



71TACD2022

Between

████████████████████

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I and section 997A(8) of the Taxes Consolidation Act 1997 (“the TCA 1997”) brought on behalf of ██████████ (“the Appellant”) against a decision of the Revenue Commissioners (“the Respondent”) to deny a credit for income tax deducted from the Appellant’s emoluments, but not remitted to the Respondent, by a Company in which the Appellant held a material interest.
2. The Appellant was a Director of and held more than 15% shareholding in ██████████ (“the Company”). The Appellant was jointly assessed with his spouse.
3. Amended Notices of Assessment were raised in November 2015, May 2016 and July 2016 and the Appellant duly appealed to the Commission. The appeal proceeded by way of oral hearing, which took place on 27 April 2022.

Background

4. The Company was incorporated on 24 July 1989 and carried on the business of a ██████████ known as ██████████. As set out above, the Appellant was both a

Shareholder and Director of the Company. On 17 April 2013, the Respondent served a demand pursuant to section 214 of the Companies Act, 1963 as amended, demanding the payment of certain tax liabilities in relation to VAT/PRSI/PAYE and interest thereon. On 30 August 2013, a petition was presented for the winding up of the Company returnable before the High Court on 23 September 2013. On 14 October 2013, by Order of the High Court, the Company was wound up and a Liquidator appointed.

5. The Appellant is appealing the application of section 997A of the TCA 1997 and the withdrawal of a credit for Income tax, deducted from employment income earned by the Appellant and his spouse from the Company. In addition, the Appellant maintains that the sum of €12,000 has been overpaid to the Respondent, which he is entitled to a credit for.
6. Following the application of section 997A of the TCA 1997, Amended Notices of Assessment were raised in July 2016, for the years 2012 and 2013, showing balances payable of €10,575 and €7,440.09, respectively. The Appellant maintains that any outstanding tax liability has either been paid by him or has been reconciled by the Liquidator, following the liquidation of the Company.
7. The Respondent submits that section 997A of the TCA 1997 was applied as payment in respect of PAYE and USC had not been remitted to the Respondent, by the Company, in respect of emoluments paid to the Appellant and his spouse.
8. At the hearing on 26 April 2022, the Respondent submitted Amended Notices of Assessment dated 26 April 2022, for the years 2012 and 2013. The Amended Notices of Assessment reflect an outstanding liability of €2,301.74 for the year 2012 and for the year 2013, no liability arises. The Respondent stated that the Amended Notices of Assessment issued following payments made by the Liquidator to the Respondent and thus, apply the credit at issue in this appeal.
9. In addition, the Respondent submits that the payment of €12,000 by the Respondent was allocated for the years 2009 and 2011 as follows:

<i>"Date</i>	<i>Taxhead</i>	<i>Period</i>	<i>Tax</i>	<i>Interest</i>
<i>30/01/2014</i>	<i>IT</i>	<i>2009</i>	<i>€8,111</i>	<i>€1,889</i>
<i>22/05/2014</i>	<i>IT</i>	<i>2011</i>	<i>€1,000</i>	<i>€0</i>
<i>11/07/2014</i>	<i>IT</i>	<i>2011</i>	<i>€1,293</i>	<i>€0"</i>

Legislation and Guidelines

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

11. Section 983 of the TCA, 1997 definition of Emoluments, provides:-

“anything assessable to income tax under Schedule E, and references to payments of emoluments includes references to payment on account of emoluments”.

12. Section 997A of the TCA 1997, Credit in respect of tax deducted from emoluments of certain directors, provides:-

“1 (a)

'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 against the amount of tax chargeable 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 2000 (SI 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 provision of those regulations.

(4)Where the company remits tax to the Collector-General which has been deducted from emoluments [paid by the company in a year of assessment, the tax remitted for that year of assessment] 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”.

13. Section 957(4) of the TCA 1997, Appeals, provides:-

“Where an appeal is brought against an assessment or an amended assessment made on a chargeable person for any chargeable period, the chargeable person shall specify in the notice of appeal-

(a) each amount or matter in the assessment or amended assessment with which the chargeable person is aggrieved, and

(b) the grounds in details of the chargeable person's appeal.”

14. Section 432(2) of the TCA 1997, Meaning of “associated company” and “control” provides:-

“For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire-

(a) the greater part of the share capital or issued share capital of the company or of the voting power of the company”.

15. Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations, 2001 (S.I No. 559 of 2001) provides:-

Notification of liability

“[The inspector may], in any case where he or she does not propose to make an assessment on an employee with respect to whom tax was deducted during a year, send to the employee, as soon as possible after the end of the year, a statement of his or her liability for the year and showing how it is proposed to deal with any overpayment or underpayment of tax”.

Submissions

16. Both the Appellant and his spouse gave evidence on the day of the hearing, in addition to the documentation furnished in advance of the appeal.

Appellant

17. [REDACTED] gave oral evidence on behalf of the Appellant. She submitted that a mistake was made by the Respondent in March 2007, when a Tax Clearance Certificate ("TCC") issued to the wrong address. She gave evidence that this resulted in the closure of the Company's premises by Gardaí, on 14 March 2007, for a period of over 6 weeks. She stated that the 6 week delay in issuing a TCC to the Company and the subsequent closure of its premises, caused considerable losses for the Company of over €50,000. She further stated that despite the premises being closed, costs were incurred namely, staff salaries in order to retain them. She submitted fees and expenses were also incurred relating to fire safety and planning. She gave evidence that when they went to Court to apply for [REDACTED], it was acknowledged by the Respondent that one branch of the Respondent had not been speaking to the other branch and that the TCC went to the wrong address. She stated that taxes were still being paid while the premises was closed and that the amount of €50,000 that was lost, is directly attributable to the Respondent, which should have been refunded to them.
18. [REDACTED] gave evidence that prior to 2013, they tried on several occasions to meet with the Respondent, to make arrangements to pay any outstanding tax liabilities. She submitted that between 2007 and 2013, the Respondent did not meet with them despite their efforts. She stated that at all stages it was acknowledged that they wanted to pay any outstanding liabilities. However, in 2013 a Liquidator was appointed. She submitted that prior to the Liquidator being appointed, three individuals of the Respondent misread figures resulting in incorrect calculations. She stated that there was a battle between the Liquidator and the Receiver. She stated that they were made notice parties to the Liquidation, by the Judge in High Court, so that they could understand what was happening to the Company.
19. [REDACTED] stated in relation to the demand notice that issued in 2013, liabilities have been paid by the Liquidator and there are no liabilities outstanding. She submits that there is still a demand for €18,000 for 2012, however this was also paid by the Liquidator. She stated that there is no equity in the process. There were mistakes made and misreading of calculations yet the Respondent continued to refuse to meet with them. They lost their business and their livelihood.
20. [REDACTED] gave evidence that having regard to Form E4 and the Liquidator's statement of proceedings and position of winding up in accordance with section 68(2) of the Companies Act, 2014, which she submitted at hearing, there is €325,000 missing, in relation to the overall assets realised during the Liquidation. She submitted that there has been overpayment of €12,000.

21. During cross examination, the Appellant clarified that a Receiver was appointed first and following that, the Liquidator was appointed.
22. [REDACTED] put forward documentary evidence from the [REDACTED] [REDACTED] that the Appellant meets the criteria for registration with the [REDACTED].
23. The Appellant gave evidence in relation to his belief that payments have been made and liabilities discharged for the years at issue. He stated that there has been a double payment of €12,000 for the years 2009/2011, as liabilities have been discharged by the Liquidator. He submitted that the credit should be returned to him. He made reference to the Amended Notices of Assessment that he received at the hearing from the Respondent, in relation to the year 2012 and 2013.

Respondent

24. The Respondent submitted that Amended Notices of Assessment were raised for 2012 and 2013 on 26 April 2022. It was submitted that liabilities in the amount of €2,301 are outstanding for 2012 and no liability now arises for 2013. The Respondent submitted that the amended notices issued, having applied the credit which was previously revoked under section 997A of the TCA 1997.
25. In relation to the argument that there has been a double payment of €12,000, which should be returned to the Appellant, the Respondent submitted that the sum which the Appellant refers to was applied to liabilities outstanding for 2009 and 2011, which were personal liabilities and not the liabilities of the Company. The Respondent referenced calculations at page 129 of the booklet of documents submitted on behalf of the Respondent.
26. The Respondent submitted that it cannot comment on the calculations or conclusions of the Liquidator, as this relates to the Company and not to the personal tax liabilities of the Appellant.

Material Facts

27. The Commissioner finds the following material facts:-
- i. The Appellant held a material interest in the Company within the meaning of section 432 of the TCA 1997 and was a proprietary Director of the Company.
 - ii. The Appellant in his capacity as Director of the Company is a person to whom section 997A of the TCA 1997 applies.

- iii. The credit withdrawn under section 997A of the TCA 1997 has now been applied which has resulted in Amended Notices of Assessment being raised on 26 April 2022, for the years 2012 and 2013.

Analysis

28. The Appellant appeals the withdrawal of a credit for tax deducted under section 997A of the TCA 1997. Further, the Appellant claims that there has been an overpayment or “double payment” to the Respondent in the sum of €12,000.
29. In addition to the above arguments relating to emoluments and the discharge of the Appellant’s tax liabilities, the Appellant has raised dissatisfaction with both the Liquidator of the Company and the manner in which he was dealt with by the Respondent. The Appellant submits that he has always acted responsibly over the lifetime of the Company and has paid substantial sums to the Respondent during the period in which the Company traded. The Appellant submits that considerable efforts were made to meet with the Respondent to put in place a scheme of arrangement for the payment of outstanding liabilities but “*instead a Liquidator was appointed*”. The Appellant holds the view that there was no equity, that the Liquidator closed his business, resulting in ruin to his livelihood and ability to provide for his family. The Appellant submits that all of his dealings with the Respondent have been unfair, inequitable and that an investigation into the conclusions reached and the figures presented by the Liquidator, is required.
30. The Commissioner notes the Appellant’s arguments in relation to this point. However, the scope of the jurisdiction of an Appeal Commissioner, as discussed in a number of cases, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (“the Lee decision”), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577 is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. The jurisdiction of the Commission does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings. Insofar as the Appellant seeks that the Commissioner set aside a decision of the Respondent based on the alleged unfairness, breach of legitimate expectation, disproportionality or repugnance to the Constitution of Ireland, such grounds of appeal do not fall within the jurisdiction of the Commissioner and thus, do not fall to be determined as part of this appeal.

31. Section 997A (3) of the TCA 1997 provides that “*no credit for tax deducted shall be given against the amount of tax chargeable in any assessment raised on the person ... unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General*”. The Commissioner is satisfied that the statutory wording of this section is clear and precise and there is no ambiguity.
32. Section 997A of the TCA 1997 was introduced by an Act of the Oireachtas, the effect of which gives statutory authority to deny persons in positions of control and influence over a company’s business activities from claiming a credit for the tax deducted from their emoluments, but not remitted to the Respondent by companies in which those individuals hold a material interest. The demonstrable effect of section 997A of the TCA 1997 is to deny from claiming a credit for unpaid taxes that ought to have been deducted and remitted by such companies to the Respondent. The effect of the section is to secure the payment of taxes from the emoluments derived from such individuals.
33. The Appellant is a propriety Director of the Company having held more than a 15% shareholding in the Company. This is borne out by the submissions and documentation adduced in this appeal. The Appellant did not dispute the deficit which arose in relation to the failure of the Company to remit the tax, in relation to their emoluments. However, the Appellant argues that the Liquidator has discharged all outstanding liabilities.
34. The Amended Notices of Assessment raised relate to the Appellant’s personal liabilities and thus are separate and distinct liabilities owed by the Appellant and not the Company. The Respondent acknowledged the difficulties faced by the Appellant, however the Commissioner agrees with the Respondent that it was bound by the legislation in raising the assessments pursuant to section 997A of the TCA 1997. Section 997A of the TCA 1997 requires that “*...there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General*.” The evidence does not suggest that the Appellant provided documentary evidence to show that tax deducted from emoluments, had been remitted to the Respondent and as such, the Respondent was incorrect to apply the provisions of section 997A of the TCA 1997.
35. As set out above, the Commissioner is satisfied that the wording of the statutory provision is clear namely, that it provides that “*no credit shall be given*” Accordingly, the Commissioner finds that the Respondent did not have discretion to depart from the clear and mandatory wording of section 997A of the TCA 1997. The Respondent was bound by the legislation in raising the assessment pursuant to section 997A of the TCA 1997, at that particular time.

36. In relation to the Appellant's argument that the sum of €12,000 paid by him in 2013, has been paid by the Liquidator rendering in effect, a "double payment" being made, the Commissioner notes that the Respondent submitted an account of the allocation of payments for particular years.

37. As in all appeals before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at para. 22, Charleton J. stated

"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".

38. The Commissioner cannot accept the Appellant's argument that there has been a "double payment" because the Appellant has not furnished sufficient evidence to support this argument. The role of the Liquidator was to identify the assets of the company, take those assets under control, liquidate those assets, identify creditors and distribute those assets in order to satisfy all or part of the claims of such creditors, in accordance with the law relating to priority of payments. Consequently, the funds realised by the Liquidator are distributed in a preordained order as set out in the Companies Acts.


39. The outstanding liabilities in this appeal relate to the Appellant's own personal liability for tax and not the liability of the Company. Moreover, the Appellant's argument is unsupported by evidence to show that the payment of €12,000, used to discharge his tax liabilities relating to 2009 and 2011, as set out by the Respondent, was then paid again by the Liquidator when distributing the assets of the liquidation to the Creditors. The Appellant has failed to distinguish between the tax liability owed by the Company which was settled by the Liquidator and the personal tax liability of the Appellant, which he must discharge.

40. Accordingly, the Appellant has not discharged the burden of proof to satisfy the Commissioner that section 997A of the TCA should not have been applied and that that the disputed tax is not payable.

Determination

41. For the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the Respondent was incorrect to apply the provisions of section 997A of the TCA 1997.

42. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax.
43. This appeal is hereby determined in accordance with the statutory provisions of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.


Claire Millrine
Appeal Commissioner
03 May 2022