any emoluments from the company. They submitted that it was not possible for the Appellant to have control of the company as he was neither a shareholder, director nor employee of the company for the periods under appeal. The Appellant's agents stated that the Appellant's sole source of income for the periods under review was various withdrawals from his pension scheme which had been taxed at source and they denied that any unrecorded sales were in existence, or if so proven that that Appellant had received these funds. In those circumstances, they requested that the Commissioner vacate the assessments.

Respondent

21. The Respondent stated despite the Appellant holding no employment with the company and not being an office holder or shareholder they were of the view that the Appellant was in control of the company for the periods under appeal. Furthermore, they were of the view that as the Appellant was in control of the company, it was him, and him alone who had benefited from the gross proceeds of the unrecorded sales and as such the assessments should be upheld by the Commission.

22. To demonstrate that the Appellant was in control of the company and received the proceeds of the unrecorded sales, the Respondent called the then Respondent's official who conducted the intervention as a witness. Under examination-in-chief, the witness stated:

- The company recorded its sales in a cash drawer which was not a functioning till. By this the witness stated that the till did not produce any receipts or reads such as z reads (z reads are an end of period report that show the amount of sales recorded for a given period of time split, if applicable, between the various classifications of goods sold or applicable VAT rates).

- The sales of the company were computed by adding together the amount of the credit card receipts and the cash taken on any particular day. The witness stated that the cash was recorded in a handwritten "black book" and rather than an itemised list of sales being recorded, it just listed a single item described as "sales" with a total figure for the day.

- As there was no practicable way of verifying the company's sales, the witness advised that he wished to establish who was in control of the business as he noted that the Appellant was neither an employee nor shareholder of the company. The witness stated that he was satisfied following questioning to the Appellant that the Appellant was the only person in control of the company as he undertook all aspects of the business and was responsible for recording the cash receipts, lodgements and payments to staff and suppliers.

- In response to the question, "*so are you satisfied that the Appellant had full and exclusive control of the cash in the shop?*" the witness replied "*a hundred percent*".

- As he (the witness) was not satisfied that the sales were properly recorded he proceeded to examine the purchases of the company and spoke to the Appellant regarding the mark-up applied to such purchases. The witness advised following detailed calculations and discussions with the Appellant that he formed the view that the correct mark-up to be applied to the purchases in the years 2014 and 2015 was 105%.

- That he applied this mark-up to the company's purchases for 2014 and 2015, allowed for stock adjustments and that this gave him a figure for expected sales. The witness advised that when he compared the expected sales calculated from his workings to those returned by the company that this resulted in discrepancies. The monetary implications of the discrepancies was that sales for the years 2014 and 2015 had been understated in the sum of €137,611 to those returned by the company in its financial statements.

- That he requested the Appellant to provide an explanation for the discrepancies in the figures and he was unable to do so. The witness further advised that he asked the Appellant to provide details of where the unrecorded sales went to and he was unable to provide any answer.

- As he was of the view there were unrecorded sales for the years 2014 and 2015, he proceeded to calculate the additional tax liabilities due on these sums. He advised that he calculated the additional VAT and PREM due by the company on the additional unrecorded sales. In calculating the PREM liability, the witness stated that he discounted down the amount of unrecorded sales by the amount of the credit owed to the Appellant as a result of the loans he had advanced to the company and calculated the liability on the net figure.

- That he had issued an alternative assessment to the Appellant in his personal capacity to supplement the PREM assessment which had issued to the company. In calculating the Income Tax liability on the Appellant, the witness stated that he gave a similar credit in respect of the loan amounts due to him from the company and similarly taxed him on the net amount of the deemed unrecorded sales.

23. The Respondent's counsel stated that his client was agreeable that the lower mark up on the company's sales, 98% as determined in the company's determination was acceptable to them in computing the additional unrecorded sales. They stated that while neither they nor the Commission were bound by the findings of the company that they agreed as a concession in the instant appeal that they would accept that lower mark-up of 98% than that which they had originally applied in their calculations, 105%. In addition, the Respondent stated that they were agreeable to reduce down the company's unrecorded sales by the amount of the loans owed to the Appellant from the company.

24. The Respondent advised the monetary effect of reducing the mark-up and allowing for the loan credits was that the income tax on the 2014 assessment was reduced from €7,463 to €1,447 and for 2015 from €45,988 to €39,578.

25. The Respondent submitted that the burden of proof lay with the Appellant in establishing that he had not received the amount of the unrecorded sales and as he had not done so, the assessments should be upheld by the Commission with the qualification that the quantum of those assessments should be reduced to €1,447 for 2014 and €39,578 for 2015.

26. **Letter Dated 4 November 2019**

The Commissioner was requested during the course of the appeal by the Respondent's Counsel to make a preliminary ruling in relation to the admissibility and weight to be attached to the Respondent's letter of 4 November 2019. In support of the contention that the Commissioner should determine that the Respondent is not bound by the terms of that letter and what, if any weight should be attached to that letter, the Respondent's Counsel referred to the case of *Kenny Lee v The Revenue Commissioners* [2021] IECA 18 ("*Lee*") which considered the jurisdictional scope of the Commission. In *Lee*, Mr. Justice Murray held that:

> *"From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focused on the assessment and the charge. The 'incidental questions' which the case law acknowledges as falling within the Commissioners' jurisdiction are questions that are 'incidental' to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment."*

27. In addition, *Lee* made the following findings:

- The Commission does not have jurisdiction to grant any form of declaratory relief.
- The Commission has jurisdiction to determine that no tax is due in a particular tax dispute. Although the reduction of an assessment to nil could be portrayed as being similar to declaratory relief, *Lee* confirmed that the Commission's ability to determine quantum must include nil quantum and the ability to determine that no tax was properly due in accordance with the relevant charging provisions.
- Irish law does not support the UK position, which entitles tribunals to determine certain public law questions (including settlements between the revenue authority and the taxpayer) without such jurisdiction being expressly conferred on the tribunal by statute.

28. Having considered the Respondent's submissions, noting that the Appellant's agent made no further submissions in relation to the admissibility of the letter's contents and having regard to the principles enunciated in *Lee,* the Commissioner determined that to admit the contents of the letter as evidence or to abide by the terms set out in that letter would equate

to the granting of equitable relief or estoppel. As these reliefs are not conferred within the jurisdiction of the Commission and as the consideration of admissibility of the contents of the letter is not “incidental” to the statutory charge to tax, the Commissioner determined that that no weight is to be attached to the contents of that letter in the instant appeal. This decision relates to this appeal.

Material Facts

29. The Commissioner finds the following material facts:-

29.1. Since 2012, the Appellant was not an office holder, shareholder or employee of the company.

29.2. Despite not holding any formal position within the company, the Appellant continued to work on a full time basis within the company.

29.3. The Appellant did not receive any official remuneration from the company.

29.4. Neither the Appellant’s wife nor the other shareholder in the company, who happens to be the Appellant’s daughter, had any active part in the operation of the company’s business.

29.5. The Appellant was assisted in his duties by two part-time workers whom he exercised control over.

29.6. The Appellant was responsible for all aspects of the company’s operations which included the recording and accounting for the cash of the company.

29.7. By virtue of the Appellant being responsible for all aspects of the company’s operations, he was in control of the company.

29.8. The methodology used for recording the company’s sales was inadequate, incapable of independent verification and as such open to manipulation.

29.9. The computations and rationale used by the Respondent in calculating additional unrecorded sales was practicable and sensible.

29.10. The Appellant was unable to assist the Respondent or the Commission by providing any explanation of where the unrecorded sales went.

29.11. The PREM assessment against the company was vacated as a result of the company’s appeal hearing.

29.12. The Respondent indicated that it was agreeable for the mark-up of the company to be reduced from the figure they calculated, 105% to a lesser figure of 98% and

that credit should be available to the Appellant in respect of loans owed to him from the company in establishing his charge to tax.

Analysis

30. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49 ("*Menolly*"), at paragraph 22 Charleton J. stated:

> '*The burden of proof in this appeals 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*'

31. The central issues to be determined by the Commissioner are whether the company had unrecorded sales, whether these unrecorded sales were appropriated to the Appellant and whether the Appellant is liable to Income Tax on such receipts.

32. Section 949AN (1) permits the Commissioner to have regard to the "similar" determination issued under reference 62TACD2020 on the 9th January 2020. In that appeal, the Commissioner determined that the company had unrecorded sales in the sum of €137,611 and having considered that determination and the evidence of the Respondent's witness, the current Commissioner is in agreement with those findings and determines that the company under-returned its sales in 2014 and 2015 in the sum of €137,611.

33. The Commissioner dismisses the Appellant's submission that the onus of proof is on the Respondent as the asserting party to determine on a balance of probability basis that the Appellant received the proceeds of the unrecorded sales. It is evident from *Menolly* that the burden rests with the Appellant. In considering the Respondent's witness further evidence, it is clear that the Appellant was at all material times in control of the business which included the receipt and accountability of cash takings. As the Respondent's witness stated in evidence that the Appellant was unable to provide any explanation as to where the unrecorded sales were placed and no satisfactory evidence was presented to the Commission in this regard by the Appellant's agent, logic dictates that the Appellant as the person in control of the business was the only person who could have received this cash and the Commissioner finds accordingly.

34. In considering the charge to tax, the Commissioner is not satisfied that the receipt of unrecorded cash by the Appellant is properly considered within the charge to Schedule E under section 112 TCA 1997 as a "salary, wage, perquisites or profit" arising from "the

exercise of an office or employment". In forming this view, the Commissioner had regard to the fact that the Appellant was not an employee or officer of the company at all times relevant and the receipt of unrecorded sales by the Appellant is unlikely to be classified as a "salary, wage, perquisites or profit".

35. Having considered the nature of the payments received by the Appellant, the Commissioner determines that the receipt of unrecorded sales is more properly charged to tax in accordance with the provisions of section 58 TCA 1997 - "*Charge to profits or gains from unknown or unlawful source".* The Commissioner therefore determines that the Appellant be taxed in accordance with that section under Schedule D, Case IV and that the assessment reflect the income as "miscellaneous income".

36. As the Respondent agreed that those assessments be calculated in accordance with the lower mark-up applicable for the company, 98% and that allowance be granted to the Appellant for sums owed to him by the company, the Commissioner further determines that the quantum of miscellaneous income be amended to reflect tax payable by the Appellant in the sum of €1,447 for 2014 and €39,578 for 2015.

37. In considering the foregoing, the Commissioner examined the alternate assessments which issued to the Appellant on 5th and 6th November 2019 and confirmed that these were issued in in accordance with the provisions of section 811C (5) TCA 1997 and as such are valid assessments.

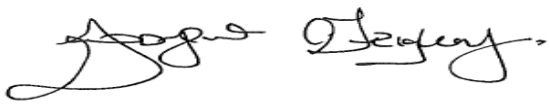
38. The Commissioner determines that the Appellant has not discharged the necessary burden of proof to satisfy the Commission that the assessments should be vacated. However, the Commissioner determines that the assessments for the year 2014 and 2015 be reduced to reflect a liability of €1,447 and €39,578 respectively.

Determination

39. The Commissioner determines that the assessments to Income Tax under Schedule E in the sums of €7,463 and €45,988 for the tax years 2014 and 2015 be amended to classify the income as "miscellaneous income" taxable under Schedule D, Case IV and that the income shown on those assessments be reduced to reflect tax payable by the Appellant in the amount of €1,447 for 2014 and €39,578 for 2015.

40. The Commissioner appreciates this decision will be disappointing for the Appellant but the Commissioner has no discretion and must, as stated above apply the provisions of the TCA, 1997. The Appellant was correct to check to see whether his legal rights were correctly applied.

41. The appeal is determined in accordance with section 949AK Taxes Consolidation Act 1997 ("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.



Andrew Feighery
Appeal Commissioner
3 August 2022