



163TACD2022

Between

██

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeal Commission (“the Commission”) pursuant to section 933 of the Taxes Consolidation Act 1997, as amended (“TCA 1997”) by ██████████ (“the Appellant”) against an assessment made by the Revenue Commissioners (“the Respondent”) to income tax (PAYE), social insurance contributions (PRSI) and universal social charge (USC) in the total amount of €5199.59 for the tax year 2015.
2. The appeal proceeded by way of a hearing on 30 September 2022.

Background

3. On 22 December 2020, the Respondent issued a Notice of Assessment against the Appellant. On 4 March 2021, the Appellant’s agent appealed against the assessment to the Commission.
4. The Respondent objected to the Commission accepting the appeal on the basis that it was made late (i.e. more than 30 days after the assessment) and that the Appellant had not paid the tax charged by the assessment. The Appellant claimed that a case worker for the Respondent had supported the Appellant in bringing a late appeal.

5. The Respondent reiterated its objection to the acceptance of the appeal at the start of the hearing herein. The Commissioner notes that the Commission, having satisfied itself that the appeal should be admitted pursuant to section 949O of the TCA 1997, notified the Respondent of the appeal on 18 August 2021, and that the Respondent did not object to the acceptance of the appeal until 11 October 2021. Section 949L(2) of the TCA 1997 provides that:

“Where the Revenue Commissioners do not send the notice referred to in subsection (1) [i.e. the objection to acceptance of the late appeal] to the Appeal Commissioners within 30 days after the date on which the Appeal Commissioners send the notice of appeal to them, the Appeal Commissioners shall not be required to have regard to the objection in deciding whether to accept an appeal.”

6. In the circumstances, given that the objection was raised by the Respondent nearly three months after it was notified of the appeal by the Commission, and also that the parties had attended the hearing of the appeal, the Commissioner has decided, pursuant to section 949L(2) of the TCA 1997, to not have regard to the Respondent’s objection and to proceed to consider the substantive appeal.

Legislation

7. Section 884 of the TCA 1997 states *inter alia* that

“In this section-

“linking documents” means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;

“records” includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to-

(a) all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,

(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,

(c) the assets and liabilities of the trade, profession or other activity referred to in paragraph (a) or (b), and

(d)all transactions which constitute an acquisition or disposal of an asset for capital gains tax purposes.

(2)(a)Every person who-

(i)on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,

(ii)is chargeable to tax under Schedule D or F in respect of any other source of income, or

(iii)is chargeable to capital gains tax in respect of chargeable gains,

shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.

[...]

(4) (a)Notwithstanding any other law, linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records-

(i)for a period of 6 years after the completion of the transactions, acts or operations to which they relate..."

8. Section 985 of the TCA 1997 states that

"On the making of any payment of any emoluments to which this Chapter applies, income tax shall, subject to this Chapter and in accordance with regulations under this Chapter, be deducted or repaid by the person making the payment notwithstanding that –

(a)when the payment is made no assessment has been made in respect of the emoluments, or

(b)the emoluments are in whole or in part emoluments for some year of assessment other than that during which the payment is made."

9. Regulation 4 of the Income Tax (Employments) (Consolidated) Regulations 2001 (SI 559/2001) states that

"Persons who are required to make any deduction or repayment referred to in these Regulations shall, in the case of a deduction (whether or not made), be accountable

for the amount of the tax, and liable to pay that amount, to the Revenue Commissioners and shall, in the case of a repayment, be entitled, if it has been made, to be paid it, or given credit for it, by the Revenue Commissioners.”

Evidence and Submissions

Appellant's Evidence ([REDACTED])

10. [REDACTED] is a director of the Appellant company. He stated that the appeal concerned a payment of €10,000 to [REDACTED] [REDACTED] who was also a director of the Appellant. This payment constituted a capital repayment of a director's loan to the Appellant and therefore should not attract tax.
11. [REDACTED] stated that the funds for the director's loan came from him, and arose from loans he had been provided by [REDACTED] in or around 2006/2007. He referred to the judgment of the High Court (Barr J) in [REDACTED] [REDACTED].
12. He stated that, due to the passage of time, he did not have documentation showing the provision of a loan by him to the Appellant. Furthermore, a receiver had been appointed over the Appellant's former premises, [REDACTED], in or around 2017/2018, and the bailiff had prevented [REDACTED] and the Appellant from accessing documents retained therein. He believed that the relevant loan documents were retained in [REDACTED].
13. On cross examination, [REDACTED] denied the Respondent's suggestion that the Appellant had repeatedly promised to provide documentation showing the source of funds for the director's loan, but had failed to do so. He stated that the director's loan was repaid fully in 2018.

Appellant's submissions

14. The Appellant's agent stated that the documentation relating to the loans to [REDACTED] from [REDACTED] were currently held by [REDACTED]. He stated that he had requested the documentation on two occasions but had received no response, and that he would request it again. It was submitted that the Respondent's contention that documentation relating to the director's loan should be retained for six years after the loan account was closed was draconian and would set a significant precedent, given that the loan was opened in 2006/2007.

Respondent's Evidence ██████████)

15. ██████████ stated that the Respondent accepted that a repayment of a director's loan would not attract tax. However, its difficulty with the payment by the Appellant was that there was no evidence regarding the source of the funds to the Appellant, and as a result the Respondent treated the payment of €10,000 to ██████████ as emoluments that were subject to tax.
16. ██████████ stated that the Respondent had requested documentation showing the source of the funds on numerous occasions (seven meetings, six letters) and had been repeatedly assured that the evidence would be provided, but that this had not occurred. He stated that the Appellant's financial statements were not reliable and there was no evidence for the Respondent to conclude that ██████████ had provided the funds for the director's loan as contended by him.
17. He stated that it was in the interests of a director to retain records showing that he had made a loan to a company, and that it was also a requirement under section 886(4)(a)(i) of the TCA 1997 to retain records for six years after the transaction had been completed. He argued that, in respect of a loan, the transaction was completed when the loan was repaid.

Material Facts

18. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:
 - 18.1 The Appellant made a payment of €10,000 to ██████████ in the tax year 2015.
 - 18.2 There was no documentary evidence to show the source of the funds of the director's loan to the Appellant.

Analysis

19. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners* [2010] IEHC 49, Charleton J. stated at paragraph 22: "*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.*"

20. The Commissioner has noted the oral evidence of ██████████, on behalf of the Appellant, that he provided the loan to the Appellant, and that the subsequent payment of €10,000 to ██████████ constituted a partial repayment of this loan. He has also noted ██████████ evidence that the relevant documentation demonstrating his provision of the loan to the Appellant was held in the Appellant's former premises to which it no longer had access after a receiver was appointed and it was repossessed.
21. However, the Commissioner is satisfied that, as held by the High Court in *Mennolly Homes*, the onus rests on an appellant to demonstrate that an assessment to tax is incorrect. In this regard, the Commissioner considers that there was no documentary or objective evidence before him to show the source of the funds in the director's account. The Commissioner has considered the High Court judgment in ██████████. However, he notes that the Appellant did not point him to any portion of that judgment stating that some of the monies received by ██████████ from ██████████ were provided as a loan to the Appellant, and he himself has been unable to identify any reference in the judgment to any such loan to the Appellant. Therefore, the Commissioner does not consider that the judgment is of assistance in ascertaining the source of the director's loan.
22. Furthermore, the Commissioner notes that section 886(4)(a)(i) of the TCA 1997 requires a taxpayer such as the Appellant to retain documents and records for six years "*after the completion of the transactions, acts or operations to which they relate*", and he accepts the submission of the Respondent that, in respect of the director's loan to the Appellant, this means six years from when the loan is fully repaid. According to ██████████, the loan was fully repaid in 2018.
23. The Commissioner has also considered the Appellant's evidence that the relevant loan documentation was held in the Appellant's former premises to which the Appellant no longer has access, and is also likely to be held by ██████████, whom the Commissioner understands to be the current successor in title to ██████████ in respect of the loans to ██████████. However, the Commissioner can only have regard to the evidence actually before him, and as there is no documentary or other objective evidence to demonstrate the source of the funds in the Appellant's director's loan account, he is satisfied that the Appellant has failed to meet the burden of proof to demonstrate that the assessment to tax was incorrect and should be abated. Consequently, the Commissioner is satisfied that the Respondent was entitled to conclude that the payment to ██████████ constituted emoluments rather than partial repayment of a director's loan, and therefore was liable to tax.

Determination

24. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising an assessment to tax against the Appellant in the amount of €5199.59 for the tax year 2015. Therefore, this assessment stands.
25. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. 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.



Simon Noone
Appeal Commissioner
4th October 2022