29TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

1. Factual background & Outline of the issues

1. This appeal comes before the Tax Appeals Commission by way of an appeal against an Amended Assessment for the 2009 tax year, issued by the Respondent on January 15 2011. The facts giving rise to this appeal are relatively straightforward and not in dispute between the parties, and are summarised hereafter.

2. The Appellant was throughout 2009 a director and a 99% shareholder in a limited liability company called [redacted] Limited, hereinafter referred to as "**the Company**". The Company was engaged in the [redacted] business.

3. The P35 declared by the Company for 2009 showed a PAYE liability of €16,296 and an Income Levy liability of €4,199, giving a total tax liability of €20,495. Of this, €7,337 in respect of PAYE and €686 in respect of Income Levy were attributable to

the Appellant. The P35 also showed an Employee PRSI liability of €13,895 and an Employer's PRSI liability of €24,122, giving rise to a total PRSI liability of €38,017. The Appellant's Employee PRSI liability was €2,602.

4. The Company made monthly payments to the Collector General in respect of PAYE, PRSI and Income Levy deducted from employees' remuneration, together with Employer's PRSI contribution due. The Company paid €37,500 by direct debit during the 2009 tax year which was allocated by the Respondent on a monthly basis as to €12,375 for PAYE and Income Levy and €25,125 for PRSI. In addition to the direct debit payments, the Company also made two cheque payments during 2009 totalling €826.37, which were allocated as to €489.20 for PAYE and Income Levy and €337.17 for PRSI.

5. The Respondent's records indicated that as the Company had total tax liabilities of €20,495 and had paid tax of €12,684.20, there was an underpayment of tax in the sum of €7,630.80 in the 2009 tax year.

6. On [redacted] 2010, the Company was placed in a creditors' voluntary liquidation.

7. On 22 October 2010, the Respondent issued the Appellant with a PAYE balancing statement (P21) for the 2009 tax year which recorded, *inter alia*, that the Appellant had been given credit for taxes deducted by the Company in the sum of €7,337. This resulted in an overpayment of tax by the Appellant of €119.77, which was duly refunded by the Respondent.

8. On 15 January 2011, the Respondent issued a Notice of Amended Assessment for the 2009 tax year. This was issued on the basis that the Company had an unpaid PAYE liability of €6,067.40. As the amount of PAYE unpaid was less than the PAYE of €7,337 deducted from the Appellant, the Respondent deemed the underpayment

wholly attributable to the Appellant by virtue of section 997A(4) of the Taxes Consolidation Act 1997 as amended (hereinafter "**TCA 1997**"). The Notice of Amended Assessment therefore reduced the Appellant's PAYE credit by the said sum of €6,067.40 and further by the PAYE refund of €119 made to the Appellant, the cumulative effect of which was to reduce the Appellant's PAYE credit to €1,150.60.

9. The Appellant duly appealed against the said Notice of Amended Assessment, which gives rise to the instant appeal.

2. Relevant Legislation

10. Section 531D(4)(a)(i) of TCA 1997 provides as follows:-

> *Within 14 days of the end of every income tax month the employer shall remit to the Collector-General the total of all amounts of income levy which the employer was liable to deduct from relevant emoluments paid by the employer during that income tax month.*

11. Section 960G of TCA 1997 provides as follows:-

> *(1) Subject to subsection (2), every person who makes a payment of tax to the Revenue Commissioners or to the Collector-General shall identify the liability to tax against which he or she wishes the payment to be set.*
>
> *(2) Where payment of tax is received by the Revenue Commissioners or the Collector-General and the payment is accompanied by a payslip, a tax return, a tax demand or other document issued by the Revenue Commissioners or the Collector-General, the payment shall, unless the contrary intention is or has*

been clearly indicated, be treated as relating to the tax referred to in the document concerned.

(3) Where payment is received by the Revenue Commissioners or the Collector-General from a person and it cannot reasonably be determined by the Revenue Commissioners or the Collector-General from the instructions, if any, which accompanied the payment which liabilities the person wishes the payment to be set against, then the Revenue Commissioners or the Collector-General may set the payment against any liability due by the person under the Acts.

12. Section 997A of TCA 1997, as it applied in respect of the 2009 year of assessment, provided as follows:-

(1) (a) In this section-

"control" has the same meaning as in section 432;

"ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company.

(b) For the purposes of this section-

(i) a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and

(ii) the question of whether a person is connected with another person shall be determined in accordance with section 10.

(2) This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.

(3) Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies shall be given in any assessment raised on the person or on any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.

(4) Where the company remits tax to the Collector-General which has been deducted from emoluments paid by the company, the tax remitted shall be treated as having been deducted from emoluments paid to persons other than persons to whom this section applies in priority to tax deducted from persons to whom this section applies.

(5) Where, in accordance with subsection (4), tax remitted to the Collector-General by the company is to be treated as having been deducted from emoluments paid by the company to persons to whom this section applies, the tax to be so treated shall, if there is more than one such person, be treated as having been deducted from the emoluments paid to each such person in the same proportion as the emoluments paid to the person bears to the aggregate amount of emoluments paid by the company to all such persons.

13. It is relevant to note that an additional subsection (7) was inserted into section 997A by section 15(h) of the Finance Act 2012 with effect from 1 January 2012, which provides as follows:-

> *(7) Notwithstanding section 960G and for the purposes of the application of the section, where a company has an obligation to remit any amount by virtue of the provisions of-*
>
> *(a) the Social Welfare Consolidation Act 2005 and regulations made under that Act, as respects employment contributions,*
>
> *(b) Part 18D and regulations made under that Part, as respects universal social charge, and*
>
> *(c) this Chapter and regulations made under this Chapter, as respects income tax,*
>
> *any amount remitted by the company for a year of assessment shall be set-*
>
> *(i) firstly against employment contributions,*
>
> *(ii) secondly against universal social charge, and*
>
> *(iii) lastly against income tax.*

14. Section 13(4) of the Social Welfare Consolidation Act 2005 provides as follows:-

> *The employer shall, in relation to any employment contribution, be liable in the first instance to pay both the employer's contribution comprised therein and also, on behalf of and to the exclusion of the employed contributor, the contribution comprised therein payable by the contributor.*

15. Section 17(4) of that Act provides that:-

> *The provisions of any enactment, regulation or rule of court relating to-*
>
> *(a) the inspection of records, the estimation, collection and recovery (including the provisions relating to the offset of taxes and appropriation of payments*

in Chapter 5 of Part 42 of the Act of 1997) of, or the furnishing of returns by employers in relation to, income tax, or

(b) appeals in relation to income tax, or

(c) the publication of names of persons under section 1086 of the act 1997,

shall apply in relation to employment contributions which the Collector-General is obliged to collect as if the contributions were an amount of income tax which the employer was liable to remit to the Collector-General under the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001).

16. Article 28(1) of the Income Tax (Employments) (Consolidated) Regulations 2001 provides as follows:-

Within 14 days from the end of every income tax month the employer shall remit to the Collector-General the total of-

(a) all amounts of tax which the employer was liable under these Regulations to deduct from emoluments paid by the employer during that income tax month, and

(b) any amount of tax that was not so deducted but which the employer was liable, in accordance with section 985A(4) of the Act, to remit, in respect of that income tax month, to the Collector-General in respect of notional payments made by the employer,

reduced by any amounts which the employer was liable under these Regulations to repay during that income tax month.

17. Article 8 of the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 provided at the relevant time that:-

(1) Subject to article 12(2), contributions payable in respect of emoluments and of earnings, other than earnings of a special contributor, shall be collected

and be recoverable by the Collector-General and accounted for by him and paid into the Social Insurance Fund.

(2) Contributions to which sub-article (1) applies shall be remitted by the employer to the Collector-General…"

18. Article 9(1) of those Regulations provides:-

The time within which a contribution due in respect of earnings or emoluments by an employer shall be paid in accordance with article 8(2) shall be fourteen days from the end of the relevant period during which the payment of such earnings or emoluments to which the contribution relates was made.

3. Submissions of the Appellant

19. The Appellant submitted that the Amended Assessment for 2009 had the effect of disallowing a credit for the PAYE tax deducted from the Appellant's salary during that year. The Respondent had done so on the basis that section 997A of TCA 1997 applied, which the Respondent believed to be applicable on the grounds that the Appellant had a "*material interest*" in the Company.

20. It was submitted on behalf of the Appellant that, because the Company was in liquidation from [redacted] 2010 onwards, the Appellant was no longer a director of the Company at the relevant time. Furthermore, given that the Company was in a creditors voluntary liquidation, it was submitted that the Appellant could not be regarded as being the beneficial owner of or able to control more than 15% of the Company's ordinary share capital for the purposes of section 997A(1)(b)(i).

21. The Appellant referred me in this regard to the decision in ***Commissioners of Inland Revenue –v-Olive Mill Ltd* 41 TC 77** where Buckley J had to consider, *inter alia*, whether a parent company was the beneficial owner of not less than three quarters of the ordinary share capital of a subsidiary company. Both the parent company and the subsidiary had been placed in a members voluntary liquidation on the same date. Buckley J stated as follows:-

> *"The grouping notice, I think, also falls to the ground for the reason that the holding Company upon going into liquidation ceased to be the beneficial owner of the shares in* [the subsidiary company] *within the meaning of the Section I have just read. In this connection I refer to the decision of the Court of Appeal in* In re Oriental Inland Steam Co. (1874) 9 Ch. App. 557*. In that case, in the course of this judgement, James L.J. said this, at page 559:*
>
> > *"The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up or to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it ceased to be beneficially the property of the company; and, being so, it is ceased to be liable to be seized by the execution creditors of the company."*
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> *Mellis L.J. expressed a similar view. He said, at page 560:*
>
> > *"But, in my opinion, the beneficial interest is clearly taken out of the company.'*

22. The Appellant submitted that this decision was also support for the proposition that in a liquidation situation, any rights of the shareholders are within the liquidation process. The Appellant's agent also referred me to the provisions of section 260 and section 269 of the Companies Act, 1963 in this regard.

23. The Appellant submitted that the relevant date for the purposes of ascertaining whether section 997A was applicable was 22 October 2010, being the date on which the P21 Balancing Statement was issued by the Respondent to the Appellant (and the Appellant pointed out that this was deemed to be an assessment to income tax pursuant to section 997) or, alternatively, 15 January 2011, when the Notice of Amended Assessment was issued.

24. The Appellant submitted that it was noteworthy that the present tense was used in section 997A(1)(b)(i):- "*A person shall have a material interest in the company if the person … **is** the beneficial owner of, or **is able**…*" The Appellant said it was significant that the provision did not include the words "*is able for that year of assessment*", and pointed out that the legislature had in 2010 deemed it necessary to amend subsection (4) to include the words "*for that year of assessment*" for the purposes of that subsection.

25. The Appellant further submitted in this regard that section 997A was an attempt to circumvent the corporate veil and to make a director, with an interest of more than 15% the share capital of a company, liable for the company's PAYE debts up to a specified limit. He submitted that this was highly questionable having regard to the wider legal principles.

26. The Appellant submitted that the issue by the Respondent of the Notice of Amended Assessment on 15 January 2011 was an attempt to recover part of its claim against the Company directly from one of the employees to whom a salary was paid, with no corresponding reduction under the liquidation process for either the Appellant or any other individual to whom salaries and wages were paid. The Appellant also pointed out that for those other individuals, section 997 restricted their credit to the actual income tax deducted.

27. The Appellant further submitted that the Respondent had stated that the grounds for its set-off of tax paid between PAYE, health levies and PRSI was the obligation on the Company to remit PAYE, health levies and PRSI on a monthly basis. The Appellant submitted that there was no legislative basis for such an approach. The Appellant submitted that there was a direct monthly debit in operation pursuant to section 991A of TCA 1997, which meant that there was no obligation to file monthly returns for PAYE, health levies and PRSI contributions.

28. The Appellant further submitted that the Company had remitted €37,500 to the Collector-General during 2009. This sum exceeded all amounts of tax deducted during that income tax year from emoluments paid to all employees, including the Appellant. The total deductions amounted to €34,391.13, comprising PAYE of €16,295.61, Income Levy of €4,199.99 and Employee PRSI of €13,895.53. The Appellant submitted that there was therefore no tax deducted but not remitted for 2009 for the Appellant or any other employee. He submitted that the Employer's PRSI contribution payable of €24,123.32 was clearly not a deduction from emoluments paid.

29. The Appellant further submitted that insofar as the Respondent might seek to rely upon the provisions of section 960G(3) of TCA 1997, this approach was mistaken because the definition of "*tax*" in section 960A does not include PRSI contributions.

30. The Appellant further pointed out that it was noteworthy that the provisions of subsection 997A(7) as inserted by section 15 of the Finance Act 2012 provided an order for the set-off of amounts remitted by a company for a year of assessment as against employment contributions, Universal Social Charge and income tax; they pointed out that this subsection was not in force for the year under consideration in this appeal.

31. The Appellant submitted that the factual position was that the total sum paid to the Respondent by the Company for the 2009 tax year was €37,500. It was submitted that this exceeded the amount of the Company's obligations in relation to deductions for PAYE, health levy and PRSI employee contributions, which totalled €34,391.

32. In summary on this issue, the Appellant submitted that not only was there no legislative basis for the Respondent's order of set-off between PAYE, health levies and PRSI employee contributions, there was also no legislative basis that entitled the Respondent to take into account employer's PRSI.

33. The Appellant further submitted that sections 997 and 997A were administrative or "*machinery implementation*" provisions in TCA 1997 which applied to the income tax liability imposed under Schedule E. The substantive charging provision giving rise to this liability was section 12.

34. The Appellant submitted that it was well-established that in applying the taxing Acts, it is necessary to bear in mind that a machinery section is intended merely to provide rules for the assessment or collection of the tax, and not to increase or vary the tax due. The Appellant referred me in this regard to *Simon's Taxes* Binder 2 at A2.112 and to the decisions in ***Corporation of Birmingham –v- Commissioners of Inland Revenue*** **15 TC 172** (at page 204), ***Diggins (H.M. Inspector of Taxes) –v- Forrestal Land, Timber and Railways Co. Ltd.*** **15 TC 630** (at page 641) and ***Brunton –v- New South Wales Stamp Duty Commissioner*** **[1931] AC 747**.

4. <u>Submissions of the Respondent</u>

35. The Respondent submitted that the Company was obliged to make monthly payments to the Collector General in respect of PAYE, PRSI and Income Levy deducted from employees' remuneration together with Employer's PRSI contribution due.

36. The Company's P35 for 2009 recorded a total tax liability of €20,495, made up of PAYE of €16,296 and Income Levy of €4,199. The Company had paid a total of €38,326.37 during the year under appeal. This sum was allocated by the Respondent as to €12,864.20 for PAYE and Income Levy and €25,462.17 for PRSI. Accordingly, the Respondent calculated that there was total unpaid tax of €7,630.80. The Respondent calculated that the unpaid PAYE attributable to the Appellant was €6,067.40 on the basis of the following formula:-

Total Company PAYE per P35	X	Unpaid Total Tax / Total Tax Declared	=	Unpaid PAYE Attributable to Appellant

37. The Respondent submitted that because the unpaid PAYE of €6,067.40 was less than the PAYE of €7,337 deducted from the Appellant, the former sum was wholly attributable to him by virtue of section 997A(4) and meant, pursuant to section 997A(3), that the Appellant's PAYE credit should be reduced by that sum.

38. The Respondent submitted that subsection 960G(3) was not relevant in the instant appeal. That subsection only applied where it cannot reasonably be determined from a taxpayer's instructions which liabilities the taxpayer wishes the payment to be set against. In the instant appeal, the Company had completed a form CG7 when setting up its direct debit payments to the Collector General and this form had instructed that the direct debit payments be posted against PAYE/PRSI. Accordingly, the Respondent was entitled to and did set the payments received against PAYE/PRSI pursuant to the provisions of section 960G(1).

39. In relation to the Appellant's argument that section 997A could not increase the Appellant's liability because it was an administrative and not a charging provision, the Respondent submitted that the liability of the Appellant had not been increased. This was because, in the first instance, his liability was established by determining the level of taxable income and then applying the relevant rates and bands to that taxable income. This resulted in the determination of the gross tax liability. From this gross tax liability, the Respondent had deducted personal status tax credits and any other credits to which the Appellant might be entitled, such as medical expenses, dependant relative credits and so on. After deduction of those credits, the balance was the net tax liability due. It was from this net tax liability due that withholding taxes at source (such as dividend and withholding tax and PAYE) were deducted to determine if there was a balance due. It was this latter balance due which had been increased, as opposed to the net tax liability itself, and so the Respondent submitted that the liability to tax of the Appellant was not in fact increased by section 997A.

40. The Respondent further submitted that the Appellant had overlooked the obligation on the Company to make PRSI contributions in respect of its employees in its capacity as an employer, and had instead focused on Employee PRSI contributions only. It submitted that the factual position for the year under appeal was that when all PAYE/PRSI liabilities of the company were aggregated together, there was an underpayment of part of the total for PAYE/PRSI/Income Levies.

41. The Respondent further submitted in relation to PRSI that section 13(4) of the Social Welfare Consolidation Act 2005 provides that an employer, in relation to employment contributions, is liable in the first instance to pay both the employer's contribution and also, on behalf of and to the exclusion of the employed contributor, the contribution payable by the contributor. It submitted that the clear implication of this

section was that PAYE/PRSI payments made by an employer contain elements of both the PRSI deducted from employees and also the Employer's contribution.

42. The Respondent further submitted that Article 9(1) of the 1996 Social Welfare (Consolidated Contributions and Insurability) Regulations required that an employer paid the contributions due in respect of earnings or emoluments within the prescribed timeframe of 14 days. The Respondent submitted that the contributions referred to included both those represented as deductions from the employee's emoluments and also those contributed by the employer, given that both were a product of the earnings/emolument of the employee.

43. The Respondent further pointed out that section 17(4) of the Social Welfare Consolidation Act 2005 provided *inter alia* that any enactment or regulation relating to the collection and recovery of, or the furnishing of returns by employers in relation to, income tax also apply in relation to employment contributions which the Collector-General is obliged to collect as if the contributions were an amount of income tax which the employer was liable to remit to the Collector-General.

44. The Respondent further took issue with the Appellant's argument that section 997A was essentially forward facing, in that the Appellant contended that the taxpayer had to have a material interest in the employer company on the date on which an assessment was issued reflecting a section 997A adjustment, as opposed to the dates on which the events giving rise to the underpayment of the PAYE/PRSI liabilities arose.

45. The Respondent submitted that the correct position was that taxpayer came within the ambit of section 997A if he had a material interest in the company:-

(a) on a date or dates that the company makes a payment of wages/salary or other income taxable as Schedule E income to the taxpayer; and/or

(b) on a date or dates that PAYE/PRSI/Levies/USC are due for payment to the Collector-General or the Revenue Commissioners on the income, taxable under Schedule E, that has been paid to the taxpayer concerned.

46. The Respondent submitted that the Appellant's contention that a determination of whether section 997A was applicable should take place on the date that an assessment or an amended assessment was raised to reflect section 997A was absurd and illogical.

47. The Respondent submitted in this regard that it was not possible for the Respondent to know on any single date or point in time the shareholding structure of a company, or whether the company was in liquidation. The reporting obligations imposed on companies by statute meant that real-time shareholding information was simply not available; most company information is historic in nature, and it was against that background that section 997A was enacted. To effectively suggest that the Respondent should know what the shareholding structure of the company is on the date of raising an assessment, before raising that assessment, was absurd insofar as it would essentially mean that the Respondent could not exercise its functions effectively.

48. The Respondent further submitted that the entirety of section 997A was about how past events, namely the tax that had been paid by a company under the PAYE system, were to be treated. It could not have been the intention of the Oireachtas that the provision, as regards the time at which a person subject to a Section 997A restriction must hold the material interest, be present or forward facing to the extent that it was only on the date the assessment including the restriction is issued that the material interest be held by the taxpayer.

49. The Respondent further submitted that the Appellant's interpretation of section 997A could effectively legitimise the failure of a director to exercise his or her duties in the manner prescribed by legislation, including the obligation to ensure that the PAYE/PRSI owed by a company in respect of all salaries paid by it is remitted to the Collector-General within the time allowed.

50. The Respondent further submitted that section 997A had to be interpreted in the context of TCA 1997 as a whole. That Act imposed an obligation on an employer to remit fiduciary taxes by specified dates and, in the context of a company, it was the directors of the company who assumed these legal obligations on the part of the company. Therefore, it was only reasonable to conclude that the plain ordinary intention of the Oireachtas was that the material interest test had to be applied to the time at which the director availed of the funds in question and/or at the time he or she was in a position to ensure that the taxes were paid by the company.

5. Analysis and Findings

51. In deciding whether the Appellant is or was a person with a "*material interest*" in the Company for the purposes of section 997A, the first issue which requires to be determined is the date on which the statutory test is to be applied. As outlined above, the Appellant submits that it is the date on which the P21 Balancing Statement was issued or, alternatively, the date of the Notice of Amended Assessment. In contrast, the Respondent submits that it is the date(s) on which a company makes a payment of salary, wages or other income taxable pursuant to Schedule E and/or the date(s) that that PAYE/PRSI/Levies/USC are due for payment to the Collector-General or the Revenue Commissioners on the income, taxable under Schedule E, that has been paid to the taxpayer concerned.

52. Neither section 997A nor the other provisions of TCA 1997 explicitly state precisely when the test is to be applied. In considering the proper interpretation of the legislation relevant to this appeal, I have applied the judgment of the Supreme Court given by McKechnie J in ***Dunnes Stores -v- Revenue Commissioners***, where he stated:-

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. 'The words themselves alone do in such cases best declare the intention of the lawmaker' (Craies on Statutory Interpretation, 7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach '... it is natural to enquire what is the subject matter with respect to which they are used and the object in view' – Direct United States Cable Company –v- Anglo-American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question – McCann Limited –v- O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*
>
> *Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both*

coherently and intelligibly explain why, in any given case, one particular rule rather than another has been applied, and why in a similar case the opposite is also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

53. The foregoing passage was cited with approval by O'Donnell J giving the Supreme Court's decision in ***Bookfinders*** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54:-

"However, the rest of the extract from the judgement [of McKechnie J] *is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the*

principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."

54. Applying the foregoing principles, I am satisfied that I must attempt to interpret the legislation in a manner which best reflects the objects and purpose of the section, on the basis that such an interpretation is that intended by the Oireachtas.

55. I respectfully agree with the view expressed by my colleague in **13TACD2019** that "*… the demonstrable effect of TCA, section 997A is to deny persons in positions of control and influence over the company's business activities from claiming credit for unpaid taxes that ought to have been deducted and remitted by such companies to the Respondent."*

56. Accepting, as I do, that the effect of section 997A reflects the intention of the legislature, I am satisfied that the relevant date(s) for the purposes of the "*material interest*" test is the date(s) on which a company fails to remit to the Collector General within the time allowed by the legislation sums deducted in respect of PAYE/PRSI/Income Levies/USC from the monies paid to the company's employees. It is the failure to remit those sums that triggers the application of section 997A(3) to persons with a material interest, and I therefore find that it is the date(s) of such failure which is relevant to the application of the test.

57. I would also observe in this regard that I agree with the submission of the Respondent that the interpretation contended for by the Appellant, while arguable on the literal wording of the section, could give rise, if not necessarily to absurdity, to significant practical difficulties for the Respondent in seeking to apply the section. That cannot, in my view, have been the intention of the legislature.

58. Accordingly, for the purposes of determining this appeal, I must decide whether the Appellant had a material interest in the Company during the 2009 tax year, when the Company deducted monies from the salaries and wages paid to its employees but failed to remit the entirety of those monies to the Collector General.

59. The Appellant submits in this regard that he ceased to have a material interest in the Company once the Company went into a creditors' voluntary liquidation and a liquidator was appointed on [redacted] 2010.

60. It was submitted on behalf of the Appellant that he ceased to be a director on the appointment of the liquidator. I believe this submission to be incorrect in law. Section 269(3) of the Companies Act 1963, which applied at the time that the Company went into liquidation, provided that on the appointment of the liquidator, all the powers of the directors ceased, except so far as the committee of inspection, or if there was no such committee, the creditors, sanctioned the continuance thereof. The section meant that the Appellant's powers as a director ceased as and from [redacted] 2010; however, neither section 269(3) nor any other provision of the 1963 Act operated to remove the Appellant as a director on the appointment of the liquidator.

61. However, the question of whether or not the Appellant was a director at the material time is, in my view, irrelevant. This is because the "*material interest*" test in section 997A(1)(b)(i) does not consider whether a person was a director of the company but instead turns on whether that person, either on his own or with connected persons, is the beneficial owner of or is able to control more than 15% of the ordinary share capital.

62. The Appellant in the instant appeal was the owner of 99% of the ordinary share capital in the Company at all material times. The appointment of a liquidator does

not have the effect of cancelling the ordinary share capital of a company, nor does it alter the ownership of the shares. I note that as of the date of this Determination, the liquidation of the Company is ongoing and the Company has not been dissolved. Accordingly, the Appellant remains the owner of 99% of the ordinary share capital.

63. It was submitted on behalf of the Appellant, however, that I had to have regard to the beneficial ownership of the shares and, on the authority of the ***Olive Mills*** decision cited above, that the commencement of the creditors' voluntary liquidation had operated to transfer the beneficial interest in the shares from the Appellant to the liquidator, and that thereafter the Appellant held the shares on trust.

64. I believe that this submission is based on a misreading of the ***Olive Mills*** decision. Having carefully considered what Buckley J said in that case, and the judgements in the Court of Appeal quoted by Buckley J, it is clear that what he decided was that the shares in a subsidiary company ceased to be beneficially owned by the parent company when the parent company went into liquidation. He did not find that the commencement of a liquidation of a company resulted in the beneficial ownership of that company's shares transferring from the members to the liquidator, nor am I aware of any other authority which would support such a proposition.

65. I am therefore satisfied and find as a material fact that the Appellant in the instant appeal was at all material times and remains the legal and beneficial owner of 99% of the ordinary share capital of the Company.

66. For the reasons outlined above, I have found that the relevant dates for the application of the section 997A(1)(b)(i) test in the instant appeal are the dates in 2009 on which the Company failed to remit to the Collector General monies which had been deducted from the wages or salaries of employees in respect of

PAYE/PRSI/Income Levies within the time allowed by the legislation and the Regulations made thereunder.

67. However, even if I am wrong in this conclusion and the Appellant is correct that the test ought to be applied as of 22 October 2010 or 15 January 2011, the Appellant was still the legal and beneficial owner of more than 15% of the ordinary share capital of the Company on those dates.

68. Accordingly, I find that the Appellant had a "*material interest*" in the Company for the purposes of section 997A(1)(b)(i) in 2009, 2010 and in 2011 and is therefore potentially subject to the application of section 997A(3).

69. The Appellant submits that even if section 997A(3) is potentially applicable, there has been no underpayment of tax because the total sum paid by the Company to the Respondent during the 2009 tax year was €38,326.37, which sum exceeded the total amount of €34,391.13 deducted by the Company from wages and salaries in respect of PAYE, Income Levy and Employee PRSI. The Appellant submits that the Employer's PRSI contribution payable of €24,123.32 is clearly not a deduction from emoluments paid, and therefore cannot be taken into account for the purposes of restricting tax credits pursuant to subsection (3).

70. The Appellant further submits that there is no legislative basis for the manner in which the Respondent set off and apportioned the monies received by monthly direct debit and by cheque from the Company against PAYE and PRSI liabilities during 2009. However, as the Respondent has pointed out, the Company informed the Respondent by its submission of the CG7 Form when setting up the direct debit payments that the monies received from such payments were to be applied to PAYE and PRSI liabilities. The fact that the CG7 Form contained such an instruction was not disputed by the Appellant. I am satisfied that the Respondent was entitled to treat the Form as the

Company's identification of the liabilities against which the direct debit payments were to be set off for the purposes of section 960G(1). The Respondent was permitted by statute to act in accordance with the Company's instructions in this regard and did so in setting the 2009 payments against the PAYE/PRSI liabilities.

71. The next question which arises is whether the Respondent was entitled to take into account payments attributed to and set off against the Company's Employer's PRSI contributions due when deciding that not all of the tax deducted in 2009 had been remitted by the Company. For the reasons outlined above, the Appellant submits that the Respondent was not so entitled.

72. I prefer the arguments and submissions advanced on behalf of the Respondent in this regard. Having given very careful consideration to the submissions made on behalf of both parties and to the provisions of section 13(4) of the Social Welfare Consolidation Act 2005, I am satisfied that employers are liable in the first instance to pay not only the employee's PRSI contribution but also their own employer's PRSI contribution.

73. I am further satisfied that both the employee contribution and the employer contribution to PRSI are contributions payable in respect of emoluments and of earnings which must be collected and are recoverable by the Collector General pursuant to Article 8 of the 1996 Social Welfare (Consolidated Contributions and Insurability) Regulations. Equally, both contributions are contributions due in respect of earnings or emoluments by an employer which must be paid by the employer within the time allowed by Article 9 of those Regulations.

74. Accordingly, I find that the Respondent was entitled as a matter of law to attribute a portion of the monthly direct debit payments and of the cheque payments received from the Company to the Company's Employer's PRSI Contributions when setting off

those payments against PAYE/PRSI liabilities in accordance with the Company's instructions.

75. I believe this finding is supported by and consistent with the provisions of section 17(4) of the Social Welfare Consolidation Act 2005, which provides *inter alia* that the provisions of any enactment and regulation relating to the estimation, collection and recovery of, or the furnishing of returns by employers in relation to, income tax shall apply in relation to employment contributions which the Collector General is obliged to collect as if those contributions were an amount of income tax which the employer was liable to remit to the Collector General under the Income Tax (Employment) (Consolidated) Regulations 2001.

76. For the reasons outlined above, I find that the Respondent is correct in its submission that it was entitled to take into account the Company's Employer's PRSI contributions when deciding whether all of the tax deducted from the emoluments paid by the Company to the Appellant had been remitted by the Company to the Collector General.

77. Accordingly, I am satisfied and I find as a material fact that the total tax liability in respect of PAYE and Income Levy of the Company for 2009 amounted to €20,495 but the total amount remitted to the Collector General in respect of PAYE and Income Levy, following the lawful and permissible apportionment of payments received as between PAYE and PRSI, was €12,684.20.

78. There was therefore an underpayment of PAYE and Income Levy in the amount of €7,630.80 and I accept as correct the Respondent's submission and calculation that €6,067.80 of the sum is attributable to unpaid PAYE. By virtue of the provisions of section 997A(4), the entirety of this underpayment is attributable to the Appellant as a person with a material interest in the Company.

79. The final argument advanced on behalf of the Appellant was that section 997A is merely an administrative or machinery provision and not a charging provision, and therefore cannot increase or vary the Appellant's liability to tax. While I fully accept the statement of principle made by the Appellant in this regard, I agree with the Respondent that the operation of the section does not increase or alter the Appellant's tax liability but simply determines whether a balance remains payable after tax is deducted at source or credited against the Appellant's net tax liability. Accordingly, I find that the Appellant has not succeeded in this ground of appeal.

*6. **Conclusions***

80. For the reasons outlined above, my findings can be summarised as follows:-

(a) section 997A does not operate to increase or vary the Appellant's liability to tax and therefore the Appellant cannot succeed in a challenge to the provision on the basis that it has the effect of a charging provision;

(b) the relevant date(s) for the purposes of the "*material interest*" test contained in section 997A(1)(b)(i) is the date(s) on which a company fails to remit to the Collector General within the time allowed by the legislation sums deducted in respect of PAYE/PRSI/Income Levies/USC from the monies paid to the company's employees;

(c) the relevant dates in the instant appeal therefore fell during the 2009 tax year;

(d) the Appellant was at all material times the legal and beneficial owner of 99% of the ordinary share capital of the Company, and neither the voluntary liquidation of the Company nor the appointment of a liquidator altered the position in this regard;

(e) the Appellant was accordingly a person with a material interest in the Company, within the meaning of section 997A(1)(b)(i), at all material times and, in particular, during the 2009 tax year when the Company failed to remit to the Collector General sums deducted in respect of PAYE, PRSI and Income Levies from monies paid to the company's employees;

(f) the Company instructed the Respondent to set off the monthly direct debit payments against PAYE and PRSI liabilities and the Respondent acted lawfully in setting off the payments received during 2009 in accordance with that instruction;

(g) the Respondent was entitled as a matter of law to attribute a portion of the monthly direct debit payments and of the cheque payments received from the Company to the Company's Employer's PRSI Contributions when setting off those payments against PAYE/PRSI liabilities in accordance with the Company's instructions;

(h) there was an underpayment by the Company in the 2009 tax year of PAYE and Income Levy in the amount of €7,630.80 and €6,067.80 of that sum is attributable to unpaid PAYE;

(i) the entirety of this underpayment is attributable to the Appellant as a person with a material interest in the Company pursuant to the provisions of section 997A(4);

(j) the Respondent was therefore correct in reducing the Appellant's PAYE credit from €7,337 to €1,150.60 for the 2009 tax year.

81. I therefore find that the Appellant has not been overcharged by reason of the Notice of Amended Assessment issued by the Respondent on 15 January 2011 and determine pursuant to section 949AK(1)(c) that the said Notice of Amended Assessment stand.

Dated the 2nd of February 2022

MARK O'MAHONY
APPEAL COMMISSIONER

The Appellant has requested that this appeal be reheard by a Judge of the Circuit Court pursuant to the provisions of section 942 of the Taxes Consolidation Act 1997 as amended and section 27(4) of the Finance (Tax Appeals) Act 2015.