

Background

4. The Appellant is involved in the provision of staff to the Health Service Executive (“HSE”). The Appellant is controlled by [REDACTED] (“the Director of the Appellant”) a Director and 100% shareholder of the Appellant and his wife, [REDACTED] [REDACTED] (“the Appellant’s Doctor”) also a Director of the Appellant. The Appellant’s Doctor works as an Emergency Medicine Registrar at [REDACTED].
5. On or about 27 September 2013, the Appellant entered into a contract with [REDACTED] [REDACTED] source locum doctors for the HSE. A copy of said contract has been submitted with the bundles of documentation in this appeal.
6. The terms and conditions of the Appellant’s contract with [REDACTED] required the Appellant’s Doctor to work as an Emergency Medicine Registrar [REDACTED]. The Appellant issued invoices to [REDACTED] setting out the amount owed to the Appellant based on the number of hours worked by the Appellant’s Doctor at [REDACTED].
7. For the years 2016 to 2018 inclusive, the Appellant claimed a deduction under section 81 TCA 1997 for wages paid as follows:

	2016	2017	2018
[REDACTED]	€41,200	€42,450	€37,750
[REDACTED]	€43,197	€51,250	€54,000

8. On 14 December 2018, an audit notification letter issued to the Appellant. On 6 March 2019, the Respondent wrote to the Appellant to state that the salary paid to the Director of the Appellant appeared excessive in relation to the duties performed and that his salary *“is now being restricted to the sum of €3,198 (based on average secretary wage of €12.30 per hour for 5 hours per week for 52 weeks) as this is commensurate with the expected duties of an administrator in a company of this size. The remaining salary is disallowed and will be treated as the additional income of [the Appellant’s Doctor] and subject to PAYE/PRSI/USC (with credit for tax paid)”*.
9. On the 26th March 2019, further correspondence issued to the Appellant from the Respondent stating that the Respondent *“will allow on a concessional basis without prejudice an extra amount of €2,000 in relation to.....duties as a Director of the company. Thereforesalary will be restricted without prejudice to €5,198 as this is commensurate with the expected duties of an administrator / Director in a company of this size”*.

10. On 16 July 2019, the Respondent notified the Appellant that an amended assessment had been raised for 2016, on the basis that deductions allowed in respect of the payments made to the Appellant's Director were being restricted to €5,198 for each year.

11. The Director of the Appellant argues that given the diversity of roles undertaken by him on behalf of the Appellant, it is wrong on the part of the Respondent to use a secretarial rate as a comparator. He contends that the remuneration received is commensurate with the duties and responsibilities undertaken by the Director of the Appellant on behalf of the Appellant.

Legislation and Guidelines

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

13. Section 65 TCA 1997, Cases I and II: basis of assessment, *inter alia* provides:-

(1) Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment

(2) Where in the case of any trade or profession it has been customary to make up accounts-

(a) if only one account was made up to a date within the year of assessment and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year of assessment;

.....

14. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides:-

(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts

(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—

(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;

(b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession;

15. Revenue Tax and Duty Manual 04-06-23 - Family Wages.

16. Revenue e-Brief 120/18 - Tax deductibility in remunerating family members.

Submissions

Appellant

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

- (i) He said that in 2013, he established the Appellant for the purpose of providing medical personnel to a locum agency. He said that he has been Finance Director of the Appellant for over nine years and has a number of responsibilities *inter alia* preparing and approving annual financial reports, corporation tax submissions to the Respondent, analysing spreadsheets, submission of the Form 11, monthly cash flow analysis, dealing with client invoices, choosing a firm of accountants, accepting any medical position offered to the Appellant, the health and safety of the Appellant's Doctor, preparation and submission of documentation to the Companies Registration Office ("CRO") and any other business related tasks as required by the Appellant.
- (ii) He stated that he and his wife, as Directors of the Appellant, divide the tasks into two areas, whereas his wife is responsible for the provision of medical care and he is responsible for the office. He said that he is required to be on standby when the Appellant's Doctor is at work, in case there is any emergency related incident.
- (iii) He stated that as Finance Director of the Appellant, his role should not be treated akin to a normal secretarial role, as there is a significant difference in responsibilities. Further, he said that he is responsible for the safety of the manpower supply to the Appellant. He mentioned that a secretary would not normally be responsible for such tasks such as cash flow forecasting, preparing and submitting documents to the CRO and/or the Respondent and decisions around what salary should be paid to the employees of the Appellant. He said that the Appellant pays the Appellant's Doctor the rate that the HSE pays its doctors and that the balance of the income of the Appellant should be distributed to its other employees.
- (iv) He accepted when asked by Counsel for the Respondent during cross examination that he had not completed the Association of Chartered Certified Accountants ("ACCA") exams. He said that the Appellant employs a Chartered Accountant to

conduct the financial reporting of the Appellant, but that he prepares all of the relevant documentation.

- (v) He mentioned that he did not keep time sheets of the hours worked for the Appellant, as in his view, he was working at the same time his wife was working. He repeated that there was a requirement for someone to be in the office in case there was a problem with the locum doctor, but accepted that there had not been an issue where he needed to be contacted. When asked if he had contacted agencies to see if there was a more cost effective approach to the role within the Appellant, he said that he took no steps to ascertain this, as it is a family business.
- (vi) He confirmed that he set up the Appellant to maximise profits and that he made salary payments to himself at year end, once he was aware of the funds available to the Appellant. He mentioned the breakdown of the various roles that he undertakes concurrently for the Appellant and agreed that the hours attributed to each role were in fact estimates. He stated that it was his view he should be in a position to achieve €140,000 per annum or €67.00 per hour for the role, as opposed to the secretarial rate of €12.30 which the Respondent contends for.

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

- (i) She confirmed that she is a Director of the Appellant but that her role is as a Locum Doctor. She stated that she is not involved in the administrative side of the Appellant and that it is her husband's responsibility. She said that she provides timesheets to him and has no other role. She mentioned that she usually works 12 hour shifts, at varying times, and that she keeps a diary of her rostered dates. She confirmed that she is not a proprietary Director of the Appellant.

19. The Appellant's Director submitted that the salary awarded to him for the years 2016, 2017 and 2018 was wholly and exclusively for the purpose of the Appellant's trade.

Respondent

20. Counsel on behalf of the Respondent made a number of submissions, a summary of which is set out hereunder:-

- (i) The test to be applied is provided for under section 81 TCA 1997.
- (ii) Reference was made to the decision of *Bookfinders Limited v the Revenue Commissioners* [2020] IESC 60 and the principles of statutory interpretation

namely that, in the first instance the plain and ordinary meaning should be ascribed to legislative provisions.

- (iii) Reference was made to the decision of *Copeman v William Flood & Sons Ltd* [1940] 24 TC 5 wherein Lawrence J held that

"It does not follow that because the sums of money were paid to the Directors as remuneration that they were necessarily wholly and exclusively laid out for the purposes of the trade."

- (iv) Whilst it is open to a Company to make arrangements in relation to the payment of remuneration, it must be tested against what the purpose was in terms of deductions. The number of hours worked as contended for by the Director of the Appellant were very close, if not the same, as the number of hours estimated by the Respondent. The Director of the Appellant was not in a position to advance any evidence to conclude that his estimates should be preferred to the estimates allowed for by the Respondent.
- (v) Despite a lengthy list being submitted by the Appellant in relation to the tasks that were undertaken by the Director of the Appellant, when interrogated, there were a strikingly small number of tasks undertaken by him and the final preparation of the returns, at least in 2016, were undertaken by a third party.
- (vi) The Director of the Appellant made merely a bald statement as to the appropriate hourly rate that he could achieve in his role with the Appellant. No evidence of comparators in a similar sized company, with similar complexity, were submitted to allow a conclusion to be drawn in that regard. The onus of proof is on the taxpayer, who is best able to keep records and to speak to the business. The Appellant must be able to justify objectively and evidentially what is his role and it is not sufficient to estimate the hours and value that should be attributed to his role.

Material Facts

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

- (i) The Appellant was established on 29 August 2013.
- (ii) The Director of the Appellant is the sole shareholder of the Appellant.
- (iii) The Appellant is controlled by the Appellant's Director (Director and 100% shareholder) and his spouse, the Appellant's Doctor (Director and medical doctor).

- (iv) On 27 September 2013, the Appellant entered into a contract with [REDACTED] who source locum doctors for the HSE.
- (v) The terms of the said contract between the Appellant and [REDACTED] required the Appellant's Doctor to work as an emergency medical registrar in [REDACTED]
- (vi) For the tax years 2016 to 2018, the Appellant claimed a deduction under section 81 TCA 1997 for wages paid to the Director of the Appellant and the Appellant's Doctor.
- (vii) The Respondent allowed an additional amount of €2,000 in relation to the Appellant's duties as a Director of the Appellant. Therefore, the Director of the Appellant's salary was restricted to €5,198 in terms of deductions.

Analysis

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

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

23. Before addressing the competing arguments in relation to whether the criteria have been met, the appropriate starting point is to consider the approach which the Commissioner is required to take in relation to the interpretation of taxation statutes. The principles are now well settled and the Commissioner is mindful of the recent judgment in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, wherein McDonald J., from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation at paragraph 74

"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*. 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:*
- (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”.

24. The Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. The Commissioner is satisfied that the legislative provisions applicable to the within appeal are plain and their meaning is self-evident such that the ordinary, basic and natural meaning of the words should prevail.
25. In accordance with the TCA 1997, Schedule D is the heading under which business income is charged to tax. It has five cases and the general rule is that income tax is charged on the full amount of the profits of a trade or profession arising in the year of assessment. This is in accordance with section 65 TCA 1997.
26. The only deductions authorised by the TCA 1997, are allowed in computing the profits of a trade or profession. No deduction is allowed for any expense, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession. This is in accordance with the provisions of section 81 TCA 1997.
27. When arriving at business profits assessable to tax, a taxpayer must first look to section 81 TCA 1997 to determine what expenses are deductible. The central test of deductibility when computing assessable profits is whether the expense has been *“wholly and exclusively laid out or expended for the purposes of the trade or profession.”*
28. The Commissioner has considered the decision in *Copeman v William Flood & Sons Ltd* which the Respondent relies upon in support of its position. Lawrence J. held that although the sums were paid to the directors as remuneration, they were not for that reason necessarily wholly and exclusively laid out for the purposes of the company’s trade. Lawrence J agreed that *“the Commissioners cannot interfere with the prerogative of the company to pay its directors whatever it thought fit, but they can find in a proper case that sums so paid are not wholly and exclusively laid out for the purposes of the trade, and it is their duty to direct their minds to that questions and that question alone”.*

29. The Commissioner considered the evidence of the Appellant's Director that his role, as Financial Director of the Appellant, should not be treated akin to a normal secretarial role, as there is a significant difference in responsibilities and risk. The Commissioner considered that the Director of the Appellant is also a Director and Shareholder of the Appellant, nevertheless the Commissioner is satisfied that the test to be applied is how much of the remuneration was incurred wholly and exclusively for the purposes of the Appellant's trade. The Commissioner has no role in interfering with the Appellant's right to pay its Directors whatever it thinks fit.
30. The Commissioner has had regard to the evidence adduced on behalf of the Appellant both at the hearing of the appeal and the detailed documentary evidence submitted. The Director of the Appellant's evidence was that he had a multiplicity of roles and responsibilities within the Appellant and worked at the same time that the Appellant's Doctor worked as a Registrar in [REDACTED]. Nevertheless, the Commissioner is not satisfied that having regard to the size of the Appellant, the number of employees of the Appellant and the evidence that the Appellant was assisted by an accountant in terms of its financial reporting, that the remuneration was wholly and exclusively laid out or expended for the purposes of the Appellant's trade.
31. Further, there was no evidence submitted to support the hours worked by the Director of the Appellant and in fact, the evidence was that the hours worked were an estimation only and the roles undertaken by the Director of the Appellant were carried out concurrently. The Commissioner would have considered such additional evidence had it been produced to negate the assessment raised by the Respondent. But, that did not occur. The Commissioner does not find it credible that the Director of the Appellant worked the same hours as the Doctor of the Appellant and the reason being, in case of a health and safety issue occurring.
32. Moreover, whilst the Director of the Appellant gave clear and consistent evidence in terms of his role, his testimony was not supported by any real comparators or documentation, such that the hourly rate he contends for, should be preferred to that of the Respondent. The deficiency in records and documentation, in particular, the absence of weekly time sheets and payslips, prove disadvantageous for the Appellant in terms of the deductions claimed, in circumstances where the Appellant bears the burden of proof in an appeal before the Commission. Consequently, the Commissioner is satisfied that the Respondent was correct to raise the assessments, the subject matter of this appeal.
33. As set out above, in a tax 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. The Appellant, being the person with access to all of the facts and documents relating to its own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions (section 886 TCA 1997) but also to produce such documentation as may be required in support of its appeal so as to meet the burden of proof.

34. Accordingly, the Commissioner is satisfied that the Appellant in this appeal has not succeed in proving on the balance of probabilities that the Notices of Estimation of Amounts Due raised by the Respondent are incorrect and has not brought forward any additional evidence to demonstrate that the notices of estimation are incorrect. Hence, then the Notices of Estimation of Amounts Due shall stand.

Determination

35. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in showing that the tax is not payable. Accordingly, the Commissioner finds that the Notices of Estimation of Amounts Due raised by the Respondent and the subject of this appeal, shall stand.

36. 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.

37. This appeal is hereby determined in accordance with Part 40A of the 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 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine
Appeal Commissioner
12 December 2022