72TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This appeal comes before the Tax Appeals Commission by way of an appeal against an Amended Assessment for the 2016 tax year, issued by the Respondent on 16 January 2018.

2. The core issue for determination in the appeal is whether certain payments received by the Appellant following the termination of his employment were payments received by the Appellant in consideration or consequence of the termination of his employment, as he contends, or were instead payments arising from his employment, as contended for by the Respondent.

B. Factual Background

3. The facts material to this appeal are relatively straightforward, and are not in dispute between the parties. The facts which I find material to the determination of this appeal are set forth below.

4. The Appellant entered into a contract of employment with [redacted] (hereinafter referred to as **"his Employer"**) in or about September of 2010. His terms and conditions of employment were recorded in a written agreement dated 17 June 2010. The Appellant was employed as Head of Corporate Finance for his Employer at an annual salary of €150,000, reviewable annually. The contract of employment further provided that the Appellant would receive 150,000 share options in his Employer on the commencement of his employment, and up to a further 450,000 such options over the following three years, conditional upon the Appellant achieving certain specified targets detailed in the Schedule to the Agreement.

5. The Appellant's contract of employment with his Employer was amended by a letter dated 11 February 2014.

6. On 14 July 2015, the Appellant and his Employer entered into a further written agreement (hereinafter referred to as **"the Termination Agreement"**), which recited the Appellant's intention to terminate his employment with his Employer and recorded "*the arrangements pursuant to which you have agreed to continue your employment pending such termination."*

7. Clause 1 of the Termination Agreement provided that the Appellant's employment would end on the later of 31 October 2015 or the completion of the Deliverables contemplated in Schedule 1, but in any event no later than 31 March 2016. It further provided that:-

"Your salary and other contractual benefits will be paid up to the Termination Date less tax, employee PRSI, USC and any other deductions required by law."

8. Clause 6 of the Termination Agreement is of particular importance and provided as follows:-

"Subject to your agreement to all the terms of this Agreement, and in particular clauses 9, 10 and 11, the Company will pay not later than 14 working days after the Termination Date (or 14 working days after the Company receives from you a signed copy of this Agreement, whichever is the later) subject where relevant to any required Revenue approval or letters of confirmation regarding applicable tax treatment:

(a) an amount of €92,360, being the accrued amount as at 31 March 2015, together with further contributions, interest and accruals to the Termination Date, in respect of the agreement between you and the Company in lieu of the contributions referred to in an email from [redacted] *to you on 20 August 2012;*

*(b) a payment of an ex gratia payment on the termination of your employment (the "**Ex Gratia Payment**"). The Ex Gratia Payment shall be €75,000;*

(c) a payment of the success fees calculated in the manner set out in Schedule 1 hereto;

(d) unless otherwise paid prior to the Termination Date, all expenses properly incurred in connection with the performance of your employment; and

(e) an amount in respect of accrued but untaken annual leave as of the Termination Date. For the avoidance of doubt, such leave shall comprise all untaken leave since the commencement of your employment and the Company consents for the purposes of Clause 9.3 of your Contract of Employment to such leave being carried over and counted for such purposes.

The payments set out in this clause 6 include all statutory and contractual payments to which you are entitled in connection with the termination of your employment with the Company (but, for the avoidance of doubt, shall not affect your entitlements under your Contract of Employment prior to the Termination Date)." [emphasis in original]

9. Clause 7 of the Termination Agreement provided that all payments made and benefits provided to the Appellant under the Termination Agreement would be subject to deduction of tax, employee PRSI, USC and any other withholdings or deductions required by law.

10. Clause 9 of the Termination Agreement provided as follows:-

"Each party agrees and acknowledges that in consideration of the mutual covenants and undertakings contained in this Agreement and in further consideration of the payments referred to in clause 6 of this Agreement which are offered without any admission of liability, each party is entering into this Agreement in full settlement, satisfaction and discharge of all claims (save for acts of fraud) in any jurisdiction howsoever arising, whether for breach of contract, at common law or under statute, in equity or in tort (including any claim for personal injuries), against each party arising out of your employment by the Company or any Group Company or the termination of that employment…"

11. Clause 10 provided that, without prejudice to the generality of Clause 9, the Appellant and his Employer agreed and acknowledged each had no claim against the other party arising from the employment or pursuant to various pieces of employment law legislation recited therein. Clause 11 provided that neither party had instituted any

claim against the other party relating to the Appellant's employment or the termination of that employment.

12. The Success Fees payable pursuant to Clause 6(c) were provided for in Schedule 1 of the Termination Agreement, the relevant portions of which stated as follows:-

" *SUCCESS FEES*

1. *Subject to the terms and conditions set out in this Schedule 1, you will be entitled to receive the following gross bonus payments (less applicable statutory and voluntary deductions):*
   (a) if the [redacted] Deliverable or the Alternative Funding Deliverable in respect of the [redacted] Deliverable is attained, the aggregate of
      (i) €147,778; and
      (ii) The Additional [redacted] Payment;
   (b) if the [redacted] Deliverable or the Alternative Funding Deliverable in respect of the [redacted] Deliverable is attained, the aggregate of
      (i) €147,778; and
      (ii) The Additional [redacted] Payment;
   (c) if the [redacted] Deliverable or the Alternative Funding Deliverable in respect of the [redacted] Deliverable is attained, the aggregate of
      (i) €295,555; and
      (ii) The Additional [redacted] Payment;
   (d) If any Further Funding is raised, an amount equal to 1% of the Further Funding…

2. *No Success Fee shall be paid until the aggregate of the Success Fees that would otherwise be payable in accordance with this Schedule 1 exceeds €75,000 (the **"De Minimis Threshold"**). Once the De Minimis Threshold has*

been reached, then only the portion of the Success Fees in excess of the De Minimis Threshold shall be payable and, for all other purposes, the aggregate Success Fees shall be deemed to have been reduced by an amount equal to the De Minimis Threshold. For the avoidance of doubt, once the De Minimis Threshold has been exceeded, it shall have no further application in relation to any Success Fee that becomes payable.

3. *If the condition to the payment of a Success Fee as set out in paragraph 1 of this Schedule has been attained,* [the Appellant] *shall issue a written notice to the Company in respect of the relevant Success Fee and the Company shall pay the relevant Success Fee in cash within 10 Business Days of receipt of that notice.*

4. *The amount of any Success Fee stated to be payable by the Company under this Schedule 1 is the gross amount before any tax, employee PRSI, USC withholdings and other statutory or voluntary deductions…"*

13. The Appellant's employment with his Employer came to an end in January 2016. The Appellant's final payslip from his Employer records him receiving the following on 31 January 2016:-

(i) Basic pay of €10,769.22;

(ii) Payment in lieu of 13 days accrued holidays of €8,749.91;

(iii) Success Fees of €516,111;

(iv) Payment in lieu of pension entitlements of €113,453.75; and,

(v) Ex Gratia Payment of €75,000 (of which €13,985 was treated as tax exempt by his Employer).

14. The Appellant entered into correspondence with the Respondent, in which he asserted that both the Ex Gratia Payment of €75,000 and the Success Fees of €516,111 were payments made in consideration for the termination of his employment. The Appellant subsequently submitted his income tax return for the 2016 tax year on that basis.

15. In response to a request from the Appellant, his Employer confirmed by way of letter written by its Chief Executive Officer on 14 November 2017 as follows:-

> *"...I wish to confirm that the Success Fees and the Ex-Gratia Payment provided for in the agreement dated 14 July 2015 between yourself and* [redacted] *arose as a result of the termination of your employment and were paid to you on account of the termination of your employment with* [redacted]*."*

16. The Respondent accepted that the Ex Gratia Payment of €75,000 was a payment received by the Appellant in consideration for the termination of his employment but did not accept that the Success Fees of €516,111 could be treated as such. Accordingly, the Respondent issued the Amended Assessment which is the subject matter of this appeal.

17. In addition to the core issue of the correct tax treatment of the Success Fees, the Appellant further contends that the Respondent has failed to allow him credit in respect of a PRSI overpayment of €29,144.91 in assessing him to income tax for the year under appeal.

C. Grounds of Appeal

18. The Grounds of Appeal advanced by the Appellant were stated to be as follows:-

> *"**Income Tax***

Given the facts of the matter, the contracts giving effect to the payments and the subsequent confirmation received from my former employer, I disagree with Revenue's contention that some of the payments received by me as a result of the termination of my employment were not paid to me on account of the termination of my employment and that Section 123 TCA 1997 applies only to the ex gratia payment received by me. Revenue assert that all of the remaining payments received by me are chargeable to tax under the provisions of Section 112 TCA 1997 whereas I believe that Section 123 TCA 1997 is the relevant provision. The amount of the payments in question is 516,111.

PRSI

Notice of Assessment excludes PRSI Payable on Schedule D Income and PRSI paid of €29,144.91 and hence I believe a further refund of tax is due."

D. Relevant Legislation

19. Section 112(1) of the Taxes Consolidation Act 1997 as amended (hereinafter referred to as **"TCA 1997"**) provides as follows:-

Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

20. The relevant provisions of section 123 of TCA 1997 provide as follows:-

(1) This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodical payments (whether chargeable to tax or not) which would otherwise have been so made.

(2) Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment…

21. Section 201 and Schedule 3 of TCA 1997 provide for exemptions and reliefs in respect of tax payable under section 123, including the basic exemption and the Standard Capital Superannuation Benefit. The provisions of same are not material to the issues in this Determination.

E. Evidence given by the Appellant

22. The Appellant gave evidence on oath at the hearing of the appeal. He accepted that there was some tension between his assertion that the Success Fees were paid to him in consideration of the termination of his employment and the wording of the Termination Agreement.

23. In addition to testifying to and confirming the factual background detailed above, the Appellant further gave evidence in relation to the events leading up to the termination of his employment. He had achieved considerable success in his role during the first

years of his employment, and had been instrumental in securing very substantial levels of financing for his Employer which had enabled it to grow the business significantly. However, a new Chairman was then appointed to his Employer. The Appellant and the Chairman had differing views in relation to the strategy that ought to be pursued by the Company and the Chairman ultimately expressed a lack of confidence in the Appellant. The Appellant felt that he then had no choice but to step aside from the company.

24. The Appellant testified that in negotiating the terms of the Termination Agreement, he need to take steps to manage his exit from the business while at the same time ensuring the continuity and success of the business. He further stated that it was necessary to phrase the Termination Agreement in a particular way in order to persuade his Employer's Board that they were getting value for the termination payments and would agree to the level of same. He said that this was the reason for the use of the phrase "*Success Fees.*"

25. He said that he was happy to accept what appeared on their face to be contingent payments in respect of his termination because there was agreement in principle to all three transactions and he was confident that they would proceed. Heads of Terms had been agreed in relation to the [redacted] deal, a verbal agreement had been reached with [redacted] and executive buy-in had been achieved in relation to the proposed [redacted] transaction.

26. The Appellant agreed that there was a connection between the €75,000 Ex Gratia Payment he received and the reference in Schedule 1 of the Termination Agreement to a De Minimis Threshold of €75,000.

27. The Appellant gave evidence that he withdrew from day-to-day leadership functions in his employment following the execution of the Termination Agreement. He was

permitted to do so by Clause 2 of the agreement, and he had insisted on the 'no replacement' provision contained therein in order to protect his reputation.

28. The Appellant reiterated that the Success Fees paid to him were unequivocally in consideration of his agreeing to leave his Employer, and gave evidence that he would not have received those payments or equivalent payments if he had continued in his employment.

29. In relation to the letter of 11 February 2014 amending his contract, the Appellant stated that the letter was to do with the vesting of share options and a reduction in the strike price at which he could exercise those options. It might also have recorded an increase in his salary but he could not be certain in this regard.

30. The Appellant sought to obtain a copy of the said letter subsequent to the hearing, as he did not himself have a copy, but the liquidator appointed to his Employer confirmed that a copy of the letter was no longer available.

31. The Appellant further confirmed subsequent to the hearing that he had been awarded options over 440,478 shares in his Employer, which he had exercised at a price of €0.001 per share. These options were exercised by him and the shares had been sold by him in September 2015.

F. Submissions of the Appellant

32. Having referred me to the provisions of section 112 and 123, the Appellant submitted that the position taken by the Respondent was in conflict with the facts of the appeal

and was not consistent with the Respondent's own Tax & Duty Manual, which then provided at Part 05-05-19 that:-

> *"Examples of payments to which section 123 applies are:*
>
> *…*
>
> *b) Compensation for loss of office;*
>
> *c) Payments made on redundancy and termination of employment;*
>
> *d) A payment to obtain release from a contingent liability under a contract of service…"*

33. He submitted that the Termination Agreement was put in place to facilitate the orderly termination of his employment with his Employer and pointed out that the Termination Agreement, and in particular Clause 6, drew a clear distinction between payments arising as a result of the termination of his employment and payments made pursuant to his contract of employment. The payments made were not a supplement to his remuneration, and the provisions of his employment contract, including those governing the remuneration he was to receive, remained in force up to the date of the termination of his employment.

34. The Appellant submitted that the Success Fees could only be liable to tax pursuant to section 112 if they were payments made pursuant to a contractual obligation that formed part of the terms and conditions of his employment, pursuant to his contract of employment. He submitted that there was no express or implied provision in his contract of employment pursuant to which the Success Fees were paid.

35. He further submitted that it was important that his Employer had confirmed by their letter of 14 November 2017 that both the Ex Gratia Payment and the Success Fees "*arose as a result of the termination of your employment and were paid to you on account of the termination of your employment…"*

36. He submitted that it was illogical for the Respondent to accept that the Ex Gratia Payment was on account of the termination of his employment but to refuse to accept the same in relation to the Success Fees.

37. The Appellant further submitted that it was relevant that the payments had been made at the time of the termination of his employment and he submitted that they simply would not have been made if his employment had not been terminated. He also pointed out that he had not been re-engaged either as an employee or a consultant by his Employer following the termination of his employment.

38. The Appellant referred me to the decision of the Court of Appeal in ***Henley –v- Murray* 31 TC 351**, where it held that monies had been paid to a taxpayer "*in consideration of the abrogation of his contract of employment, and not under that contract*", and were consequently not assessable as a profit of the employment. The Appellant submitted that the Success Fees paid to him were similarly paid in consideration for the abrogation of his contract of employment.

39. The Appellant further submitted that in order to obtain the Success Fees, it was necessary for him to surrender his right to bring proceedings against his Employer and to forego the opportunity to take up alternate employment. He submitted that payments made for the surrender of employment rights were not taxable as an emolument from employment, and referred me to the decisions in ***Mairs (HM Inspector of Taxes) –v- Haughey* [1993] BTC 399**, ***Mc Manus –v- Griffiths* [1997] STC 1089** and ***EMI Group Electronics –v- Coldicott* [1997] STC 1372** in support of this argument.

40. The Appellant further submitted that the decision in ***Walker –v- Adams* [2003] STC 269**, which the Respondent had cited in written submissions, did not support their

argument but was instead consistent with the decision in ***Henley –v- Murray*** and supported his submissions.

41. The Respondent referred to the decision of Vinelott J in ***Williams (Inspector of Taxes) –v- Simmonds*** **[1981] STC 715** in the course of the hearing before me. The Appellant submitted that the decision in that case was clearly distinguishable from the facts of the instant appeal, and the taxpayer in that case had elected to accept compensation under the terms of his service agreement rather than serving notice and bringing his employment to a conclusion. Furthermore, the compensation paid to the taxpayer in that case was envisaged in his Service Agreement with his employer. In contrast, the Appellant submitted, his contract of employment did not make any provision for the payment of Success Fees, and the Success Fees were instead paid pursuant to the Termination Agreement, which the Appellant entered into to bring his employment to a close, and were paid in respect of the abrogation of his employment rights.

42. In relation to PRSI, the Appellant submitted that he had paid €29,144.91 in respect of the 2016 tax year and that this was not reflected in the Amended Assessment under appeal. While the Respondent had indicated that Schedule E PRSI was never included in an assessment, the Appellant pointed out that his 2015 assessment had included in Panel 6 a charge to PRSI computed as being 4% of the aggregate of his Schedule D and Schedule E income. He submitted that the Respondent had failed to clarify this seeming contradiction.

43. The Appellant further advanced a number of complaints in relation to the manner in which his tax affairs had been dealt with by the Respondent over the years preceding the hearing of the appeal. As these complaints do not fall within the jurisdiction of the Tax Appeals Commission, they are not considered further in this Determination.

G. ***Submissions of the Respondent***

44. Having made reference to the relevant legislation referred to above, the Respondent submitted that the provisions of Schedule 3 of TCA 1997 applied only to the Ex Gratia Payment of €75,000, and all other components of the payment received by the Appellant were taxable pursuant to section 112. The Respondent pointed out in this regard that Schedule 3 provided certain reliefs from the charge to tax imposed under section 123 which are supplementary to the reliefs and exemptions provided for by section 201.

45. In essence, the Respondent's position was that the Success Fees of €516,111 were Schedule E payments and were chargeable to tax under section 112 as they were "*salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment."* As section 123 only applies to a payment "*not otherwise chargeable to tax*", the Success Fees did not come within the terms of that section because they were otherwise chargeable to tax. Accordingly, the Respondent submitted that the provisions of section 201 and of Schedule 3 did not apply to the sum of €516,111.

46. The Respondent submitted that sections 148 and 188 of the UK Income and Corporation Taxes Act 1988 were equivalent to sections 123 and 201 respectively in this jurisdiction, and that I could therefore derive assistance from decisions in England and Wales on the interpretation and application of those sections. They referred me in this regard to the decision of the Special Commissioner in ***Walker –v- Adams*** **[2003] STC 269**, which concerned an award of £63,946 made by the Fair Employment Tribunal under the Fair Employment (Northern Ireland) Act 1989 to compensate the taxpayer for loss of net income to date and into the future, and the loss of pension rights, arising from his constructive dismissal based on religious discrimination. The Special Commissioner rejected the taxpayer's argument that

section 148 (or section 123 in this jurisdiction) operated only to tax payments made to bring a contractual relationship to an end, and did not encompass payments made under a statutory compensation scheme. The Special Commissioner rejected this argument, and held that the payment of £63,946 fell within the ambit of section 148 because it was a payment made "*otherwise in connection with the termination of the … employment…*"

47. The Respondent further submitted that the Appellant had failed to put all of the relevant portion of the Revenue Tax and Duty Manual before me, and referred me to paragraph 2.2 of Part 05-05-19, which stated:-

> *"A charge under section 123 only arises where the payment is not otherwise chargeable to tax. Therefore, before accepting that a payment is taxed under that section and qualifies for the reliefs provided for in section 201 and Schedule 3, it is necessary to consider whether the payment is an emolument arising from an office or employment.*
>
> *Where a payment arises from an office or employment and is in the nature of income, it is chargeable to tax under the ordinary rules of Schedule E by virtue of section 112 TCA 1997. Section 112 applies to salaries, fees, wages, (including inducement payments), perquisites, or profits whatsoever from an office or employment.*
>
> *In particular, a sum paid under the terms of a contract of employment at the end of the contract is chargeable to tax under the ordinary rules of Schedule E – i.e. under the provisions of section 112 TCA 1997."*

48. The Respondent submitted that certain provisions of the Termination Agreement were key to my determination and referred me in particular to:-

(a) Paragraph 1, which recorded that the Appellant's "*employment with the Company will end on 31 October 2015 or the date of completion of the Deliverables contemplated in Schedule 1, whichever is the later, provided that this date will be no later than 31 March 2016 in any event…"*;

(b) Paragraph 2, which described the Appellant as Head of Corporate Finance and stated that he would continue to hold that position up until the termination date;

(c) Paragraph 1 of Schedule 1, which provided that the Success Fees would be payable to the Appellant if certain targets regarding the attainment of stated funding deliverables were met; and,

(d) Paragraph 3 of Schedule 1, which provided that in order to claim the Success Fees, the Appellant had to issue written notice to his Employer in respect of the relevant Success Fee and his Employer would then pay the relevant Success Fee within 10 business days of receipt of that notice.

49. The Respondent submitted that it was clear from the foregoing that the Success Fees were part of the Appellant's contract of employment and that it was he who would trigger the payments, not his Employer. The payments were an emolument arising from an office or employment. The Appellant had been employed to raise or secure funds for his Employer, and the Success Fees were contingent on his raising certain funds. The Success Fees were therefore payment for the Appellant doing his job. The payments were made at the time of the termination of the employment but were not in connection with the termination of his employment. The Respondent submitted that the Termination Agreement should be viewed as an addition to or an amendment of the Appellant's original contract of employment. The Success Fees were therefore chargeable to tax under section 112, and did not come within the terms of section 123.

50. The Respondent referred me to the decision in ***Williams (Inspector of Taxes) –v-Simmonds*** **[1981] STC 715** where the taxpayer was managing director of a company. He entered into a service agreement with the company which provided that he would be deemed to have lost his office as managing director on the happening of certain specified events and thereupon would be entitled to be paid a lump sum as "*compensation for loss of office*." A specified event was agreed by the parties to have occurred and the taxpayer received a lump sum payment calculated in accordance with the terms of the service agreement. The High Court held that since, following the termination of his employment in the events which had happened, the taxpayer had elected to accept compensation under the terms of his service agreement, the sum paid to him as compensation was taxable as an emolument of his employment under section 181 of the Income and Corporation Taxes Act 1970 (equivalent to section 112 in this jurisdiction).

51. In relation to the PRSI issue, the Respondent submitted that PRSI is not a tax imposed by any of the Taxes Acts but is instead a charge imposed by the Department of Employment Affairs and Social Protection. An employer is obliged to make deductions under the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 as amended. Revenue's role was to act as a collection agent for the Department. Where, as in the instant appeal, an employer has deducted PRSI through its payroll system, it is not included on the relevant Notice of Assessment. Only income on which PRSI is due that has not been taxed at source is included on an assessment.

52. Schedule E emoluments which are taxed at source under Pay As You Earn are not included in a Notice of Assessment. Share options are chargeable to tax under section 128, and section 128B also makes them chargeable to tax under Schedule E. However, they are not subject to tax under Pay As You Earn and therefore any USC and PRSI due

is charged on the Notice of Assessment for the relevant year. This was why there was a reference to PRSI calculated on the aggregate of the Appellant's Schedule D and Schedule E income in his 2015 Assessment.

53. The Respondent submitted that as the Appellant's Employer had treated the payment of the Success Fees as being liable to the deduction of PRSI at source, it had not been included on the Notice of Amended Assessment and could not form part of this appeal. While the Appellant might have a claim for repayment of overpaid PRSI depending on the outcome of the appeal, his remedy lay in a claim for a refund or repayment from the Department.

H. Analysis and Findings

54. In deciding whether the Success Fees of €516,111 are taxable under section 112 or, alternatively, under section 123 of TCA 1997, it is common case between the parties that the key issue is whether the Success Fees were paid under the Appellant's contract of employment with his Employer.

55. This mutual position is supported by the case law opened to me in the course of this appeal. For example, Lord Wilberforce in ***Comptroller General of Inland Revenue – v- Knight*** **[1973] AC 428** stated:-

> *"Questions as to the taxability of payments received by employed persons at the end of their employment have frequently come before the courts; they have often been described as difficult, borderline and depending on narrow distinctions. Two propositions are accepted as common ground in the instant case. First, where a sum of money is paid under a contract of employment, it is taxable, even though it is received at or after the termination of the employment… Secondly,*

where a sum of money is paid as consideration for the abrogation of a contract of employment, or as damages for the breach of it, that sum is not taxable…"

56. Vinelott J cited the foregoing passage with approval in ***Williams –v- Simmonds***, and went on to say:-

"The first of these two categories extends to a sum payable under a contract, even though it is and is expressed as compensation for loss of future earnings under the contract. The reason is explained by Lawrence LJ in Henry (Inspector of Taxes) v Foster. In that case the articles of the company provided that a director who had held office for a term of not less than five years on ceasing to hold office for any cause, other than misconduct, bankruptcy, lunacy or incompetence, should be entitled, by way of compensation for loss of office, to a sum equal to the remuneration he had received in the preceding five years. He said:

In my judgment, the determining factor in the present case is that the payment to the Respondent whatever the parties may have chosen to call it was a payment which the company had contracted to make to him as part of his remuneration for his services as a director. It is true that payment of this part of his remuneration was deferred until his death or retirement or cessor of office, and that in the articles it is called "compensation for loss of office". It is, however, a sum agreed to be paid in consideration of the Respondent accepting and serving in the office of director, and consequently is a sum paid by way of remuneration for his services as director."

57. It is clear from the terms of the Appellant's original June 2010 contract of employment with his Employer that no provision was made therein for the payment of the Success Fees or their equivalent. While they did make provision for the award of certain share options on the attainment of certain specified and general targets,

those awards were separate and distinct from the Success Fees provided for in the Termination Agreement. This is evidenced by the fact that the Appellant exercised his share options and sold the shares received immediately following the execution of the Termination Agreement, without that exercise impacting upon his receipt of the Success Fees. There can accordingly be no question of the Success Fees being viewed or treated as a substitute for the performance rewards to which the Appellant was entitled pursuant to the original contract of employment.

58. The original contract of employment was amended by the letter of 11 February 2014. While it was not possible to obtain a copy of that letter, I accept on the balance of probabilities the Appellant's evidence that the letter dealt with the vesting of share options, the strike price and, possibly, an increase in his salary. The amendments to the original contract of employment made or recorded by that letter are therefore not material to the issues in this appeal.

59. It was, however, also submitted by the Respondent that the Termination Agreement not only dealt with the termination of the Appellant's employment with his Employer, but also amended the terms and conditions on which he was to remain employed until the termination date. They submitted that the agreement to pay the Success Fees was an amendment to the remuneration which the Appellant was entitled to receive for his work, but that entitlement still arose from his work for his Employer and from his contract of employment.

60. I can understand why the Respondent took this view of the relevant provisions of the Termination Agreement. I agree with the Respondent that the Termination Agreement did amend the Appellant's employment contract in certain respects. The wording of the Termination Agreement, and of Schedule 1 in particular, can be read as suggesting additional remuneration for the Appellant attaining certain fund-

raising targets in the course of his work for his Employer prior to the termination of his employment more than it suggests payments made in relation to the termination of his employment. I note the provisions of the Termination Agreement referred to by the Respondent in this regard, which are summarised in paragraph 48 *supra*. In addition, the description of the Success Fees in paragraph 1 of Schedule 1 as "*gross bonus payments*" is also suggestive to me of remuneration.

61. However, it is expressly stated in Clause 6 of the Termination Agreement that all of the payments to be received by the Appellant under that agreement were conditional upon his agreeing to all the terms thereof, including the termination of his employment and, in particular, his agreeing not to bring proceedings against his Employer in connection with the termination of his employment.

62. It is also relevant, in my view, that the end of Clause 6 sought to draw a distinction between the Appellant's entitlements in connection with the termination of his employment and those arising under his contract of employment, stating:-

> *"The payments set out in this clause 6 include all statutory and contractual payments to which you are entitled in connection with the termination of your employment with the Company (but, for the avoidance of doubt, shall not affect your entitlements under your Contract of Employment prior to the Termination Date)."*

63. I am also entitled as a matter of law to have regard to the factual matrix or background in which the Termination Agreement was entered into by the Appellant and his Employer. In this regard, I note the fact that the Appellant decided he had no option but to leave the company in circumstances where the new Chairman and he had strong differences as to the strategic approach to be taken by the Company.

64. I further accept as truthful and accurate the Appellant's evidence, and I find as a material fact, that the wording of the Termination Agreement, and in particular the reference to Success Fees, was chosen and agreed for the purpose of persuading the Board of the Company to agree to termination payments which were, by any objective standard, substantial in amount. Although couched in the language of success or bonus payments contingent upon the Appellant attaining certain targets, they were in fact calculated with reference to fund-raising which had already been agreed in principle, and which was not in reality contingent upon the Appellant's performance in the conduct of his duties during the remaining period of his employment.

65. My view in this regard is supported by the fact that the calculation and payment of the Success Fees by reference to a De Minimis Threshold of €75,000 was clearly linked with the agreement in Clause 6(b) that the Employer would make an Ex Gratia Payment of €75,000. This, in my view, makes it clear that there was a concrete link between the Ex Gratia Payment and any additional payments receivable by the Appellant in the form of Success Fees.

66. In light of the foregoing, and having carefully considered the documents and evidence presented in the course of the appeal as well as the written and oral submissions of the parties, I am satisfied and find that the Success Fees payable and paid to the Appellant were payments made in connection with the termination of his employment and/or as consideration for his surrendering rights which might arise on the termination of his employment.

67. I therefore find that the Success Fees of €516,111 paid to the Appellant in January 2016 were not taxable pursuant to section 112 of TCA 1997 but were instead chargeable to tax pursuant to section 123 of that Act. The Appellant is accordingly entitled to succeed in this aspect of his appeal.

68. In relation to the balance of the appeal, relating to the Appellant's assertion that the Respondent has failed to give credit for the PRSI deducted at source by his Employer in the Notice of Amended Assessment, I find that the Respondent is correct in its assertion that the PRSI deducted at source in relation to the Success Fees does not form part of the Notice of Amended Assessment under appeal herein, and therefore cannot properly form part of this appeal. Any dissatisfaction or grievance which the Appellant may have in this regard should be dealt with by way of a claim for refund or repayment made to the Department of Employment Affairs and Social Protection. I therefore refuse this aspect of the Appellant's appeal.

I. Conclusion

69. By reason of the matters aforesaid, I find that the Appellant has been overcharged to income tax by reason of the Notice of Amended Assessment issued by the Respondent on 16 January 2018 and determine pursuant to section 949AK(1)(a) that the said Notice of Amended Assessment be reduced accordingly.

Dated the 5th of May 2022

MARK O'MAHONY
APPEAL COMMISSIONER