



133TACD2023

**Between**

████████████████████

**Appellant**

and

The Revenue Commissioners

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“the TCA 1997”) brought on behalf of ████████████████████ (“the Appellant”) against Notices of Amended Assessment dated 9 December 2021, issued by the Revenue Commissioners (“the Respondent”) for the tax years 2016 and 2017 (“the relevant years”) in the sum of €56,025.16 and €33,175 respectively.
2. The liabilities arose in circumstances where the Respondent treated all but €5,198 of the salary purportedly paid to the Appellant’s wife and children as being income earned by the Appellant himself and paid to the benefit of the Appellant himself. Further, the Respondent disallowed as non-deductible the travel and subsistence expenses claimed by the Appellant, on the basis that the expenses were not expenses incurred wholly, exclusively and necessarily in the performance of his duties as a director or employee.
3. The appeal proceeded by way of a remote hearing on 21 June 2023. The Appellant was represented by his Accountants ████████████████████ and the Respondent was represented by Junior Counsel. ████████████████████, ████████████████████ and ████████████████████ attended as witnesses for the Appellant.

4. Following further consideration by the Respondent of vouched expenses submitted by the Appellant, the amounts at issue are now the reduced agreed sum of €53,786 for the year 2016 and €32,285 for the year 2017.

## **Background**

5. The Appellant is one of two shareholders and one of two directors of [REDACTED] (“the company”). During the relevant years, 50% of the shares of the company were held by the Appellant and the other 50% were held by the Appellant’s spouse. The directors of the company were at all material times the Appellant and his spouse.
6. The company provided the services of the Appellant as a medical consultant to a locum agency, [REDACTED] (“the locum agency”). In turn, the locum agency contracted with the [REDACTED] to provide to it the Appellant’s services as a medical practitioner in certain hospitals. During the relevant years, the Appellant provided his services as a medical practitioner at [REDACTED] hospital. There exists no written employment contract between the company and the Appellant for his services.
7. The [REDACTED] paid the locum agency, which in turn paid the company for the Appellant’s services. The company then remunerated the Appellant by way of director’s emoluments, and his wife and sons as employees. There exists no written contract of employment between the company and the Appellant’s wife and sons.
8. The Appellant contends that the travel and subsistence expense payments are expenses incurred wholly, exclusively and necessarily in the performance of his duties as a director or employee and that the payments to his wife and sons were *bona fide* payments to them, by the company, for their duties as employees and/or director.
9. On 18 February 2019, the Respondent issued correspondence to the Appellant notifying the Appellant that he had been selected for an Aspect Query in relation to the relevant years and a request was made for certain information from the Appellant.
10. On 3 December 2021, the Respondent issued correspondence to the Appellant entitled Notification of Assessment, stating that “*the income tax liability has been quantified and assessed at €51,465.69 for 2016 and €33,175.54 for 2017*”.
11. In raising the amended assessments for the relevant years, the Respondent disallowed the travel and subsistence expenses claimed by the Appellant on the basis that these were not expenses incurred wholly, exclusively and necessarily in the performance of his duties as a director or employee. In addition, the Respondent treated all but the sum of

€5,198, of the salary purportedly paid to the Appellant's wife and sons, as being income earned by the Appellant himself and paid to the benefit of the Appellant himself.

12. At page 5 of the Respondent's outline of arguments and page 55 of the Book of Hearing Documentation, the Respondent sets out a summary of the disallowed expenses, additional salary (originally attributed to his wife and children) attributable to the Appellant, and additional undeclared salary, which in turn gives rise to the increased liabilities to income tax, as set out above, as follows:-

<b>Expenses 2016</b>	<b>Amount Allowed</b>	<b>Amount Disallowed</b>
Additional family wages	€5,198	€52,594
Additional Director's salary	0	€50,000
Corporation Tax	0	€409
Diesel/Petrol	0	€1,200
Office Expenses	0	€1,500
Stationery	0	€711
Professional Fees	€1,470	€6,213
Telephone	€332	€1,776
Travel and Subsistence	0	€23,087
Vehicle	0	€3,189
██████████ payments	0	€4,537
<b>TOTAL (2016)</b>		<b>€145,216</b>

<b>Expenses 2017</b>	<b>Amount Allowed</b>	<b>Amount Disallowed</b>
Additional family wages	€5,198	€43,594
Additional Director's salary	0	€20,000
Corporation Tax	0	€1,621
Diesel/Petrol	0	€1,261.02
Stationery	0	€710.99
Printing	0	€405.69
Postage and Delivery	0	€346.50
Meals and Entertainment	0	€550
Professional and accountancy fees	€1,470	€2,810.53
Telephone	€382.72	€1,530.87
Mobile	€31.07	€124.26
Landline and fax	€16.21	€64.83
Travel and Subsistence	0	€4,042.96
Vehicle	0	€2,136
Rent and Rates	0	€4,453.66
Insurance	0	€618.50
<b>TOTAL (2017)</b>		<b>€84,270.82</b>

13. On 9 December 2021, Notices of Amended Assessment were issued by the Respondent in relation to the relevant years, in the sum of €56,025.16 and €33,175 respectively.

14. On 7 January 2022, the Appellant duly appealed to the Commission.

### **Legislation and Guidelines**

15. The legislation relevant to this appeal is as follows:-

16. Section 112 of the Taxes Consolidation Act 1997, Basis of assessment, persons chargeable and extent of charge, provides:-

*(1) 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 salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*

*(2) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.*

17. Section 114 of the Taxes Consolidation Act 1997, General rule as to deductions, provides:-

*Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.*

18. Section 117 of the Taxes Consolidation Act 1997, Expenses allowances, provides:-

*(1) Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*

*(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her.*

## **Evidence and Submissions**

### *Appellant's evidence*

19. The Appellant gave sworn oral evidence at the hearing of the appeal and the Commissioner sets out hereunder a summary of the evidence given by the Appellant:-

19.1. The Appellant testified that he has been working in the community for nearly ■ years and paying high taxes. The Appellant said that the company was incorporated in 2011, but that since 2002, he has been working as a locum Doctor with various locum agencies.

19.2. The Appellant explained that his work as a locum Doctor is completely different from permanent work as a Doctor in a hospital, as he is required to travel large distances. The Appellant said that in 2016 and 2017, he was travelling 300km between ■ and ■ hospital where he worked. The Appellant testified that he had to rent accommodation in ■, in order to work as a locum Doctor in ■ Hospital.

19.3. The Appellant testified that during the relevant years, he had multiple short term locum contracts and that the agency would pay the company for the Appellant's services and the expenses and salaries would come out of the company. The Appellant gave evidence that it was his wife that took care of the administration work as the company secretary, as the Appellant was responsible for the medical work as a Doctor. The Appellant therefore stated that he is unaware of the process for timesheets and payments for his services, as this was the administration work that was carried out by his wife.

19.4. ■  
■■  
■■ his son assisted him with driving him to the hospital and moving around the hospital. The Appellant stated that he was unable to work for six months, but that during that time, he never claimed unemployment benefit or any other benefits. The Appellant

referred to photographic evidence [REDACTED], which he had submitted prior to the hearing of the appeal.

- 19.5. The Appellant stated that he felt very unfairly treated following the Respondent's audit, which affected his mood, his family and his life generally.
- 19.6. The Appellant was cross examined on his evidence by Counsel for the Respondent. Reference was made to page 92 and 93 of the Book of Hearing Documentation, namely correspondence from the Appellant's accountants to the Respondent wherein reference is made to the Appellant's son's duties. The Appellant was asked why it states that his wife was responsible for driving him to work. The Appellant stated that his wife also assisted with driving him to locations. It was put to the Appellant that the letter simply referred to his son's duties being administration, assistance with diary keeping, file maintenance of medical journals and research. The Appellant confirmed that he commenced work in 2015 in [REDACTED] hospital and completed work there in 2019, on a series of short contracts. The Appellant confirmed that the standard hourly rate was €87.00 and there is an on call hourly rate of €30.00. The Appellant agreed that his total salary per year for the relevant years was approximately €230,000. The Appellant stated that it was his view that the locum agency would only deal with a limited company and not a Doctor directly.
- 19.7. The Appellant was cross examined on the various expenses claimed. The Appellant confirmed that he has not produced evidence of the duties of the employees of the company for the relevant years. Further, the Appellant accepted that he has not produced timesheets or email correspondence issued by the company or its employees. The Appellant confirmed that there existed no email addresses attached to the company. In addition, the Appellant confirmed that he has produced no evidence of payments to his two sons. The Appellant stated that he would transfer payments to them from his personal account on either a weekly or two weekly basis or sometimes, on a monthly basis. The Appellant confirmed that his sons were not paid from the company, but that the Appellant paid college fees and accommodation fees from the company account.
- 19.8. The Appellant confirmed that he was provided with an office in [REDACTED] hospital to carry out his patient appointments and that all medical records remained in the hospital as the property of the [REDACTED]. The Appellant stated that he had two places of work, both [REDACTED] Hospital and his home, as his wife undertook the administration work there. The Appellant said that he rented a

house in [REDACTED], as that is where he worked at the time, but that his family resided in [REDACTED]. In relation to his wife's duties, the Appellant confirmed that she was responsible for arranging his schedule and liaising with the locum agency, arranging conferences and flights, and dealing with invoices for the Medical Council. The Appellant stated that it was any work other than medical work. It was put to the Appellant that there was very little non-medical work to be done and the Appellant stated that his timesheets were provided weekly. The Appellant stated that his sons would file his medical journals in his library. The Appellant confirmed that he went to two major conferences during the relevant years. The Appellant said that his car was a company car, but no benefit in kind ("BIK") was ever declared in relation to the car.

20. [REDACTED] gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by [REDACTED]:-

20.1. The witness confirmed that her role was secretary in the company and she was paid once per month by cheque. The witness testified that during the relevant years, her duties were general secretary work such as timesheets, mailing, taking notes, arranging the Appellant's schedule and contacting the locum agency. The witness stated that she took calls from the locum agency in relation to future contracts and used the Appellant's email address to correspond with them. In addition, the witness said that she was responsible for booking his car into the garage.

20.2. The witness was cross examined on her evidence by Counsel for the Respondent. The witness confirmed that she cannot pinpoint any emails wherein she corresponded with the locum agency on the Appellant's behalf. The witness stated that she was not responsible for any medical files of the Appellant. The witness said that in relation to conferences, she would research relevant conferences, be responsible for booking them and for arranging payment, flights and transportation. The witness confirmed she was not provided with a company email address or contract with the company.

21. [REDACTED] gave evidence on behalf of the Appellant. the Commissioner sets out hereunder a summary of the evidence given by [REDACTED]:-

21.1. The witness testified that he assisted the Appellant with filing his medical journals and transported him to work when he was injured. He said that he would do a similar job for another organisation at the same rate he was paid for the work he had done.



21.2. The witness was cross examined on his evidence by Counsel for the Respondent. The witness confirmed that he did not have a contract of employment with the company nor did he have a company phone or email address. In addition, the witness confirmed that he has not produced any text message or email communication relating to his employment. The witness testified that he was paid in cash at times, but that he had no receipts of any payments. It was put to the witness that he was also working for a recruitment company in 2016, and the witness confirmed same. The witness said that he was engaged as a customer service agent. The witness gave evidence that he would provide transportation if the Appellant needed it in [REDACTED], but that it was his brother who covered [REDACTED]

22. [REDACTED] gave evidence on behalf of the Appellant. the Commissioner sets out hereunder a summary of the evidence given by [REDACTED]:-

22.1. The witness testified that he was employed by the company during the relevant years. He said that English is not the first language for the Appellant or his mother, so part of his role was reviewing any applications or important paperwork, to make sure that the language was correct. In addition, [REDACTED] the witness said that he was responsible for driving the Appellant from [REDACTED] hospital and then while the Appellant resided in [REDACTED]. The witness testified that he was helping the Appellant to get into his car, to move around the hospital to his places of work and waiting for the Appellant until he was finished work to drive him home.

22.2. The witness was cross examined on his evidence by Counsel for the Respondent. The witness testified that he was writing a thesis during 2017, the period which he was assisting his father and that he was doing odd deliveries for a company during 2017. The witness testified that the Appellant [REDACTED] in 2017, but that he was unsure about 2016, as this was many years ago now. The witness confirmed that he was paid from the Appellant's account and not the company account.

#### *Appellant's submissions*

23. The Appellant's Accountant made submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions made:-

23.1. The Appellant tried to resolve this matter with the Respondent and reference was made to pages 92 and 121 of the Book of Hearing Documentation. The Appellant

is attempting to agree and reduce certain expenses with the Respondent. All payments were made via bank accounts and no cash was used for expenses. Therefore, receipts from Visa cards exist for expenses claimed. Reference was made to pages 121 to 123 and the Appellant's efforts to reduce expenses. Reference was also made to pages 124 to 155 in relation to expenses claimed.

- 23.2. In relation to the salary of the Appellant's wife, she is not only a secretary, but also a company director and directors have certain responsibilities. Therefore, she is entitled to a financial benefit for that. The Appellant's wife was required to send documents to the Appellant's accountants on a monthly basis.
- 23.3. The Appellant has offered that 50% of the expenses be disallowed, but that the rest should be allowable expenses. Reference was made to the calculations at page 136 of the Book of Hearing Documentation and that €12,000 of the salary of each of the Appellant's sons can be disallowed.
- 23.4. Reference was made to an email dated 29 July 2022, wherein the Appellant provided receipts in relation to certain conferences and associated expenses. The travel and subsistence expenses claimed for 2016 is in the sum of €23,087 and for 2017 is in the sum of €4,042. A large portion of the travel and substance expenses for 2016 relate to travel from [REDACTED] hospital. Reference was made to a conference in [REDACTED] and associated expenses, a conference in Ireland, Medsu expenses, tuition expenses and both General Medical Council ("GMC") and Medical Council of Ireland ("MCI") expenses.
- 23.5. There is no way of assessing whether the Human Appeal donation of €1,000 was a company donation or a donation from the Appellant. The Appellant no longer claims the tuition fees or the electricity bill furnished with the Appellant's email of 29 July 2022.

#### *Respondent' submissions*

24. Counsel for the Respondent made submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-
  - 24.1. The Respondent will accept the expenses attached to the Appellant's email dated 29 July 2022, in the total sum of €4,306 for 2016 and €1,713 for 2017. However, in relation to the Human Appeal donation of €1,000, it is a personal donation not a company donation and therefore, the Respondent is not permitting it as an

expense. The Respondent does not accept the claims for the tuition fees or the electricity bill.

- 24.2. Reference was made to page 166 of the Book of Hearing Documentation and the schedule of expenses. In relation to professional fees, anything that was vouched was allowable. However, payments to a firm of Solicitors was not allowable.
- 24.3. In terms of travel and subsistence, there is approximately €20,000 of €23,087 worth of travel and subsistence expenses claimed, in relation to travel from [REDACTED] [REDACTED] in 2016. In relation to allowable expenses, reference was made to section 112 TCA 1997 and section 114 TCA 1997. There is a difference between travelling to perform your duties i.e. travel to put yourself in a position to perform your duties and travelling in the performance of your duties. The Appellant did not travel to [REDACTED] in the performance of his duties, but was merely travelling to the relevant hospital in order to perform his duties at his assigned location of place of work.
- 24.4. The phrase “in the performance of those duties” must be strictly interpreted and does not mean “in order to enable the duties to be performed”, and must refer to the duties of the director or employee. In that regard, reference was made to the decisions in *Ricketts v Colquhoun (Inspector of Taxes)* [1926] AC 1 and *Miners v Atkinson (Inspector of Taxes)* [1997] STC 58 wherein the Court approved the decision in *Taylor v Provan* [1975] AC 194 at 227.
- 24.5. The “wholly and exclusively” rule means that where an expense serves both a personal and a trade purpose, it is not an allowable expense. Reference was made to the decision in *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665.
- 24.6. In relation to all travel and subsistence, it is the Respondent’s position that travel from [REDACTED] and from [REDACTED] is not allowable. In any event, it is not vouched, but even if it were to be vouched, the cost of living in [REDACTED] is not an allowable expense and the cost of going from the Appellant’s house in [REDACTED] to his place of work is not an allowable expense. The reason is the use of the word “necessarily” in the legislation.
- 24.7. In addition, aside from the lack of vouched expenses, there has been a double claim, in that the claim for subsistence was on the civil service rates but one

cannot claim civil service rates and claim for diesel and depression at the same time. It is either one or the other.

- 24.8. The expenses do not meet the test under section 114 TCA 1997 which would make the receipt of the sums tax free on the basis that it represents a reimbursement of sums incurred that were “wholly, exclusively and necessarily in the performance of those duties”. These expenses solely relate to travelling to work, which is not allowed.
- 24.9. In order to succeed, therefore, the Appellant must show that the expenses in question were incurred by the Appellant, that they were incurred in the performance of his duties, that they were incurred of necessity in the performance of his duties, and that they were incurred wholly and exclusively in the performance of his duties (in their entirety, and excluding any ancillary or personal purpose).
- 24.10. In relation to payments to the Appellant’s wife and to his sons, the amount of €5,198 has been allowed in relation to the directors duties undertaken by the Appellant’s wife. A spousal salary, the balance of which is €28,594 for 2016, was disallowed and a spousal salary, the balance of which is €19,594 for 2017, was disallowed.
- 24.11. The Appellant carried out the entirety of the income generating activity of the company as a locum Doctor and was provided with the full range of administrative supports by his place of work.
- 24.12. There is no evidence of the Appellant’s wife or sons carrying out any duties or role in the company, commensurate with the purported level of salary alleged. There is no employment contract and there is no evidence of payments made to them. There is no evidence of any work done or work product created by the Appellant’s wife or sons. There is no company email address and company filings and taxes were handled by the Appellant’s accountants.
- 24.13. Reference was made to the decisions in *Murray Group Holdings Ltd and others v Revenue and Customs Commissioners* [2016] STC 468 and *RFC 2012 Plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45. These decisions establish that payments arising or deriving from a person’s efforts in their office or employment, even if they are redirected, still fall to be taxed on the person who earned the income. In order to succeed in establishing that the payments to the Appellant’s wife and children are not taxable

as the income of the Appellant, the Appellant must establish that these are payments that were made on a *bona fide* basis to remunerate them for work actually done by them, and that they were not just redirected payments to the Appellant for the duties carried out by him.

24.14. The onus of establishing that the disbursements were expended “wholly, exclusively and necessarily in the performance of those duties” rests on the Appellant. The balance of payments made to the Appellant’s wife and sons were emoluments arising or deriving from the Appellant’s own efforts in his office or employment and should be subject to tax as such.

### **Material Facts**

25. Having read the documentation submitted and having listened to the oral evidence and submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

25.1. The company is a private limited company, established by the Appellant for the purposes of providing his services as a locum Doctor.

25.2. The Appellant is one of two shareholders and one of two directors of company with 50% of the shares of the company being held by the Appellant and the other 50% being held by the Appellant’s wife.

25.3. The directors of the company were at all material times the Appellant and his wife.

25.4. The company provided the services of the Appellant as a medical practitioner to the locum agency.

25.5. The locum agency contracted with the ██████ to provide to it the Appellant’s services as a medical practitioner in certain hospitals.

25.6. The locum agency paid the company for the services of the Appellant.

25.7. There exists no written employment contract between the company and the Appellant for his services.

25.8. There exists no written employment contract between the company and the Appellant’s wife for her services.

25.9. There exists no written employment contract between the company and the Appellant’s sons for their services.

25.10. No company email address exists.

25.11. No evidence exists of any email correspondence from the Appellant's wife to third parties and the Appellant's sons to third parties, illustrative of them undertaking employment duties.

25.12. The Appellant's sons were not paid from the company account. There exists no evidence of any payments to the Appellant's sons.

25.13. The ██████ paid the locum agency, which in turn paid the company for the Appellant's services.

25.14. There exists no evidence of payments made by the company to the Appellant's wife and sons in discharge of their duties.

25.15. The sum of €5,198 is allowable to the Appellant's wife as remuneration associated with her duties as Director of the company.

## **Analysis**

26. The appropriate starting point for the analysis of the issues is to confirm that in an appeal 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 paragraph 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".*

27. The central issues to be determined are twofold. Firstly, whether the relevant expenditure in question, claimed to be deductible, was incurred by the Appellant wholly, exclusively and necessarily in the performance of his duties as a director or employee and secondly, whether the payments to the Appellant's wife and sons were *bona fide* payments for activities carried out by them and not a mechanism for making payments to the Appellant derived from his office or employment.

28. The Appellant contends that the relevant expenses were incurred in the performance of his duties as a medical locum Doctor. The Appellant's position is that during the relevant years, he was engaged as a locum Doctor by a locum agency on short term contracts in ██████ hospital, which involved either him travelling large distances from his home in

██████████ to his place of work in ██████████ hospital or renting a property in ██████████  
In addition, the Appellant contends that payments made to his wife and sons were earned by them and were not payment of money earned by the Appellant and paid for his benefit.

29. The Respondent's position is that the company and the Appellant had for income tax purposes, under-declared the Appellant's income by claiming expenses which the Appellant was unable to vouch, explain or establish were allowable, including travel and subsistence expenses which were not incurred wholly, exclusively and necessarily in the performance of his duties as a director or employee.
30. Moreover, the Respondent states that the assessments were raised on the basis that there were payments made to the Appellant's wife and sons, in circumstances where there was no evidence of any contractual obligation to do so and no evidence of any work done or duties carried out by the Appellant's wife or sons. Therefore, the Respondent is of the view that the evidence shows that these were payments made to or for the benefit of the Appellant.

### **Expenses**

31. Section 117 TCA 1997 provides that travel and subsistence ("T&S") expenses paid by a company to its directors and/or employees shall be treated as perquisites of the office or employment and subject to tax in accordance with section 112 of the TCA 1997. It is only where the test under section 114 TCA is met does the sum become deductible for the company and not taxable for the recipient, as they are being reimbursed.
32. The Commissioner is satisfied that the general rule as provided for in section 114 TCA 1997 is longstanding, being in all material respects identical to that prescribed in the Income Tax Act 1918 and, before that, the Income Tax Act 1853. In *Ricketts v Colquhoun*, Viscount Cave L.C., at page 4, made the following observations in respect of travel expenses:-

*"..they must be expenses which the holder of an office is necessarily obliged to incur - that is to say, obliged by the very fact that he holds the office and has to perform its duties - and they must be incurred in - that is, in the course of - the performance of those duties.*

*The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those*

*duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them”.*

33. Further, Viscount Cave, L.C. in disallowing subsistence payments, observed at page 134 as follows:-

*“A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.*

34. As is clear from the passages in *Ricketts v Colquhoun* quoted above, it is a strict requirement for the allowance of a deduction under section 114 TCA 1997, that there be an objective obligation arising from a duty that necessitates a taxpayer to incur an expense. This rules out expenses that arise from decisions that are “*personal*” to a taxpayer.

35. In addition, the Respondent directed the Commissioner to the decision in *Miners v Atkinson (Inspector of Taxes)* [1997] STC 58 where a company director, who was a computer consultant, claimed a deduction for travel expenses from his home (also the company’s registered office) to a client’s premises. The claim was disallowed on the grounds that the expenses arose from his personal choice regarding his place of residence. The Court quoted and approved the decision in *Taylor v Provan* [1975] AC 194 at 227, which held unambiguously “*Expenses incurred in travelling to work are not deductible.*”

36. The “wholly and exclusively” rule means that where an expense serves both a personal and a trade purpose it is not an allowable expense. In *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665, the taxpayer, a barrister, purchased dark clothes to comply with Bar Council rules for court appearances. This expense was found to have a dual purpose of preserving warmth and decency as well as satisfying the Bar Council rules and so the cost was not tax deductible. The Appellant must show that the expenses in question were incurred by the Appellant of necessity in the performance of his duties and that they were incurred wholly and exclusively in the performance of his duties (in their entirety, and excluding any ancillary or personal purpose).

37. The entitlement to the deduction for travel expenses is with reference to the first limb of the rules governing expenses and requires that a person “*is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of*



*travelling in the performance of the duties*". As such, travelling expenses can be distinguished from the second limb of the rule concerning other employment type expenses which requires strict conformance with the obligation for the expense to be incurred "*wholly, exclusively and necessarily in the performance of those duties*".

38. Having regard to all of the foregoing, the Respondent submits that the travel expenses incurred by the Appellant in travelling from his home to his place of work at [REDACTED] hospital, are ordinary commuting expenses and are not deductible under section 114 TCA 1997. The Commissioner agrees with the Respondent's submission in that regard. The Appellant's travel expenses were incurred travelling to and from his home to [REDACTED] hospital to work. That is not an expense incurred by the Appellant of necessity in the performance of his duties, but an expense incurred in putting the Appellant in the position to perform his duties. In this regard, the Commissioner is mindful of the words of Viscount L.J in decision in *Ricketts v Colquhoun*, wherein he states that:-

*"A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance"*.

39. The Commissioner has considered pages 166 and 168 of the Book of Hearing Documentation and the schedule of expenses claimed for the years 2016 and 2017. The Commissioner has considered the evidence of the Appellant and submissions of his Accountant as to the expenses claimed. The Commissioner notes the correspondence from the Appellant's Accountants at pages 121 to 123 of the Book of Hearing Documentation. The Commissioner observes that on page 122 of the Book of Hearing Documentation the Appellant makes a number of concessions in relation to those expenses claimed and the family salaries.

40. The Commissioner has considered the Respondent's reasons why the expenses claimed are not permitted, in addition to both the applicable legislation and jurisprudence. The Respondent asserts that the Appellant has been unable to vouch or alternatively, has been unable to establish that the expenses were incurred wholly and exclusively in the performance of his duties as a director or employee of the company. The Commissioner notes that the Respondent has allowed a certain number of expenses and submits that it has been more than reasonable in its approach to the Appellant. In addition, the Commissioner observes that the Respondent has permitted additional vouched expenses

in relation to travel arising from the Appellant's email correspondence dated 29 July 2022. As a result, the Commissioner observes that there is a reduction in liability for the year 2016 in the sum of €2,239 and for the year 2017, in the sum of €890.

41. As set out above, the burden of proof in a tax appeal is on the Appellant. The Commissioner is satisfied that in order for the Appellant to succeed in his appeal, the Appellant must show that the expenses in question were incurred necessarily in the performance of the Appellant's duties and that they were incurred wholly and exclusively in the performance of his duties. The Commissioner is satisfied that the Appellant has failed to discharge that burden.
42. The Commissioner does not consider that the evidence adduced by the Appellant supports a reduction in liabilities arising from the notices of assessment issued by the Respondent in relation to the relevant years, as the evidence adduced does not support a claim that the expenses were incurred "*wholly, exclusively and necessarily in the performance of those duties*" and that the Appellant was "*necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties*", in accordance with the provisions of section 114 TCA 1997. The Commissioner is satisfied that the Appellant has not met the statutory requirements for deductible expenditure.

### **Emoluments to family members**

43. The Appellant contends that payments made to his wife and sons were *bona fide* payments by the company for their duties as employees of the company. In this regard, the Commissioner heard sworn oral testimony from the Appellant's wife and sons. The Appellant's wife set out some detail as to her duties *inter alia* engaging with the locum agency, sending timesheets and payments to the Appellant's accountant, booking conferences and looking after the Appellant's car. The Appellant's sons each gave evidence as to their purported duties, such as driving the Appellant to the hospital and assisting him [REDACTED] and filing the Appellant's medical journals in the Appellant's library. Notably, both of the Appellant's sons confirmed that there existed no contract of employment with the company for work done, no documentation setting out their duties and payments were made to them not from the company account but from the Appellant's account. In addition, both sons confirmed that they were not provided with a company email address, but would engage in text messaging or calls with their father, the Appellant, as to their duties. The Commissioner notes that there was no documentary evidence submitted to support that such communications took place in relation to their duties.

44. In relation to the role of the Appellant's wife, the Commissioner notes that the sum of €5,198 is allowed by the Respondent for her duties as a company Director. In addition, the Commissioner observes that there exists no contract of employment between the Appellant's wife and the company, no documentation setting out the duties of the role and the evidence was that the Appellant was paid monthly by cheque from the Appellant's account, but sometimes she took cash from the Appellant's account. The Commissioner again observes the correspondence from the Appellant's accountant at page 93 of the Book of Hearing Documentation wherein it states that "*We recognise that as both [REDACTED] and [REDACTED] are students and upon reflection the level of salary paid to them is not justifiable for the level of service provided to the business. We are therefore offering to allocate 50% of the salary declared for them as salary arising to [the Appellant] himself.*"

45. The Commissioner has considered the Respondent's position in relation to the family salaries. The position is that the Respondent has treated all but €5,198 of the salary purportedly paid to the Appellant's wife and sons as being income earned by the Appellant himself. In terms of context of the level or amount of salaries earned by the Appellant's family members for the relevant years, the Commissioner observes the Respondent's submission that the amounts are significant, such that they total in or around €80,000 for two years. The Respondent submits that what the Appellant is requesting, is that it is accepted that €80,000 worth of work was done by the Appellant's wife and sons during the relevant years. The Respondent contends that it was "*a tax efficient way of taking the money of the company because he was going to support his wife and kids.*"

46. The Respondent directed the Commissioner to two decisions that have addressed the matter in the United Kingdom ("UK") and are contained at Tab 7 and Tab 8 of the Book of Authorities. In *RFC 2012 Plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland*, at paragraph 35, Lord Hodge stated that income tax on earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee. In particular, the Commissioner observes paragraph 39 of the decision, wherein Lord Hodge addresses the subject of payments to third parties and states that:

*"39. I see nothing in the wider purpose of the legislation, which taxes remuneration from employment, which excludes from the tax charge or the PAYE regime remuneration which the employee is entitled to have paid to a third party. Thus, if an employee enters into a contract or contracts with an employer which provide that he will receive a salary of £X and that as part of his remuneration the employer will also pay £Y to the employee's spouse or aunt Agatha, I can ascertain no statutory purpose*

*for taxing the former but not the latter. The breadth of the wording of the tax charge and the absence of any restrictive wording in the primary legislation, do not give any support for inferring an intention to exclude from the tax charge such a payment to a third party which the employer and employee have agreed as part of the employee's entitlement. Both sums involve the payment of remuneration for the employee's work as an employee".*

47. The Commissioner has also considered the decision in *Murray Group Holdings Ltd and others v Revenue and Customs Commissioners* which was opened to her by Counsel for the Respondent. Specifically, the Commissioner notes the dicta of Lord Drummond Young at paragraph 56, wherein he states that:-

*"The fundamental principle that emerges from these cases appear to us to be clear: if income is derived from an employee's services qua employee, it is an emolument or earnings, and is thus assessable to income tax even if the employee requests or agrees that it be redirected to a third party. That accords with common sense. If the law were otherwise, an employee could readily avoid tax by redirecting income to members of his family to meet outgoings that he would normally pay: for example to a trust for his wife, as in *Hadlee*, or to trustees to pay for his children's education or the outgoings on the family home".*

48. The Respondent submits that in order to succeed in establishing that the payments to the Appellant's wife and sons are not taxable as the income of the Appellant, the Appellant must establish that these are *bona fide* payments made to remunerate them for work actually done by them and that they were not just redirected payments to the Appellant for the duties carried out by him. The Commissioner does not consider this submission to be incorrect.
49. With that in mind, the Commissioner has considered the evidence in relation to what the Appellant's wife and sons duties were during the relevant years. There existed no contract of employment between the Appellant's wife and sons and the company. There existed no documentation relating to the duties to be undertaken by the Appellant's wife and sons for the company. In addition, there existed no evidence of the salary paid or salary negotiations that took place in relation to the company and the Appellant's wife and sons, relating to the duties to be carried out. More fundamentally, the Commissioner was furnished with no documentary evidence to support that actual work was carried out, such as the product of the workplace for example, email or other written correspondence. Notably, the company had no email address and the Appellant's wife gave evidence that she used the email address of the Appellant in any correspondence.

50. Having regard to the lack of evidence relating to the employment of the Appellant's wife and sons, the Commissioner considers that there existed no genuine employment relationship. Certainly, there is no evidence that work to the value of €80,000 for the relevant years or any other amount, was carried out by the Appellant's wife and sons. In fact, there has been no evidence adduced of any payments made to the Appellant's sons, aside from any evidence that work was actually carried out. The Appellant's representative disputes the amount of €5,198 allowed for the duties of the Appellant's wife in relation to her role as Director of the company and queries the manner in which the Respondent is capable of determining such an amount. The Commissioner notes that no other evidence was adduced in this regard, to challenge that the amount allowable by the Respondent was somehow unreasonable.
51. Having carefully considered all of the evidence, including documentary evidence and sworn oral testimony of the Appellant and his witnesses and legal submissions advanced by both parties, in addition to the written submissions of the parties, the Commissioner has taken her decision on the basis of clear and convincing evidence and submissions in this appeal. Consequently, the Commissioner finds that the Appellant has not succeeded in establishing on balance that the Respondent was incorrect to raise the Notices of Amended Assessment. For the reasons set out above, the Commissioner is satisfied that there exists no credible evidence to support the deductibility of the expense payments and no credible evidence of any duties carried out by the Appellant's wife and children to justify the payments made. Hence, the appeal is denied.
52. Finally, the Commissioner notes that the Respondent's submissions that in light of the Appellant's email dated 29 July 2022, there is a reduction in liabilities for the year 2016 in the sum of €2,239 and for the year 2017, in the sum of €890. This in turn reduces the Notice of Amended Assessment raised for 2016 in the sum of €56,025 to €53,786 and the Notice of Amended Assessment raised for the year 2017 in the sum of €33,175 to €32,285.

### **Determination**

53. As such and 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 tax is not payable. Therefore, the Notices of Amended Assessment dated 9 December 2021, for the tax year 2016 in the reduced sum of €53,786 and for the tax year 2017 in the reduced sum of €32,285, shall stand.

54. 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 and duties.

55. This appeal is hereby determined in accordance with Part 40A TCA1997 and in particular, section 949 thereof. 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 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine  
Appeal Commissioner  
21 August 2023