



35TACD2022

Between

██████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter “the Commission”) as an appeal against an assessment, under Chapter 5 of Part 41A Taxes Consolidation Act 1997 (hereinafter the “TCA 1997”) to income tax for the tax year 2012 raised by the Revenue Commissioners (hereinafter “the Respondent”). The amount of tax at issue is €3,056.16.

Background

2. The Appellant was a Proprietary Director of ██████████ (hereinafter the “Company”) holding 50% of the shares in the Company. The Company was dissolved on ██████████ 2014 leaving a PREM liability outstanding for the tax years 2010, 2011 and 2012.
3. On 16th January 2019 the Respondent issued a statement to the Appellant which showed a balance of Income Tax due for 2012 of €3,056.16 which reflected a disallowance of a credit for tax deducted by the Company from the Appellant’s 2012 emoluments pursuant to section 997A of the TCA 1997 and which also reflected a credit applied to the Appellant’s 2012 balance from an overpayment made by the Appellant in 2017.

4. The Appellant filed an Appeal against the Respondent's assessment with the Commission dated 16th January 2019 and which the Commission received on 20th January 2019.
5. The oral hearing of the within appeal was heard on 22nd February 2022 at which the Commissioner did not hear direct evidence and at which the Commissioner heard submissions on behalf of both Parties.

Legislation and Guidelines

6. The legislation relevant to this appeal is as follows:

Section 997A of the TCA 1997:

(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 in 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.]

(6) Where, in accordance with subsection (5), the tax to be treated as having been deducted from the emoluments paid to each person to whom this section applies exceeds the actual amount of tax deducted from the emoluments of each person, then the amount of credit to be given for tax deducted from those emoluments shall not exceed the actual amount of tax so deducted.

...”.

Submissions

Appellant's Submissions:

7. The Appellant's Tax Agent submitted the following in support of this appeal:

“I'm writing to you to appeal the decision by the revenue to find [REDACTED] [sic] (PPS [REDACTED]) personally liable for the unpaid taxes of liquidated company [REDACTED] [REDACTED] for the year 2012.

Back in 2012 [REDACTED] was a director of [REDACTED], a company that fell victim of the recession. Two debtors of the Limited Company refused to pay large outstanding debts. [REDACTED] took legal action against one of the large Debtors and was successful. However, despite being successful the Debtor still refused to pay. The second Debtor left the country and refused to pay. As a result of the actions of the Debtors of [REDACTED] the Company became insolvent and was **advised by Revenue** to liquidate.

At that time [REDACTED] was advised that the unpaid taxes of the Limited Company would die with the liquidation. However, Revenue have subsequently held [REDACTED] personally liable for P.35 liabilities unpaid by the company in 2012.

██████████ was owed a large sum of money by ██████████ at the time the company folded. In 2012 (and previous years) the amount of cash withdrawn by ██████████, from the Company, could have been recorded as payment of a Directors Loan account rather than as a salary. In that case there would have been no Tax liability involved at all. However, ██████████ was running the business as a going concern and did not foresee the subsequent bad debts. In the light of winning his legal action against the company debtor such action was not deemed necessary. As a result, ██████████ remains an unpaid Creditor of a Company liquidated on the advice of the revenue. As the accountant for ██████████ and ██████████ I would like the opportunity to adjust the accounts of the company and to remove the "salary" paid to ██████████ and reclassify it as a repayment of Directors loan. In that way there will be no unpaid tax for 2012 and ██████████ will not be held liable for the failure of his debtors to pay his company - despite the company winning legal action to have the funds paid.

In the interest of fairness I would plead that the debts of ██████████ be treated in the same way as the debt owed to ██████████ and be confined to the past."

8. The Appellant's Tax Agent confirmed to the Commissioner that he was not in a position to provide documentary evidence that the Company made P35/PREM returns to the Respondent in 2012.
9. The Appellant's Tax Agent stated that he was not going to quote laws, details and facts to the Commissioner and submitted that he had to accept that the case that the Appellant makes may fall outside of the provisions of the TCA 1997.

Respondent's Submissions:

10. The Respondent submitted that section 997A of the TCA 1997 states that no credit for tax deducted from the emoluments paid by a company to a director/employee with a material interest in the company shall be given, unless there is a documentary evidence to show that the tax deducted has been remitted by the company to the Collector General.
11. The Respondent submitted that it reviews every liquidated company for outstanding PREM liabilities.
12. As a result of the Company, of which the Appellant was a Proprietary Director, ceasing to trade with outstanding PREM liabilities, amendments were carried out to the Appellant's Notices of Assessment in accordance with section 997A of the TCA 1997 for the tax years

2010, 2011 and 2012 to withdraw the credit for "PAYE Paid" and this gave rise to the tax liability the subject matter of the within appeal.

Material Facts

13. The following material facts are at issue in this appeal:

[13.1] The Appellant was a Proprietary Director and employee of the Company in 2012;

[13.2] The Company was dissolved on [REDACTED] 2014 leaving a PREM liability outstanding for the years 2010, 2011 and 2012.

14. The material facts at issue are not in dispute between the Parties. The Commissioner accepts that the Appellant was a Proprietary Director and employee of the Company in 2012 and that the Company was dissolved on [REDACTED] 2014 leaving a PREM liability outstanding for the years 2010, 2011 and 2012. Therefore these material facts are accepted.

Analysis

15. Section 997A(1)(b)(i) of the TCA 1997 defines a person having a material interest in a company as: "*(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*".
16. Section 997A(2) of the TCA 1997 states that "*(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.*".
17. Section 997A(3) of the TCA 1997 provides that "*(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 in 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.*". (emphasis added)

18. It is not in dispute that the Appellant had a material interest in the Company pursuant to section 997A(1)(b)(i) of the TCA 1997.
19. The Appellant's Tax Agent confirmed to the Commissioner that a P35/PREM return was not made by the Company for 2012 and also confirmed that he was not in a position to provide the Commissioner with documentary evidence that a P35/PREM return was made by the Company to the Respondent for 2012.
20. Section 997(3) of the TCA 1997 sets out that no credits should be allocated to the Appellant in respect of deductions made by the Company from the Appellant's emoluments in circumstances where the Appellant has not provided documentary evidence that a P35/PREM return was made by the Company to the Respondent. The Commissioner finds that section 997(3) of the TCA 1997 confers no authority or discretion on the Commissioner to direct that credits should be allocated to the Appellant in respect of deductions made by the Company from the Appellant's emoluments in circumstances where the Appellant has not provided documentary evidence that a P35/PREM return was made by the Company to the Respondent.
21. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

"This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable."

22. The Appellant has not discharged the burden of proof to satisfy the Commissioner that the Respondent was incorrect in not allocating a credit for tax deducted by the Company from the Appellant's emoluments pursuant to section 997A of the TCA 1997.

Determination

26. For the reasons set out above, the Commissioner determines that the Respondent was correct in disallowing a credit for tax deducted by the Company from the Appellant's emoluments pursuant to section 997A of the TCA 1997.
27. It is understandable that the Appellant will be disappointed with the outcome of his appeal. The Appellant was correct to check to see whether his legal rights were correctly applied.
28. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949AK thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point

of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

A handwritten signature in black ink, appearing to read 'Clare O'Driscoll', written in a cursive style.

Clare O'Driscoll
Appeal Commissioner
23rd February 2022