AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

34TACD2023

Between

[redacted]

Appellant

-and-

REVENUE COMMISSIONERS

Respondent

Determination

A. Introduction

1. This was an appeal to the Tax Appeals Commission ("the Commission") of amended notices of assessment of the Revenue Commissioners ("the Respondent") assessing the Appellant as having made underpayments of income tax for the years 2010, 2011, 2013 and 2014. The underpayments were found to have arisen from the Appellant's over-claiming of credit arising from professional services withholding tax ("PSWT") borne by a [redacted] partnership called [redacted] [redacted] ("the Partnership") of which she was a member.

2. The legislation relevant to this appeal is set out in detail in part "C" this Determination. In order however to give context to part "B", which describes the background to this appeal, it is necessary to state at this point that section 526 of the Taxes Consolidation Act 1997 ("the TCA 1997") permits a person who has borne PSWT in a given year to set it against the income tax chargeable for that year. Section 528 of the TCA 1997 provides that where a payment bearing PSWT is made to *"two or more persons* […] *any necessary apportionment shall be made".* 529A of the TCA 1997, which came into force on 27 March 2013, now makes express provision for payments to a partnership and links the

apportionment among partners of credit for PSWT borne to their share of the profits and gains of the partnership.

3. The sums assessed by the Respondent as having been underpaid were:-

    - 2010 - €2,637.33;
    - 2011 - €2,748.29;
    - 2013 - €13,663.46; and
    - 2014 - €12,563.81.

4. It is appropriate also to record at this point of this Determination that this was one of three separate appeals brought by partners in the Partnership, raising precisely the same issues. The Appellant declined to have her appeal heard in tandem with those of the other two partners, as was her right. The Appellant did not attend the appeal, as she was required to under section 949AA of the TCA 1997, despite indicating that she would do so. No application was made for remote attendance, which is a facility provided by the Commission in appropriate circumstances. Instead, the Appellant was represented by her tax agent, who contended that her appeal could be proven on papers submitted to the Commission, including correspondence from persons who themselves were not called as witnesses. This unsatisfactory situation, created by the Appellant, was alleviated to a significant extent by the Respondent, which took a practical approach to matters by agreeing that the Commissioner could consider the sworn evidence of the other appellant partners given to the Commission in the course of the hearing of their separate, but factually identical, appeals against amended assessments for the same periods. It should also be noted that the Appellant's non-attendance was excused pursuant to section 949AA (1) of the TCA 1997.

B. Background

5. The Appellant is [redacted] based in [redacted] In 2006 she became a partner in the Partnership, which was formed in [redacted]. The partners preceding her were [redacted], [redacted] ("the second partner"), [redacted] and [redacted]. The Partnership was dissolved in [redacted] 2016. [redacted] and [redacted] are the aforementioned partners who brought appeals to the Commission against assessments identical to those at issue in this appeal and gave sworn evidence in so doing. The evidence of these partners given in support of their appeals was in most if not all material respects the same.

6. The Commissioner heard that in the early years of the Partnership the then partners contributed approximately the same [redacted] hours to its practice and shared equally in its profits and gains. However, in [redacted] the second partner [redacted] limited the amount of [redacted] hours he was able to perform and, so as to maintain his contribution to the income of the Partnership, he arranged [redacted] to fulfil his obligations in his stead.

7. The Commissioner heard that while this arrangement was acceptable to the then partners for a number of years, over time they formed the view that it was unsatisfactory for their business to have [redacted] standing in for the second partner on a permanent basis.

8. As a consequence, at some stage in [redacted] it was agreed by all of the then partners, including the second partner, that the arrangements for the sharing of the profits and gains of the trade of the partnership should be changed. From then on each partner would receive what was referred to as a monthly salary based on [redacted] hours to be worked each week. The [redacted] hours and the salary on which they were based would be agreed at the beginning of each year at the partners' AGM.

9. The Commissioner heard that it was further agreed that the partners, with the exception of the second partner, would receive a percentage share of the profits of the partnership remaining after the partners' salaries were deducted. The percentage that each such partner would receive was also to be determined at the AGM for the forthcoming year. It would appear that the profits or gains of the partnership remaining after account was taken of the partners' salaries would invariably be split equally between those entitled to them.

10. In evidence, [redacted] and [redacted] referred to the second partner's status in the partnership during this period as being [redacted] paid solely for [redacted] hours worked. [redacted] was not, in their view, an 'equity partner'.

11. The Commissioner heard that the aforementioned partner's AGM was attended by the partnership's accountant. From [redacted] this was [redacted] of [redacted]. Thereafter, until the dissolution of the Partnership it was [redacted] ("the Partnership's accountant) of the same firm. Also in attendance was each partner and their respective personal accountant.

12. The Appellant provided correspondence dated 25 October 2018 from the Partnership's accountant to the Commission containing information regarding the presentation of annual accounts to the partners and further factual background relevant to the appeal. This correspondence stated as follows:-

"We confirm that we acted for [redacted] since [redacted]. [redacted] was the Partner responsible for the account up to 2008. I took over the account from 2009 until [redacted] was dissolved in [redacted] 2016. Our practice prepared the Partnership Accounts for [redacted] and completed the Form 1 Partnership return to Revenue annually. Each [redacted] retained their own independent advisor to prepare their Personal Tax Return.

Our process each year was as follows;

1. We would obtain the books and records from the practice for the year.

2. Our staff would draft the accounts. We also prepared a Profit Share Calculation and a Capital Account which showed the [redacted] Opening Capital balance, their share of profit, their Drawings, other adjusting items and their Closing Capital balance.

3. The Profit Share calculation was prepared based on the instructions received from the [redacted] Practice. The instructions did not change from year to year (other than a slight change in 2009 which was agreed at a meeting with all [redacted] Advisors).

4. We would issue a report on the draft accounts together with a copy of the accounts to the 5 [redacted]. A copy of the Capital Account and the Profit Share Calculation would also have been included.

5. A meeting would then be arranged where I would present the Accounts to the five [redacted] The proposed profit share would be presented and discussed.

6. The Accounts would be reviewed, any required adjustments would be discussed and agreed.

7. Our office would then make any adjustments and would re-issue the final accounts and profit share to the [redacted] and their Advisors.

8. The Advisors were responsible for filing the Personal Tax return for [redacted].

9. To the best of my recall, all 5 [redacted] attended the Accounts Review meeting each year that I was responsible for the account.

Meeting with Advisors

As mentioned earlier, I took over the account in 2009. At that time there was some concern among the Partners in relation to the Profit Share Arrangement. The concern raised was that the Capital Balances of the Partners were getting out of line. Several meetings were arranged [redacted] that year to address the concern. All 5 [redacted] attended these meetings. The final meeting was attended by 5 [redacted] and their individual advisors. [redacted] was accompanied by [redacted] on this

occasion. A slight adjustment to the Profit Share calculation was agreed at this meeting. It was clear from all the documentation at these meeting [sic] that [redacted] *share of profit was being calculated on a different basis to the other* [redacted]*. This had been the practice for many years and no objection or discussion arose in relation to this issue at this meeting.*

[redacted]

I queried the treatment of [redacted] *Profit Share shortly after I took over responsibility for the account. It was explained to me that when* [redacted] *he continued to work for a day or day and a half per week.* [redacted]*. This arrangement continued for many years. This arrangement was listed on the agenda of the 2010 Accounts Review Meeting. I was not instructed to make any changes to the existing arrangement arising from this meeting.*

Around 2013, [redacted] *indicated to me that he was unhappy with this arrangement. I explained that the Profit Share was a matter for the Practice and suggested he discuss the matter with the other* [redacted]*. The result of these discussions was that it was agreed that* [redacted] *would be allocated €20,000 in Professional Services Withholding Tax as part of the overall Profit Share for the 2012 Tax Year as he had worked* [redacted] *covering* [redacted] *for 6 months.*

For the tax years 2013 to 2015 we continued to follow the previously agreed method and advised the [redacted] *and their agents to do their tax returns on this basis.*

We were advised that it was agreed that [redacted] *would receive Profit Share on the same basis as the other* [redacted] *with effect from 1st June 2015.*

We were subsequently advised that the Partnership was to be dissolved with effect from [redacted] *2016."*

13. On 6 August 2008 the partners each signed a written partnership agreement ("the written agreement"). In giving this determination it is necessary to quote a number of its terms as some of them were in accordance with the foregoing account of how profits of the partnership were to be divided, whereas others were not. Clause 1 of the partnership agreement provided:-

"The Parties hereto will carry on [redacted] *under the style and title of* [redacted] *and they are hereinafter called "the Partners".*

14. Clause 2 of the partnership agreement was entitled "*Commencement*", yet it contained no commencement date. This clause provided that:-

> *"The Partnership Practice shall be carried on at* [redacted] *at* [redacted] *or at such other* [redacted] *as shall be agreed upon by the Partners and the said* [redacted] *shall be accessible at all reasonable times to all Partners."*

15. Clause 4 of the partnership agreement provided that upon its execution the partners would enter into the lease of a property located in [redacted]

16. Clause 7 of the partnership agreement was entitled "*remuneration*" and provided:-

> "*(i) The monthly salary of the partners shall be agreed by the Partners unanimously at an annual general meeting held in January of each year. The amount of any such salary shall be deducted from the gross profits of the practice.*
>
> *(ii) The Partners shall be respectively entitled to the Partnership property (subject to clause 6 hereof) and an equal division of the net profit of the Practice as agreed at the Annual General Meeting of the Practice of each year"*

17. Clause 8 dealt with the property of the partnership and provided:-

> *"All private fees and private monies paid or given to any of the Partners respectively for professional services and the emoluments (whether by fee, salary or otherwise) of every profession office or appointment now or hereafter held by the Partners or either of them respectively, shall be their own individual property; all monies received under* [redacted]*,* [redacted] *and any other* [redacted] *hereafter agreed by the Partners at Annual General Meeting shall belong to the partnership and shall be distributed by the partners in accordance with the decisions of the partners at the Annual General Meeting."*

18. There was no dispute that, in accordance with the contents of the correspondence of the Partnership's accountant and contrary to the terms of Clause 7(ii) of the written agreement, the second partner did not, for the years under appeal, receive any share of the profits or gains remaining after payment of the partners' salaries.

19. The Commissioner heard evidence from [redacted] and [redacted] concerning the circumstances in which the written agreement came into being. They both stated that it was produced in circumstances where the Partnership wished to obtain finance from a lending institution for the purpose of acquiring a new premises from which to carry on its

practice. Its terms regarding profit share did not reflect the reality of the agreement among the partners and were not intended to be binding *inter se*. The evidence given was that this document had, in reality, no impact on the long-established practice of the Partnership regarding the fixing of profit share at the AGM and distribution on the basis agreed.

20. The Commissioner was provided with the accounts of the Partnership, its Form 1 (Firms) returns and the Appellant's Form 11 returns for the years 2010 – 2014. The Form 1 (Firms) returns appeared to disclose under the section headed "*Partnership Details"* the fixed salary of each partner and the figure representing profit share. For 2010 these were listed separately under "*Partner's share of Case I/II*" and "*Partners Share of other income*". For the other years, however, they appeared to be taken as a cumulative figure under the heading "*Partner's share of Case I/II*". In each of the Form 1 (Firms) Returns the "*Basis of distribution of profits at end of period"* and *"Basis of distribution at end of period"* was set at *"25%"* for all of the partners, bar the second partner whose figure for each year was *"0%*".

21. It would appear that in the Form 1 (Firms) returns that the salaries of the partners were not included in the "*Expenses and deductions"* section of the return under the heading "*Salaries/Wages".* Rather, they were taken from the partnership's adjusted net profit.

22. Section 7 of the accounts of the partnership for the years 2011, 2013 and 2014 disclosed that the second partner received no allocation of PSWT borne by the partnership, whereas the other four partners received a quarter share. The accounts for the year 2010 did not appear to address this matter, however.

23. The Form 11 tax returns filed by the Appellant for the years 2010, 2011, 2013 and 2014 disclosed that she received the following income from [redacted] the Partnership and claimed the following credit for PSWT withheld from the Partnership.

Year	Income	Credit Claimed for PSWT
2010	€285,635	€77,106
2011	€261,975	€72,466
2013	€257,543	€68,322
2014	€247,224	€62,815

24. The amount of credit for PSWT claimed by the Appellant for the above years constituted a quarter of the total PSWT withheld from the Partnership in respect of professional services provided. [redacted] likewise claimed the same amount of credit for PSWT borne by the partnership. This was in accordance with the contents of section 7 of the partnership accounts.

25. The Form 1 (Firms) returns for the same periods suggested that the second partner received salary from the [redacted] practice of €47,531, €52,790, €128,087 and €115,703 respectively.

26. For these periods the second partner claimed credit for PSWT in the amount of €13,188. €13,748, €45,758 and €87,068. These claims were submitted on time. They were not in accordance with what was set out in section 7 of the partnership accounts for the same period.

27. As noted in the correspondence of the Partnership's accountant, quoted above at paragraph 12, for the year 2012 the second partner claimed, with the agreement of the other partners, credit for PSWT in the sum of €20,000. The Commissioner heard evidence from [redacted] that this was to compensate the second partner for his increased commitment to the partnership in covering for [redacted].

28. When taken together the claims of the five partners in the Partnership to credit for PSWT borne in the years 2010, 2011, 2013 and 2014 exceed that which was available by the amount claimed by the second partner. Clearly, the root of the problem was that, when the claims were made, four of the partners, including the Appellant, considered themselves entitled to one quarter of the credit for PSWT, with nothing left for the second partner. The second partner, by contrast, considered himself entitled to a claim a smaller sum in credit for the years 2010 and 2011 and larger amounts for 2013 and 2014. In fact, the second partner's claim for 2014 exceeded the quarter share claimed by his fellow partners by over €24,000.

29. As alluded to in the correspondence of the Partnership's accountant quoted at paragraph 12 herein, at some point the second partner became dissatisfied with the arrangement concerning the distribution of profits. Correspondence of 27 May 2015 from the second partner to the other members of the Partnership, submitted by the Appellant to the Commissioner, evidenced aspects of the disagreement. Therein the second partner stated:-

"I have taken legal advice over a prolonged period and I am informed that the Partnership Agreement signed by us in August 2008 is a legal document.

Therefore in accordance with my letter of 22nd September 2014 (copy enclosed) I now claim my entitlement to equal status as a full partner with regards to all matters including equal salary and profit share. I am also to work a five day week and all proceeds shared accordingly. I like wise bear equal responsibility for all costs accruing to the practice just like you. As the AGM of the practice never concluded there was no agreement. Nineteen weeks have already elapsed in 2015 and I have a substantial financial loss as a consequence. You have not agreed with me and I have not agreed with you what the monthly salary drawings should be for 2015 (Section 10). I intend to start working my entitlement to 5 days per week from Monday 1st June 2015.

I would advise an emergency AGM be held as soon as possible with the practice accountant in attendance. I have forwarded to him the retrospective figure that is owing to me for the period 2011 - 2014. This again is in accordance with my letter to you of 22nd September 2014, all of which I have now concluded.

They are as follows:

1) PSWT is with Revenue (2010 – 2012)

2) Future status as equal is clear and I work accordingly.

3) Retrospection is only an outstanding issue and as stated I am open to negotiation."

30. Returning to the collective over-claim of PSWT, when this came to light the approach of the Respondent was to engage with the partners, their personal accountants and the Partnership's accountant. This engagement was set out in correspondence dated 17 November 2015, furnished to the Commissioner by both parties, from the Officer of the Respondent dealing with the matter to the Partnership's accountant. This stated:-

"I had separate meetings with (one) [redacted] *and (two)* [redacted] *on* [redacted].

We had general discussions about the ongoing disagreement within the partnership in the context of the partners' tax liabilities and, in particular, the claiming of available PSWT credits. I drew the partners' attention to excessive claims for PSWT credits for the years 2010, 2011 and 2013, which are as follows:

2010 €13,188

2011 €13,748

2013 €45,758

There is also a significant amount of PSWT credits claimed in excess of the available credits for the year 2014, which Returns were filed by last week. I will quantify the actual amount and advise you shortly.

I propose to collect the 2010 and 2011 amounts from the partners by amending their respective PSWT claims for those years.

I would like to hear from the partners at an early date as to how they propose to rectify the excessive PSWT claims for the years 2013 and 2014.

The partners advised me that they are engaging in an arbitration process in relation to the partnership issues which are in dispute and I wish them a successful outcome in that process.

I mentioned to them that any redistribution of partnership profits and PSWT credits may create overpayments of tax for some of them. I advised them of the four year time limit within which refunds of tax must be claimed. In that regard the partners should be aware of the requirement to submit any claims for refunds in respect of the year 2011 before 31 December 2015. Otherwise, they may lose entitlement to refunds of any overpayments that may arise."

31. On 9 December 2015, the Respondent issued Notices of Amended Assessment for the years ending 31 December 2010 and 2011, which found the Appellant to have a balance payable of €2,636.67 and €2,749 respectively. This was arrived at by reducing the claims made by each of the partners equally by one-fifth. These assessments were appealed by the Appellant by Notice of Appeal delivered to the Commission on 19 August 2016.

32. On 13 July 2016, after the making of the amended assessments for 2010 and 2011, the Officer of the Respondent sent correspondence to the Partnership's accountant, which stated:-

Thank you for taking my call in regard to the ongoing dispute within [redacted] *partnership and its adverse effect on the correct amounts of their tax liabilities being returned by the partners.*

I previously met all the partners to discuss the matter of claims for credits in respect of PSWT in excess of the combined amounts withheld from payments to the partnership. In the absence of any agreement as to how the PSWT should be apportioned I have since reduced each of the partners' claims by an amount equal to one-fifth of the excessive claims for the years 2010 and 2011. I also advised the partners that the

combined PSWT claims in respect of the years 2013 and 2014 inclusive are also excessive. I now intend to adjust each of the partners' assessments for the years 2013 and 2014 to bring the tax relating to excessive claims back into charge. A letter will issue to each of them and their agents to that effect today. There are a few other matters that will be queried in the letters, including apparent discrepancies between profit and capital allowances shares returned in the Forms 1 (Firms) and the partners' individual Forms 11.

I am concerned that the dispute is continuing to affect the accurate return and assessment of the partners' annual liabilities, which has the effect of involving Revenue in a dispute which should be resolved by the partners. In that case, my priority is to ensure that the correct liabilities are on record for each partner. In the absence of clear, agreed directions from all the partners I must apply my judgement as to how the profits, capital allowances, PSWT, etc. should be apportioned annually based on available information.

There is a written partnership agreement in place since 6 August 2008. However, individual partners have told me that the terms of the partnership agreement were varied by verbal agreements in the years since 2008. There would not appear to be any consensus among them as to what the verbal agreements were or, indeed, if they were actually agreed by all the partners.

I understand from our conversation that your firm, as the partnership accountants, prepared annual accounts and presented them to the partners for their agreement and sign-off. In turn, you gave each partner details of their profit and capital allowances shares to be included in their individual tax returns and use submitted Forms 1 to Revenue. I further understand that you may have minutes, notes or memoranda of partners' meetings, correspondence or other documentation that reflect the outcome of the annual meetings. (If my understanding is incorrect to any extent I would be obliged for any clarification that you might give me). I would appreciate it if you would let me have copies of all such documentation that you have so as to assist me in resolving matters from a revenue perspective at least."

33. On 19 July 2016, the Partnership's accountant wrote to all of the partners to inform them of the course of action that the Respondent had taken in respect of the over-claim for the years 2010 and 2011, the Respondent's intended course of action in respect of 2013 and 2014 and the documentary material sought by the Respondent so as to inform it in the exercise of its judgment in respect of these latter years. In so doing the Partnership's accountant wrote at the paragraph 4 therein that:-

"There is a partnership agreement dated and signed on 6 August 2008 however the terms of this agreement may have been varied by verbal agreement. There is, at present, no agreement between the partners as to these variations in this partnership agreement."

34. On 14 September 2016, the Partnership's accountant replied to the Respondent's correspondence of 13 July 2016 in the following terms:-

"Further to your letter dated 13th July 2016, please find enclosed copies of our file documentation as requested.

As instructed by the practice our service to [redacted] *has worked as follows over the years;*

1. Draft Accounts were prepared annually by [redacted] *personnel based on the records provided by the* [redacted]

2. These draft accounts were circulated to the partners for review.

3. A meeting was arranged with all the Partners to discuss the accounts, profit share and the Partner Capital Accounts.

4. Based on the outcome of the meeting, Final Accounts would be circulated.

5. Details of the profit share, taxable income, capital allowances applicable to each partner would be forwarded to each Partners' Tax Adviser based on the agreed Final Accounts.

6. [redacted] *would then submit the Partnership Form 1 based on the Final Accounts."*

35. On 28 July 2016, the Respondent issued amended notices of assessment in respect of the years 2013 and 2014, which found the Appellant to have balances payable of €13,663.46 and €12,563.81 respectively. In contrast to the method of calculation adopted in respect of the years 2010 and 2011, the Respondent arrived at these amounts by dividing the credit available to be claimed by the partners in equal one-fifth amounts. For this reason the Appellant's liability was higher than for the years 2010 and 2011.The Appellant appealed these amended assessments by Notice of Appeal, also delivered on 19 August 2016.

C. Legislation and Guidelines

36. Chapter 1 of Part 18 of the Taxes Consolidation Act 1997 (hereafter "the TCA 1997") is entitled "*Payments made in respect of professional services by certain persons".* Under

section 526(2) of the TCA 1997, a person who has borne PSWT may have that set against their amount of income tax due for the chargeable year.

37. Section 528 of the TCA 1997 is entitled "*Apportionment of credits or interim refunds of appropriate tax*" and provides:-

> *"Where the payment notification referred to in either section 526(3) or 527(2)(c) relates to 2 or more specified persons, any necessary apportionment shall be made for the purposes of giving effect to sections 526 and 527."*

38. Tax Briefing 22 of 1996 concerned, among other things, the allocation of credit for PSWT borne by partnerships in accordance with the above provisions. Of particular relevance to this appeal is the following passage therein:-

> *"[…] credit for PSWT borne by a partnership is apportioned between the partners in proportion to the ratio by which they share the partnership profits to which the PSWT relates.*
>
> *From time to time, partners, due to the particular circumstances of their partnership agreement, may wish to allocate the credit for PSWT between them other than in accordance with this basis.*
>
> *Revenue is prepared to consider requests for the allocation of credit for PSWT between partners other than on the strict basis required by the legislation. Such requests should be made in exceptional circumstances only. For example, where one partner is entitled to a repayment of PSWT, while another partner owes a significant amount of tax, consideration will be given to a request to have credit for PSWT allocated in such a way as to reduce/eliminate both the repayment and the tax outstanding.*
>
> *The partners in question will be required to sign an undertaking that they will not seek credit/ repayment of the tax on any basis, other than that agreed. Any application for such treatment should be made to the partnerships local tax office."*

39. Section 529A of the TCA 1997, which was inserted by section 93 of the Finance Act 2013, came into effect from 27 March 2013. [redacted]. In full it provides:-

> *"(1) Subject to the provisions of this section, where a professional service is provided in the conduct of a partnership trade or profession then, for the purposes of this*

Chapter, an accountable person may make a relevant payment (including a payment to which section 522 applies) in relation to that service in the name of the partnership.

(2) Where a relevant payment (including a payment to which section 522 applies) is in relation to a professional service that is provided in the conduct of a partnership trade or profession, then for the purposes of sections 520(2), 526 and 527—

(a) the relevant payment shall be deemed to have been made to each person who is a partner in the partnership in the proportion in which profits or gains of the partnership trade or profession for the chargeable period involved are to be apportioned amongst the partners, and

(b) appropriate tax deducted from the relevant payment shall be apportioned solely between the partners and in the same proportion referred to in paragraph (a).

(3) Where an apportionment as referred to in subsection (2) applies to a relevant payment and to the appropriate tax deducted from that payment, the precedent partner shall, for the purposes of sections 526 and 527, provide details of the apportionment that applies to the payment and the appropriate tax deducted, and the basis for that apportionment, in a statement issued to each partner in the partnership, which shall include the details provided to the precedent partner by the accountable person in accordance with section 524(7).

(4)The statement referred to in subsection (3) may be issued in writing or by electronic means (within the meaning of section 917EA) and shall be in such form as may be approved by the Revenue Commissioners for that purpose."

D. Submissions

Appellant

40. The Appellant's tax agent observed that it was agreed that the second partner had not been the recipient of any part of the surplus profits of the partnership for the years 2010, 2011, 2013 and 2014. On this basis alone, the Appellant was not entitled to share in the PSWT for these years taking into account Tax Briefing 22 of 1996 and section 529A of the TCA 1997.

41. The Appellant's tax agent submitted that even if the basis for determining the apportionment of PSWT was not the actual distribution of profits but rather the partners' legal entitlement to share in the profits, she should still succeed in her appeal. It was submitted that the written agreement never had any binding effect on the partners among

one another. Even if it did, the evidence indicated that it was varied subsequently at the partners' AGM.

42. In this regard, the agent for the Appellant stressed that the end of year accounts of the partnership, which he said reflected what was agreed at the AGM, were drawn up by the Partnership's accountant and then circulated to each partner's accountant prior to the apportionment of surplus profits. The non-allocation of a share of the profits evident from the accounts was not objected to by the second partner for the relevant years. While an issue did arise in respect of the year 2012, this related specifically to cover provided by the second partner [redacted]. This was solved by a "once-off" allocation of credit for PSWT in the amount of €20,000.

43. Thus, the second partner's claim for PSWT was inconsistent with his rights regarding profit share. His actual rights were reflected by his non-allocation of PSWT evident in section 7 of the annual accounts.

44. In seeking to bolster this argument, the Appellant also cited the correspondence of the second partner of 27 May 2015, which, he submitted, indicated that he was asserting entitlement to be treated as a full "equity partner" from that point onward. Implicit in this was that he was not one before.

45. The Appellant's tax agent also pointed to the fact that the second partner received €20,000 in credit for PSWT for the year 2012, in spite of his claimed entitlement to an equal allocation for the years 2010, 2011, 2013 and 2014. This was not consistent with the conduct of a person who considered himself entitled to a status equal to his fellow partners for the years 2013 and 2014.

46. This being so, it was submitted that it was clear that under 529A(2)(a) and (b) of the TCA 1997 (applicable to 2013 and 2014) and section 528 of the TCA 1997 (applicable to 2010 and 2011) the second partner had no entitlement under section 526 to PSWT credit borne by the partnership in those years.

Respondent

47. The Respondent submitted that, having engaged with and heard from four of the five partners, its Officer had no option other than to exercise his best judgment in allocating credit for PSWT among them, while "protecting the tax". In respect of the years 2010 and 2011, in which the second partner had made claims for PSWT credit that were substantially lower than those of the Appellant, this meant reducing each partner's claim in the same proportion, specifically by one-fifth.

48. In respect of the years 2013 and 2014 the second partner submitted claims constituting €8,900 less and €24,253 more than a one-fifth share of the overall amount of PSWT incurred by the Partnership. Having received no response from the Partnership, the Officer determined that the only viable approach was to adhere to the terms of the written agreement concerning the division of profit. Section 529A of the TCA 1997 makes clear that a relevant payment subject to PSWT made in respect of a professional service provided by a partnership shall be deemed to have been made to partners in proportion to how the profits of the partnership are "*to be apportioned*" amongst them. The written agreement, the Respondent contended, had to be the touchstone for the apportionment of PSWT. This document could not be 'looked behind' in circumstances where there was no clear agreement among the partners as to whether there had been an oral variation regarding profit share.

49. The Respondent submitted that the extrinsic evidence did not lead to the conclusion that the written agreement either never had binding effect among the partners, or was varied thereafter if it did. The Respondent observed that it would have been a curious state of affairs for the second partner to hold himself out as a partner in writing, thus making himself liable jointly and severally in respect of the debts and obligations of the partnership to third parties, while remaining only a salaried partner not entitled to share in the profits of the enterprise.

E. Material Facts

50. The facts material to this appeal that were agreed were as follows:-

- the Appellant was, [redacted], one of five partners in a partnership [redacted];
- on 6 June 2008 the partners entered into a written partnership agreement which on its face gave each of the partners equal rights regarding the share of the net profit of the partnership after the apportionment of partners' salaries;
- for the years 2010 – 2014 the second partner did not receive a share of the profits of the partnership after the apportionment of the partner's salaries;
- for the years 2010, 2011, 2013 and 2014 the Appellant filed Form 11 annual returns in which she claimed, and duly received, credit for PSWT borne by the partnership. The credit claimed was a quarter of the PSWT borne by the partnership;
- for the years 2010, 2011, 2013 and 2014 three of the other partners claimed credit for the PSWT borne by the Partnership in the same amount as the Appellant;

- for the years 2010, 2011, 2013 and 2014 the second partner claimed credit for PSWT withheld from the partnership in respect of its professional services in the amount of €13,188, €13,748, €45,758 and €87,068 respectively;
- this was inconsistent with the apportionment of PSWT to the second partner evident in section 7 of the accounts for those years;
- the Partnership as a whole over-claimed credit for PSWT in the amounts of €13,188 in 2010, €13,748 in 2011, €45,758 in 2013 and €87,068 in 2014;
- an Officer of the Respondent having met the partners in November 2015, on 9 December 2015 amended notices of assessment were issued to the Appellant in respect of the years 2010 and 2011. These amended assessments reduced the Appellant's claim in respect of PSWT by one-fifth. The Appellant was thus found to have balances payable for these years of €2,637.33 and €2,748.29 respectively;
- thereafter, the Respondent issued amended assessments in respect of the years 2013 and 2014 which found that Appellant to have balances payable of €13,663.46 and €12,563.81 respectively. These figures were arrived at in circumstances where the Appellant's claim in respect of PSWT was reduced to one-fifth of the overall amount withheld from the Partnership in each of these years;

51. In addition, for reasons set out in part "F" of this Determination, the Commissioner finds as a material fact that:-
    - the written agreement was varied by the partners, such that for the years 2010 – 2014 the second partner had no entitlement to share in the profits and gains left after the allocation of the partners' salaries.

F. Analysis

52. The Appellant's case was that section 528 of the TCA 1997 and section 529A of the TCA 1997 deem the partners in a partnership who share in its profits and gains to be the recipients of payments subject to PSWT made by "accountable persons" to that partnership. It was submitted that the fact was that four of the partners shared in the profits, whereas the second partner did not. Consequently, only these four should be deemed recipients entitled to equal apportionment of PSWT withheld from the Partnership, to the exclusion of the second partner. It was also argued that, in any event, the division of profits was agreed orally by the partners each year at their AGM. This meant that even if it was determined that the basis for the apportionment of PSWT among partners was how profits were "*to be*" distributed, it would still be the case that only the four should share and, thus,

the Appellant's claim in respect of PSWT borne by the Partnership should not have been reduced.

53. The core of the Respondent's case was that the legislation applicable to each year requires apportionment in proportion to how profits and gains in a partnership *should* be divided pursuant to the partners' agreement with each other. Given the existence of a dispute amongst the partners as to the allocation of PSWT for the relevant years, this had to be determined by reference to what was in the written agreement.

54. Dealing with the interpretation of the relevant legislation, the first matter to note is that section 528 and section 529A of the TCA 1997 are different from one another. The former, which applies to the years 2010 and 2011, provides that where credit for tax borne relates to two or more specified persons, "*any necessary apportionment shall be made…"* . In this regard, the basis for apportioning only among partners entitled to share in "profits" stems, if at all, from the Tax Briefing of 1996. This document, while undoubtedly useful guidance, does not have the status of law. Section 529A of the TCA 1997, however, which applies to the years 2013 and 2014 provides expressly that PSWT borne by a partnership is to be apportioned amongst partners in proportion to how profits or gains of the trade for the chargeable year are to be shared.

55. The Commissioner finds that section 528 of the TCA 1997 does not prescribe how the Respondent must apportion credit for PSWT borne by a partnership amongst its partners. The method outlined in Tax Briefing 22 of 1996 is one that is logical, but not mandatory. The Commissioner finds, by contrast, that section 529A of the TCA 1997 is prescriptive in nature and, by its natural and ordinary meaning, requires that PSWT withheld from a partnership be apportioned amongst its partners in accordance with their rights and entitlements to share in the partnership's profits and gains from its trade. This is not to say that the Respondent is obligated in each instance to form a view as to partners' rights and entitlements to profit share before approving apportionment of PSWT as agreed by partners themselves. Rather it is that where dispute arises, as in this case, the prior agreement between the partners should prevail.

56. The Officer of the Respondent adopted an approach in respect of the years 2010, 2011 that differed from that in respect of 2013, 2014. For 2010 and 2011 he took the view that the cumulative over-claim should be addressed by reducing each partners' claim by one-fifth. This left the second partner with a smaller claim than that of his colleagues, including the Appellant. In respect of the latter years, he decided to divide the credit for PSWT borne equally among the five partners. He did so having formed the opinion that he could not

determine the rights and entitlements of the partners to profit share other than by reference to clause 7 of the written agreement.

57. In giving this determination the Commissioner likewise addresses the years 2010, 2011 and 2013, 2014 separately by reference to the differing legislation applicable to each.

The years 2010 and 2011

58. The Commissioner finds that having regard to the years 2010 and 2011, the Officer of the Respondent exercised the discretion granted to him under section 528 of the TCA 1997 to make "*any necessary apportionment".* This was made on the basis of the evidence and information furnished to him by all the partners and their accountants, some of which was not presented to the Commissioner at hearing. It is obvious that in adopting this approach the Officer of the Respondent sought to act fairly to the partners, while bringing, as he put it, the credit claimed by all of the partners "*back into charge".*

59. It is the Commissioner's view that the evidence presented in respect of this appeal does not warrant a departure from this apportionment decision of the Officer of the Respondent, reached having consulted with a variety of persons not present to give evidence in the course of the hearing before the Commission. The Commissioner thus confirms the assessment made in respect of the year 2010 and 2011.

The years 2013 and 2014

60. Before addressing these years, the Commissioner feels the need first to express some doubt concerning whether the "*profits or gains*" of the partnership should exclude the sums allotted to the partners each year in respect of "salary". The cause for doubt stems from the status of the partners as Schedule D employees and the manner of accounting for the salary in the Form 1 (Firms) returns. Nevertheless, in this appeal both parties based their submissions on the calculation of profit share being exclusive of salary. Indeed, this assumption was at the heart of the assessments raised by the Respondent that were under appeal. For this reason, in determining the Appellant's charge to tax for 2013 and 2014, the Commissioner is prepared to take only the profit remaining after salary distribution as the basis under section 529A of the TCA 1997 for assessing the entitlement to share in the PSWT borne by the partnership.

61. The Commissioner thus turns to the question before him: namely the Appellant's entitlement to share in this profit. Were it to be found that the clause 7(ii) of the written agreement was binding on the partners, the assessment would, as with 2013 and 2014, have to be affirmed.

62. As regards the question of whether the terms of the written agreement were ever intended by the partners to be binding on each other, the Commissioner finds that they were. This was a detailed deed, signed by each partner and witnessed. It is not credible that the partners, all of whom were professional persons with ready access to legal advice, did not appreciate that by entering into it they could then be held to it by their fellow partners.

63. The Commissioner finds, however, that the oral evidence of [redacted] and [redacted] and the documentary evidence proffered proves, on the balance of probabilities, that the written agreement was varied subsequently by the partners, such that for the years 2010 – 2014 the second partner had no entitlement to share in the profits and gains left after the allocation of the partners' salaries. This finding of fact is made for the following reasons.

64. The Commissioner heard oral evidence from [redacted] and [redacted] on the agreement between the partners regarding the division of profits and gains. Both stated that at each AGM for the years 2010 – 2014 all the partners were in attendance with their own personal accountant and agreed what the entitlement to monthly salary drawings and share of the profit would be. Their evidence was that the second partner accepted on each occasion that he was entitled to a sum in salary representing his [redacted] hours, but not to the division of remaining profit. The Commissioner found both [redacted] and [redacted] to be credible witnesses.

65. Moreover, their evidence was broadly supported by the correspondence of the Partnership's accountant, which described a process whereby accounts, reflective of the agreement suggested by [redacted] and [redacted], were be circulated to the partners for discussion and observation. This correspondence indicated that, while objection was raised in 2013 by the second partner in relation to the specific issue concerning his deputising for [redacted], it was not until 2015 that the agreement between the partners was varied again, such that he had an entitlement to share in the profit of the Partnership on equal terms with his colleagues.

66. The Commissioner must admit to some hesitation in making the above finding of fact in circumstances where the partnership accountant was not present to give evidence and no minutes recording what happened at the AGM's were furnished to the Commissioner. Nevertheless, the Commissioner is persuaded by, aside from the oral testimony given, the content of the correspondence of the second partner dated 27 May 2015, which although open to interpretation in some respects, overall tends to indicate that the second partner was demanding to be treated as a partner on an equal footing to his colleagues from that point on, but not before.

67. The Commissioner also notes that the accounts of the partnership for the years 2011, 2013 and 2014 also disclose in section 7 that the second partner was for the relevant years allocated no credit for PSWT, in contrast to his fellow partners. The oral evidence of [redacted] and [redacted] suggested that the second partner did not raise objection to this prior to 2015, with the exception of 2012 which gave rise to what they described as a discreet issue. The final paragraphs of the correspondence of the Partnership's accountant of 25 October 2018, while somewhat unclear on this question, tend to support this as well.

68. The second partner was absent and unheard in this appeal. It was not indicated to the Commissioner by the Respondent whether it had requested that he attend to give evidence. In any event, no application was made for the Commissioner to summon the second partner under section 949AE of the TCA 1997. Similarly, the Officer who met with the partners, including the second partner was not called as a witness. This was explained by the Respondent as being on account of his having retired. It was not stated however whether he was actually unavailable to give evidence. For the avoidance of doubt, the absence of both persons was understandable given the nature and circumstances of the case and the Commissioner does not make any criticism of the Respondent in this regard.

69. Nevertheless, whatever the reasons and explanations for these absences, the Commissioner finds that the preponderance of the oral and documentary evidence actually proffered suggested that the agreement for the relevant years was that four of the partners would have the right to draw a pre-determined salary and receive a share of remaining profits, while one would have only the right to draw salary. The other persons mentioned above might also have had evidence to give relevant to this question, but they did not give it. The Commissioner can only make a determination on the evidence furnished. This being so, the Commissioner is satisfied that the burden resting on the Appellant to prove on the balance of probabilities that there was a variation of the written agreement has been met. This variation was such that, for the years in question, the second partner was not entitled to share in the profit of the partnership after allocation of the partners' respective salaries.

70. The consequence of this finding is that, in accordance with section 529A of the TCA 1997, the assessments made by the Respondent finding the Appellant to have balances payable for the years 2013 and 2014 of €13,663.46 and €12,563.81 were in error. The Appellant has, in the view of the Commissioner, satisfied the burden on her to prove that the sum claimed by her in her Form 11 returns in credit for PSWT borne by the partnership was in the correct amount. The Appellant's balance payable should thus be adjusted to nil.

G. Determination

71. The Commissioner affirms the amended assessments made by the Respondent for the years 2010 and 2011, which found the Appellant to have balances payable of €2,637.33 and €2,748.29 respectively.

72. The Commissioner determines that the amended assessments made by the Respondent for the years 2013 and 2014, which found the Appellant to have balances payable of €13,663.46 and €12,563.81 respectively were in error. The Commissioner determines that the amended assessments for these years be varied such that the Appellant's liability is reduced to nil.

73. This appeal is determined under section 949AK of the TCA 1997. 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 within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
07 December 2022