



## Background

4. The Appellant incorporated a company "██████████" (hereinafter the "Company") on ██████████ 2014 of which she and her husband Mr ██████████ were directors.
5. On 7<sup>th</sup> April 2014 a Company Application Form RINE-C was submitted by the Appellant to the Respondent seeking relief against Income Tax under the Start-Up Relief for Entrepreneurs (hereinafter "SURE") scheme on an investment of €110,000 by the Appellant in the Company. The RINE-C stated that the Company's date of commencement of trade was 26<sup>h</sup> March 2014 and that as at 7<sup>th</sup> April 2014, the date of the application, the Company had 1 employee.
6. On the same date, 7<sup>th</sup> April 2014, the Appellant submitted an Application by an Individual for Refund of Income Tax (hereinafter an "RINE-I") seeking relief under the SURE scheme on an investment of €110,000 in the Company. The RINE-I stated that the Appellant had begun employment with the Company on 26<sup>th</sup> March 2014 and that her employment with the Company was as a Director. The Appellant requested in the RINE-I application that any relief granted be against Income Tax liabilities for the years 2008 to 2013 inclusive.
7. The Appellant's application for SURE was approved by the Respondent on 15<sup>th</sup> May 2014 and the Appellant was granted and received refunds of Income Tax for 2008, 2009 and 2010 totalling €44,387.00.
8. On 8<sup>th</sup> January 2015 the Appellant sent an email to the Respondent's Incentives and Financial Services Division which stated:

"Hi ██████████,

*Hope u are well. I set up a business in March last year which was unsuccessful. I availed of seed capital relief but have made no money and need to be earning. I have financial commitments that need to be met so I'm taking a job with the cso to pay my mortgage. I have no choice its either work or lose my house. Please advise.*

██████████."

9. The Respondent replied to this email on 8<sup>th</sup> January 2015 as follows:

██████████,

*Seed Capital Relief will not be withdrawn if the company fails for Bone Fide commercial reasons.”*

10. On 20<sup>th</sup> July 2015 the Respondent's Companies Unit received an undated letter from the Appellant which stated as follows:

“ [REDACTED]

*Company Number – [REDACTED]*

*To Whom it May Concern,*

*The above named company has never traded and I wish to apply for a letter of no objection from the Revenue Commissioners.*

*As the company has never traded (due to ill health) I do not have any accounts for this company.*

*The company has no assets or liabilities.*

*Thanking you in advance,*

[REDACTED]”

11. On 17<sup>h</sup> August 2015 the Respondent issued a letter of no objection to the Registrar of Companies in relation to the Company which stated as follows:

*“Based on the information currently available, and without prejudice, the Revenue Commissioners have no objection to the company being struck off the Register of Companies.”*

12. On 21<sup>st</sup> September 2015 the Companies Registration Office received a G1-H15 Special Resolution to apply for Voluntary Strike-Off for the Company pursuant to section 731(1)(b)(i) of the Companies Act 2014. The Special Resolution had been signed by the Appellant on 9<sup>th</sup> July 2015 in her capacity as Director and Secretary of the Company.

13. On 3<sup>rd</sup> November 2015 the Appellant's husband Mr [REDACTED] submitted a Tax Registration Cancellation Notification TRCN1 form in relation to the Company which stated that the reason for the cancellation of the Company's tax registration was because it had never traded due to ill health.

14. Subsequently, and over 1 year later, on 8<sup>th</sup> December 2016 the Appellant and Mr [REDACTED] submitted an application seeking relief against Income Tax under the SURE scheme on an investment of €80,000 in a new venture “[REDACTED] Limited” which had been incorporated on [REDACTED] 2016.

15. On assessing the SURE application for [REDACTED] Limited, the Appellant’s letter of 20<sup>th</sup> July 2015 came to the Respondent’s attention and the application for SURE made by the Appellant in relation to the Company on 7<sup>th</sup> April 2014 was reviewed.

16. Following correspondence with the Appellant, the Respondent decided that the SURE relief received by the Appellant in 2014 was not due for the following reasons:

- i. It had not been determined whether the Company had commenced to trade pursuant to section 501(1)(a)(ii) of the Taxes Consolidation Act 1997 (hereinafter the “TCA1997”);
- ii. Full time employment had never commenced in the Company pursuant to section 493(7) of the TCA1997;
- iii. The Company was not a “qualifying new venture” pursuant to section 493(1)(c) as the Appellant had previously carried on the trade in her own name;
- iv. The return of capital made on the winding up of the Company triggered a claw back of the SURE relief granted to the Appellant pursuant to sections 497(5) and (10) of the TCA1997;
- v. The €110,000 which had been invested in the Company was lodged to a bank account in the Appellant’s name rather than into a Company bank account;
- vi. The reporting obligations contained in sections 503(2) and (2) of the TCA1997 were not complied with.

17. On foot of this decision the Respondent issued the disputed Notices of Assessment on 6<sup>h</sup> July 2017 which showed the following balances as being payable:

2008 €6,490.98

2009 €15,049.59

2010 €22,848.96

18. The Appellant subsequently appealed the Notices of Assessment for 2008, 2009 and 2010 by way of Notice of Appeal dated 18<sup>th</sup> July 2017.

19. The oral hearing to which this determination relates took place on 4<sup>th</sup> April 2022.

### **Legislation and Guidelines**

20. The legislation relevant to this appeal, that is to say at the time of the claim for SURE by the Appellant in 2014, is as follows:

#### Section 488 TCA1997

“ ...

*‘qualifying new venture’ means a venture consisting of relevant trading activities which are set up and commenced by a new company other than—*

*(a) activities which were previously carried on by another person and to which the company has succeeded, or*

*(b) a venture, the activities of which were previously carried on as part of another person’s trade or profession;*

*‘relevant employment’, in relation to a specified individual, means employment throughout the relevant period by the company in which the specified individual makes a relevant investment (being that individual’s first such investment in that company) and where the specified individual is a full-time employee or full-time director of the company;*

...

*‘relevant trading activities’ means activities carried on in the course of a trade the profits or gains of which are charged to tax under Case I of Schedule D, excluding activities related to—*

*(a) adventures or concerns in the nature of trade,*

*(b) dealing in commodities or futures or in shares, securities or other financial assets,*

*(c) financing activities,*

*(d) the provision of services, which would result in a close company (within the meaning of section 430) that provides those services being treated as a service company for the purposes of section 441 if that close company had no other source of income,*

*(e) dealing in or developing land,*

*(f) the occupation of woodlands within the meaning of section 232,*

*(g) operating or managing hotels, guest houses, self catering accommodation or comparable establishments or managing property used as an hotel, guest house, self catering accommodation or comparable establishment,*

*(h) operating or managing nursing homes or residential care homes or managing property used as a nursing home or residential care home,*

*(i) operations carried on in the coal industry or in the steel and shipbuilding sectors, and*

*(j) the production of a film (within the meaning of section 481),*

*but including tourist traffic undertakings;*

*...”*

Section 493(1) TCA1997

*“(1) ... this section shall apply for affording relief from income tax where—*

*(a) a specified individual makes a relevant investment,*

*(b) the shares issued to the specified individual are issued for the purposes of raising money by a qualifying company for the benefit of its activities referred to in paragraph (d),*

*(c) the activities carried on by the qualifying company constitute a qualifying new venture,*

*(d) the money was used, is being used or is intended to be used for the benefit of a qualifying new venture for the purposes of—*

*(i) carrying on of relevant trading activities, or*

*(ii) in the case of a company which has not commenced the carrying on of relevant trading activities, incurring expenditure on research and development within the meaning of section 766,*

*and*

*(e) the use of the money as set out in paragraph (d) will contribute directly to the creation or maintenance of employment in the company.*

Section 493(5) TCA1997

*“Relief shall be given on a claim and shall not be allowed in the case of a relevant investment unless and until the qualifying new venture commences to carry on relevant trading activities or in the case of a company referred to in section 493(1)(d)(ii), has expended not less than 30 per cent of the relevant investment on research and development activities which are connected with and undertaken with a view to the carrying on of the relevant trading activities”*

Section 493(7) TCA1997

*“In the case of a claim allowed before a specified individual commences a relevant employment with the company in which that individual has made a relevant investment (being that individual’s first such investment), the relief shall be withdrawn if the specified individual fails to commence such employment -*

*(a) within the year of assessment in which the investment is made, or*

*(b) if later, within 6 months of the date of-*

*(i) where the investment consists of the subscription of only one amount for eligible shares, that subscription, or*

*(ii) where the investment consists of the subscription of more than one amount for eligible shares, the last such subscription.”*

Section 494(10) TCA1997

*“A company shall not be regarded as ceasing to comply with subsection (3) by reason only of the fact that it is wound up or dissolved without winding up if—*

*(a) it is shown that the winding up or dissolution is for bona fide commercial reasons and not part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax, and*

*(b) the company’s net assets, if any, are distributed to its members before the end of the relevant period or, in the case of a winding up, the end (if later) of 3 years from the commencement of the winding up.”*

**Section 497(5) TCA1997**

*“For the purposes of this section, an individual shall also receive value from the company where the individual receives in respect of ordinary shares held by the individual any payment or asset in a winding up or in connection with a dissolution of the company, being a winding up or dissolution within section 494(10).”*

**Section 497(10) TCA1997**

*“Where an individual who subscribes for eligible shares in a company—*

*(a) has, before the issue of the shares but within the specified period, received any value from the company, or*

*(b) on or after their issue but before the end of the specified period, receives any such value,*

*then, the amount of the relief to which the individual is entitled in respect of the shares shall be reduced by the value so received.”*

**Section 501(a)(i) TCA1997**

*“A claim for the relief in respect of eligible shares issued by a company in any year of assessment shall be made—*

*(a) not earlier than—*

- (i) in the case of a claim under section 493, the date on which the company commences to carry on the relevant trading activities or in the case of a company referred to in section 493(1)(d)(ii), has expended not less than 30*



*per cent of the relevant investment on research and development activities which are connected with and undertaken with a view to the carrying on of the relevant trading activities,*

...”

#### Section 503 TCA1997

*“(1) Where an event occurs by reason of which any relief given to an individual is to be withdrawn by virtue of section 492, 496 or 497, the individual shall within 60 days of coming to know of the event give a notice in writing to the inspector containing particulars of the event.*

*(2) Where an event occurs by reason of which any relief in respect of any shares in a company is to be withdrawn by virtue of section 494, 495, 497, 498, 499 or 500—*

*(a) the company, and*

*(b) any person connected with the company who has knowledge of that matter,*

*shall within 60 days of the event or, in the case of a person within paragraph (b), of that person coming to know of it, give a notice in writing to the inspector containing particulars of the event.*

...”

#### **Submissions**

21. At the oral hearing of the appeal the Commissioner heard sworn evidence and submissions from the Appellant and also submissions on behalf of the Respondent.

#### Appellants' Submissions

22. The Appellant gave the following direct evidence to the Commissioner:

23. She stated that in March of 2014 she and her husband set up the Company which was to be involved in assisting weight loss through the use of the product [REDACTED]. Both she and her husband were directors of the Company.

24. The Appellant stated that she applied for SURE which was granted by the Respondent and received by the Appellant.

25. The Appellant stated that she was diagnosed with [REDACTED] in August 2014 and had surgery in October 2014. The Company was not going well, she was under a lot of pressure with her health and she and her husband decided that it would be better if they closed up the Company and for her to look for a job when she was feeling up to it.
26. In January 2015 she asked the Respondent a question in relation to seed capital relief and whether it would be withdrawn if the Company was wound up. She stated that she was informed that the SURE would not be withdrawn if the Company failed for *bone fide* commercial reasons.
27. The Appellant stated that she and her husband along with their accountant took the view that her illness was a *bone fide* commercial reason and subsequently the Company was wound up by way of an application for voluntary strike off on foot of receipt of a letter of no objection from the Respondent.
28. Subsequently, the Appellant applied for SURE for [REDACTED] Limited which is a company set up for [REDACTED]. She stated that she was eventually granted SURE for [REDACTED] but that she never received this as the Respondent decided to claw back the SURE which was paid on foot of the 2014 application the subject matter of the within appeal.

#### Respondent's Submissions

29. No direct evidence was adduced on behalf of the Respondent to the Commissioner.
30. The Respondent submitted that the Company never commenced to carry on relevant trading activities and that section 493(5) TCA1997 provides that SURE shall not be allowed in the case of a relevant investment unless and until the qualifying new venture commences to carry on relevant trading activities. The Respondent submitted that the Company never had any customers, never had any income, was never in a position to provide a customer list, to file any returns or to produce accounts. Therefore, the Respondent submitted, the Company and the Appellant did not qualify for SURE.
31. In addition the Respondent submitted that the application for SURE had had been made relief prior to the Company commencing to trade. This, they submitted, was contrary to section 501(a)(i) TCA1997 which provides that a claim for SURE shall

not be made earlier than the date on which a company commences to carry on relevant trading activities. Therefore, the Respondent submitted, the Company and the Appellant did not qualify for SURE.

32. The Respondent further submitted that the Company was not a new venture in that the Appellant had been purchasing the [REDACTED] products since January 2014 prior to March 2014 when the Company was incorporated. Therefore the Respondent submitted that the Company did not constitute a new venture as set out in section 493(1)(c) TCA1997.
33. In addition the Respondent submitted that, because the Company had never traded, the money invested in the Company was not used for the purposes of carrying on relevant trading activities pursuant to section 493(1)(d)(i) TCA 1997.
34. The Respondent submitted that the money invested in the Company did not contribute directly to the creation or maintenance in the company as set out in section 493(1)(e) TCA1997. The Respondent submitted that it is clear that there was no meaningful employment in the Company, there were no returns made in respect of any employment in the Company or of the Appellant's employment in the Company. It is also clear, the Respondent submitted, that as the Company never traded there is no question that the money invested in the Company was used for creating or maintaining employment in the Company.
35. The Respondent submitted that the Appellant failed to take up employment with the Company within the year of assessment in which the investment was made or within six months of the date of the subscription for eligible share as set out in section 493(7) TCA1997. As a result of this, the Respondent submitted that it was required to claw back the relief which had been granted to the Appellant as set out in section 493(7) TCA1997.
36. The Respondent submitted that the winding up of the Company was not for *bona fide* commercial reasons in circumstances where the Company never began to trade and in circumstances where the full amount of the subscription for eligible shares was received back by the investor, that is to say by the Appellant.
37. The Appellant did not give notice in writing to the Inspector pursuant to section 503(1) and (2)TCA1997.

38. The Respondent submitted that the correspondence of 17<sup>th</sup> August 2015 from the Respondent to the Appellant which stated that relief would not be withdrawn if the company fails for *bone fide* commercial reasons was in answer to a very limited question from the Appellant which did not set out the precise circumstances which pertained at the time the Appellant and her husband were considering winding up the Company.

### **Material Facts**

39. The following material facts are at issue in this Appeal:

- i. The Company failed to commence to carry out relevant trading activities;
- ii. The application for SURE was made prior to the Company commencing to carry out relevant trading activities;
- iii. The Appellant failed to take up employment with the Company within the year of assessment in which the investment was made or within six months of the date of the subscription for eligible shares;
- iv. The money invested in the Company was not used for the purposes of carrying on relevant trading activities;

40. The Commissioner has examined the material facts at issue.

#### The Company failed to commence to carry out relevant trading activities:

41. On the one hand the Respondent contends that the Company failed to commence to carry out relevant trading activities required by section 493(5) TCA1997 which provides that SURE shall not be allowed in the case of a relevant investment unless and until the qualifying new venture commences to carry on relevant trading activities. On the other hand the Appellant contends that the Company did commence to carry out relevant trading activities.

42. The RINE-C application dated 7<sup>th</sup> April 2014 submitted by the Appellant stated that the Company's date of commencement of trade was 26<sup>h</sup> March 2014. The Appellant has not submitted any documentation which supports her contention that the Company commenced to carry out relevant trading activities. The Appellant has not submitted accounts for the Company nor has she submitted bank statements for the Company.

43. In support of her claim that the Company did commence to carry out relevant trading activities the Appellant has submitted copies of “Summary of Earnings” documents from [REDACTED] Limited for March 2014, April 2014 and June 2014 – December 2014. Each of these documents have a distributor address in the name of the Appellant at her home address. The Company is not referenced in these documents. On cross examination by the Respondent, the Appellant stated that she and members of her family had begun to use [REDACTED] products prior to the incorporation of the Company. The Appellant accepted under cross examination that the Company did not have any clients and that they were building up to the Company having clients by using the [REDACTED] products personally.
44. The Appellant stated under cross examination that she and her husband had established the Company with a view to it being a success and in order for it to be a success they started using the [REDACTED] products personally. The Appellant stated under cross examination that whilst the Company had not commenced to trade, she and her husband had started the process by using the [REDACTED] products and that they had applied for SURE genuinely and in order to set up the Company.
45. The Commissioner has considered other documentation which has been submitted during the course of this appeal, namely:
- i. The letter which the Appellant sent to the Respondent’s Companies Unit on 20<sup>th</sup> July 2015 and which stated that the Company had never traded due to ill health and which stated that she did not have any accounts for the Company;
  - ii. The G1-H15 completed by the Appellant and submitted to the Companies Registration Office date 9<sup>th</sup> July 2015 which stated that due to illness the Company never traded; and
  - iii. The Tax Registration Cancellation Notice dated 3<sup>rd</sup> November 2015 completed by the Appellant’s husband which stated the reason for the cancellation of the Company’s tax registration as being that it never traded due to ill health.
46. As with any taxation appeal, the burden of proof rests with the Appellant who must prove on the balance of probabilities that the disputed tax is not payable as set out

by Charleton J. in *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49.

47. Having considered all of the above the Commissioner finds that the Appellant has not discharged the burden of proof to establish that the Company commenced to carry out relevant trading activities. The Appellant conceded during cross examination that the Company had not commenced to trade and the documentation which was submitted to the Respondent and to the Companies Registration Office supports the Respondent's contention that the Company had never traded. In those circumstances the Commissioner accepts that the Company failed to commence to carry out relevant trading activities.

48. Therefore this material fact is accepted.

The application for SURE was made prior to the Company commencing to carry out relevant trading activities

49. The Commissioner has already found that the Company did not begin to carry out relevant trading activities at all. It therefore follows that the application for SURE could not have been made prior to the Company commencing to carry out relevant trading activities.

50. Therefore this material fact is not accepted.

The Appellant failed to take up employment with the Company within the year of assessment in which the investment was made or within six months of the date of the subscription for eligible shares:

51. In her RINE-I application dated 7<sup>th</sup> April 2014 the Appellant stated that she had begun employment with the Company on 26<sup>th</sup> March 2014. Under cross examination the Appellant accepted that she had not begun employment with the Company on 26<sup>th</sup> March 2014 and further stated that the intention had been that she would not take a wage from the Company until there was money to pay a wage.

52. The Appellant did not submit any documentation such as pay-slips or returns to the Respondent which established that she had taken up employment with the Company.

53. Having considered all of the above the Commissioner finds that the Appellant failed to take up employment with the Company within the year of assessment in which

the investment was made or within six months of the date of the subscription for eligible shares.

54. Therefore this material fact is accepted.

The money invested in the Company was not used for the purposes of carrying on relevant trading activities:

55. The Appellant submitted an Ulster Bank statement to the Commissioner which was in the Appellant's name which shows a lodgement of €60,000 on 8<sup>th</sup> April 2014 and of €50,000 on 17<sup>th</sup> April 2014. The only other transactions which this bank statement shows are two transfers dated 22<sup>nd</sup> April 2014 one for €500 and the other for €1,000.

56. Under cross examination the Appellant stated that this money had come from her father-in-law and that the entirety of the €110,000 had been returned to her father-in-law when the Company had been wound up.

57. No evidence, oral or documentary, was given to the Commissioner which establishes that the money invested in the Company was used for the purposes of carrying on relevant trading activities.

58. The Commissioner finds that the money invested in the Company was not used for the purposes of carrying on relevant trading activities.

59. Therefore this material fact is accepted.

60. The following material facts have therefore been accepted by the Commissioner:

- i. The Company failed to commence to carry out relevant trading activities;
- ii. The Appellant failed to take up employment with the Company within the year of assessment in which the investment was made or within six months of the date of the subscription for eligible shares; and
- iii. The money invested in the Company was not used for the purposes of carrying on relevant trading activities.

## **Analysis**

61. Section 493(5) TCA1997 provides that:

*Relief shall be given on a claim and shall not be allowed in the case of a relevant investment unless and until the qualifying new venture commences to carry on relevant trading activities...*

62. The Commissioner has already found as a material fact that the Company failed to commence to carry out relevant trading activities. As a result of the Company failing to commence to carry out relevant trading activities section 493(5) TCA1997 provides that SURE relief shall not be allowed.

63. Section 493(7) TCA1997 provides that:

*“In the case of a claim allowed before a specified individual commences a relevant employment with the company in which that individual has made a relevant investment (being that individual’s first such investment), the relief shall be withdrawn if the specified individual fails to commence such employment -*

*(a) within the year of assessment in which the investment is made, or*

*(b) if later, within 6 months of the date of-*

*(i) where the investment consists of the subscription of only one amount for eligible shares, that subscription, or...”*

64. The Commissioner has already found as a material fact that the Appellant failed to take up employment with the Company within the year of assessment in which the investment was made or within six months of the date of the subscription for eligible shares.

65. The use of the word 'shall' as set out in section 493(7) TCA1997, indicates an absence of discretion in the application of this provision. The wording of section 493(7) TCA1997 sets out a mandatory provision whereby the Respondent, and in turn the Commissioner, must claw back SURE if an individual fails to commence employment with a company within the year of assessment in which the investment is made. Section 493(7) TCA1997 does not provide for extenuating circumstances whereby, in the absence of employment being taken up, SURE may not be clawed back.

66. Section 493(1)(d)(i) and (ii) TCA1997 provide that:



*“(1) ... this section shall apply for affording relief from income tax where—*

*(d) the money was used, is being used or is intended to be used for the benefit of a qualifying new venture for the purposes of—*

*(i) carrying on of relevant trading activities, or*

*(ii) in the case of a company which has not commenced the carrying on of relevant trading activities, incurring expenditure on research and development within the meaning of section 766,*

*and*

*(e) the use of the money as set out in paragraph (d) will contribute directly to the creation or maintenance of employment in the company”*

67. 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.”*

68. As a result of the above the Commissioner finds that because the application for SURE did not meet the provisions of sections 493(1)(d)(i) and (ii), 493(5) and 493(7) TCA1997 the Appellant did not qualify for SURE and was not entitled to the relief which was approved by the Respondent on 15<sup>th</sup> May 2014.

69. As a result of the above the Commissioner finds that it is not necessary to consider whether the Company failed for *bone fide* commercial reasons.

### **Determination**

70. For the reasons set out above, the Commissioner determines that the Appellant has failed in this appeal and has not succeeded in showing that she was eligible for the relevant relief.

71. It is understandable that the Appellant might be disappointed with the outcome of this appeal. The Commission commends both Parties for the manner in which they conducted the appeal.

72. This Appeal is determined in accordance with Part 40A TCA 1997 and in particular, section 949 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.



Clare O'Driscoll  
Appeal Commissioner  
20<sup>th</sup> April 2022