AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

140TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This appeal comes before the Tax Appeals Commission (hereinafter the "Commission") against a Notice of Amended Assessment to Income Tax for the year 2017 raised by the Revenue Commissioners (hereinafter the "Respondent") on 15 December 2022.

2. The amount of tax in dispute is €9,023.48.

Background

3. Mr [redacted] (hereinafter the "Appellant") is a [redacted] (hereinafter the "Company") which is a company registered in Ireland whose shares are quoted on the [redacted].

4. On 31 March 2017 the Appellant exercised 9,000 share options which had been granted to him by the Company. The Appellant exercised the share options by purchasing 9,000 Company shares at a price of [redacted] 79.64 per share.

5. On the same date, 31 March 2017, immediately after exercising the share options, the Appellant sold the 9,000 shares.

6. The Appellant and the Respondent are hereinafter referred to collectively as "the Parties".

7. It is agreed between the Parties that the Appellant filed a Relevant Tax on a Share Option (hereinafter "RTSO") return with the Respondent and paid RTSO of €351,339 within 30 days after the date on which the share options were exercised. A copy of the RTSO return filed by the Appellant has not been submitted as part of this appeal.

8. On 8 August 2018 the Appellant, through his tax agent, filed a Form 11 income tax return with the Respondent which stated the amount chargeable in respect of the exercised share options as follows:

Share Options exercised, released or assigned in 2017	
Total chargeable amount	€675,653
Amount of RTSO paid	€351,339

9. On 28 August 2018 a Notice of Self-Assessment for 2017 was issued to the Appellant by the Respondent the summary page of which stated as follows:

Amount of income or profits arising for this period	€1,158,955.00
Amount of income tax chargeable for this period	€ 450,062.00
Amount of USC chargeable for this period for self	€ 73,641.38
Amount of USC chargeable for this period for spouse	€ 14,034.66
Amount of PRSI chargeable for this period for self	€ 27,026.12
Amount of PRSI chargeable for this period for spouse	€ 502.76
Amount of tax payable for this period	€ 5,824.92
Amount of tax paid directly to the Collector General for this period	€ 6,683.00
Balance of tax overpaid for this period	€ 858.08

10. A repayment of the overpaid tax was made by the Respondent to the Appellant.

11. On 25 February 2022 the Respondent wrote to the Appellant stating that he Appellant's tax affairs were being considered and seeking detailed information in relation to:

    i. the exercise of any share options by the Appellant between 2017 and 2020 and detailed information in relation to such transactions;

    ii. confirmation of any Capital Gains Tax liabilities on the sale or disposal of shares between 2017 and 2020; and

    iii. details of any share dividends received.

12. On 2 March 2022 the Appellant responded and set out the following information in relation to the 2017 exercise of the share options:

    i. confirming that he had exercised 9,000 share options in 2017;

    ii. stating that he had sold 9,000 shares immediately after exercising the share options;

    iii. stating that on 6 April 2017 he had been paid a gain of €675,652.90 directly into his AIB bank account;

    iv. confirming that RTSO of €351,339 had been paid on the gain.

13. On 20 April 2022, following further discussions between the Parties, the Appellant provided further details on the exercise of the share options as follows:

i. the share options were exercised on 31 March 2017 before markets opened at a strike price of [redacted] 79.64 per share;

ii. as there was limited liquidity in the Company's shares on the [redacted] Stock Exchange at the time, a third party private purchaser for the shares was identified in advance of the exercise of in or around [redacted] share options in the Company, all of which were exercised at the same time;

iii. the shares were sold at a discount to their publicly quoted price, but the price achieved represented the highest price which could be achieved in the market for shares at that time;

iv. the shares were sold at a price of [redacted] 160 which was the price which the Appellant used to calculate the gain on the exercise of the share options;

v. the Company, in submitting its Return of Share Options and Other Rights RSS1 Form to the Respondent, had utilised the [redacted] Stock Exchange closing share price on 30 March 2017 of [redacted] 176.

14. The Appellant provided the Respondent with the following calculation of the gain received on the exercise of the share option and sale of the shares:

Options Exercised		**9,000**
Strike Price	[redacted]	79.64
Paid to Company	[redacted]	716,760.00
Company Shares Sold		**9,000**
Sale Price	[redacted]	160.00
Total Net	[redacted]	**721,800.00**
FX [redacted] / EUR		[redacted]
Amount Received	**EUR**	**675,652.91**

15. On 3 October 2022 the Appellant wrote to the Respondent setting out the position in relation to the liquidity of the Company's shares in March 2017 and attaching the Company's 2017 annual report which identified the date of the exercise of the share options as being 31 March 2017. The Appellant also attached a letter from [redacted]

[redacted] dated 30 September 2022 which confirmed that [redacted] had purchased the Appellant's 9,000 Company shares on 31 March 2017, with a value date of 4 April 2017 at a gross price of [redacted] 162.00 and a net price of [redacted] 160.00, that being a purchase price of [redacted] 162.00 minus commissions of [redacted] 2.00 per share.

16. On 21 November 2022 the Respondent wrote to the Appellant indicating that, in its opinion, the correct sale price which should have been used in calculating the gain was [redacted] 162.00 and also indicating that, in its opinion, the commission of [redacted] 2.00 was not an allowable deduction for the purposes of Income Tax, Pay Related Social Insurance (hereinafter "PRSI") or Universal Social Charge (hereinafter "USC") purposes.

17. On 2 December 2022 the Respondent set out the following calculation in relation to the exercise of the share options and the sale of the shares by the Appellant:

Options Exercised		**9,000**
Strike Price	[redacted]	79.64
Paid to Company	[redacted]	716,760.00
Market Value per share	[redacted]	162.00
Market Value of 9,000 shares	[redacted]	1,458,000.00
Market Value less Exercise Price	[redacted]	741,240.00
F/X on Exercise Date – 31.03.2017 (1.0696)	EUR	€693,006.73
Total Tax due to Revenue (52%)		**€360,363.50**
Tax already paid to Revenue		€351,339.00
Additional Tax Due to Revenue		**€ 9,024.50**

18. On 15 December 2022 the Respondent issued a Notice of Amended Assessment for 2017 to the Appellant a summary of which is as follows:

Amount of income or profits arising for this period	€1,176,308.00
Amount of income tax chargeable for this period	€ 457,003.20
Amount of USC chargeable for this period for self	€ 75,029.62

Amount of USC chargeable for this period for spouse	€ 14,034.66
Amount of PRSI chargeable for this period for self	€ 27,720.24
Amount of PRSI chargeable for this period for spouse	€ 502.76
Amount of tax chargeable for this period	€ 574,290.48
Amount of tax paid for this period	€ 552,130.00
Amount of tax payable for this period	€ 14,848.48
Less amount paid directly to Collector General for this period	€ 5,825.00
Balance of tax payable for this period	**€ 9,023.48**

19. This appeal therefore relates to the difference between the "amount of tax payable" for the year 2017 of €5,824.92 contained in the Notice of Self-Assessment dated 28 August 2018 and the "amount of tax payable" of €14,848.48 contained in the Notice of Amended Assessment dated 15 December 2022.

20. The Appellant submitted a Notice of Appeal to the Commission on 3 January 2023.

21. The oral hearing of this appeal took place remotely on 28 June 2023. The Appellant did not appear at the hearing and was represented by a tax agent.

Legislation and Guidelines

22. The legislation relevant to the within appeal is as follows:

Section 114 of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997")

"*General rule as to deductions*

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."

Section 128 of the TCA1997

"Tax treatment of directors of companies and employees granted rights to acquire shares or other assets

(1)(a) In this section, except where the context otherwise requires—

"branch or agency" has the same meaning as in section 4;

"company" has the same meaning as in section 4;

"director" and "employee" have the meanings respectively assigned to them by section 770(1);

"right" means a right to acquire any asset or assets including shares in any company;

"market value" shall be construed in accordance with section 548;

"shares" includes securities within the meaning of section 135 and stock.

(b)In this section—

(i)references to the release of a right include references to agreeing to the restriction of the exercise of the right;

(ii)a person shall be regarded as acquiring a right as a director of a company or as an employee—

(I)if by reason of the person's office or employment it is granted to the person, or to another person who assigns the right to the person, and

(II)if section 71(3) does not apply in charging to tax the profits or gains of that office or employment,

and clauses (I) and (II) shall apply to a right granted by reason of a person's office or employment before the person has commenced to hold it or after the person has ceased to hold it as they would apply if the person had commenced to hold the office or employment or had not ceased to hold the office or employment, as the case may be.

(2) Where a person realises a gain by the exercise of, or by the assignment or release of, a right obtained by the person on or after the 6th day of April, 1986, as a director of a company or employee, the person shall be chargeable to tax under Schedule E for the year of assessment in which the gain is so realised on an amount

equal to the amount of his or her gain as computed and shall be so chargeable notwithstanding that he or she was not resident in the State on the date on which the right was obtained.

…

(4) The gain realised by—

(a)the exercise of any right at any time shall be taken to be the difference between the market value of the asset or assets, as the case may be, at the time of acquisition and the aggregate amount or value of the consideration, if any, given for the asset or assets and for the grant of the right, and

(b)the assignment or release of any right shall be taken to be the difference between the amount or value of the consideration for the assignment or release and the amount or value of the consideration, if any, given for the grant of the right,

and for this purpose the inspector may make a just apportionment of any entire consideration given for the grant of the right or for the grant of the right and for something besides; but neither the consideration given for the grant of the right nor any such entire consideration shall be taken to include the performance of any duties in or in connection with an office or employment, and no part of the amount or value of the consideration given for the grant shall be deducted more than once under this subsection."

Section 959A of the TCA1997 (as enacted between 21 March 2016 and 24 December 2017)

"*Interpretation*

In this Part, except where the context otherwise requires -

"Acts"

(a)the Income Tax Acts,

(b)the Corporation Tax Acts,

(c)the Capital Gains Tax Acts,

(ca)Part 18A,

(d)Part 18C,

(e)Part 18D,

and any instruments made under any of those Acts or Parts;

"amount of tax chargeable", in relation to a person and an Act, means the amount of tax chargeable on the person under the Act after taking into account -

(a)each allowance, deduction or relief that is authorised by the Act to be given to the person against income, profits or gains or, as applicable, chargeable gains, and

(b)in the case of an individual to whom Chapter 2A of Part 15 applies, any increase in the taxable income of the individual by virtue of that Chapter;

"amount of tax payable", in relation to a person and an Act, means the amount of tax computed by reducing the amount of tax chargeable on the person by the amount of any tax credit that is authorised by the Act to be given to the person in relation to a person and an Act, means the amount of tax payable by the person after reducing the amount of tax chargeable on the person under the Act by the amount of any tax credit that is authorised by the Act in relation to that person;

"assessment", other than in section 959G, means an assessment to tax that is made under the Acts and, unless the context otherwise requires, includes a self-assessment;

"chargeable gain" has the same meaning as in section 545(3);

"chargeable period" means an accounting period of a company or a tax year;

"chargeable person" means, as respects a chargeable period, a person who is chargeable to tax for that period, whether on that person's own account or on account of some other person but, as respects income tax, does not include a person to whom subsection (1) of section 959B relates;

"determination of the appeal" means a determination made by the Appeal Commissioners in accordance with section 949AK, and includes the withdrawal, settlement, refusal or dismissal of an appeal under section 949G;

"due date for the payment of an amount of preliminary tax" has the meaning assigned to it by Chapter 7;

"electronic means" includes electronic, digital, magnetic, optical, electromagnetic, biometric, photonic means of transmission of data and other forms of related technology by means of which data is transmitted;

"electronic record" includes electronic, digital, magnetic, optical, electromagnetic, biometric, photonic means of storing data and other forms of related technology by means of which data is stored;

"precedent partner" has the same meaning as in Part 43;

"prescribed form" means a form prescribed by the Revenue Commissioners or a form used under the authority of the Revenue Commissioners;

"preliminary tax" means the amount of tax which a chargeable person is required to pay in accordance with section 959AN;

"return" means the return which is required to be prepared and delivered in accordance with Chapter 3;

"Revenue assessment" shall be construed in accordance with section 959C;

"Revenue officer" means an officer of the Revenue Commissioners;

"self assessment" means an assessment to tax made by a chargeable person, or in relation to a chargeable person, in accordance with Chapter 4;

"specified provisions" means sections 877 to 881, section 884, paragraphs (a) and (d) of section 888(2), section 1023, and section 1031H;

"specified return date for the accounting period" shall be construed in accordance with paragraph (b) of the definition of specified return date for the chargeable period;

"specified return date for the chargeable period" means –

(a)in relation to a tax year for income tax or capital gains tax purposes, 31 October in the tax year following that year,

(b)in relation to an accounting period of a company -

(i)subject to subparagraphs (ii) and (iii), the last day of the period of 9 months starting on the day immediately following the end of the accounting period, but in any event not later than day 21 of the month in which that period of 9 months ends,

(ii)where the accounting period ends on or before the date the winding up of the company starts and the specified return date in respect of that accounting period would, apart from this subparagraph, fall on a day after the date the winding up started but not within a period of 3 months after that date, the day which falls 3 months after the date the winding up started but in any event not later than day 21 of the month in which that period of 3 months ends, and

(iii)where, in relation to the accounting period, a return is made by electronic means in accordance with Chapter 6 of Part 38 and any payment which the company is required to make in accordance with the provisions of the Acts is made by such electronic means as are required by the Revenue Commissioners –

(I)in circumstances other than those referred to in subparagraph (ii), the last day of the period of 9 months starting on the day immediately following the end of the accounting period, but in any event not later than day 23 of the month in which that period of 9 months ends provided that both the return and the payment is made by that day,

(II)in the circumstances referred to in subparagraph (ii), the day which falls 3 months after the date the winding up started but in any event not later than day 23 of the month in which that period of 3 months ends provided that both the return and the payment is made by that day;

"specified return date for the tax year" shall be construed in accordance with paragraph (a) of the definition of specified return date for the chargeable period;

"tax", other than in section 959G, means any income tax, corporation tax, capital gains tax or any other levy or charge which under the Acts is placed under the care and management of the Revenue Commissioners;

"tax credit", in relation to a person and an Act, means an amount authorised by the Act to be given or set against, or deducted from, the amount of tax chargeable on the person under the Act;

"tax year" means a year of assessment."

Section 959AA of the TCA1997 (as enacted between 21 March 2016 and 18 December 2018)

"*Chargeable persons: time limit on assessment made or amended by Revenue Officer*

(1) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period –

(a)an assessment for that period, or

(b)an amendment of an assessment for that period,

shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and -

(i)no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii)no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.

(2) Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period -

(a)where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,

(b)to give effect to -

(i)a determination of an appeal against an assessment,

(ii)a determination of an appeal, other than one made against an assessment, that affects the amount of tax charged by the assessment, or

(iii)an agreement within the meaning of section 949V.

(c)to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(d)to correct an error in calculation in the assessment, or

(e)to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment.

(3)Nothing in this section affects the operation of section 804(3), 811, 811A, 811C, 811D or 1048."

Section 959AV of the TCA1997

"*Date for payment of tax: determination of an appeal*

(1) Where, on the determination of an appeal against an assessment made on a chargeable person for a chargeable period, the amount of tax payable by the person for the period is in excess of the amount of the tax which the chargeable person had paid before the making of the appeal, the excess shall be deemed to be due and payable on the same date as the tax charged by the assessment is due and payable.

(2) Notwithstanding subsection (1), where—

(a)the amount of tax which the chargeable person had paid before the making of the appeal is not less than 90 per cent of the amount of tax found to be payable on the determination of the appeal, and

(b)the tax charged by the assessment was due and payable in accordance with section 959AO(2), section 959AQ, section 959AR(3) or section 959AS(3), as the case may be,

the excess referred to in subsection (1) shall be deemed to be due and payable not later than one month from the date of the determination of the appeal."

Section 997 of the TCA1997 (as enacted between 1 January 2013 and 24 December 2017)

"*Supplementary provisions (Chapter 4)*

(1)No assessment under Schedule E for any year of assessment need be made in respect of emoluments to which this Chapter applies except where -

(a)the person assessable, by notice in writing given to the inspector, requires an assessment to be made,

(b)the emoluments paid in the year of assessment are not the same in amount as the emoluments which are to be treated as the emoluments for that year, or

(c)there is reason to suppose that the emoluments would, if assessed, be taken into account in computing the total income of a person who is liable to tax at the higher rate or would be so liable if an assessment were made in respect of the emoluments;

but where any such assessment is made credit shall be given for the amount of any tax deducted from the emoluments against the amount of tax chargeable in the assessment on the person assessed.

(1A)Subject to sections 959AB and 959AD, an assessment under Schedule E in respect of emoluments to which this Chapter applies shall not be made for any year of assessment

(a)where paragraph (a) of that subsection applies, unless the person assessable has requested the assessment

(i)in the case of any year of assessment prior to the year of assessment 2003, within 5 years, and

(ii)in the case of the year of assessment 2003 or any subsequent year of assessment, within 4 years,

from the end of the year of assessment concerned, and

(b)where paragraph (b) or (c) of that subsection applies, at any time later than 4 years from the end of the year of assessment concerned.

(2)Where an employer pays to the Revenue Commissioners any amount of tax which, pursuant to this Chapter and any regulations under this Chapter, the employer has deducted from emoluments, the employer shall be acquitted and discharged of the sum represented by the payment as if the employer had actually paid that sum to the employee.

(3)Where the inspector, in accordance with the provisions of Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) sends a statement of liability to an employee, that statement shall, if the inspector so directs and gives notice accordingly in or with the statement sent to the employee, be treated in all respects as if it were an assessment raised on the employee, and all the provisions of the Income Tax Acts relating to appeals against assessments and the collection and recovery of tax charged in an assessment shall accordingly apply to the statement."

Submissions

23. The following is a summary of the submissions made by both Parties. No witness evidence was adduced to the Commissioner at the oral hearing of this appeal.

Appellant's Submissions

24. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions received whether written, oral or documentary received when considering this determination.

25. The Appellant's appeal is grounded on two arguments, those being:

    i. Section 114 of the TCA1997: The Appellant submitted that expenses incurred in exercising the share options and selling the shares are expenses of employment and are therefore deductible pursuant to section 114 of the TCA1997;

    ii. Time Limit: The Appellant submitted that the Respondent is outside of the four year time limit as no tax is payable after the end of the 4 year time period provided for in section 959AA of the TCA1997.

Section 114 of the TCA1997

26. The Appellant submitted that he was entitled to deduct the expenses incurred in disposing of the shares pursuant to section 114 of the TCA1997.

27. It was submitted that the only way that the Appellant could secure the profit from his employment was by disposing of the shares. It was submitted that it follows that the cost of getting paid or securing the profit was an expense in respect of the Appellant's employment. It was submitted that in the event that the Appellant could not secure the profit by getting paid, the office or employment could not be regarded as being an office or employment of profit.

28. As a result, it was submitted that the Appellant was entitled to a deduction in respect of expenses incurred in the disposal of the shares when calculating Income Tax for 2017.

Time Limit

29. The Appellant submitted that he accepts that the Notice of Amended Assessment issued by the Respondent on 15 December 2022 in relation to the tax year 2017 was issued within the 4 year time limit provided for in section 959AA of the TCA1997.

30. However, the Appellant submitted that it is not sufficient for the Respondent merely to issue the Notice of Amended Assessment within the 4 year time limit. The Appellant submitted that section 959AA(1)(b)(i) of the TCA1997 provides that no additional tax shall be payable by the chargeable person after the end of the period of 4 years. This, the Appellant submitted, was underpinned by Mr. Justice Clarke in his judgment in *The Revenue Commissioners v Hans Droog* (2016) IESC 55 (hereinafter "*Droog*").

31. The Appellant submitted that the earliest date that any balance of tax could become payable in respect of 2017 is sometime in 2023. The Appellant submitted that this is because the amount of tax which the Appellant had paid before the making of the appeal

is not less than 90% of the amount of tax that may be payable on the determination of this appeal pursuant to the provisions of section 949AV of the TCA1997.

32. The Appellant submitted that, pursuant to the provisions of Section 959AA of the TCA1997, the amount of tax payable by the Appellant is the amount of tax chargeable on the Appellant as reduced by the amount of any tax credit that is authorised by the TCA1997.

33. The Appellant submitted that "tax credit" means the basic credits (personal, employee, health expenses, etc.) that are deducted from the amount of tax chargeable to arrive at the tax liability that is payable.

34. The Appellant submitted that the Notice of Amended Assessment issued by the Respondent indicated that the amount of tax chargeable for the tax year 2017 is €574,290.48. It was submitted that after deducting the tax credits referred to in panel 5 of the Notice of Amended Assessment, the tax payable amounts to €566,978.48. The Appellant submitted that he paid €200,791 by way of deduction of PAYE/USC at source under the PAYE system. The Appellant submitted that a further amount of €347,164 was paid directly to the Collector General at the time of his RTSO return in 2017 and this leaves a balance payable of €9,024 which is the subject matter of this appeal. It was submitted that in excess of 90% of the tax payable of €566,978.48 was therefore paid before this appeal was lodged by the Appellant.

35. The Appellant submitted that if, in the alternative, the amount of €200,791 paid by way of deduction at source under the PAYE system were to be regarded as falling with the definition of "tax credit", in excess of 90% of the remaining tax payable was paid before the making of the appeal.

36. The Appellant submitted that the tax liability being sought by the Respondent in respect of the gain on the exercise of the share options amounts to €360,362. It was submitted that that in excess of 90% of the Appellant's tax liability was paid directly to the Revenue Commissioners before making the appeal.

37. It is submitted that on the basis of the above, the Respondent is outside the time limit as no tax is payable after the end of the 4 year period.

Respondent's Submissions

38. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of

the submissions received whether written, oral or documentary when considering this determination.

Section 128(4) TCA1997

39. The Respondent submitted that the key question is whether a commission is a deductible Schedule E expense for the purposes of the section 128 of the TCA1997 income tax gain calculation.

40. The Respondent submitted that in the circumstances of this appeal where the Appellant exercised his share options and immediately thereafter sold his shares, there are two distinct taxable events, those being:

    i. the exercise of the share options, and
    ii. the sale of the shares.

41. The Respondent submitted that the exercise of the share options by the Appellant gives rise to an Income Tax liability pursuant to section 128(2) of the TCA1997.

42. The Respondent submitted that the sale of the shares by the Appellant, which occurred immediately after the Appellant exercised the share options, is a separate taxable event which may give rise to a gain or loss relating to Capital Gains Tax but which is not the subject of the Notice of Amended Assessment to which this appeal relates.

43. The Respondent submitted that the issue in this appeal relates to the calculation of the income tax liability on the Appellant's exercise of the share options and, specifically, whether the Appellant was entitled to deduct a commission when making his income tax calculation.

44. The Respondent submitted that section 128 of the TCA1997 does not provide for any other deductions in the calculation of the income tax gain, that is to say that, the market value of the asset can only be reduced by any amount paid by the taxpayer for the shares and grant of the right.

45. As a result, the Respondent submitted that the income tax calculation relating to the exercise of the share options by the Appellant should be based on the market value of the shares at the time of the exercise of the share option and acquisition of the shares by the Appellant on 31 March 2017. The Respondent submitted that this was [redacted] 162 per share based on the data provided by the Appellant minus the amount which the Appellant paid for the shares [redacted] 79.64 per share.

Time Limit

46. The Respondent submitted that under the provisions of section 959AV of the TCA1997 the due date for additional tax being assessed in certain circumstances is one month from the date of determination of an appeal. The Respondent submitted that, if the Respondent succeeds in this appeal, section 959AV(2) of the TCA1997 does not apply as the "*amount of tax payable*" as defined in section 959A of the TCA1997 will have increased from €5,824.92 to €14,848.48 and that the tax payable before the raising of the assessment will be less than 90% of the final tax payable.

47. The Respondent submitted that section 959AA(1)(i) must be interpreted in the context of the entire self-assessment, assessment and appeals scheme. It was submitted that if an appeal is brought, the chargeable person, subject to certain exceptions, is not obliged to pay the taxes assessed until the appeal is determined. It was submitted that at that point, liability to pay any excess tax due is governed by section 959AV of the TCA1997 which provides in the first instance that payment of any excess tax is back-dated to the date on which the tax payable under the assessment was due and payable. It was submitted that an exception is made where the tax already paid is 90% of the tax found to be due, in which case the excess is deemed to be due and payable "*not later than one month from the date of the determination of the Appeal*".

48. The Respondent submitted that it is clear from the structure of section 959AA(1) of the TCA1997 that the words in sub-section (i) and (ii) are statements of the consequences of the four-year time limitation. The Respondent submitted that the words cannot be ascribed a literal meaning in isolation from the section itself and from the entire scheme of self-assessment, assessment, amended assessment and appeal and cannot be regarded as a stand-alone prohibition on the liability to pay any tax once the four-year period has expired.

49. The Respondent submitted that, when interpreted in context, it is clear that the words relate back to the imposition of a tax burden as founded in an assessment or an amended assessment. It was submitted that the obligation to pay on foot of the imposition of a tax burden may be postponed or removed as a result of an appeal process but such postponement or removal does not undermine the validity of the imposition of a tax burden.

50. The Respondent submitted that the Appellant's argument would frustrate the clear statutory intention to be discerned from the text of the section in context and in the context of the scheme prescribed by the TCA1997.

Material Facts

51. 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 (hereinafter "*Menolly Homes*"), 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".*

52. Whilst the Parties did not submit a Statement of Agreed Facts to the Commissioner, the following material facts are not at issue in the within appeal and the Commissioner finds same as material facts:

    i. The Appellant was a [redacted] on 31 March 2017;

    ii. The Appellant, as a [redacted], had been granted 9,000 share options in the Company;

    iii. On 31 March 2017 the Appellant exercised 9,000 share options in the Company before the stock market opened;

    iv. The strike price for the exercise of the share options was [redacted] 79.64 per share;

    v. The Appellant paid consideration of [redacted] 716,760.00 for the exercise of the share options on 31 March 2017;

    vi. Immediately after exercising the share options on 31 March 2017, the Appellant sold the 9,000 shares;

vii. The shares were sold at a discount to their publicly quoted price but the price achieved represented the highest price which could be achieved in the market for shares at that time;

viii. A commission of [redacted] 2.00 per share was levied on the sale of the shares;

ix. The Appellant returned the following in respect of the exercised share options to the Respondent:

Share Options exercised, released or assigned in 2017	
Total chargeable amount	€675,653
Amount of RTSO paid	€351,339

53. The following material facts are at issue in this appeal:

i. The Euro / [redacted] exchange rate applicable on 31 March 2017;

ii. The amount of the gain realised by the Appellant on the exercise of the share options;

iii. Whether, in calculating his Income Tax liability for 2017, the Appellant was entitled to a deduction in relation to the commission and expenses incurred in selling the shares pursuant to the provisions of section 114 of the TCA1997.

<u>The Euro / [redacted] exchange rate applicable on 31 March 2017:</u>

54. The Appellant has based his calculations on a Euro / [redacted] exchange rate of EUR 1 / [redacted]. No evidence has been adduced to the Commissioner as to how or why the Appellant decided upon utilising this exchange rate.

55. The Commissioner notes that copies of Contract Notes from [redacted] relating to transactions on 31 March 2017 which the Appellant submitted in support of this appeal refer to an exchange rate of EUR 1 / [redacted]. However, by the Appellant's own admission in correspondence with the Respondent dated 29 September 2022, these Contract Notes do not relate to the purchase of the Appellant's shares and instead relate to the purchase of Treasury Shares in the Company on 31 March 2017.

56. The Respondent has based its calculations on a Euro / [redacted] exchange rate of EUR 1 / [redacted] which is the exchange rate quoted by the European Central Bank for 31 March 2017.

57. Whilst no documentation evidencing the Euro / [redacted] exchange rate on 31 March 2017 has been submitted during the course of this appeal, the Commissioner notes that the European Central Bank official Euro / [redacted] exchange rate on 31 March 2017 is as follows:

    - Min - [redacted]
    - Max - [redacted]
    - Average - [redacted]

58. The Commissioner therefore finds as a material fact that the Euro / [redacted] exchange rate applicable on 31 March 2017 was EUR 1 / [redacted] 1.0696.

<u>The amount of the gain realised by the Appellant on the exercise of the share options:</u>

59. Section 128 of the TCA1997 is entitled "*Tax treatment of directors of companies and employees granted rights to acquire shares or other assets*".

60. Section 128(1) of the TCA1997 defines a "*right*" as meaning a right to acquire any asset or assets including shares in a company.

61. Section 128(2) of the TCA1997 provides that where a person, who is a director or an employee of a company, realises a gain by the exercise, or by the assignment of, a right obtained by the person on or after 6 April 1986, that person shall be chargeable to tax under Schedule E of the TCA1997 for the year of assessment in which the gain is realised on the amount of gain realised.

62. Section 128(4) of the TCA1997 provides that the gain realised by the exercise of a right shall be taken to be the difference between the market value of the asset or assets at the time of acquisition and the aggregate amount or value of the consideration given for the asset or assets and for the grant of the right.

63. It is not in dispute between the Parties, and the Commissioner has found as a material fact, that the Appellant was a [redacted] of the Company on 31 March 2017.

[redacted]

64. It is also not in dispute between the Parties, and the Commissioner has found as a material fact, that the Appellant exercised the 9,000 share options in the Company on 31 March 2017 at a strike price of [redacted] 79.64 per share.

65. It is further not in dispute between the Parties, and the Commissioner has found as a material fact, that the Appellant paid consideration of [redacted] 716,760.00 for the exercise of the share options on 31 March 2017.

66. The Commissioner must consider what the market value of the asset or assets, that is to say the shares in the Company, was at the time of acquisition by the Appellant, that is to say, on the morning of 31 March 2017 prior to the opening of the stock market.

67. Section 128(1) of the TCA1997 provides that "*"market value" shall be construed in accordance with section 548*". Section 548(1) of the TCA1997 provides that *"Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.*"

68. On the one hand, the Appellant has submitted that the market value of the shares in the Company which he realised on the exercise of the 9,000 share options was [redacted] 1,440,000 which was based on a sale price per share of [redacted] 160.00

69. On the other hand, the Respondent has submitted that the market value of the shares in the Company which he realised on the exercise of the 9,000 share options was [redacted] 1,458,000 which was based on a sale price per share of [redacted] 162.00.

70. The Appellant has submitted the following documentation in support of his claim that the market value of the shares was [redacted] 160.00 on 31 March 2017:

    i. A Contract Note Sale Contract Number [redacted] for the sale of 311,947 shares in the Company issued by [redacted] on 31 March 2017 at a price of [redacted] 160,000;

    ii. A Contract Note Sale Contract Number [redacted] for the sale of 3,500 shares in the Company issued by [redacted] on 31 March 2017 at a price of [redacted] 160,000;

    iii. The letter of 30 September 2022 from [redacted] which confirmed that [redacted] had purchased the Appellant's 9,000 Company shares on 31 March 2017, with a value date of 4 April 2017 at a gross price of [redacted] 162.00

and a net price of [redacted] 160.00, that being a purchase price of [redacted] 162.00 minus commissions of [redacted] 2.00 per share.

71. Whilst the Appellant did not appear at the oral hearing of this appeal and did not give oral evidence to the Commissioner, the Commissioner has taken note of the correspondence from the Appellant to the Respondent dated 29 September 2022 where he stated that the Contract Notes which he submitted to the Respondent related to Treasury Shares sold by the Company and where he stated that he had never received a Contract Note in relation to the sale of his shares.

72. The Commissioner has also taken note of the correspondence from [redacted] dated 30 September 2022 which confirmed that [redacted] had purchased the Appellant's 9,000 Company shares on 31 March 2017, with a value date of 4 April 2017, at a gross price of [redacted] 162.00 and a net price of [redacted] 160.00, that being a purchase price of [redacted] 162.00 minus commissions of [redacted] 2.00 per share.

73. In the absence of any evidence to the contrary, the Commissioner must accept the information contained in the letter from [redacted] dated 30 September 2022 that the purchase price of the shares was [redacted] 162.00 and that commissions of [redacted] 2.00 per share had been levied on the shares.

74. There is no provision in section 128 of the TCA1997 or in section 548 of the TCA1997 which allows for the deduction of commission charges or any other charges in the calculation of the market value of an asset and no argument to that effect has been made to the Commissioner.

75. It therefore follows, and the Commissioner finds as a material fact, that the market value of the shares in the Company which the Appellant realised on the exercise of the 9,000 share options was [redacted] 1,458,000 which is based on a sale price per share of [redacted] 162.00.

76. Having already found as a material fact that the Appellant paid consideration of [redacted] 716,760.00 for the exercise of the share options on 31 March 2017 and that the market value of the share options at the time of the exercise of the share options was [redacted] 1,458,000, it therefore follows that the gain realised by the Appellant on the exercise of the share options was [redacted] 741,240.

77. Applying the Euro / [redacted] exchange rate applicable on 31 March 2017 of EUR 1 / [redacted] to the gain of [redacted] 741,240, the Commissioner finds as a material fact that the gain realised by the Appellant on the exercise of the share options was EUR €693,006.73.

Whether, in calculating his Income Tax liability for 2017, the Appellant was entitled to a deduction in relation to the commission and expenses incurred in selling the shares pursuant to the provisions of section 114 of the TCA1997:

78. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

> *"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
> >
> > *(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
> >
> > *(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*
> >
> > *(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*
> >
> > *(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what*

otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".*

79. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43.

80. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo*, the Commissioner finds that the words contained in section 114 of the TCA1997 of the TCA1997 are plain and their meaning is self-evident.

81. Section 114 of the TCA1997 is entitled "*General rule as to deductions*" and provides as follows:

> "*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."

82. The Commissioner considers that this wording means that where the holder of an office or an employee must:

    i. incur and defray the expenses of travel from the payments which they receive from the office or employment; or

    ii. expend money wholly, exclusively and necessarily in the performance of the office or employment

    then the expenses of travel or money expended wholly, exclusively and necessarily in the performance of the office or employment may be deducted from the emoluments to be assessed.

83. The general rule as to deductions is in all material respects identical to that prescribed in the Income Tax Act 1918 and, before that, the Income Tax Act 1853. Its scope has been explained in a variety of English judgments that have been approved in this jurisdiction in the case of *SP Ó Broin v Mac Giolla Meidhre* [1959] IR 98 (hereinafter "*Mac Giolla Meidhre").*

84. In *Lomax (HM Inspector of Taxes) v Newton,* [1953] All ER 801**,** a captain in the army sought a deduction in respect of mess hall charges that went towards the entertainment of regimental guests. It was accepted by both sides in the appeal that had the captain refused to pay these charges, he would have been asked to resign his commission. In refusing the deduction, Vaisey J. held:-

    "*…I would observe that the provisions of [the general rule] are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of [the general rule] it must be shown that the expenditure incurred was not only necessarily but wholly and exclusively incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements of [the general rule] without specifying the detailed facts on which the finding is based. An expenditure may be "necessary" for the holder of an office without being necessary to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are, indeed, stringent and exacting. Compliance with each and every one of*

them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that, when examined, they are found to come to nearly nothing at all."

85. In *Mac Giolla Meidhre,* Teevan J., quoted the following words of Blanesburgh LJ in relation to the operation of the general rule as to deductions in *Ricketts v Colquhoun* [1926] AC 1:-

"It says: 'if the holder of an office' – the words be it observed are not 'if any holder of an office' – 'is obliged to incur expenses in the performance of the duties of the office' – the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective. The deductible expenses do not extend to those which the holder has to incur mainly, and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition."

86. In *McKie v Warner* [1961] 1 WLR 1230 Plowman J. held :-

"It has been pointed out many times, and it is unnecessary for me to refer to any of the occasions because it is notorious, that it is very difficult for a taxpayer under Schedule E to bring his expenses within [the statutory predecessor of section 198(1) in rule 7 of Schedule 9 to the Income Tax Act 1952]. In order to succeed in a claim under the rule the taxpayer has to prove, first of all, that the expense is one which he was necessarily obliged to incur and, secondly, that it was incurred wholly, exclusively and necessarily in the performance of his duties.

As regards the first of those two requirements, the authorities show that the word "necessarily" in the expression "necessarily obliged to incur" refers to the necessities of the office or the employment. In order to qualify, the expense must have been necessitated by the duties of the employment. The fact that it was required by the employer is not sufficient, nor is the facts that it was thought to be necessary by the employee.

As regards the second requirement, the authorities show that the expression "in the performance of the said duties" is a very stringent one: it has quite a different connotation from what I might call the corresponding provision in section 137 of the Act relating to expenses for purposes of Schedule D, where the relevant words are 'for the purposes of'. In rule 7, the necessity for expenditure "in the performance of the said duties" means that the sum in question must be defrayed in the actual discharge of duties – "in doing the work of the office" is the expression which Rowlatt J used in

Nolder v Walters, [(1930) 15 TC 380, at page 387]. But, even if the expenditure was necessarily incurred in doing the work of the office, it must also have been defrayed wholly in discharge of the duties and exclusively in the discharge of the duties."

87. Given the above words of Plowman J. concerning the general rule as to deductions then in being in England and Wales regarding the deduction of Schedule D, it is worth noting that the equivalent general rule in this jurisdiction in respect of income arising from trades or professions is prescribed in section 81 of the TCA1997. Like the Income Tax Act 1952, this provides that no sum shall be deducted unless it is wholly and exclusively laid out or expended "…for the purposes of the trade or profession."

88. More recently, in *HMRC v Banarjee* [2009] EWHC 62 (CH), an authority relied on by the Appellant, Henderson J. held in the Court of Appeal of England and Wales that:-

"The critical requirements […] are two in number. First, the obligation to incur the expenditure must be an objective necessity imposed by the duties of the employment itself, in the sense that (as Donovan LJ said in Brown v Bullock, loc. cit.) 'irrespective of what the employer may prescribe, the duties themselves involve the particular outlay'. Secondly, the expenditure must be incurred in the actual performance of the duties of the employment, and it must be wholly and exclusively so incurred.

Wrapped up in this second requirement are a number of important distinctions. Expenditure which is not incurred in the actual performance of the taxpayers duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible. Again, any duality of purpose is fatal: that is the force of the word 'exclusively'."

89. The case to which Henderson J. referred, *Brown v Bullock* [1961] 1 WLR 1095, concerned a claim made by a bank manager who was required by his employer to join a London club at his own expense for the purpose of entertaining customers. In dismissing the bank manager's appeal against refusal, Donovan L.J. held:-

"The test is not whether the employer imposes the expense, but whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay.

… Mr Monroe has conceded that even If the Midland Bank did not request and expect the appellant to join a club like the Devonshire Club, he could still perform his duties as bank manager; and that if the test is the strictly objective one which I have stated, he must fail."

90. It was submitted on behalf of the Appellant at the oral hearing that getting paid is part of the performance of a person's duties and that the exercise of the share options and the sale of the shares by the Appellant was part of the performance of his duties as an office holder and as an employee. The Commissioner asked the tax agent appearing on behalf of the Appellant how the exercise of a share option is the performance of a duty of an office or of an employment. In response the tax agent stated:

> "*Well sorry, it is an employment of profit on which he is required to exercise to perform and he is getting paid for it, and in order to actually physically get paid, he is having to incur these expenses.*"

91. The Appellant did not appear at the oral hearing and did not give direct evidence to the Commissioner as to what the duties of his [redacted] with the Company are. In particular no evidence, whether oral or documentary, has been adduced to the Commissioner to the effect that he had incurred the expenses claimed in relation to travel or other expenditure incurred wholly, exclusively and necessarily in the performance of his office or employment with the Company.

92. The Commissioner finds that the Appellant has not discharged the burden of proof to establish that the expenses claimed fall within the general rule as to deductions contained in section 114 of the TCA1997.

93. Therefore this material fact is not accepted.

94. For the avoidance of doubt the Commissioner accepts the following as material facts in this appeal:

    i. The Appellant was a [redacted] of the Company on 31 March 2017;

    ii. The Appellant, as a [redacted] of the Company, had been granted 9,000 share options in the Company;

    iii. On 31 March 2017 the Appellant exercised 9,000 share options in the Company before the stock market opened;

    iv. The strike price for the exercise of the share options was [redacted] 79.64 per share;

    v. The Appellant paid [redacted] 716,760.00 for the exercise of the share options on 31 March 2017;

vi. Immediately after exercising the share options on 31 March 2017, the Appellant sold the 9,000 shares;

vii. The shares were sold at a discount to their publicly quoted price but the price achieved represented the highest price which could be achieved in the market for shares at that time;

viii. A commission of [redacted] 2.00 per share was levied on the sale of the shares;

ix. The Appellant returned the following in respect of the exercised share options to the Respondent:

Share Options exercised, released or assigned in 2017	
Total chargeable amount	€675,653
Amount of RTSO paid	€351,339

x. The Euro / [redacted] exchange rate applicable on 31 March 2017 was EUR 1 / [redacted];

xi. The market value of the shares in the Company which the Appellant realised on the exercise of the 9,000 share options was [redacted] 1,458,000 which is based on a sale price per share of [redacted] 162.00.

xii. The gain realised by the Appellant on the exercise of the share options was EUR €693,006.73.

xiii. In calculating his Income Tax liability for 2017 the Appellant was not entitled to a deduction in relation to the commission and expenses incurred in selling the shares pursuant to the provisions of section 114 of the TCA1997.

Analysis

95. The Appellant submitted that it is not sufficient for the Respondent merely to issue the Notice of Amended Assessment within the 4 year time limit. The Appellant submitted that section 959AA(1)(b)(i) of the TCA1997 provides that that no additional tax shall be payable by the chargeable person after the end of the period of 4 years.

96. Section 959AA is entitled "*Chargeable persons: time limit on assessment made or amended by Revenue officer*" and provides:

"*(1) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period-*

(a) an assessment for that period, or

(b) an amendment of an assessment for that period,

shall not be made by a Revenue Officer on the chargeable person after the end of four years commencing at the end of the chargeable period in which the return is delivered and -

(i) No additional tax shall be payable by the chargeable person after the end of that period of four years, and

(ii) No tax shall be repaid after the end of a period of four years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return."

97. Section 959AA(2) then provides for an extension beyond the four year limitation period where the chargeable person has made a return which does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period.

98. Therefore, section 959AA(1)(b)(i) TCA 1997 provides, all other requirements of the section being in order, no additional tax shall be payable after the end of the four-year period. The end of the four-year period in this case was 31 December 2022.

99. Section 959AV is entitled "*Date for payment of tax: determination of an appeal*" and provides:

"*(1) Where, on the determination of an appeal against an assessment made on a chargeable person a chargeable period, the amount of tax payable by the person for the period is in excess of the amount of the tax which the chargeable person had paid before the making of the appeal, the excess shall be deemed to be due and payable on the same date as the tax charged by the assessment is due and payable.*

(2) Notwithstanding subsection (1), where -

(a) the amount of tax which the chargeable person had paid before the making of the appeal is not less than 90 per cent of the amount of tax found to be payable on the determination of the appeal, and

(b) the tax charged by the assessment was due and payable in accordance with section 959AO(2), section 959AQ, section 959AR(3) or section 959AS(3), as the case may be,

the excess referred to in subsection (1) shall be deemed to be due and payable not later than one month from the date of the determination of the appeal."

100. The question which arises for the Commissioner is whether the provision in section 959AA of the TCA1997 that "*no additional tax shall be payable by a chargeable person*" after the four year time limit renders an amended assessment issued within that four year period nonetheless out of time by reason of the operation of section 959AV(2) which provides that, subject to certain conditions, excess tax found to be due following a determination of an appeal shall be deemed to be due and payable *"not later than one month from the date of the determination of the Appeal*".

101. Section 959AA of the TCA1997 is comprised in Part 41A of the TCA1997. The provisions of section 959AA of the TCA1997 reflect those previously contained in section 955 of the TCA1997, its statutory predecessor. Section 959AA of the TCA1997 is part of the scheme governing the self-assessment tax system whereby a chargeable person's liability to taxation is in the first instance self-assessed by them and that assessment is either accepted or not accepted by the Respondent. If not accepted, the Respondent raises an assessment, or an amended assessment, and that in turn is subject to appeal by the chargeable person to the Commission.

102. Section 959AA of the TCA1997 limits the time within which the Respondent can make an assessment or an amended assessment to four years from the end of the year of assessment in which a compliant return was made. This limitation is contained in section 959AA(1) of the TCA1997 in terms of a mandatory prohibition against making an assessment outside that time limit.

103. Clarke J (as he then was) in Droog stated the following at paragraph 7.4 of his judgment:

> "*However, the wording of s. 955(2) as it stood in 2007 is clear. Section 955(2)(a)(i) says that no additional tax shall be payable by the chargeable person after the end of the relevant four year period. That provision is expressed in clear and unambiguous terms. It is in addition to the prohibition on raising further assessments. The section clearly prohibits the imposition of any additional tax burden outside the four year period in the case of the person who has made a fully compliant return. It is quite clear that the purpose of the Revenue opinion, if it were to become final and conclusive, would be, by whatever means, to impose an additional burden on Mr Droog to pay tax. He would be required to pay the sum of IR£24,022 which he saved by virtue of the losses attributable to Taupe Partners being allowed for the purposes of the calculation of his tax when originally assessed. The only reason for a section 811 opinion is to initiate a process leading, from Revenue's perspective, to a requirement to pay that money in some form. It is designed to ensure that Mr. Droog pays more tax. If section 955 is not expressly excluded by s.811(4) then the requirement to make Mr. Droog pay that additional tax, which was the sole ultimate purpose of the opinion, would be expressly prohibited. There is no point in a section 811 opinion if the consequences of that opinion cannot be put into effect because they breached section 955. It seems to me that, again, the issue narrows to whether the wording of s. 811 (4) is sufficient to provide for an express exception to section 955.*"

104. The decision in *Droog* relates to the interaction between section 955 of the TCA1997 and section 811 of the TCA1997 and in particular it relates to whether the formation of an opinion that a transaction was a tax avoidance transaction for the purposes of section 811 of the TCA1997 was subject to the four-year time limit imposed by section 955 of the TCA1997. The issue was whether the words "*at any time*" in section 811 of the TCA1997 were sufficient to dis-apply section 955 of the TCA1997 having regard to section 950(2) of the TCA1997 and the Supreme Court held that they were not sufficient so to do. The judgment in *Droog* does not directly address the correct interpretation of the "*no additional tax ... payable*" provision.

105. However, it is important to note that Clarke J went on to state the following at paragraph 7.6 of his judgment:

"*Obviously what s.955 prohibits is an obligation to pay tax arising outside the four-year time limit in those cases to which the section applies. The problem stems from a distinction between the way in which the ordinary system works in comparison with the way in which section 811 operates. In ordinary cases the raising of an assessment gives rise to an obligation to pay the tax or additional tax assessed subject only to the fact that, in certain cases, that obligation may be postponed or ultimately removed as a result of the appellate process.*"

106. Clarke J recognised that it is the making of an assessment or an amended assessment which in law creates the obligation to pay tax, or as he described it in paragraph 7.4 of his judgment that is the imposition "*of ... the tax burden.*"

107. Murray J in the Court of Appeal in *Lee v Revenue Commissioners* [2022] IR 388 stated at paragraph 24 of his judgment:

"*As explained by Lord Dunedin in Whitney v. Inland Revenue Commissioners [1926] A.C. 37, at p. 52, there are three stages in the imposition of a tax - the declaration of liability, the assessment and the methods of recovery. The liability is declared by statute, which determines what persons are liable in respect of which property. The assessment particularises the ex-act sum which a person has to pay in the light of the applicable statutory charge.*"

108. The High Court Decision *Thomas McNamara v Revenue Commissioners* [2023] IEHC 15 states the following in respect of *Droog* case at paragraphs 87 to 88:

"*Both decisions make it abundantly clear that the court was only dealing with the question of whether the four-year time limit applied to opinions given under s. 811, in the same way as it applied to assessments generally. The court is satisfied that the Commissioner was correct to hold that the time limitation ground of appeal, which concerned the time within which an amendment could be made to an assessment, was not at issue in the Droog case*"

109. Section 959AA(1)(i) of the TCA1997 must be interpreted in the context of the entire self-assessment, assessment and appeals scheme.

110. The Commissioner finds that, the meaning of section 959AA of the TCA1997 entitled "*Chargeable persons: time limit on assessment made or amended by Revenue officer*" is that if an appeal is brought, the chargeable person (subject to certain exceptions) is not obliged to pay the taxes assessed until the appeal is determined.

111. The Commissioner further finds that on the determination of an appeal, liability to pay any excess tax due is governed by section 959AV of the TCA1997 which provides in the first instance that payment of any excess tax is backdated to the date on which the tax payable under the assessment was due and payable. The Commissioner finds that an exception is made where the tax already paid is 90% of the tax found to be due, in which case the excess is deemed to be due and payable "*not later than one month from the date of the determination of the Appeal*".

112. The Commissioner does not accept the argument put forward by the Appellant in this regard.

113. Having made the findings of material fact set out at paragraph 93 of this determination, and in particular having found that the gain realised by the Appellant on the exercise of the share options on 31 March 2017 was €693,006.73, the Commissioner finds that the correct calculation of the Appellant's income tax liability for 2017 is as set out in the Notice of Amended Assessment raised by the Respondent on 15 December 2022:

Amount of income or profits arising for this period	€1,176,308.00
Amount of income tax chargeable for this period	€ 457,003.20
Amount of USC chargeable for this period for self	€ 75,029.62
Amount of USC chargeable for this period for spouse	€ 14,034.66
Amount of PRSI chargeable for this period for self	€ 27,720.24
Amount of PRSI chargeable for this period for spouse	€ 502.76
Amount of tax chargeable for this period	€ 574,290.48
Amount of tax paid for this period	€ 552,130.00
Amount of tax payable for this period	€ 14,848.48
Less amount paid directly to Collector General for this period	€ 5,825.00

Balance of tax payable for this period	€ 9,023.48

Determination

114. For the reasons set out above, the Commissioner determines that the Appellant in this appeal has not succeeded in his appeal.

115. It is understandable that the Appellant will be disappointed with the outcome of his appeal. The Appellant was correct to check to see whether his legal rights were correctly applied.

116. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular, section 949AL thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only to the High Court within 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
28 August 2023