28TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

-and-

Ref: [redacted]

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION OF PRELIMINARY ISSUES

1. *Factual background & Outline of the issues*

1.1. This Determination relates to certain preliminary issues advanced for the first time at the hearing of the above two appeals. The Appellants in both appeals

are connected and because the issues of fact and law are inseparably linked it was agreed that both appeals would be heard together.

1.2. Having heard oral submissions from Counsel for the parties at the commencement of the appeal hearing, I directed that further written submissions be furnished by the parties and indicated that, having regard to the potential significance of my decision for other appeals, I would give a written Determination on the points raised as preliminary issues.

1.3. [redacted] (hereinafter "**the First Appellant**") is the owner of certain lands situate at [redacted], County [redacted]. [redacted] Limited (hereinafter "**the Second Appellant**") operates a camping site and caravan park on the lands owned by the First Appellant. The First Appellant and his wife are the owners of the Second Appellant and the First Appellant is a director and secretary of the Second Appellant.

1.4. In or about 20[redacted] and 20[redacted], the Second Appellant carried out substantial works and capital improvements to the camping and caravan site and claimed a substantial VAT input credit in respect of the cost of those works. Following an audit of the First and Second Appellants in June 2013, the Respondent came to the view that the Second Appellant had transferred value to the First Appellant by way of the improvement expenditure incurred on the lands owned by the First Appellant in his personal capacity. It is the Respondent's contention that, because there was no consideration given by the First Appellant for this benefit, the expenditure giving rise to the benefit should be treated as a distribution pursuant to section 130(3) of the Taxes Consolidation Act 1997 as amended (hereinafter "**TCA 1997**") or, alternatively, as a benefit in kind pursuant to section 118 of TCA 1997.

1.5. On 24 June 2015, the Respondent issued a Notice of Amended Assessment for 2009. The Amended Assessment recorded at Panel 1 that the First Appellant had received Benefits in Kind of €820,526 taxable under Schedule E and, furthermore, that the First Appellant had received Distributions taxable under Schedule F also in the amount of €820,526. The Respondent also raised an Estimate for PAYE/PRSI in respect of 2009 on the Second Appellant in respect of the same transactions. The Amended Assessments and the Estimate were duly appealed by the Appellants and give rise to the instant appeals.

1.6. The Appellants submit that the Amended Assessment raised on the First Appellant therefore includes an assessment in respect of the same figure in respect of the same matter twice, and that the First Appellant has accordingly been double assessed in respect of the same figure of €820,526. The Appellants further point out that the Respondent has raised an estimate on the Second Appellant on the basis that it has a liability to PAYE/PRSI under Schedule E in respect of the same sum.

1.7. The Respondent contends that the Appellants were at all times aware that the above-mentioned assessments were alternative and that the Appellants had been expressly notified that alternative assessments might be raised in correspondence dated 30 October 2014 and again when the assessments were raised. The Respondent further highlights that the Form AH1 makes clear that the First Appellant is liable to tax pursuant to Schedule E or Schedule F, but not both.

2. ***Relevant Legislation***

2.1 At the time of the commencement of the hearing of this appeal, section 949AG of the Taxes Consolidation Act 1997 as amended (hereinafter "**TCA 1997**") provided as follows:-

> *"Unless the Acts provide otherwise, in adjudicating on and determining an appeal, the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners may or were required by the Acts to have regard-*
> *(a) in making their decision or determination,*
> *(b) in making or amending an assessment,*
> *(c) in forming an opinion, or*
> *(d) in taking any other action,*
> *in relation to the matter under appeal."*

2.2 Section 959A of TCA 1997 provides that "*Revenue assessment*" shall be construed in accordance with section 959C, which in turn provides in subsection (1) that:-

> *"Any assessment made under the Acts, other than a self assessment, shall be made by or on behalf of the Revenue Commissioners and shall be known as a "Revenue assessment"."*

2.3 Section 959F(1) of TCA 1997 provides as follows:-

> *"Where it appears to the satisfaction of the Revenue Commissioners that a person, either on the person's own account or on behalf of another person, has been assessed to tax more than once for the same chargeable period for the same cause and on the same account, they shall vacate the whole, or the part, of any assessment as appears to them to constitute a double assessment."*

2.4 Section 959Y(1) of TCA 1997 provides as follows:-

"Subject to the provisions of this Chapter, a Revenue officer may at any time-

(a) make a Revenue assessment on a person for a chargeable period in such amount as, according to the officer's best judgment, ought to be charged on the person,

(b) amend a Revenue assessment on, or a self assessment in relation to, a person for a chargeable period in such manner as he or she considers necessary, notwithstanding that-

(i) tax may have been paid or repaid in respect of the assessment, or

(ii) the assessment may have been amended on a previous occasion or on previous occasions."

2.5 Section 990(1) of TCA 1997 provides as follows:-

"Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as "other officer") has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respect of income tax months comprised in any year of assessment was greater than the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer-

(a) may make an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and

(b) may serve notice on the employer specifying-

(i) the total amount of tax or estimated,

(ii) the total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and

(iii) the balance of tax remaining unpaid."

3. Submissions of the Appellants

3.1 At the hearing before me and in the written submissions furnished thereafter, Counsel on behalf of the Appellants raised a number of preliminary issues and arguments which the Appellants say can be summarised as follows:-

(a) Whether the Respondent is prohibited under the provisions of section 959F from raising a double assessment on a taxpayer for the same chargeable period for the same cause and therefore prevented from raising assessments on the First Appellant in this appeal for both Schedule E and Schedule F on the same assessments for the same year in respect of the same matter;

(b) Whether the requirements of section 959 with respect to the exercise of the Revenue officer's "*best judgment*" can be said to have been met in circumstances where the Respondent has assessed the First Appellant in respect of the same matter twice on the same assessment, once under Schedule E and once under Schedule F;

(c) Whether the Respondent can be said to have exercised "*best judgment*" in circumstances where they have, in addition to the foregoing, raised an estimate on the Second Appellant in respect of the same matter as a Schedule E matter while at the same time raising assessments on the First Appellant in respect of both Schedule E and Schedule F;

(d) Whether the Respondent can be said to have "*reason to believe*" that the liability arises on the Second Appellant as a Schedule E matter in circumstances where the Respondent also contemporaneously raised Schedule F assessments on the First Appellant in respect of the same matter;

(e) Where the Respondent has raised an assessment on the First Appellant in circumstances where it says it is its "*best judgment*" that the assessment under Schedule F is correct, whether the Respondent can also contemporaneously maintain

that it has "*reason to believe*" that the Second Appellant has a Schedule E exposure on the same matter;

(f) Whether the Respondent can have a number of best judgments in respect of the same matter on the same assessment allowing them to raise an assessment in respect of the same matters on the same assessment under different tax headings;

(g) Whether it is possible to have a number of best judgments in respect of the exact same thing;

(h) Where the Respondent has raised an assessment according to a Revenue officer's best judgment, whether the Respondent must, in accordance with section 949AG, make known to the Appeal Commissioner and to the Appellants "*all matters to which the Revenue Commissioners may or were required by the Tax Acts to have regard… in making or amending an assessment…*";

(i) If the Appeal Commissioner has regard to such matters pursuant to section 949AG, whether the Appellants should as a matter of natural justice be equally entitled to have regard to such matters and/or to conduct a cross examination in respect of same; and,

(j) Whether the Respondent is obliged as a result of section 949AG to go into evidence in relation to the Revenue officer's "*best judgment*" before any assessment can be considered in an appeal hearing.

Prohibition on Double Assessment

3.2 The Appellants submit that section 959F(1) of TCA 1997 constitutes a specific prohibition on the assessment of the taxpayer more than once for the same chargeable period for the same cause and on the same account, and further submit that the Respondent is obliged to vacate the whole or any part of an assessment which amounts to double assessment.

3.3 The Appellants submit that the Respondent in these appeals has in fact assessed the First Appellant twice within the same assessment in respect of "*the same chargeable period for the same cause and on the same account*", and that accordingly the double assessment of the First Appellant on the sum of €820,526 by the Notice of Amended Assessment dated 24 June 2015 must be vacated. The Appellants submit that section 959F operates on a mandatory or peremptory basis once it is established "*to the satisfaction of the Revenue Commissioners*" that a double assessment has occurred, and that the only basis on which such an assessment can be maintained is if it is demonstrated that there is in fact no double assessment.

3.4 The Appellants further submit that there is no basis in the tax legislation under which the Respondent is permitted to doubly assess a taxpayer for the same amount in the same year, and that accordingly the Respondent is compelled to vacate either the entirety of the Amended Assessment or that part of the Amended Assessment which constitutes a double assessment. They submit that this means in the circumstances of the instant appeals that either the Amended Assessment raised on the First Appellant must be vacated in its entirety or, in the alternative, that the Respondent must choose between the assessment under Schedule E and the assessment under Schedule F, and vacate the part of the Amended Assessment relating to the other of those charges.

3.5 The Appellants further submit that if the Respondent elects to vacate the Schedule E assessment, leaving the Schedule F assessment only, then it would be entirely inconsistent for the Respondent to also maintain that it has "*reason to believe*" that the Second Appellant has a liability in respect of Schedule E. They submit that the Respondent cannot have both a "*best judgment*" that it is a Schedule F assessment and also have "*reason to believe*" that it is a Schedule E matter. They submit that the holding of two incompatible and mutually exclusive positions contemporaneously undermines any attempt to say that the Respondent had "*reason to believe"* that a Schedule E liability

arose in the Second Appellant. Put another way, they submit that the Respondent cannot have a "*best judgment*" that the First Appellant has a Schedule F exposure while at the same time having "*reason to believe*" that the Second Appellant has a Schedule E liability in respect of the same matter.

Power to raise Amended Assessments

3.6 The Appellants submit that the power of the Respondent to make a Revenue assessment is contained in section 959Y(1) of TCA 1997. They further submit that the definition of "*Revenue assessment*" in section 959C makes it clear that the expression "*Revenue assessment*" used in section 959Y does not include the original self assessment that would have been carried out by the taxpayer. Accordingly, the making of any assessment other than a self assessment is a Revenue assessment and therefore subject to the requirement for the exercise of "*best judgment*". Equally, they submit that the amendment of a self assessment results in it becoming a Revenue assessment, and accordingly there is the same requirement for the exercise of "*best judgment*". They submit that the same requirement applies to any subsequent amendment of a Revenue assessment.

3.7 The Appellants further submit that there is no provision in the legislation which would allow the Respondent to include a liability under Schedule E and a liability under Schedule F within the same Amended Assessment on the basis of alternative assessments, and argue that charging provisions in the tax legislation must be interpreted in favour of the taxpayer in case of ambiguity.

3.8 The Appellants further submit that the meaning of the expression "*best judgment*" must be given its ordinary meaning, which must mean that it is a singular "*best judgment*" rather than one of a number of judgments, and that a best judgment can only include one position as opposed to alternative positions or multiple positions in the same

assessment. They submit that the ordinary meaning of the expression requires that the judgment be singular or unique rather than simply one of multiple positions taken by the Respondent, and further submit that the taking of multiple positions by the Respondent indicates that there is in fact no "*best judgment*". They submit that the Respondent cannot have two or more best judgments included on the same assessment in respect of the same matter, and seeking to do so demonstrates that best judgment has not in fact been exercised.

3.9 The Appellants further submit that in the absence of the Respondent exercising "*best judgment*", there is no basis for the Respondent to make a Revenue assessment. Any Revenue assessment made otherwise than in accordance with section 959Y is not authorised by the legislation, is therefore not a valid assessment and is not capable of resulting in a charge to tax on a taxpayer. They submit that this argument is supported by the prohibition on double assessments found in section 959F.

3.10 The Appellants submit that, by reason of the foregoing, the Respondent must either withdraw the Amended Assessment raised on the First Appellant in its entirety or, alternatively, they must select which of the charges is the charge arising from the "*best judgment*" of the Revenue officer. However, the Appellants further submit that an election by the Respondent to withdraw one of the charges would necessarily mean that the Amended Assessment was made otherwise than in accordance with "*best judgment*", and therefore would be invalid *ab initio*. They further point out that once an appeal has commenced, an assessment cannot be amended otherwise than by the conclusion of the appeal and the determination of the Appeal Commissioner (pursuant to section 932 of TCA 1997).

3.11 The Appellants submit that a similar point arises in relation to the Estimate which was raised on the Second Appellant. They point out that an Estimate can only be raised

by Inspector or Revenue officer if he or she has "*reason to believe*" that a Schedule E liability arises on an employer in respect of the matter. They submit that in the instant appeals, it is absurd for the Respondent to seek to maintain that their "*best judgment*" is that the First Appellant has a Schedule F liability in respect of the amount of €820,526 while at the same time seeking to maintain that it has "*reason to believe*" that it is a Schedule E matter for the Second Appellant in respect of the exact same matter.

3.12 They therefore submit that the existence of the Revenue assessment on the First Appellant and the existence of the Estimate on the Second Appellant means that the Respondent could not possibly have exercised "*best judgment*" in respect of the First Appellant and could not have "*reason to believe*" that the Second Appellant has a Schedule E liability. They submit that the positions taken by the Respondent in the Notice of Amended Assessment and in the Estimate are wildly at variance and irreconcilable with one another and must mean that neither was raised in accordance with the relevant legislation outlined above. Accordingly, they submit that the Amended Assessment and the Estimate are invalid. They further submit that the purported coexistence of these disparate positions means that the position taken by the Respondent is unreasonable and/or capricious.

Section 949AG

3.13 The Appellants submit that the provisions of section 949AG constitute a mandatory provision which obliges an Appeal Commissioner to have regard to all matters to which the Revenue Commissioners can or were required by the legislation to have regard when making assessments or amending assessments. They submit that as a matter of natural justice, if an Appeal Commissioner is to have regard to such matters, then the Appellants should also be in a position to have regard to the same matters. They further submit that this requires that the Respondent and/or the Appeal Commissioner must ensure that the necessary information and documentation is shared with the Appellants.

3.14 The Appellants further submit that the position taken by the Respondent in relation to the Notice of Amended Assessment raised on the First Appellant and the Estimate raised on the Second Appellant are, for the reasons set forth above, mutually exclusive. They submit that this clearly discloses capriciousness and a lack of credibility in relation to the Respondent purporting to have exercised "*best judgment*" and having "*reason to believe*".

3.15 The Appellants further submit that Counsel for the Respondent had agreed during the hearing before me that the Respondent would be obliged to call the relevant Revenue officers to give evidence in relation to the Amended Assessment and the Estimate, and that this would entail as a consequence the right for the Appellants to cross-examine those individuals.

3.16 The Appellants further submitted that it was not necessarily the case that the onus of proof rested upon them in the instant appeals. They relied in this regard upon the decision of Charlton J in ***Menolly Homes –v- The Appeal Commissioners*** **[2010] IEHC 49**. They submitted that that decision was authority for the proposition that cross-examination of a Revenue officer could be legitimate and it was within the power of an Appeal Commissioner to determine whether cross-examination was required in the circumstances of an appeal. They referred me in particular to paragraph 42 of the decision wherein Charlton J stated:-

> *"At paragraph 70 of the* Davy *decision I referred to a power within the administration of an adjudication by the Financial Services Ombudsman to review the papers and decide whether any form of oral hearing is necessary. That hearing, as I have indicated, is only required if there is an issue of fact which cannot fairly be resolved without hearing the parties. In this instance, the papers may well have been sufficient for the Appeal Commissioners to come to the view that a hearing would be pointless. There was*

no contested issue of fact as between opposing witnesses, as evidenced from the written statement, unlike in the Davy *case. There is an attempt to make an issue of fact through cross-examination. While that can be legitimate, it is within the scope of an administrative officer to rule on whether an issue requires cross-examination. It is within his jurisdiction to adjudicate that objectively the point could not arise."*

3.17 The Appellants submit that the decision confirms that cross-examination is appropriate in certain circumstances, and was only disallowed in that case because of a lack of capriciousness or absence of belief based upon reason. They submit that the circumstances of the instant appeals are entirely different in that there is a patent *prima facie* capriciousness evident in the Notice of Amended Assessment and the Estimate, and that there is accordingly a clear need for the Respondent to tender witnesses to give evidence of "*best judgment*" and/or "*reason to believe*", and a consequent right for the Appellants to cross-examine those witnesses.

3.18 The Appellants further referred me to the decision of Hedigan J in ***Dunnes Stores –v- Revenue Commissioners*** **[2011] IEHC 469** where he stated:-

"It is quite clear that the whole basis of self-assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the inspectors judgment or to be charged on that person."

3.19 The Appellants submitted that it was clear from that passage that Hedigan J was of the view that an appellant's right to see information and documents was a matter governed by legislation, and submitted that the enactment of section 949AG had altered

the previous position. They submitted that section 949AG imposed a statutory, mandatory obligation upon me to have regard to certain matters and that Counsel for the Respondent had accepted that the Respondent would need to tender evidence in relation to those matters, which would necessarily mean that the Appellants had the right to cross-examine the Respondent's witnesses. They further submitted that, even if the enactment of section 949AG had not altered the legal position as set out in ***Menolly Homes*** and ***Dunnes Stores***, both of those cases envisaged cross-examination taking place in circumstances where there was capriciousness and/or a statutory right to do so respectively.

4. Submissions of the Respondent

4.1 Counsel for the Respondent submitted that the very nature of the self assessment system of tax and tax appeals means that it may be necessary to raise alternative assessments in appropriate cases. The person who has full knowledge of the taxpayer's affairs is, of course, the taxpayer. The Respondent uses its best judgment to assess and, if it is not clear either because of a dispute as to the facts or the possible legal categorisation of the transaction, it is not just possible but proper to raise alternative assessments. The Respondent submits that failure to do so could lead to an inefficient system of appeals with consecutive appeals.

Double Assessment versus Alternative Assessment

4.2 The Respondent submitted that the Appellants had conceded in their supplementary submissions that they were aware that the impugned assessments were alternative assessments. It submitted that the Appellants were arguing that an Inspector was not

entitled to raise alternative assessments as to do so amounted to double assessment of the Appellants contrary to section 959F. It further pointed out that the Appellants had not cited any authority other than sections 959F and 959Y of TCA 1997 in support of their argument that the Respondent is not entitled to raise alternative assessments.

4.3 The Respondent further submitted that it has long been accepted that Revenue authorities may raise alternative assessments, citing ***IRC –v- Wilkinson*** **[1992] STC 454** and ***Lord Advocate –v- McKenna*** **61 TC 688**. It further referred me to the decision in ***University Court of the University of Glasgow –v- Customs & Excise Commissioners*** **[2003] STC 495**, where the Appellant argued that the Commissioners in that jurisdiction did not have the power to raise alternative assessments, even though it had been made plain that the taxpayer was expected to pay only one of the assessments raised. Counsel for the Appellant in that case alleged that the absence of an express statutory power providing for the raising of alternative assessments meant that no such power could exist.

4.4 Giving the judgment of the Inner House of the Court of Session, Lord Hamilton stated as follows:-

"The concept of alternative assessments is not, any more than that of a 'global' assessment, to be found in the statutory language, which accordingly does not expressly sanction such procedure; nor does that language expressly exclude it. The issue in this case is whether it is implicitly within the powers of the commissioners, in circumstances such as the present, to make under section 73(1) alternative assessments, in the sense of distinct assessments in respect of the same transaction or series of transactions but expressed to be in the alternative. The point is apparently novel in relation to VAT. In the present case the commissioners, for reasons which have been described, made and notified alternative assessments in respect of various periods during which, it appears, the relevant arrangements in respect of the assets in question were in place. They did so

out of concern that the making of single assessments might, having regard to certain features (including analysis, calculation and result), be open to challenge. It is not necessary for the disposal of this appeal to decide whether or not that concern was well-founded. The only issue is the competency of the assessment procedure in fact adopted.

The burden of [Counsel for the Appellant]*'s submission was that other provisions of the statute (in particular sections 73(9) and 84(3)) were inconsistent with the existence of the power under section 73(1) to make alternative assessments. Section 73(1) involves an assessment of 'the amount' (that is, a particular, specified amount) of VAT considered to be due by the taxable person. It is clear that, if distinct, albeit alternative, assessments are made and notified, each of them involves an assessment of the particular, specified amount considered to be due. The effect of section 73(9) is that, subject to the statutory provisions for appeal, each of these amounts, if looked at in isolation, is deemed to be an amount of VAT due from the assessed person. But it does not, in our view, follow that the aggregate of these amounts is so due. Where two assessments in different amounts, made and notified contemporaneously, are so made and notified expressly as being in the alternative, they are, in our view, not independent but interrelated. As such, they are mutually exclusive and not exigible in the aggregate. It is quite clear that no court would knowingly grant decree in such circumstances for the aggregate amount. Nor would it be proper for the commissioners to institute legal proceedings for the aggregate."*

4.5 The Respondent further referred me to the decision of Patten J in ***Westone Wholesale Ltd –v- Revenue and Customs Commissioners*** **[2008] STC 828**, where the Court held that two assessments relating to different transactions and different fiscal issues and which were raised at different times were valid alternative assessments, and reaffirmed the principles set out in the cases of ***University of Glasgow*** (cited *supra*) and ***Courts plc –v- Customs and Excise Commissioners*** **[2005] STC 27**.

4.6 The Respondent also pointed out that no difficulty with or concern about the use of alternative assessments had been expressed by the Irish courts in ***McGarry –v- R*** **[1954] 1 I.R. 64** and ***AS –v- Criminal Assets Bureau*** **[2005] IEHC 318**, but accepted that the use of alternative assessments was not the subject of any express challenge or judicial comment in those decisions.

4.7 In closing on this issue, the Respondent submitted that there is a distinction between the concept of double assessment and alternative assessments. It submitted that an Inspector is entitled to raise alternative assessments as they have traditionally done. The use of alternative assessments represented a pragmatic approach towards the disposal of the issues in dispute between the parties herein. It also observed that the Appellants did not make any complaint about the use of alternative assessments in their grounds of appeal, nor did they express any difficulty with this course of action prior to the commencement of the hearing.

Best Judgment

4.8 The Respondent submitted on this issue that, in essence, the Appellants were arguing that *prima facie* by raising alternative assessments, an Inspector was effectively conceding that he or she had not raised either, or any, interrelated assessment to the best of his or her judgment.

4.9 The Respondent pointed out that the Appellants had cited no authority, legal or otherwise, as to the proper meaning and effect which they submitted ought to be imported into the phrase "*best judgment*." The Respondent referred me in this regard to the decision of Lord Justice Parker in ***Courts plc*** (cited *supra*) and the judgments in ***Customs and Excise Commissioners –v- Pegasus Birds Ltd*** **[2004] STC 1509**. In the latter case, Lord Justice Carnwath stated that:-

"It should be noted that the shorthand 'best judgment', as used in some of the cases, may be misleading, if it is taken to imply a higher standard than usual. The statutory words 'to the best of their judgment' are used in a context where the taxpayer's records may be incomplete, so that a fully informed assessment is unlikely to be possible. Thus the word 'best', rather than implying a higher than normal standard, is a recognition that the result may necessarily involve an element of guesswork. It means simply 'to the best of (their) judgment on the information available'…"

4.10 Lord Justice Chadwick agreed with the decision of Lord Justice Carnwath and further stated as follows:-

"For my part, I would accept that an assessment made on behalf of the Commissioners by an officer who had, consciously or unconsciously, 'closed his mind' to any material which did not fit his case, would not be an assessment of an amount due to the best of their judgment. The exercise of judgment, based on the evaluation of material, requires that the task be approached with an open mind. That does not, of course, mean that the officer is required to accept all that the taxpayer tells them; or to accept that all of the material that the taxpayer produces is genuine. As Carnwath LJ has observed, in the present case the Commissioners were entitled to be highly sceptical of information coming from a convicted fraudster. The officer is entitled to reject material on the basis that, on evaluation, he does not regard it as credible; but he must not reject material on the basis that, before evaluation, he has closed his mind to the possibility that it might be credible.

There was no direct evidence, in the present case, that [the assessing Revenue official] *had 'closed his mind' to material which did not fit his case. The tribunal reached the conclusion which they did on the basis of their finding that 'the assessments were wholly unreasonable, being outside the parameters of the reasonable'. Unless implicit in that finding, there was nothing to support the conclusion that* [the assessing Revenue

official] *did not approach his task, as he was required to do, with an open mind; or that he did not make an honest and genuine attempt to assess the amount of VAT probably due from the taxpayer."*

4.11 The Respondent submitted that the foregoing statements represented a correct statement of the law in this jurisdiction.

4.12 The Respondent further submitted that it was clear from the transcript that the Respondent had not agreed during the hearing before me to call evidence from the appropriate Revenue officers in relation to the exercise of their "*best judgment*."

Import of section 949AG

4.13 The Respondent noted that Counsel for the Appellants had conceded that they could not advance the arguments put forward at the commencement of the hearing in relation to this issue were it not for the coming into force of section 949AG.

4.14 The Respondent submitted that, contrary to what was argued on behalf of the Appellants, the section was not a new departure but was instead simply a restatement of the principles regarding the Appeal Commissioners' functions previously set out in case law. It submitted that it was a restatement of the obligation and duty of the Appeal Commissioners in deciding tax appeals as set out by Lord Wright MR in ***R –v- Income Tax Special Commissioners (ex p. Elmhirst)*** **[1936] 1 K.B. 487**, where he stated:-

"… And I may note here at once, that in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and the statutory duty which they are bound to carry out. They are not in the position of Judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as it comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to

make the assessment or the estimate which the law requires them to make. They are not deciding the case inter partes; they are assessing or estimating the amount on which, in the interest of the country at large, the taxpayer ought to be taxed."

4.15 The Respondent pointed out that the foregoing statement had been cited with approval by the Irish High Court in ***State (Whelan) –v- Smidic*** **[1938] I.R. 626** and in ***Menolly Homes*** (cited *supra*).

4.16 The Respondent submitted that since section 949AG is, in reality, no more than a codification of the pre-existing law, the arguments the Appellants now sought to advance were as misguided as they were prior to the coming into force of the section. Put another way, the provision did not provide for the radical change in the administration of Appeal Commissioner hearings advocated for by the Appellants.

4.17 The Respondent further submitted that, even if section 949AG represented the new departure contended for by the Appellants, they were still misinterpreting the section. The section provides that the Appeal Commissioners "*shall have regard to all matters to which the Revenue Commissioners may or are required by the Acts to have regard.*" It did not state that the Appeal Commissioners shall have regard to all matters to which the Revenue Commissioners had regard. Similarly, it would not be correct for the Appeal Commissioners to request production of the material to which the Revenue Commissioners had regard in making their decision. The Appeal Commissioners were not reviewing the decision of the Revenue Commissioners; they were instead seeking to ascertain the correct amount of tax payable. The Respondent submitted that if the Appellant's apparent interpretation was to be accepted, an Appeal Commissioner could be precluded from considering additional material which the Appellant might wish to put before him or her.

4.18 In summary, the Respondent submitted that the Appellants were mistaken in their belief that one or both of them had been the subject of a double assessment. It was at all times clear to them that the Respondent had raised alternative assessments, and the Respondent submitted that it was entitled to do so.

4.19 It further submitted that there is no requirement, statutory or otherwise, for the Respondent to lead evidence of "*best judgment*" at the outset of the appeals. It submitted that the Appellants' argument that an Inspector who raises interrelated alternative assessments necessarily acts capriciously, or has failed to exercise his or her best judgment, was misconceived.

5. Analysis & Findings

5.1 The first issue for determination is whether the Respondent was, as contended by the Appellants, precluded in law from raising assessments against the First Appellant which assessed a liability under Schedule E and Schedule F in respect of the same matter and an Estimate which assessed a liability under Schedule E against the Second Appellant in circumstances where those assessments each arose from the same set of facts and series of transactions.

5.2 The Appellants submit that the Amended Assessment amounts to a double assessment on the First Appellant which, they argue, is expressly prohibited by the provisions of section 959F. It is clear from the wording of that section that there is a statutory prohibition on a taxpayer being assessed to tax more than once for the same chargeable period for the same cause and on the same account.

5.3 However, I am satisfied that a taxpayer is not assessed to tax more than once contrary to section 959F where the Revenue Commissioners make distinct assessments in respect of the same transaction or series of transactions which are expressly stated to be in the alternative. I accept the submission of the Respondent that a distinction must be made between double assessments and alternative assessments. A taxpayer would be liable to a double assessment if he was liable or potentially liable to pay the aggregate of the amounts assessed in those distinct assessments. If, however, it is made clear by the Revenue Commissioners that the taxpayer is liable to pay only one of the amounts assessed in the distinct assessments and that the distinct assessments are advanced on an alternative basis, then they are alternative assessments, and not double assessments which fall foul of section 959F.

5.4 I note that this issue does not seem to have been the subject of direct consideration by the courts in this country, and so I have derived guidance from cases in our neighbouring jurisdiction. While the decisions are of course not binding upon me, and while I am mindful of the risks inherent in adopting statements of principle founded upon legislation different to our own, I agree with the reasoning, logic and conclusions expressed by the Court of Appeal in ***IRC –v- Wilkinson*** and by the Court of Session in the ***McKenna*** and ***University of Glasgow*** decisions. I am satisfied that, notwithstanding the absence of an express statutory power to make alternative assessments (save for that contained in section 811C(5) of TCA 1997, which is not relevant to these appeals), the Respondent does have an implicit power to raise alternative assessments provided that the taxpayer is made aware that the distinct assessments are being raised on an alternative basis and provided it is not sought to make the taxpayer liable for the aggregate of the amounts assessed by the distinct assessments.

5.5 In the instant appeal, the Appellants were made aware by the notification sent to them on the 30th of October 2014 that alternative assessments might be raised by the

Respondent and were expressly informed by the Inspector's letter of the 17th of December 2014 that the assessments were alternative. I therefore find that the Notice of Amended Assessment raised on the First Appellant contained alternative assessments to Schedule E and Schedule F, which were permissible as a matter of law, and did not amount to a double assessment contrary to section 959F.

5.6 Turning next to the question of whether the raising of those alternative assessments demonstrates that the Respondent's Inspector did not exercise his or her "*best judgment*" as required by section 959Y(1) and/or could not have had "*reason to believe*" that the Second Appellant was liable to PAYE/PRSI in respect of the same transactions (as required by section 990(1)), I believe that the Appellants have sought to advance an overly narrow interpretation of the phrase "*best judgment.*" In particular, I cannot accept their submission that the use of that phrase in section 959Y requires the Respondent's Inspector to reach what the Appellants described as a "*singular or unique*" judgment, thereby precluding an Inspector from raising alternative assessments.

5.7 Instead, I agree with the views expressed by Lord Justices Carnwath and Chadwick in ***Pegasus Birds*** that the phrase "*best judgment*" does not imply a higher than normal standard but simply means a decision made "to the best of his or her judgment on the information available", and reached with an open mind. This interpretation does not in my view preclude an Inspector from making alternative assessments; put another way, the raising of alternative assessments does not of itself mean that the Inspector cannot have exercised his or her best judgment.

5.8 In relation to the phrase "*reason to believe*", I believe that the decision of Charlton J in ***Menolly Homes*** is of assistance in interpreting this phrase. While I am conscious that he was considering the phrase in the context of section 23(1) of the VAT Act 1972, I believe that his views are apposite and equally applicable to section 990(1).

5.9 Charlton J observed that in using the word "*believe*" as opposed to words such as "*conclude*" or "*suspect*", a very wide form of jurisdiction was implied. Having considered the decision of Henchy J in ***Hanlon –v- Fleming*** **[1981] I.R. 489**, Charlton J went on to state in paragraph 29 as follows:-

> *"The Oireachtas did not use the phrase "reason to conclude" in the legislation. A conclusion is at a higher level of certainty than a belief. If I were required to put states of mind commonly used in law as defining liability or for allowing administrative action in descending order of certainty, they would be, from the top rung, to know; to conclude beyond reasonable doubt; to conclude as probable; to reasonably suspect; and I would tend to put mere suspicion and mere belief, without the element of legally required reasonableness, on the same level at the lowest rung. Modern legislation tends not to use those bare concepts of belief or suspicion; instead legislation may refer to someone knowing or believing in respect of criminal liability, such as in handling stolen property believing it was probably stolen or dealing in the proceeds of crime with a similar mental element, and in administrative statutes the wording tends to revolve around conclusions or beliefs based on some reason or on suspicion reasonably arising. In any event, unreasonable actions or decisions, that is those that fly in the face of fundamental common sense, exceed jurisdiction either on a quasi-judicial or an administrative level. I note that the Concise Oxford English dictionary (10th edition, 2002) says of conclude that it means to "arrive at a judgment or opinion by reasoning". In using the lesser phrase of "reason to believe", it is clear that the approach of the tax inspector cannot be based upon telepathy or a mere hunch unrelated to any basis upon which a reasonable person might thereby come "to believe that an amount of tax is due and payable" by the taxpayer. The same dictionary defines reason as a "cause,*

> *explanation or justification." Thus, the tax inspector must have a cause, an explanation or a justification to believe, not conclude, not to know, that an amount of tax is due. He or she does not have to form a concluded belief in that regard, much less a final conclusion or to arrive at a state of knowledge about the fact that tax is due. What is required is that any tax inspector should act only where their belief is backed up by reason. In attempting to describe the notion of having a reason to believe something, the exclusion of its opposite of caprice goes some way towards assisting in the definition. Simple words are ordinary because they carry a meaning. We can understand words both for what they are, and for what they are not. In raising an assessment on the taxpayer for an amount of VAT, any notion of mere belief is ruled out."*

5.10 I respectfully agree with Charlton J that the phrase "*reason to believe*" does not require an Inspector to have reached certainty or a concluded belief or a settled conclusion; instead, the Inspector must have some cause or explanation or justification for his or her belief, and cannot be acting on the basis of suspicion, hunch or mere caprice.

5.11 This interpretation confers a degree of latitude and discretion on an Inspector making an estimate pursuant to section 990(1). I believe it follows therefrom that raising an assessment on another taxpayer as an alternative to the estimate made on an employer does not of itself mean that the Inspector could not have had reason to believe that the employer had not remitted the correct amount of tax. I believe it equally follows that the existence of an estimate made pursuant to section 990(1) does not of itself mean that an Inspector could not have exercised his or her best judgment when raising an assessment on another taxpayer pursuant to section 959Y in relation to the same matter.

5.12 In the circumstances of the instant appeals, I find that the raising by the Respondent of alternative assessments on the First Appellant and the making of an estimate of the Second Appellant's liability does not demonstrate or even indicate that the Respondent failed to comply with the provisions of section 959Y and section 990 respectively. I therefore reject the Appellants' submission that the Amended Assessment and the Estimate are invalid or void for failure to comply with the relevant statutory provisions.

5.13 I also do not accept that the Appellants' submission that the positions taken by the Respondent in relation to each of the Appellants are irreconcilable, contradictory, unreasonable or capricious. In circumstances where they have been advanced as alternatives, I accept the Respondent's submission that they have been taken on a pragmatic basis and I accept that this was, for the reasons outlined above, compliant with the relevant legislation.

5.14 Finally, I must consider the Appellants' submissions on the effect and import of section 949AG. While that section has now been repealed in its entirety by section 55(d) of the Finance Act 2018, it was in force at the time of the commencement of the hearing before me and was expressly relied upon by the Appellants.

5.15 I am aware that the submissions made by the Appellants in relation to section 949AG had the support of learned commentary from a number of practitioners. However, I prefer the interpretation advanced on behalf of the Respondent, that the section did not represent a new departure or alter the burden of proof in tax appeals, but was instead a codification of the existing principles regarding the powers and functions of the Appeal Commissioners contained in case law such as ***Elmhirst***, ***Smidic*** and ***Menolly Homes***. My interpretation of section 949AG is that it was intended to ensure that, where a provision of the Tax Acts requires or permits the Revenue Commissioners to have regard to certain specific matters before reaching a certain decision or taking a certain action, an Appeal Commissioner hearing an appeal against that decision or action would also have regard

to the same specific matters. I believe that had it been the intention of the legislature to reverse even in part the burden of proof which traditionally lies upon the taxpayer in all tax appeals, this would have been clearly stated and defined. Section 949AG does not, in my view, effect such a change.

5.16 Accordingly, I reject the Appellants' submission that the provisions of section 949AG operate to require the Respondent to furnish me and the Appellants with all of the information and documents to which they had regard when raising the Amended Assessment and the Estimate. Equally, I do not accept that the section operates to require the Respondent to lead evidence as to how the Inspector(s) reached a "*best judgment*" or had "*reason to believe*" that the Appellants were liable to tax. The section does not, in my view, have the effect of reversing the burden of proof in these appeals. It is for the Appellants to make the case that they have been overcharged to tax by the Amended Assessment and/or the Estimate. When the Appellants have tendered evidence and made submissions at the resumed hearing of these appeals, the Respondent may elect to tender evidence in support of the Amended Assessment and the Estimate. If it does so, the Appellants will then be entitled to cross-examine the Respondent's witnesses and I will take such steps as may be necessary to ensure that they are not prejudiced in doing so, in accordance with the requirements of natural justice.

5.17 I therefore refuse the Appellants' application for a direction requiring the Respondent to furnish the information and/or documents which provided the basis for their "*best judgment*" and "*reason to believe*". I further find that the Respondent is not required to tender evidence to satisfy me that the requirements of section 959Y and section 990 were satisfied, whether at the outset of the resumed hearing or otherwise, albeit the Respondent may elect to do so. Equally, the Appellants do not have a right to cross-examine the Respondent's witnesses unless and until those witnesses are tendered by the Respondent to give evidence.

6. ***Conclusions***

6.1 For the reasons outlined above, I find that:-

(a) The Respondent is entitled in law to issue alternative assessments.

(b) The alternative assessments raised on the First Appellant in the instant appeals do not constitute a double assessment contrary to section 959F(1).

(c) The raising of the Amended Assessment on the First Appellant which contained alternative assessments and the making of the Estimate of the Second Appellant's liability do not demonstrate or indicate that the Respondent has failed to comply with the provisions of section 959Y(1) and/or section 990(1), and the Notice of Amended Assessment and the Estimate are not invalid by reason of the Respondent having done so.

(d) Section 949AG does not operate to require the Respondent to furnish me and the Appellant with all of the information and documents relied upon in reaching the "*best judgment*" and "*reason to believe*" required by sections 959Y and 990 respectively, nor does it operate to reverse the burden of proof and require the Respondent to give evidence in the first instance in relation to those matters.

6.2 As this Determination disposes of the preliminary issues raised by the Appellants, I will proceed to hear and determine the remaining issues in these appeals on a date to be fixed by the Tax Appeals Commission.

Dated the 28th of January 2022

MARK O'MAHONY
APPEAL COMMISSIONER