



Between

134TACD2023

██████████

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 of the Taxes Consolidation Act 1997 (“the TCA 1997”) brought on behalf of ██████████ (“the Appellant”) against Notices of Amended Assessment to income tax issued by the Revenue Commissioners (“the Respondent”) for the years ending 31 December 2007, 31 December 2008 and 31 December 2009, in the sum of €78,399, €111,044 and €30,331 respectively.
2. The liabilities arose in circumstances where the Respondent determined that certain income was that of the Appellant and not ██████████ (“the company”). The Respondent contends that it was the Appellant who was trading in relation to the operation of the quarry business and not the company. The Appellant maintains that no liability to income tax arises.
3. The appeal proceeded by way of a hearing on 14 April 2023. The Appellant was represented by Senior Counsel and the Respondent was represented by Junior Counsel. By agreement the Appellant was not present at the hearing of the appeal, due to ongoing health difficulties. The Appellant’s representative consented to the matter proceeding

without the personal testimony of the Appellant. Two witnesses for the Appellant, [REDACTED] [REDACTED] (“the Appellant’s spouse”) and [REDACTED] (“the Appellant’s sister”) gave sworn oral testimony on behalf of the Appellant. The hearing of the appeal did not take place until 2023, due to the health of the Appellant. In 2019, a case management meeting took place in order to consider how the appeal could be progressed, in the circumstances of the Appellant.

Background

4. Since the 1960s, the Appellant had been in business as a [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the owner and operator of a quarry, chiefly supplying aggregates to [REDACTED] [REDACTED] (“[REDACTED] [REDACTED]”). Until February 2007, the Appellant had undertaken these activities as a sole trader.
5. In the latter part of 2006, the Appellant was advised to set up a limited company for the operation of the quarry business, for reasons of better accounting and succession planning. In February 2007, the limited company was incorporated. The Appellant and his spouse were the founding company directors and owners of the entire issued share capital of €100.00, in equal shares.
6. Following the incorporation of the company in February 2007, to take on the quarry business, the Appellant continued as a sole trader with respect to his [REDACTED], [REDACTED] and [REDACTED] business. During 2014, quarry operations ceased, arising from an environmental law dispute with [REDACTED] [REDACTED]. The quarry has remained closed for business.
7. On 10 December 2007, the company was registered for corporation tax, with effect from 23 February 2007, for VAT with effect from 1 April 2007 and for relevant contracts tax with effect from 1 June 2007. On 19 February 2009, the company was registered as an employer for PRSI purposes with effect from 1 January 2009.
8. During the relevant years, [REDACTED] was the Appellant’s Accountant (“the Appellant’s accountant”). In addition to the services of the Appellant’s accountant, the Appellant also had a bookkeeper, [REDACTED] (now deceased) (“the Appellant’s bookkeeper”).
9. For the period 2007 to 2013, the annual accounts and annual returns to the Companies Registration Office (“CRO”) for the company were prepared by the Appellant’s accountant, who also completed the Appellant’s personal tax returns.

10. In May 2013, the Respondent advised the Appellant and the company of a proposed audit. As a result of that audit, amended assessments to income tax were raised by the Respondent in respect of the relevant years. The following are the amended amounts assessed to income tax, which issued to the Appellant by the Respondent on 2 September 2013, for the tax years 2007, 2008 and 2009:-

Tax year	2007	2008	2009
Income assessed (€)	168, 601 ¹	238,804	58, 843

11. The assessments were raised on the basis that the income from the operation of the quarry business was that of the Appellant, and not of the company. The position of the Respondent is that there was no transfer of the quarry, or the quarry business, by the Appellant to the company in 2007. The Respondent contends that the entirety of the trade of the quarry was carried out by the Appellant and he is liable to income tax on the profits of that trade. Furthermore, the majority of invoices issued in relation to the quarry business, were issued by the Appellant personally. The Respondent states that the assessments were raised on the basis that it was the Appellant who was trading and not the company.
12. The Appellant states that the income in question had accrued to the company and not to the Appellant personally, as there occurred a transfer of the quarry and the quarry business from the Appellant to the company in 2007. The Appellant states that in or around 2007, he was advised by ██████████ ██████████ that it could only accept invoices from him personally, but that the entirety of the trade of the quarry was carried out by the company.
13. Whilst the Appellant personally invoiced ██████████ ██████████, using his personal Value Added Tax (“VAT”) number and was in receipt of payments to his personal bank account from ██████████ ██████████ on foot of those invoices, the Appellant states that he transferred all payments made, to the company.
14. The Appellant contends that he agreed to transfer the company in return for value and it was never his intention to just “give the quarry away”. The Appellant states that it was his

¹ An amount of €59,052, representing the estimated income tax liability of ██████████ for the relevant years, was paid to the Revenue on 15th June 2018. An offer of €24,765 in respect of penalties and interest was not accepted.

intention that his personal holding in the quarry be accommodated and recognised in the course of the transfer of the company and it was only after the audit by the Respondent that he became familiar with the concept of goodwill.

15. On 21 March 2014, by way of a notice of appeal in the FORM AH1, the Appellant duly appealed to the Commission, the Notices of Assessment for the years ending 31 December 2007, 31 December 2008 and 31 December 2009, in the sum of €78,399, €111,044 and €30,331, respectively.

Legislation and Guidelines

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

17. Section 18(1) TCA 1997, Schedule D, inter alia provides:-

(1) The Schedule referred to as Schedule D is as follows:

SCHEDULE D

1. *Tax under this Schedule shall be charged in respect of –*

(a) the annual profits or gains arising or accruing to –

(i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,

(ii) any person residing in the State from any trade, profession or employment, whether carried on in the State or elsewhere,

(iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and

(iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State,

and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specially exempted from tax,

in each case for every one euro of the annual amount of the profits or gains

.....

(2) Tax under Schedule D shall be charged under the following Cases: Case I – Tax in respect of –

(a) any trade

.....

Case IV – Tax in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule;

Submissions and Evidence

Appellant's evidence

18. ██████████ gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by ██████████:-

18.1. The witness testified that the business was run by both herself and the Appellant. The witness confirmed that the main business prior to 2007, was the ██████████. The witness gave evidence that in 2007, the quarry business was small, but that ██████████ ██████████ commenced certain works and they successfully tendered for the contract. The witness confirmed her role in the quarry business was that at the end of each day, she took the dockets from the employees of the quarry business, collated them, prepared a day sheet and sent them to ██████████ ██████████ for payment. The witness stated that she would prepare the dockets/invoices "as much as she could" and would then leave them for the Appellant's bookkeeper, as it was his role from there, as she was not a bookkeeper or an accountant.

18.2. The witness confirmed that in late 2006, there was a decision taken by her and the Appellant to transfer the quarry business into a limited company as they wanted to separate the day-to-day business, such as the ██████████ the ██████████, the ██████████ and the ██████████ from the quarry business, so that it would be easier for the dockets for the quarry business to be prepared. The witness testified that the Appellant's bookkeeper would travel from ██████████ city regularly and he used the office above the ██████████ to carry out his work.

18.3. The witness was referred to pages 164 and 165 of the Booklet of Submissions and Correspondence which contains a document entitled Notice of Consent to the holding of an Extraordinary General Meeting ("EGM") on 28 February 2007 and a notification of the ordinary resolutions of the company to be taken at the meeting. The witness confirmed that it was her signature on the document. In

addition, the witness was referred to page 167 of the Booklet of Submissions and Correspondence which contains the minute of the meeting held on 28 February 2007, with the heading "Acquisition of the Business known as [REDACTED] Quarry" and which indicates that the Appellant chaired the meeting, with the witness and the Appellant's bookkeeper attending.

- 18.4. The witness testified that the Appellant's bookkeeper informed them that they were going to separate the [REDACTED] and the [REDACTED] business from the quarry business and that the goodwill of €650,000 was going into the quarry. The witness confirmed that the intention was that the quarry business would be transferred from the Appellant to the company, but that [REDACTED] [REDACTED] would not accept the docketts in the company name, as the pre 63 planning was in the name of the Appellant. The witness stated that the Appellant tried many times to resolve this with [REDACTED] [REDACTED] but [REDACTED] [REDACTED] insisted on dealing with the Appellant only.
- 18.5. The witness testified that she continued to send the docketts into [REDACTED] [REDACTED] in the Appellant's name and then [REDACTED] [REDACTED] would pay the Appellant. The witness stated that some of the money would then be transferred to the company. The witness confirmed that the company had expenses, such as a number of individuals who did the blasting and boring in the quarry.
- 18.6. The witness stated that the audit took place over 3 days. The witness testified that a member of the Respondent did not question the manner in which the quarry business was run and the only questions that the member of the Respondent had, were in relation to the tills in the [REDACTED] and [REDACTED]. The witness stated that all documents were provided, but the Appellant's accountant was not available at that time, as he was unwell. The witness stated that the Appellant had the [REDACTED], [REDACTED], [REDACTED] and [REDACTED] business in his own personal tax returns, but that the quarry business was in the company's corporation tax returns.
- 18.7. The witness testified that she is almost 70 years of age and the witness works every day in the [REDACTED] and the [REDACTED]. The witness testified as to the poor health of the Appellant and that they do have someone who assists them with their business on a Saturday evening. The witness stated that the quarry business was closed down by [REDACTED] [REDACTED] due to its location and they no longer have any income from that business.
- 18.8. On cross examination, the witness testified that the Appellant's accountant was his accountant for over 30 years and that the Appellant is currently in litigation

with the Appellant's accountant, wherein the Appellant claims that the Appellant's accountant was negligent in the manner in which he provided his professional services to the Appellant and specifically, in the manner in which he established the company herein. The witness confirmed that she knows very little about the case, but she does know that the accounts were not prepared correctly, despite the Appellant's accountant signing off on the accounts. The witness stated that it is not her signature or the Appellant's on the accounts for 2008. The witness said that she understood that the Appellant spoke to the Appellant's accountant, such that [REDACTED] [REDACTED] would not accept the dockets in the company name and that the Appellant's accountant stated that he would resolve it, but never did.

18.9. A number of documents were put to the witness in cross examination, including the Appellant's returns for 2007, 2008 and 2009 and the abridged financial statements of the company. The witness reiterated that she kept proper records, but that she had a bookkeeper and accountant to assist her with those records and the matters with which the witness could not deal with herself. Reference was made to page 163 of the Book of Assessments, Income Tax Returns and Company Accounts and the witness confirmed that it was not her signature or the Appellant's signature on the document. The witness confirmed that the 2007 returns were signed by them, but not the 2008 returns. The witness stated that she knew that the accounts had to be signed, but she did not know that the accounts were being signed by someone else. Reference was made to the audit correspondence commencing at page 65 of the Booklet of Submissions and Correspondence. The witness confirmed that the quarry land itself remained in the ownership of the Appellant, but that what we call the quarry or the stone was transferred to the company. The witness testified that it was never intended to transfer the quarry land to the company, only the goodwill.

18.10. Reference was made to page 105 of the Booklet of Submissions and Correspondence and it was put to the witness that at some stage the Appellant and the company lost confidence in the Appellant's accountant and employed another representative from a different firm to engage with the Respondent in relation to the audit and appeal, which was confirmed by the witness.

18.11. Reference was made to correspondence relating to the transfer of goodwill at page 109 of the Booklet of Submissions and Correspondence and a statement of the Appellant at page 111 of the Booklet of Submissions and Correspondence. The witness testified that [REDACTED] [REDACTED] confirmed that the only person who could

operate the quarry was the Appellant as the Appellant was licenced to operate it as a pre-1963 owner. Reference was made to page 112 of the Booklet of Submissions and Correspondence and it was put to the witness that the plant leasing remained in the Appellant's name. The witness confirmed that to be the case. Reference was also made to page 115 of the Booklet of Submissions and Correspondence and it was confirmed by the witness that this related to litigation with ██████████ around the closing of the quarry.

19. ██████████ gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by ██████████:-

19.1. The witness confirmed that she is the sister of the Appellant. The witness stated that she has been a ██████████ for the last 30 years and that prior to that role, she was a ██████████ and w ██████████ ██████████. The witness stated that she was familiar with the business of the Appellant, as she had worked over the years in the █████, █████ and ██████████ business to help out at home. The witness confirmed that in 2007, the quarry business became significantly busier, but was sporadic prior to that.

19.2. The witness testified that she would be quite familiar with the Appellant's affairs as a firm she worked with was involved in the Appellant's life policies and such matters. The witness stated that there would have been ongoing discussion with the Appellant about what business was like, at particular times. The witness confirmed that in 2007, she was told that the Appellant had formed the company as the quarry business was larger than it previously had been. The witness stated that the Appellant had concerns in relation to ██████████ being totally intransigent about allowing him to invoice in the company's name.

19.3. The witness was directed to the correspondence discovered in 2017, at pages 165, 166 and 167 of the Booklet of Submissions and Correspondence. The witness testified that, the Appellant contacted her following receipt of the assessments. The witness gave evidence that she was in contact with the Appellant's accountant and that at first, the exchanges were relatively friendly, but thereafter he became very uncooperative, such that he would not provide paperwork to her, as requested. She stated that in her mind there must be more documentation around the decision to form a company for the quarry business.

19.4. The witness testified that following the death of the Appellant's bookkeeper, she had a conversation with his son who informed her that the Appellant's Bookkeeper had many files that required sorting out. The witness gave evidence

that she asked the son of the Appellant's Bookkeeper, if he would check to see if any of the files relate to the Appellant's business. The witness stated that she had assisted the Appellant to engage with a new tax advisor to deal with the appeal and audit. The witness testified that the minutes of the meeting came from the son of the Appellant's bookkeeper, which he found while sorting out the files of the Appellant's bookkeeper. The witness testified that she stated to the new tax agent that "This is what you have been looking for all along" and what she described as some note of a transfer of the working business to the company. Reference was made to pages 165, 166 and 167 of the Booklet of Submissions and Correspondence, in that regard.

- 19.5. The witness testified in relation to certain additional bank statements submitted, relating to 2008 and the bank statements in the papers relating to 2009. The witness stated that there was money lodged by credit transfer lodgement and credit transfers in and payments out. The witness stated that in 2008, the corporation tax return shows activity in the company. The witness confirmed that the quarry was the only business of the company.
- 19.6. The witness gave evidence that the main customer was ██████████ ██████████ but that there was also local customers, such as local people who might be building a house or a road, or getting odd loads of stone or sand from the quarry.
- 19.7. The witness testified that the Appellant would invoice in his own name, with his own VAT number, such that ██████████ ██████████ paid the Appellant and not the company, but that the Appellant would make transfers over to the company from his own account, which the witness stated is borne out in the statements. The witness stated that it was the Appellant's desire that all business relating to the quarry would go through the company.
- 19.8. The witness testified that post February 2007, the quarry business was accounted for in the company and corporation tax returns and payments were made. Reference was made to the Book of Assessments, Income Tax Returns and Company Accounts, wherein it shows the company's corporation tax and debtors of €459,136 for 2008. The witness stated that she would assume that debtors means people that owed money to the company and is an indication of trade.
- 19.9. The witness was cross examined on her evidence by Counsel for the Respondent. The witness testified that she has had an opportunity to analyse the payments in and payments out and the money was coming through from ██████████

██████ to the Appellant in bulk form. The witness stated that in 2014, it was so frustrating, with all that was going on in our own lives, including both the ██, trying to get paperwork from an accountant, who would not give you paperwork and trying to make sense of it all. The witness stated that there is a lot of business being carried on between the ██████, ████████████████ and ████████████████ business, in addition to the quarry business and there are a lot of customers and payments. The witness testified that “you did not go to [the Appellant’s] bank account and say, oh they paid two and a half grand for a ████████████████ better move that over. You do it in bulk”. The witness stated that it is not the case that exact transfers were done for each and every item. The witness confirmed that she read the word “debtors” as individuals who owe money to the company.

19.10. Reference was made by Counsel for the Respondent to pages 65 and 66 of the Booklet of Submissions and Correspondence, wherein the Appellant’s accountant states on 28 October 2009, that there is an amount that remains payable to the company from the Appellant as at 31 March 2009. The witness stated that she was surprised that the Appellant’s accountant refers to that as being a debt due from the Appellant. Counsel for the Respondent asked if there was another explanation. The witness stated that the first time that she saw the correspondence at pages 65 and 66 of the Booklet of Submissions and Correspondence in 2013, during a meeting with the Respondent. Reference was also made to correspondence dated 19 April 2013 at page 67 of the Booklet of Submissions and Correspondence. The witness testified that there is no evidence at all that the Appellant and the Appellant’s spouse ever saw that letter and they certainly did not sign it, certainly not with their signature.

19.11. The witness was re-examined by Counsel for the Appellant and reference was made to page 163 in the Book of Assessments, Income Tax Returns and Company Accounts. The witness confirmed that the amounts which are shown in those letters as the sum of €459,136, which is the debtors as at 31 March 2008, the source of the money is the sales to ████████████████ ████████████████ and have been accounted for in the company. Further, the witness confirmed that at this point it is merely making the point that the Appellant had not yet passed on the monies to the company.

Appellant's Submissions

20. Senior Counsel made submissions on behalf of the Appellant. A summary of the submissions is set out hereunder:-

- 20.1. The issue here is simple. The company, was carrying on the quarry business with effect from 23 February 2007, a trade that had previously been carried on by the Appellant and his spouse. The submissions have narrowed the point down to that issue and it is an issue of fact rather than any case law. The issue is simply a matter of determining the reality, what entity was operating the quarry business in 2007, 2008 and 2009.
- 20.2. In relation to the transfer of a business, there is no legal, company law, or accounting requirement that such a transfer should be witnessed by any agreement, purchase or sale agreement. A doctor performs a personal service. That is a service that is entirely different to the operation of a quarry and for the Respondent to equate the two is misleading. When a business is transferred the various assets do not have to be transferred. In this instance, the land the quarry was on was owned and held by the Appellant. The business must be seen as a separate concept to transferring such assets. Plant and machinery is the same, the plant and machinery was around for years and from an accounting perspective, it is of negligible value.
- 20.3. The ██████████ ██████████ business was carried on by the Appellant as an undisclosed agent. Therefore, any debtors in the company ultimately refer to the ██████████ ██████████ business. It may be that the monies are due from the Appellant, in the first instance, but it is ultimately the ██████████ ██████████ business. That is the Appellant's contention and he has been consistent in that throughout the history of this matter. The purpose of the company was to operate a quarry. Therefore, it is reasonable that it would have commenced to trade in respect of what had previously been the Appellant's quarrying business. Quarrying revenues and receipts were recorded in the corporation tax returns of the company and in the company accounts for tax purposes. At the time of the audit, there were no issues raised regarding the quarry business. The Respondent had the opportunity to raise this issue back in 2009, but failed and if anything, gave assurance to the taxpayer that everything was okay.
- 20.4. Reference was made to page 50 of the Booklet of Submissions and Correspondence containing the submission on behalf of the Respondent's wherein it states that "*The invoicing for the quarrying income was substantially*

issued in the name of [REDACTED]. The receipts from the quarrying activity were substantially lodged in the personal bank account of [REDACTED]." That is entirely consistent with the evidence that has been given, namely that the main customer, 80% of the business was [REDACTED] and the only way that the [REDACTED] would accept invoicing was in the name of the Appellant. However, the reality of the situation was that it was the company who was taking the risks and rewards in the matter. The beneficial interest to the trade resided with the company and the Appellant was simply an undisclosed agent in the matter and this is a particular form of arrangement that is common in business practice and business parlance. Most of the invoices were issued by the Appellant personally and there is evidence as to the reasons why, such that the licence was in the name of the Appellant, but that does not mean that only the Appellant was carrying on the quarrying business.

- 20.5. Reference was made to page 51 of the Booklet of Submissions and Correspondence which states *"Following consideration of the matter the Inspector formed the view that as the quarrying income was substantially invoiced in the name of [REDACTED] and was substantially lodged to the personal bank account of [REDACTED] and because the appropriate taxes were not paid by the company in respect of the Directors' loan reflected in the company's accounts, he would proceed to assess [REDACTED] personally on the income from the quarry."* That is an incredible statement with flawed rationale, as it suggests that as the Respondent is not getting the money from the company, it will be reversed and the Appellant will be taxed personally, such that the Appellant has now been assessed on the quarrying income. There is no logical rationale as to how the Respondent has approached this issue, arising from the audit of 2013 onwards, and it has been done without any justification.
- 20.6. The Appellant's accountant on behalf of the company, was concerned about the issue of amounts due to the company from the Appellant and he focused on the issue of goodwill. The goodwill aspect of the transfer is not an issue in this appeal. At issue is, where the quarrying activity was carried on.
- 20.7. The company operated primarily using self-employed contractors who provided blasting, loading, hauling, crushing and screening services to the company. These contractors were all paid from the company's bank account. Approximately 20% of the company business turnover was accounted for by local construction firms. The remainder was accounted for by [REDACTED] [REDACTED]. The bank account was

used to lodge customer payments and to receive credit transfers, as well as occasional transfers by the Appellant from his personal bank account. No cash withdrawals were made from the company bank account and all payments from the account were by means of company cheque. The company was invoiced by a third party company in respect of the stone crushed for [REDACTED] [REDACTED], and said invoices were paid from the company bank account. In addition, other contractors, were paid from this bank account. The company paid VAT on all monies received. The company had limited plant and machinery assets, as the company was reliant on contractors for much of its business operations. The Appellant discussed leasing trucks under the company name, but the bank preferred to deal with the Appellant personally in respect of same owing to his long and positive track record with the bank. The only issue lay with the matter of the use of the Appellant's personal VAT number for invoicing [REDACTED] [REDACTED]. This was seemingly due to issues to do with pre-1963 planning permission and [REDACTED] [REDACTED] insistence on the use of the Appellant's personal VAT number.

- 20.8. It is agreed that most of the invoices were issued by the Appellant personally to [REDACTED] [REDACTED] and there is evidence as to the reasons why. However, that the licence was in the name of the Appellant, does not mean that the Appellant was carrying on the quarrying business.
- 20.9. At paragraph 10 of the Respondent's submissions, the issue of being denied a claim for retirement relief exemption from CGT is mentioned. That is not an issue in this appeal.
- 20.10. In relation to the indicators of trade, the company carried on the business as a quarry in the usual manner. The company was registered for corporation tax, VAT and for relevant contracts tax and it was indicated that it was for the purposes of a quarrying business. It cannot be any clearer.
- 20.11. In a situation where there is an agent, who is invoicing on behalf of the principal, the agent would return VAT returns and that would be the way it is done. The other issue is double taxation. The situation is that the income assessed for the assessments has been subject to taxation, as the company has already been taxed on this business. That is double taxation. There may be adjustments made, but in general that is double taxation. The amended assessments were raised prematurely, in circumstances where the whole issue of the quarrying business was not teased out in the 2013 audit and it was not teased out prior to the assessments being raised.

20.12. It is accepted that the accounts or the statutory records were probably not maintained in absolute pristine order, but that should not impact on the reality of the situation, namely the transfer of the quarry business from the Appellant to the company.

20.13. For the period 2007 to 2013, the annual accounts and annual returns to the CRO for the company were prepared by the Appellant's accountant, who also completed the Appellant's personal tax returns. For the tax year 2007, the Appellant and his spouse signed the annual accounts and remitted those accounts to the Appellant's accountant for filing with the CRO. In subsequent years, neither the accounts nor annual returns for the company were signed by the Appellant or his spouse. Subsequently, it came to the Appellant's attention that the annual accounts for years 2008 to 2013, lodged with the CRO by the Appellant's accountant, purportedly bore the signature of the Appellant and his spouse. These accounts were never signed by them. At no stage during these years did the Appellant's accountant bring any problems relating to the company accounts to the Appellant's attention or mention an overdrawn director's account to him.

20.14. The Appellant retained accountants, [REDACTED] [REDACTED] to construct the finances of the company, as they should have been accounted for in the relevant years, if the Appellant's accountant correctly discharged his professional duties.

Respondent's submissions

21. Counsel made submissions on behalf of the Respondent. A summary of the submissions is set out hereunder:-

21.1. The burden of proof in a tax appeal is on the taxpayer. At issue here is a purely factual question; was the business transferred by the by the Appellant to the company in 2007. The burden of proof rests with the Appellant to demonstrate that the transfer of the quarry business took place, and that as a result of same, the company and not the Appellant personally traded with customers such as [REDACTED] [REDACTED] and received the relevant income from the trade.

21.2. The primary position of the Respondent is that there was no transfer of the quarry or the quarry business by the Appellant to the company in 2007. The entirety of the trade of the quarry was carried out by the Appellant and he is liable to income tax on the profits of that trade.

- 21.3. Whether a company or an individual was trading is a matter of fact and two questions arise. Firstly, was there a transfer of a business? The evidence of a transfer might be a written agreement that clarifies what has been transferred. For example, the transfer of a Doctor's medical practice. What you would expect is three things to happen; the first thing is an individual, who is trading, sets up a company; the second thing is that that company agrees to buy a business; and the third thing is the actual purchase and sale agreement that sets out exactly what is being bought. In addition there will be signatures of the Directors of the company and the signature of the person, who is selling the business. Secondly, who is actually trading? Considering the Doctor's business again, the business can be transferred, but if it is the Doctor who is individually contracting with each patient or with the HSE and is receiving the money, then the Doctor is liable to tax on that money, because the Doctor is the person who is actually trading and a person is taxed on their trade. The two elements for decision are was there an actual transfer of a business and then who was carrying out the trade, subsequent to that transfer.
- 21.4. There was no actual transfer of the business, the accounts filed on behalf of the company do not record any asset within the company either intangible assets or tangible assets. When you transfer a business there are various things that you would expect to see transferred, even if it is licences to enter a property, There must be a value, because otherwise what is it that was transferred to the company in 2007, if a transfer took place.
- 21.5. The assessments were raised on the basis that the income or profit from the quarry was that of the Appellant and not the company, because the quarry itself or the business operated on it, was never transferred to the company. In addition, most of the invoices issued in relation to the quarry business were issued by the Appellant personally. The assessments were raised on the basis that it was the Appellant who was trading, and not the company.
- 21.6. To date, the Appellant has failed to provide evidence of a transfer of the business, and such evidence that has been provided contradicts the Appellant's position. It is uncontested that ownership of the quarry itself, both legal and beneficial, remained vested in the Appellant personally. In addition, ownership of the relevant machinery remained vested in the Appellant himself and no leases or licences over the quarry lands were granted to the company. The company was not operating RCT in relation to any contractors, while the Appellant was

personally operating the company as both a Principal and Subcontractor. The Appellant was personally engaging the persons working at the quarry. All trucks doing quarry business were the Appellant's own personal property, leased to him personally, and were financed with his own personal loans. The quarry licence remained at all times in the name of the Appellant and the Appellant was the licensed operator of the quarry. According to the Appellant, the quarry, as a pre-1963 development, could not legally be operated as a quarry by anyone other than the Appellant.

- 21.7. The Appellant personally traded with the quarry's principal customer, [REDACTED]. He held himself out as the operator of the quarry, issued invoices personally to the local authority customer, quoting his own personal VAT number, and received payments personally from the local authority. When proceedings were brought by the local authority in relation to the operation of the quarry, the defendant in those proceedings was the Appellant, not the company. The Appellant personally appeared and accepted he was the appropriate defendant. The company's own contemporaneous returns do not record any transfer of the business and contradict the Appellant's position that a business with goodwill to the value of €650,000 was transferred to the company. Even if the Appellant had purported to sell the goodwill and only the goodwill of his quarry business to the company, sale of the goodwill alone would not have the purported effect now claimed by the Appellant.
- 21.8. The business here was quarrying, which encompasses entering the land, extracting the stone, processing it, selling it, and the means of doing so such as, the land itself, the quarry, the stone, the machinery and the transport. Goodwill in a business, by definition, cannot be extracted and separated from the business itself. Unless the entire business was sold, the goodwill cannot be transferred. The business itself was never transferred and it remained owned and operated by the Appellant, and therefore he remains liable for tax on his trade. Goodwill cannot be traded or transferred as an asset on its own, since it is the value attributed to the reputation and good name and connections of a business. In that regard, reference is made to the decision in *Inland Revenue Commissioners v Muller & Co.'s Margarine Ltd* [1901] AC 217.

Material Facts

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

- 22.1. Since the 1960s, the Appellant has been in business as a [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the owner and operator of a quarry, chiefly supplying aggregates to [REDACTED] [REDACTED]
- 22.2. In February 2007, a limited company, was incorporated.
- 22.3. The Appellant and his spouse were the founding company directors and owners of the entire issued share capital of €100.00, in equal shares of the company.
- 22.4. The sole purpose of the incorporation of the company in February 2007, was to take on the quarry business.
- 22.5. The Appellant continued as a sole trader as respects his [REDACTED], [REDACTED] and [REDACTED] business.
- 22.6. During 2014, quarry operations ceased, arising from an environmental law dispute involving another quarry and [REDACTED] [REDACTED]
- 22.7. On 10 December 2007, the company was registered for corporation tax, with effect from 23 February 2007, for VAT with effect from 1 April 2007 and for RCT with effect from 1 June 2007. On 19 February 2009, the company was registered as an employer for PRSI purposes with effect from 1 January 2009.
- 22.8. During the relevant years, the Appellant had the advice of the Appellant's accountant and the Appellant's bookkeeper in relation to both his personal and company accounts.
- 22.9. The Appellant has instigated proceedings against the Appellant's accountant in relation to the advices received around the incorporation of the quarry business.
- 22.10. The business at issue was quarrying, which encompasses entering the land, extracting the stone, processing stone, selling stone and the means of doing so such as, the land itself, the quarry, the stone, the machinery and the transport.
- 22.11. The quarry licence remained at all times in the name of the Appellant, who was the licensed operator of the quarry.

- 22.12. In or around 2007, the Appellant was advised by ██████████ ██████████ that it could only accept invoices from him personally.
- 22.13. The assessments were raised on the basis that the income or profit from the quarry was that of the Appellant and not of the company.
- 22.14. It is uncontested that ownership of the quarry itself remained vested in the Appellant personally.
- 22.15. It is uncontested that ownership of the relevant machinery remained vested in the Appellant himself.
- 22.16. It is uncontested that all trucks doing quarry business were the Appellant's own personal property, leased to him personally and were financed with the Appellant's own personal loans.
- 22.17. There exists no documentary evidence of a transfer of the quarry business such as a deed or certificate of transfer of ownership.
- 22.18. There exists no grant of a lease or licence over the quarry lands by the Appellant to the company.
- 22.19. The Appellant personally traded with the quarry's principal customer, ██████████ ██████████. The Appellant issued invoices personally to ██████████ ██████████ quoting his own personal VAT number and received payments personally from ██████████ ██████████, as opposed to the company.
- 22.20. Approximately 20% of the quarry business was accounted for by local firms, with the remaining 80% being attributed to ██████████ ██████████.
- 22.21. When proceedings were brought by the ██████████ ██████████ in relation to the operation of the quarry, the Defendant in those proceedings was the Appellant, not the company.
- 22.22. On 15 June 2018, the Appellant paid an amount of €59,052 to the Respondent.
- 22.23. The evidence does not establish that the Appellant was acting in the capacity of an undisclosed agent for the quarrying business, in relation to the company.

Analysis

23. 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* (“*Menolly Homes*”), [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”.

24. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgement of Charlton J. in *Menolly Homes*, wherein he states that:

“Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute...”

25. The sole issue to be determined in this appeal is whether the company and not the Appellant personally traded with customers such as [REDACTED] [REDACTED] and received the relevant income from the trade. The parties agree that this is a wholly factual question to be derived from the facts of the within appeal. The Commissioner is satisfied that the burden of proof rests with the Appellant to demonstrate that a transfer of the business took place and that as a result of same, the company and not the Appellant personally traded with customers and received the relevant income from the trade.

26. The matter of the transfer of the goodwill of the quarry business from the Appellant to the company is mentioned throughout the documentary submissions, furnished in advance of the hearing of the appeal. The Commissioner notes that it was confirmed in submissions at the hearing of the appeal, that the sole issue to be determined is whether there was an actual transfer of the quarrying business and who was carrying out that trade, subsequent to the transfer. Therefore, the issue of goodwill is not a matter to be determined in this appeal and the Commissioner intends to make no finding in this regard.

27. The Appellant argues that the issue is simply a matter of determining the reality of the situation, namely what entity was operating the quarry business in 2007, 2008 and 2009. The Respondent’s position is that the business itself was never transferred and it remained owned and operated by the Appellant and therefore, the Appellant remains liable for tax on his trade. The Commissioner observes the Appellant’s position, such that as the company was incorporated on 23 February 2007, it is only from that date that the company was in receipt of quarry income. Consequently, the Appellant submits that the income of

€151,972 from the quarry trade is properly assessable on the Appellant, only up to that date.

28. There was a considerable amount of documentation submitted in relation to this appeal which the parties directed the Commissioner to and which the Commissioner has considered in addition to the oral testimony of the witnesses and submissions of Counsel for the parties. The Commissioner has considered the evidence, submissions and correspondence that ensued in relation to the audits that took place in 2013. The Commissioner observes that many of the issues ventilated in correspondence throughout 2013 and 2014, are either now not at issue in this appeal or are accepted, such as set out above in the material facts found *inter alia*, that the payments were made to the Appellant from [REDACTED] [REDACTED] and that the plant and machinery remained in the Appellant's name.

Jurisdiction of the Appeal Commissioner

29. From the submissions furnished in this appeal and in relation to the Appellant's accountant and bookkeeper, the Commissioner observes that "*this professional relationship was of over 20 years' standing with [the Appellant] reposing complete confidence in [the Appellant's accountant] expertise in financial and taxation matters, [the Appellant] having completed formal education at age 14. [The Appellant] was in regular contact with [the Appellant's accountant] during the year, [the Appellant's accountant] [REDACTED] office being close by an [REDACTED] [REDACTED] frequently visited by [the Appellant]. [The Appellant] also regularly spoke to [the Appellant's accountant] by telephone about various business matters and [the Appellant's] bookkeeper, [the Appellant's bookkeeper], visited [the Appellant's accountant] frequently on financial matters*". The Commissioner notes that the Appellant instructed a firm of Solicitors to assist him with his appeal and in addition, instructed a new tax advisor.
30. It is clear to the Commissioner from the evidence of the Appellant's spouse and the Appellant's sister that the Appellant was dissatisfied with the advices received from the Appellant's accountant, in relation to the incorporation of the company and the transfer of the quarry business. The Commissioner notes the evidence that there were issues in relation to the handover of files between advisors. In addition, the Commissioner notes that there is ongoing litigation in this regard. It is important to state that the Commissioner's jurisdiction is limited to considering "the assessment and the charge", as stated by Murray J. at paragraph 64 of the Court of Appeal's decision in *Kenny Lee v Revenue Commissioners* [2021] IECA 18. The Commissioner is confined to considering whether the liability imposed by the Respondent was correct in law, and has no equitable jurisdiction or broader power to consider circumstances not directly pertaining to the

imposition of the charge. Accordingly, the Commissioner makes no finding in relation to the manner in which the Appellant's accountant engaged with the Appellant or third parties.

31. Furthermore, the Commissioner notes the Appellant's argument concerning the manner in which the audit was conducted and that at the time of the audit, no issues were raised regarding the quarry business. The Appellant submits that the Respondent had the opportunity to raise the issue back in 2009, but failed and if anything gave assurance to the Appellant that there were no issues arising. As set out above, the Commissioner does not have jurisdiction to deal with any arguments relating to unfairness or legitimate expectation. The Commissioner's jurisdiction is limited to considering "the assessment and the charge", as stated by Murray J. at paragraph 64 of the Court of Appeal's decision in *Kenny Lee v Revenue Commissioners* [2021] IECA 18.
32. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015 and section 6(2) of the Finance (Tax Appeals) Act 2015 sets out the functions of an Appeal Commissioner appointed pursuant to that Act. Therefore, an Appeal Commissioner has jurisdiction as set out in statute and does not have jurisdiction to set aside a decision of the Respondent based on alleged unfairness or breach of legitimate expectation, as such grounds of appeal do not fall within the jurisdiction of an Appeal Commissioner and thus, do not fall to be determined as part of this appeal. This comes within the jurisdiction and remit of the Courts.

Substantive issue

33. The Commissioner notes the submission of the Appellant that in the latter part of 2006, the Appellant's accountant advised the Appellant to set up the company for the operation of the quarry business, for reasons of better accounting and succession planning. The company was incorporated in February 2007. The Appellant and his wife were the founding company directors and owners of the entire issued share capital of €100, in equal shares.
34. The Commissioner notes the evidence of the Appellant's spouse that on 28 February 2008, she attended a meeting at [REDACTED] to consider an ordinary resolution of the company. The documentary evidence in the appeal establishes that the company was incorporated prior to that date and was registered with the Respondent for *inter alia* corporation tax, since 2007. The Commissioner has considered page 165 of the Book of Submissions and Correspondence and the document indicating consent to hold an EGM of

the company on 28 February 2008. The Appellant's spouse confirmed that it was both her and the Appellant's signatures on the document.

35. The Commissioner has also considered pages 166 and 167 of the Book of Submissions and Correspondence which contains documents giving notice of the EGM and the minute of the EGM. The Commissioner observes at page 166 that it is a notice in relation to holding an EGM and that the purpose of the EGM was to consider and pass the following ordinary resolution:-

"ORDINARY RESOLUTIONS:

"That in accordance with the provisions of Part III of the Companies Act, 1990, the proposed transaction between the Company and the business known as [REDACTED] QUARRY be and is hereby approved".

"That the Company acquire the goodwill of the business known as [REDACTED] QUARRY or any part or parts thereof as the Board may determine, in consideration of such sum, if any, and subject to such terms and conditions as the board may think fit".

36. The Commissioner observes that the minute of the meeting at page 167 of the Book of Submissions and Correspondence records that the ordinary resolution was passed and authorised the company to acquire the goodwill of the business known as [REDACTED] Quarry in consideration of the following:

"1. The transfer of the Company of the business known as [REDACTED] QUARRY valued as follows:

Goodwill €650,000

2. The company will collect the debtors and discharge the creditors of the business and the balance is to be charged to the accounts as a loan repayable to the owners of [REDACTED] Quarry".

37. Notably, the evidence of the Appellant's sister was that these are the documents that were found in 2017, by the son of the Appellant's bookkeeper following his death. The Commissioner observes that in correspondence dated 7 October 2015, the Respondent contends that the Appellant's accountant only raised the issue of goodwill *"when the issues of alternative tax liabilities either on the director's overdrawn loan account or on treating the quarry income as that of [the Appellant's] were raised as part of [the Respondent's] audits. All of the accounts of the company prepared and submitted to the CRO are mute on the issue of goodwill while showing a directors liability to the company."* The Commissioner

notes that it is submitted that “for reasons currently unclear, this goodwill was not formally recorded on the balance sheet of [the company] prepared for that year (2007)”.

38. The Commissioner has considered the Appellant’s Form 11 for the years 2007, 2008, 2009 and 2010, at Tabs 4 to 7 inclusive, of the Book of Assessments, Income Tax Returns and Company Accounts. These forms relate to the Appellant’s personal income for the years and the Commissioner notes both the income and the reference to trade namely, “██████████, ██████████, ██████████”. The income (Sales/Receipts/Turnover) of the Appellant for the years is listed as €1,289,602 (2007), €1,487,074 (2008), €1,126,768 (2009) and €1,017,130 (2010).
39. Furthermore, the Commissioner has considered the company’s annual returns for the years 2007 to 2018 inclusive, at Tabs 8 to 19 of the Book of Assessments, Income Tax Returns and Company Accounts. In addition, the Commissioner considered the company’s abridged financial statements at Tabs 20 to 31 of the Book of Assessments, Income Tax Returns and Company Accounts. The Commissioner observes that for the period ended 31 March 2007, under current assets, the amount of €194,886 is shown and entitled “Debtors”. Similarly, for the period ended 31 March 2008, under current assets, the amount of €459,136 is shown and entitled “Debtors” and again for the period ended 31 March 2019, the amount of €536,953 is shown and entitled “Debtors”. For the period ended 31 March 2010, under current assets, the amount of €619,842 is shown and entitled “Debtors”. It appears to the Commissioner from these documents that the only asset of the company is debtors, as per the abridged financial statements.
40. The Commissioner notes the evidence of the Appellant’s spouse, such that the signature on the company’s abridged financial statements for the period 31 March 2009, at page 163 of the booklet, was not that of her and the Appellant’s. The witness accepts that it is both her signature and the signature of the Appellant on the Company’s abridged financial statements for the period 31 March 2008, at page 153 of the Book of Assessments, Income Tax Returns and Company Accounts.
41. The Commissioner was directed to the worksheets in the booklet entitled “Book of Day Work Sheets and Invoices”. The Commissioner observes from the booklet that it contains work sheets and invoices for the years 2007, 2008, 2009 and 2010. The Commissioner notes the evidence of the Appellant’s spouse, such that she created the dockets and sent them to the customer, ██████████ ██████████ for payment. In addition, the Commissioner observes that each of the worksheets contains *inter alia* the Appellant’s name and address, the contract, the product, price and is signed and dated by the Appellant’s spouse. In addition, the Commissioner observes that the worksheets contain the

Appellant's VAT number. The evidence and submissions are that the Appellant used his personal VAT number when engaging with ██████████. Notably, it is obvious to the Commissioner, that the worksheets do not contain the company name or VAT number.

42. The Commissioner has considered the submissions wherein it is submitted that the Appellant was advised by ██████████ that it could only accept invoices from the Appellant personally, because he was the pre-1963 owner of the quarry registered under section 261 of the Planning and Development Act, 2000. Therefore, these invoices were to be issued bearing the Appellant's personal VAT number. The Appellant submits that he approached ██████████ on a number of occasions around this time, asking that they would deal with the company rather than the Appellant. Further, it is submitted that the Appellant spoke to the Appellant's accountant in relation to this matter, but that the Appellant's accountant told him not to be concerned, as the matters would be dealt with by him.
43. In addition, the Commissioner has considered the bank account statements of the company in the Book of Submissions and Correspondence and the additional statements that were submitted at the hearing of the appeal. The Commissioner notes the evidence of the Appellant's sister, such that she has tried to reconcile payments into the company bank account with receipts/invoices in relation to the customers of the company, however as payments were made in bulk into the account by the Appellant, there was some difficulty undertaking such a reconciliation.
44. The Commissioner considers that this documentary evidence does not establish that the Appellant was transferring amounts to the company account that were invoiced by him to ██████████ and received by him into his personal bank account. The Appellant's witness was not in a position to corroborate that contention either, as set out in paragraph 43 above. The Commissioner is satisfied that the banking documentation provides no distinction between the Appellant and the company.
45. The Commissioner has considered correspondence of the Respondent dated 30 August 2013, in response to correspondence from the Appellant's accountant dated 21 August 2013, wherein the Respondent states that:

"The position now put forward by you regarding the transfer of business by [the Appellant] to [the company] is not in accordance with the facts of the case. My examination of records has shown:

1. *The quarry remains in the name of ██████████.*
2. *The plant and machinery remains in the name of ██████████.*

3. *The income from the quarry is substantially if not exclusively paid to [the Appellant] personally”.*

46. Further, the Commissioner observes the response from the Appellant’s accountant dated 19 September 2013, such that none of the above propositions are denied. The Appellant’s accountant states that:

“As stated per our previous letter when [the Appellant] transferred part of his quarrying business to [the company] in 2007, a disposal took place for capital gains tax purposes, the sale as the goodwill of the business i.e. the operation of the quarry.....He disposed of the goodwill of the business which we valued in our letter dated the 21st of August at €650,000. He meets the main conditions of retirement reef per s598 and s599 TCA.

In relation to the points made in your letter dated 30th August:

1. *The land is of negligible value. The value is derived from the extraction of the rock ad stone.*
2. *The plant and machinery have a minimal value. The majority of the plant and machinery used for extraction were contracted from third parties. The expenditure in relation to the maintenance and running of the other machines was processed through the company.*
3. *The value of the goodwill was not credited to the director’s account. The income was paid to [the Appellant] personally to discharge the director’s account.*
4. *There was no land/property sale. The sale was the goodwill of the business i.e. the operation of the quarry, not the ownership of the quarry. As the sale was of an intangible, there was no requirement for legal documentation.*

We maintain that no BIK or surcharge liabilities would arise in respect of this issue”.

47. The Commissioner notes that the Appellant argues that there are many indicators that the company was carrying out the trade and not the Appellant, such as the company was registered for Corporation Tax with effect from 23 February 2007, for VAT with effect from 1 April 2007 and for RCT with effect from 1 June 2007. On 19 February 2009, the company was registered as an Employer for PRSI purposes with effect from 1 January 2009. The company maintained a bank current account with an overdraft of €60,000 at [REDACTED], which was utilised by the company from time to time. The company operated primarily using self-employed contractors who provided blasting, loading, hauling, crushing and screening services to the company. The contractors were all paid from the company’s bank account. Approximately 20% of the company business turnover

was accounted for by local construction firms, with the remainder being accounted for by [REDACTED] [REDACTED]. The bank account was used to lodge customer payments and to receive credit transfers, as well as occasional transfers by the Appellant from his personal bank account. No cash withdrawals were made from the company bank account and all payments from the account were by means of company cheque. The company was invoiced by a third party company in respect of the stone crushed for [REDACTED] [REDACTED], said invoices being paid from the company bank account. Other contractors, were paid from this bank account. The company paid VAT on all monies received. The company had limited plant and machinery assets, as the company was reliant on contractors for much of its business operations. The Appellant discussed leasing trucks under the company name with [REDACTED], but [REDACTED] preferred to deal with the Appellant personally, in respect of same owing to his long and positive track record with the Bank.

48. The Appellant states that the income in question had accrued to the company and not to the Appellant personally, as there occurred a transfer of the quarry and the quarry business from the Appellant to the company, in 2007. Therefore, the entirety of the trade of the quarry was carried out by the company. The Commissioner does not consider that the evidence establishes that position. The Commissioner is satisfied that all of the evidence suggests that it was the Appellant and not the company that carried out the trade in relation to the quarry, in circumstances where it was the Appellant that invoiced [REDACTED] [REDACTED] and the Appellant who received the payment from [REDACTED] [REDACTED]. The Commissioner considers that the evidence in this appeal establishes that factual situation.
49. The primary position of the Respondent is that in 2007, no transfer by the Appellant of the quarry or the quarry business took place and the entirety of the trade of the quarry was carried out by the Appellant. Therefore, the Appellant is liable to income tax on the profits of that trade. The Commissioner agrees with the Respondent.
50. The Commissioner is satisfied that the Appellant may have planned for personal reasons to transfer the goodwill in his quarry business to a company. However, the Commissioner is satisfied that the evidence submitted does not establish a transfer of the business, in circumstances where the company could not legally operate the business, having regard to the position of [REDACTED] [REDACTED] and the pre 1963 licence. Moreover, the Commissioner is satisfied that the Appellant continued to own the quarry, continued to operate the quarry, continued to personally invoice the quarry's main customer, [REDACTED] [REDACTED] in his own name and with his own VAT number, and continued to personally receive payment.

The Commissioner is satisfied that it was the Appellant and not the company that traded with [REDACTED] [REDACTED]

51. The Commissioner finds that the evidence does not establish the transfer of the business to the company nor does the evidence establish that payments made to the Appellant by the main customer of the quarry were transferred to the company. It is uncontested that ownership of the quarry itself and the relevant machinery remained vested in the Appellant personally. All of the trucks doing quarry business were the Appellant's own personal property, leased to him personally, and were financed with his own personal loans. There exists no evidence of a lease or licence over the quarry lands were granted to the company. The quarry licence remained at all times in the name of the Appellant and he was the licensed operator of the quarry. The Commissioner notes that the Appellant submits that the quarry, as a pre-1963 development, could not legally be operated as a quarry by anyone other than the Appellant. Furthermore, when proceedings were brought in relation to the operation of the quarry, the defendant in those proceedings was the Appellant, and not the company. The Commissioner considers that this is all evidence that, on balance, tends to show that the business of the quarry was not transferred to the company.
52. If the Commissioner is wrong about the transfer of the business, the Commissioner is satisfied that the Appellant personally traded with the quarry's principal customer [REDACTED] [REDACTED] and no other evidence has been submitted to establish any other trade. The Commissioner is satisfied that the Appellant held himself out as the operator of the quarry, issued invoices personally to [REDACTED] [REDACTED], quoting his own personal VAT number, and received payments personally from [REDACTED] [REDACTED]. Even if the evidence had established that the Appellant transferred the payments received to the company, he was the person who personally invoiced [REDACTED] [REDACTED] and was the person in receipt of the payments. Therefore, the Commissioner is satisfied that this engagement with [REDACTED] [REDACTED] was his personal trade, such that he should be taxed accordingly. There exists no evidence of the company trading in the quarry business.
53. The Commissioner has every sympathy for the situation that the Appellant finds himself in. The Commissioner notes that the Appellant submits that his understanding was that the payments being received from [REDACTED] [REDACTED] in respect of the quarry business, were being appropriately accounted for and the relevant taxes were being paid. The Commissioner does not accept that references to debtors in the accounts means individuals that owed money to the company and thus, is an indication of trade.

54. The burden of proof is on the Appellant in this appeal to show that the income was that of the company's and not of the Appellant, such that the tax is not payable. Having carefully considered all of the evidence, including documentary evidence and sworn oral testimony of the Appellant's witnesses and legal submissions advanced by Counsel for 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.

55. Accordingly, the Commissioner is satisfied that the Appellant has not succeeded in establishing on balance that the Respondent was incorrect to raise the Notices of Amended Assessment. The evidence is that the quarrying income was substantially in the name of the Appellant and the receipts from the quarrying activity were substantially lodged to the personal account of the Appellant. The income from the quarry was that of the Appellant and not the company, because the quarry business was never transferred to the company. Moreover, most of the invoices issued in relation to the quarry business were issued by the Appellant personally. The Commissioner is satisfied that the evidence establishes that it was the Appellant who was carrying out the trade in relation to the quarry and not the company. In light of this finding, the Commissioner determines that the Notices of Assessment for the years ending 31 December 2007, 31 December 2008 and 31 December 2009, in the sum of €78,399, €111,044 and €30,331, respectively, less any amounts already paid, shall stand.

56. Finally for the sake of completeness, the Commissioner has considered the Appellant's argument that the Appellant was an undisclosed agent of the company. The Commissioner considers that this argument was not developed in any way by Counsel for the Appellant nor was the Commissioner directed to any relevant legislative provisions or case law supporting that position. The Commissioner notes that section 28(1) of the Value Added Tax Consolidated Act 2010 ("VATCA 2010") provides for special rules in relation to supplies of services and states:-

(1) The supply of services through a person (in this subsection referred to as the "agent") who, while purporting to act on his or her own behalf, concludes agreements in his or her own name but on the instructions of, and for the account of, another person, shall be deemed, for the purposes of this Act, to constitute a supply of the services to and simultaneously by the agent.

57. Nevertheless, this section was not opened to the Commissioner nor was there any submissions made by the Appellant, in relation to its relevance and applicability to the

circumstances of the within appeal. Accordingly, the Commissioner makes no finding in this regard.

Determination

58. 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 to income tax for the years ending 31 December 2007, 31 December 2008 and 31 December 2009, in the sum of €78,399, €111,044 and €30,331 respectively, less any sums already paid, shall stand.

59. 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.

60. 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

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.