AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

35TACD2023

Between/

[redacted]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter "the Commission") as an appeal by the Appellant pursuant to section 959P(8) of the Taxes Consolidation Act 1997 (hereinafter "**TCA 1997**") against a decision by the Respondent that a letter dated 23 March 2015 sent to the Respondent on behalf of the Appellant was not a genuine expression of doubt in respect of the Appellant's Corporation Tax return for the year ended 30th June 2014.

B. Background to Appeal

2. On 23 March 2015, the Appellant, acting by its tax agents, [redacted], submitted a letter to the Respondent's [redacted] Large Cases Division, in respect of its Corporation Tax return for the year end 30 June 2014. The letter was headed "*Expression of Doubt*" and stated that the Appellant:-

"...hereby expresses doubt in accordance with Section 959P Taxes Consolidation Act 1997 ("TCA 1997") with respect to its corporation tax return for the period ended 30 June 2014, as set out in detail below:-

Expression of Doubt

The expression of doubt specifically relates to the method by which the depreciation adjustment in the corporation tax computation is calculated historically and in the current and future periods for the purposes of Section 81 TCA 1997.

The somewhat unusual methodology has been followed by the company for a number of years and certainly as far back as our records are available (2000 and we believe it applied beyond this also). This detail is set out below:

- *Each tax year, a portion of the property, plant and equipment depreciation which relates to [redacted] is taken from the profit and loss account and is included as an element of trading stock in the balance sheet. When these stocks are brought into use after [redacted] (i.e. a period ranging from [redacted] to [redacted] plus years), this depreciation is released to the profit and loss account.*
- *In addition there are certain instances where a portion of the depreciation is reclassified within profit and loss account from operating expenses to cost of goods sold.*
- *As such, each tax year, a calculation is performed to identify the correct adjustment to be made in the corporation tax computation in respect of depreciation. This is to ensure that it is the element of depreciation which is actually included in to the profit and loss*

account in any given period which is adjusted out in calculating the taxable trading profits of the company for corporation tax purposes.

- *We attach at Appendix 1 a schedule which shows an extract of this calculation in respect of the periods ended 30 June 2005 to 30 June 2014 inclusive. The following to be noted from this schedule:*
  - *the "Gross" line refers to the depreciation per the fixed asset note in the financial statements for the period.*
  - *the "To stock/COGS" line refers to the amount of depreciation reclassified to the balance sheet and the amount reclassified within the profit and loss account.*
  - *the remaining lines ([redacted], [redacted] etc.) are the depreciation included in the cost of goods sold in the profit and loss account for the period.*
- *As part of the preparation of the corporation tax return in respect of the period ended 30 June 2014, a cumulative adjustment has been included in the depreciation add back to reconcile to the depreciation included in the profit and loss account for the periods ended 30th June 2007 to 30th June 2014 inclusive. The tax effect of the adjustment is €1,588,382. The tax effect of the total depreciation added back in the computation during the period ended 30th June 2014 is €372,145.*
- *In summary, this adjustment results in ensuring that the depreciation expensed to the profit and loss account reconciles to that included in the corporation tax computations.*

We would be grateful if you would please confirm your agreement with the treatment in the current year and on a go forward basis…"

3. There followed an exchange of correspondence between the parties, during which further information was provided by the Appellant. By letter dated 11 May 2016, the Respondent wrote to the Appellant's agent stating as follows:-

*"**Expression of doubt***

We have now completed our review of all of the information. Based on the information provided, we understand that the company has always added

back a "net" amount of depreciation in its corporation tax computations, being the amount actually charged to the profit and loss account for the period, rather than the "gross" depreciation charge as per the Property, Plant & Equipment note in the financial statements for the period.

It is our understanding that the adjustment made to the depreciation addback for the year ended 30 June 2014 was made in order to correct an error in the calculation of the "net" depreciation charge for each period from 2007-2014 inclusive.

From the information and explanations provided, it does not appear that there is any doubt as to the correct application of section 81 TCA 1997 in connection with the adjustment. We are not aware of any doubt as to whether depreciation is an allowable expense in computing taxable trading profits. It is a matter of fact as to what amount of depreciation is charged to the profit and loss account, in computing the profits in accordance with generally accepted accounting practice.

It is our understanding that there has been no change in how the company has applied section 81 TCA 1997 to the depreciation charge. Depreciation has always been added back; it is only the calculation of the quantum of addback that is being amended.

On the basis that we do not believe there is a doubt as to the correct application of the law regarding the non-deductibility of depreciation, we do not accept as genuine the expression of doubt in relation to the year ended 30 June 2014. We note that a similar doubt was expressed in the return for the year ended 30 June 2015. It follows that we do not accept this doubt as genuine…"

4. The Respondent's letter further referred to refund claims made by the Appellant arising from adjustments to the depreciation addbacks in the years 2007 to 2010 inclusive, and stated that these claims were out of time as they

were not made within four years after the end of the chargeable periods to which the claims related, as required by section 865 of TCA 1997. It further stated that errors made in the corporation tax returns for the periods 2011 to 2014 inclusive should be corrected by way of amendments made on ROS.

5. By Notice of Appeal submitted to the Commission on 14 June 2016, the Appellant appealed against the decision of the Respondent that the Expression of Doubt expressed by the Appellant on 23 March 2015 was not genuine.

C. Grounds of Appeal

6. The grounds of appeal on which the Appellant sought to challenge the decision of the Respondent that the Expression of Doubt was not genuine were stated to be as follows:-

(i) The accounting treatment adopted in respect of the Appellant's fixed asset depreciation (*i.e.* of charging some to stock in the balance sheet rather than directly to the profit and loss account), and the related impact that this has on the computation of the company's corporation tax liability, is relatively uncommon;

(ii) While the Appellant's agents were of the view that the appropriate treatment from a tax perspective had been adopted, their review of recent UK case law (namely ***HMRC –V- William Grant & Sons Distillers Ltd., and Small (HMIT) –v- Mars UK Ltd.*** **[2007] 78 TC 442**) on the topic gave rise to some doubt on their behalf as to the opinion of the Respondent in the circumstances. In those joined cases, the taxpayers adopted a similar method of accounting for depreciation as the Appellant. Following a number of appeals, the House of Lords ultimately decided that the approach being adopted by the taxpayers was appropriate.

(iii) Following the decision of the House of Lords in the said cases, HMRC issued guidance (BIM33190 – Stock: valuation: depreciation in stock)

confirming their opinion of the appropriate treatment from a tax perspective in circumstances where this accounting treatment was adopted.

(iv) Given that:

- The matter was sufficiently contentious to be litigated all the way to the House of Lords in the UK,
- UK case law was persuasive but not binding in Ireland, and,
- To the knowledge of the Appellant's agents, the Respondent had not publicly issued similar guidance to that issued by HMRC,

there was sufficient doubt to warrant an expression of doubt.

(v) The correspondence and discussions with the Respondent on the matter to date indicated that the matter was not straightforward.

D. Relevant Legislation

7. At the time of the bringing of this appeal, section 959P of TCA 1997 provided as follows:-

"959P Expression of doubt

(1) In this section—

"law" means one or more provisions of the Acts;

letter of expression of doubt", in relation to a matter, means a communication by written or electronic means, as appropriate, which—

(a) sets out full details of the facts and circumstances of the matter,

(b) specifies the doubt, the basis for the doubt and the law giving rise to the doubt,

(c) identifies the amount of tax in doubt in respect of the chargeable period to which the expression of doubt relates,

(d) lists or identifies the supporting documentation that is being submitted to the appropriate inspector in relation to the matter, and

(e) is clearly identified as a letter of expression of doubt for the purposes of this section,

and reference to "an expression of doubt" shall be construed accordingly.

(2) Where a chargeable person is in doubt as to the correct application of the law

to any matter to be contained in a return required for a chargeable period by this Chapter, which could—

(a) give rise to a liability to tax by that person, or

(b) affect that person's liability to tax or entitlement to an allowance, deduction, relief or tax credit,

then, the chargeable person may—

(i) prepare the return for the chargeable period to the best of that person's belief as to the correct application of the law to the matter, and deliver the return to the Collector-General,

(ii) include a letter of expression of doubt with the return, and

(iii) submit supporting documentation to the appropriate inspector in relation to the matter.

(3) This section applies only if—

(a) the return referred to in subsection (2) is delivered to the Collector-General, and

(b) the documentation referred to in paragraph (iii) of that subsection is delivered to the appropriate inspector,

on or before the specified return date for the chargeable period involved.

(3A)(a) The documentation referred to in subsection (3)(b) shall be delivered by electronic means where the return referred to in subsection (2) is delivered by electronic means.

(b) The electronic means by which the documentation referred to in subsection (3)(b) shall be delivered shall be such electronic means as may be specified by the Revenue Commissioners for that purpose.

(4) Where a return is delivered in accordance with subsection (2), a self assessment shall, where required under section 959R, be included in the return by reference to the particulars included in the return.

(5) Subject to subsection (6), where a letter of expression of doubt is included with a return delivered by a chargeable person to the Collector-General for a chargeable period—

(a) that person shall be treated as making a full and true disclosure with regard to the matter involved, and

(b) any additional tax arising from the amendment of an assessment for the chargeable period by a Revenue officer to give effect to the correct application of the law to that matter shall be due and payable in accordance with section 959AU(2).

(6) Subsection (5) does not apply where a Revenue officer does not accept as genuine an expression of doubt in respect of the application of the law to a matter, and an expression of doubt shall not be accepted as genuine in particular where—

…

(b) the officer is of the opinion, having regard to any guidelines published by the Revenue Commissioners on the application of the law in similar circumstances and to any relevant supporting documentation delivered to the appropriate inspector in relation to the matter in accordance with subsections (2) and (3), that the matter is sufficiently free from doubt as not to warrant an expression of doubt, or

(c) the officer is of the opinion that the chargeable person was acting with a view to the evasion or avoidance of tax.

(7) Where a Revenue officer does not accept an expression of doubt as genuine, he or she shall notify the chargeable person accordingly and any additional tax arising from the amendment of an assessment for the chargeable period by a Revenue officer to give effect to the correct application of the law to the

matter involved shall be due and payable in accordance with section 959AU(1).

(8) A person aggrieved by a Revenue officer's decision that the person's expression of doubt is not genuine may appeal the decision to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of notice of that decision."

8. Section 76A of TCA 1997 provided during the years the subject matter of this appeal as follows:-

"76A Computation of profits or gains of a company – accounting standards

(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.

(2) Schedule 17A shall apply to a company as respects any matter related to the computation of income of the company where as respects that matter –

(a) For an accounting period profits or gains of a trade or profession carried on by the company are computed in accordance with relevant accounting standards (within the meaning of that Schedule), and

(b) For preceding accounting periods profits or gains of a trade or profession carried on by the company are computed in accordance with standards other than relevant accounting standards (within the meaning of that Schedule).

9. Section 81 of TCA 1997 provided as follows during the relevant periods:-

"81 General rule as to deductions

(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;

(c) the rent of any dwelling house or domestic offices or any part of any dwelling house or domestic offices, except such part thereof as is used for the purposes of the trade or profession, and, where any such part is so used, the sum so deducted shall be such as may be determined by the inspector and shall not, unless in any particular case the inspector is of the opinion that having regard to all the circumstances some greater sum ought to be deducted, exceed two-thirds of the rent bona fide paid for that dwelling house or those domestic offices;

(d) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade or profession, over and above the sum actually expended for those purposes;

(e) any loss not connected with or arising out of the trade or profession;

(f) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade or profession;

(g) any capital employed in improvements of premises occupied for the purposes of the trade or profession;

(h) any interest which might have been made if any such sums as aforesaid had been laid out at interest;

(i) any debts, except bad debts proved to be such to the satisfaction of the inspector and doubtful debts to the extent that they are respectively estimated to be bad and, in the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debts shall be deemed to be the value of any such debts;

(j) any average loss over and above the actual amount of loss after adjustment;

(k) any sum recoverable under an insurance or contract of indemnity;

(l) any annuity or other annual payment (other than interest) payable out of the profits or gains;

(m) any royalty or other sum paid in respect of the user of a patent;

(n) without prejudice to the preceding paragraphs any consideration given for goods or services, or to an employee or director of a company, which consists, directly or indirectly, of shares in the company, or a connected company (within the meaning of section 10), or a right to receive such shares, except to the extent –

(i) of expenditure incurred by the company on the acquisition of such shares at a price which does not exceed the price which would have been payable, if the shares were acquired by way of a bargain made at arm's length,

(ii) where the shares are shares in a connected company, of any payment by the company to the connected company for the issue or transfer by that company of the shares, being a payment which does not exceed the amount which would have been payable in a transaction between independent persons acting at arm's length, or

(iii) of other –

(I) expenditure incurred, or

(II) payment made to the connected company.

by the company in connection with the right to receive such shares which is incurred or, as the case may be, made for bona fide commercial purposes and does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is the avoidance of liability to income tax, corporation tax or capital gains tax;

(o) any sum paid or payable under any agreement or understanding whereby a person is obliged to make a payment to a connected person resident in any territory outside the State for an adjustment made, or to be made, to the profits of the connected person for which relief may be afforded under the terms of an arrangement entered into by virtue of

section (1) or(1B) of section 826, or for a similar adjustment made to the profits of a connected person resident in a territory in respect of which there are not for the time being in force any arrangements providing for such relief.

(3) (a) In respect of a company –

(i) interest payable by the company, and

(ii) expenditure on research and development incurred by the company,

shall not be prevented from being regarded for tax purposes as deductible in computing profits or gains of the company for the purposes of Case I or II of Schedule D by virtue only of the fact that for accounting purposes they are brought into account in determining the value of an asset.

(b) Any amount shall not be regarded by virtue of paragraph (a) as deductible in computing profits or gains of a company for the purposes of Case I or II of Schedule D for an accounting period to the extent that –

(i) A deduction has been made in respect of that amount in computing such profits or gains for a previous accounting period, or

(ii) The company has benefited from a tax relief under any provision in respect of that amount for a previous accounting period."

E. Evidence given on behalf of the Appellant

Witness 1

10. I first heard evidence from **WITNESS 1**, who had been the Financial Director and Chief Financial Officer of the Appellant since 20[redacted]. **WITNESS 1** testified that he was the person responsible for the corporation tax returns and the underlying computations for the periods relevant to the appeal. He further testified that it was he who had a doubt in relation to the two strands at issue and who had decided to submit the expression of doubt to the Respondent.

11. The witness testified that his team had found an error in the computation and a discussion was held on the day on which the corporation tax return had to be filed. He met with his team and with the Appellant's tax agent on that day. Following their discussion, his understanding was there was a big question mark regarding the methodology of the component of the decision to add back, and a query about whether they should take the accumulated adjustment in 2014 or not. He was advised that it had been the subject of litigation in the United Kingdom and that there was no Revenue guidance in this jurisdiction.

12. The witness confirmed that there were two strands of doubt, the first being as to the correct methodology and the second being as to the cumulative adjustment. In relation to the second element, he testified that mistakes in the previous years had been inadvertent errors and, given that the adjustment arising therefrom amounted to approximately €1.5 million in tax, he did not view the errors as material in the context of a profit before tax which exceeded €[redacted]00 million.

13. The witness accepted that the Appellant had never raised an expression of doubt in relation to the methodology in previous years and said that it was only when the cumulative issue became apparent that he formed the view that an expression of doubt was appropriate. He further testified that part of the motivation in raising the expression of doubt was to ensure that the Appellant maintained its good standing with the Respondent and confirmed that the Appellant's substantial overpayments of tax in 2014 and subsequent years more than outweighed any tax arising from the expression of doubt.

14. In cross-examination, the witness accepted there had been no change during the relevant periods in the methodology used to allocate a certain amount of depreciation to the stock which wasn't being released for sale in the current year. Instead, the Appellant had noticed an error in the application of the methodology.

15. When asked what gave rise to a doubt, given that the Appellant had used the same methodology for a number of years, and given that the methodology was generally accepted within the industry, the witness stated that the fact that there was an error was something he wished to query and flag so that the error could be corrected. Secondly, the way of dealing with the error could result in the cumulative adjustment sought by the Appellant, and he felt that this should be flagged as part of the expression of doubt.

16. The witness accepted depreciation is generally not allowable as a taxable deduction and that the Appellant had, when calculating profit for the profit and loss account, added back whatever notional depreciation amount was included within the calculation of profit. An exercise had been carried out each year to allocate an amount of depreciation to stocks, and that amount was effectively kept out of the add back.

17. The witness testified that the errors which had been discovered were mathematical errors in the Excel file that computed the amount of depreciation going into stock, that this resulted in a need for an adjustment of some €12 or €13 million to the notional figure used to calculate the tax liability, and that the overall tax consequence of this for the years 2010 to 2014 was something in the region of €1.5 million.

18. The witness was unable to explain why the cash flow reconciliation in the Appellant's 2014 financial statements referred to a depreciation figure of some €19 million, when the calculation of the operating profit referred to depreciation of €13.5 million, and accepted that it was surprising that the two figures were different. He was also unable to explain why draft financial statements for 2014 furnished to the Respondent had also referred to a depreciation figure of €19 million. The witness further testified that the question he had at the relevant time was whether the Appellant should add back the total amount of the depreciation, or whether that amount should be reduced by the amount that was going to trading stock on the balance sheet. He accepted that this was a quantum calculation.

Witness 2

19. I next heard evidence from **WITNESS 2**, a tax partner with the Appellant's tax agent who had been advising the Appellant for more than [redacted] years.

20. The witness testified that his team had first made him aware that there had been an error in the calculation of depreciation for previous years on the day that the Appellant had to file its corporation tax return. His team had informed him that there had been calculation errors in previous years which had resulted in the overpayment of tax by the Appellant. He had telephoned **WITNESS 1** to discuss the issue.

21. In relation to the methodology issue, he said that to his mind there were at least three, and possibly more, ways in which the issue could be treated for tax purposes, and that this was evident from the ***William Grant and Mars*** cases. The first question was how much depreciation was actually in the profit and loss account. In the instant case, this was €19 million, which went into operating expenses and was then reallocated to stock. However, an alternative analysis was that it was not reallocated to stock but remained in the profit and loss account, effectively writing up the value of the stock; this appeared to be the view taken by Lightman J in the ***Mars*** case. In other words, the depreciation amount remained the gross number in the profit and loss account and you had separately an income item which arose due to writing up the value of the stock. Another possible analysis, in his view, was that if the total depreciation figure was €19 million and €15 million of that was allocated to stock, the only amount of depreciation in the profit and loss account was €4 million, and that figure lost its character as depreciation once the stock was sold. Yet another possible analysis was the approach adopted by the Appellant, which was that one added back the balance sheet depreciation amount, minus the number which was allocated to stock, and then when the goods were sold, the depreciation add back was increased by the amount released at that stage – the depreciation retained its character as depreciation

when it went into the stock, and it was only when that stock was sold that the depreciation hit the profit and loss account.

22. In relation to the second strand of doubt, namely the cumulative issue, the witness said that his view was that the key aspect of any audit was ensuring the balance sheet was audited correctly, and that the profit and loss account was simply the difference between the opening and closing balance sheet. If the opening balance sheet was wrong, a correctly audited closing balance sheet would detect and automatically adjust for the errors. In relation to the question of the need to adjust the balance sheets for previous years, he stated that this was unnecessary to correct immaterial inadvertent errors, and this approach was consistent with International Accounting Standard 8. He agreed that the errors in the instant appeal were both inadvertent and immaterial.

23. The witness reiterated that while there were two strands, they amounted to a single doubt, because both related to the question of the amount to be added back on 30 June 2014. In relation to section 81, the witness confirmed that the provision governed what sums had to be added back, but was silent on the question of when they should be added back. The witness stated that the adjustment arose by virtue of section 81(2)(f), but the precise number had to be calculated in accordance with generally accepted accounting principles because of section 76A, and that provided the basis for saying that it was appropriate to apply the IAS 8 methodology to the correction of errors.

24. The witness further testified that, when advising **WITNESS 1** on 23 March 2015, he had outlined three options for the Appellant, namely a correction of the previous years' returns, or a cumulative adjustment without an expression of doubt, or a cumulative adjustment with an expression of doubt. The third option was the most consistent with the Appellant's consistently conservative approach to tax matters and, given that it was not absolutely certain that a cumulative adjustment would be accepted by the Respondent, it was the option he recommended and the Appellant agreed with and accepted that

recommendation. A further potential advantage to the cumulative adjustment approach was that it might have avoided the issue of time limits; otherwise, the Appellant would have been reliant on the Respondent exercising its care and management powers to not insist on the strict application of time limits to repayment claims, given the Appellant's history of tax compliance and that the adjustments were necessary because of an innocent error.

25. In relation to the first, methodology strand of doubt, the witness testified that while the methodology used by the Appellant was reasonably conservative, he thought it was appropriate to seek clarification of the treatment given that the issue of the cumulative treatment had already arisen.

26. The witness further testified that he had regularly advised clients to use the expression of doubt mechanism, and that he had generally found it a satisfactory method of obtaining certainty for clients. He further stated that the Respondent encouraged the submission of expressions of doubt in appropriate cases, and reiterated that there was no Revenue guidance in this jurisdiction in relation to either strand of doubt. The Appellant's only motive had been to obtain confirmation that its approach was correct. He said that he was surprised when the Respondent indicated in correspondence that it had always accepted that the Appellant's methodology was correct, and he said that that had never previously been communicated to him or to the Appellant.

27. In cross-examination, the witness accepted that the Appellant had used the same policy in relation to the depreciation of their stocks for more than 20 years, and continued to use it. The witness stated that he had no concerns in relation to the correctness of the accounting policy, but testified that he did have a concern because there were at least three possible tax treatments of that accounting policy. He stated that the accounting treatment was not straight forward but it was not controversial.

28. The witness stated that there was doubt about the tax consequences that flowed from that accounting treatment even before the ***William Grant and***

Mars litigation in the UK, and reiterated that there were at least three possible approaches to the tax treatment. The approach taken by the Appellant had been reasonable and 'middle of the road', but it was not beyond doubt. He said that this doubt was added to by the cumulative issue which arose in 2014, which hadn't arisen in previous years.

29. He stated that the doubt was illustrated by the question of what occurred when €14 million was taken from the total depreciation figure of €19 million, effectively increasing the value of the [redacted]. He pointed out that the Special Commissioners had characterised this as a notional contra entry, and Lightman J had found that it resulted in the creation of an income item. The witness's view was that what occurred was a cancelling out of depreciation, but he said that the matter was not without doubt. While the ***William Grant and Mars*** decision in the House of Lords had confirmed the approach which the Appellant had adopted, that decision was not binding in this jurisdiction. The fact that different decision makers in that case had reached a number of different conclusions illustrated, in his view, that there were doubts about the correct tax treatment. He further expressed the view that it was not clear from the House of Lords decision that depreciation always had to be added back when the stock was sold, which was the policy adopted by the Appellant.

30. In relation to the question of why the Appellant had not sought clarification from the Respondent in the years prior to 2014, the witness stated that the approach taken by the Appellant resulted in it paying tax on its economic profit, and was a logical, fair and middle of the road approach to take. He stated that he considered the issue afresh every year and the factor which probably tipped the balance in favour of raising an expression of doubt was the discovery of the historical errors.

31. The witness further accepted that, subject to the need to comply with accounting standards and companies legislation, it was a matter for a taxpayer to decide what accounting policies were appropriate. He accepted that in one sense all accounting matters fall outside the scope of the Tax Acts, but said that accounting policies were relevant to the calculation of a Case 1 profit. On

re-examination, the witness stated that a taxpayer decides his accounting policy, and it was then the law that determined how that accounting policy interacts with the adjustment for a current year basis.

32. The witness accepted that the question of time limits was a motivating factor in the decision to adopt a cumulative approach with an expression of doubt; however, this did not detract from his belief that there was a valid basis for the proposed treatment.

33. The witness did not accept that the Appellant's Statement of Case confined the area of doubt to the second strand; he stated that it was clear therefrom that all of the grounds contained in the Notice of Appeal, including the methodology strand, were being relied upon. He accepted that the Statement of Case referred to the quantum of the depreciation, but said that there was also a doubt as to the methodology of the adjustment. He reiterated that the methodology was necessary to calculate the amount of the adjustment, and while the Appellant believed its methodology was correct, it had a doubt as to whether that would be accepted by the Respondent. The witness accepted that the effect of its preferred methodology was that the cumulative errors in the calculation would all be taken in the current year, effectively bypassing a refund claim which would be subject to the four-year limitation period.

34. In relation to the wording of the letter of expression of doubt, the witness accepted that it did not make express reference to the errors giving rise to the need for prior year adjustments, but submitted that it was implicit from the need for a cumulative adjustment to cover seven years that there had been errors in those previous years.

F. Evidence given on behalf of the Respondent

Witness 3

35. I heard evidence on behalf of the Respondent from **WITNESS 3**, a chartered accountant working as an Assistant Principal in the Respondent's Large Cases division.

36. The witness testified that her understanding of section 81 was that it provided, *inter alia*, that depreciation was not an allowable expense, and it had to be added back when performing a tax computation. She agreed that any figure included in the calculation of a profit would have to be adjusted for any amount of depreciation contained within that figure. In the context of the adjustment required by section 81, the amount of depreciation did not matter; any figure included for depreciation would have to be adjusted for in calculating the taxable profits in accordance with section 81. She was not aware of any provision of the Taxes Acts that specified how depreciation ought to be calculated. In calculating the depreciation, one had to look at the amount of depreciation that was in fact charged to the profit and loss account for the period, and it was that figure that should be adjusted for in the tax computation. As some depreciation was effectively capitalised by the Appellant and did not hit the profit and loss account in a particular year, it was only the net amount that hit the profit and loss account that had to be added back in the tax computation.

37. While the methodology used by the Appellant to calculate the amount of depreciation that would hit the profit and loss account was somewhat unusual, the witness did not accept that there as anything unusual in the Appellant adding back the depreciation amount that hit its profit and loss account; it was the approach she would expect of any taxpayer in calculating its taxable profit in accordance with section 81. It was what was required by section 81, and she did not believe that there was any ambiguity in relation to the application of that section to depreciation. Ultimately, it didn't matter to the Respondent how a taxpayer calculated the net depreciation hitting the profit and loss account, because any amount of depreciation charged to the profit and loss account had to be added back.

38. The witness agreed that the letter of expression of doubt did not make any reference to errors having been identified by the Appellant. She testified that she did not believe that the letter of expression of doubt specified the basis for the Appellant's doubt and, as the letter only referred to section 81, which was unambiguous in relation to depreciation, she did not believe that the Appellant had specified the law giving rise to the doubt. There was no reference to section 76A in the letter of expression of doubt. The witness further testified that she was unclear as to the nature of the cumulative adjustment which the letter stated was necessary, and did not understand how the cumulative adjustment arose. It was only in the course of the subsequent correspondence with the Appellant's agent that it became apparent that there had been some mistake or error in the calculation of the add back in previous years.

39. The witness confirmed that the email from the Appellant dated 14 December 2015 clarified the double entries that were required historically in terms of accounting for depreciation in [redacted] stock. These entries told her what the net figure was that hit the profit and loss account, and taking the figures and entries together, they gave her a calculation of what the net charge to the profit and loss account was, and that was the figure that should be adjusted for in the tax computation. She testified that the same methodology had been consistently used by the Appellant, and stated that she did not believe that the Appellant would have sent the letter of expression of doubt if it hadn't become aware of the historical errors arising from the error in the Excel spreadsheet.

40. In relation to the Respondent's decision that the Appellant's expression of doubt was not genuine, the witness testified that it was a matter of fact, and not a matter of law, as to what depreciation amount was actually charged to the profit and loss account in the relevant years – it was a matter of quantum and a factual issue. There was, in her view, no doubt as to the application of the law to the question of depreciation – there was no doubt as to the application of section 81. The preparation by the Appellant of its accounts in accordance with generally accepted accounting principles, including a

decision as to what amount was included as an expense for depreciation in the profit and loss account, was a matter of fact and was separate from the Taxes Acts. The subsequent preparation and filing of a corporation tax return was entirely separate from the preparation of the accounts, and that had to be carried out in accordance with the Taxes Acts. There had been no change in how the Appellant had applied section 81 to depreciation; depreciation had always been added back, and it was only the quantum of the add backs that was sought to be amended or rectified.

41. The witness stated in summary that the expression of doubt provisions applied where the chargeable person was in doubt as to the correct application of the law, meaning one or more provisions of the Taxes Acts, to a matter. The only provision of the Taxes Acts cited by the Appellant was section 81, and the witness did not believe that there could be any doubt as to the application of section 81 to depreciation. It was on that basis that she had decided that the expression of doubt was not genuine.

42. The witness confirmed that the first reference to section 76A was in the Appellant's Statement of Case. The witness, having noted that the accounts in question had been audited, stated that she assumed that the accounts were prepared in accordance with generally accepted accounting principles. She therefore did not accept that any issue arose as regards section 76A, and did not accept that there was any doubt as to its application. The Appellant had applied the same accounting principles for a number of years – the fact that there had been an error in terms of a calculation was outside of the accounting principle, and could not give rise to a doubt as to the correct application of the Taxes Acts.

43. In relation to the two possible approaches to calculating an adjustment outlined in the Appellant's Statement of Case, the witness stated that approach (a) dealt solely with accounting treatment, whereas approach (b) compared accounting treatment with how the item had been treated for tax purposes. If that approach was taken, it would permit the Appellant to correct for tax

purposes the cumulative errors that had arisen in periods prior to 2014. The witness stated that if this approach was taken, it would be a justification for correcting any error in an add back that had arisen over prior periods.

44. The witness further confirmed that the accounting treatments considered in the UK in the ***William Grant and Mars*** cases were remarkably similar to those adopted by the Appellant over a number of years, and said that she believed that the Appellant should therefore have derived comfort from the decision of the House of Lords in those cases.

45. The witness reiterated that the letter of expression of doubt only referred to section 81, and that she believed there could be no doubt as to the application of section 81 to the question of depreciation. She further expressed her belief that the letter did not set out full details of the facts and circumstances of the matter as required by section 959P. She stated that even if the letter of expression of doubt had made reference to the historical errors, that would not have given rise to a doubt as to the application of the law. She further expressed the belief that, while the letter did specify the area of doubt, the letter did not specify the basis for that doubt.

G. Submissions of the Appellant

46. A Statement of Case was submitted to the Commission by the Appellant's agents on 26 August 2016 which stated that the statutory provisions being relied upon were section 76A, section 81 and section 959P of TCA 1997. The Appellant submitted that its expression of doubt related to the methodology adopted by the Appellant when accounting for the fixed asset depreciation and the related impact on the Appellant's corporation tax computation.

47. The Appellant submitted that its doubt was in relation to the appropriate depreciation amount to be adjusted for in the corporation tax computation of the Appellant given the Appellant's method of accounting for depreciation.

The Appellant believed the two alternatives for calculating the adjustment in this regard were as follows:-

(a) The cumulative amount of depreciation which had been included within expenses/cost of sales in the profit and loss account for all periods at 30 June 2014 less the cumulative amount of depreciation which had been included within expenses/costs of sales in the profit and loss account for all periods at 30 June 2013; or,

(b) The cumulative amount of depreciation which had been included within expenses/cost of sales in the profit and loss account for all periods at 30 June 2014 less the cumulative amount of depreciation which had been adjusted for in the corporation tax computation of the company for all periods at 30 June 2013.

48. The Appellant and their advisors [redacted] understood that the Respondent's position was that the methodology in subparagraph (a) supra was the appropriate methodology, and not that outlined in subparagraph (b). The Appellant emphasised that its appeal did not directly relate to the appropriate methodology, but was instead an appeal against the Respondent's decision that the expression of doubt was not a genuine expression of doubt.

49. At the hearing of the appeal, Counsel for the Appellant stated that the appeal was against the decision of the Respondent that the Appellant's expression of doubt in relation to 2014 was not genuine. Counsel submitted that there were two strands in relation to the doubt, namely how one calculated the adjustments to profits before tax for depreciation, and, in consequence, how one calculated the adjustment in a cumulative case where errors had been identified in prior years.

50. Counsel submitted that the question before me was a net question, namely whether the Appellant's expression of doubt was genuine. The question of whether something was genuine was a low bar, and I did not have to be satisfied on the balance of probabilities that the treatment adopted was

correct; I merely had to be satisfied that there was a doubt, and that that doubt was genuine. This necessarily involved a subjective element.

51. Counsel referred me in this regard to dictionary definitions of "*genuine*" and "*doubt"*. He submitted that there could be no question of affectation or hypocrisy on the part of the Appellant; its concerns were not shammed or feigned. Doubt required there to be a feeling of uncertainty or an apprehension or an undecided frame of mind. Counsel submitted that it was clear that doubt was something which visits itself in a person's mind, and this necessarily imported a strongly subjective element. Counsel reiterated that I did not have to decide whether the Appellant's treatment of depreciation was correct; the only issue before me was whether the Appellant had a genuine doubt as to the correctness of that treatment. The views of the Respondent as to whether or not issue was free from doubt were, he submitted, entirely irrelevant; it was the belief of the taxpayer that had to be determined. He further referred me to the decision in ***Menolly Homes –v- Appeal Commissioners*** **[2010] IEHC 49**, and particularly the interpretation therein of "*reason to believe*", as authority for the proposition that I should apply a low threshold when deciding whether the Appellant had a genuine doubt; even an unreasonable doubt could potentially be genuine. The very complexity of the accounting issues in the appeal was itself supportive of the fact that a genuine doubt did exist in the mind of the Appellant.

52. Counsel further submitted that the burden of proof rested upon the Respondent in appeals pursuant to section 959P(8), and referred me to the judgment of McKechnie J in ***Revenue Commissioners –v- O'Flynn Construction*** **[2013] 3 I.R. 533** where he stated in paragraph 147 that:-

> ***"****In my view, the situation arising under s 86 is, at least to a certain but definite extent, different from the situation where an appeal against an assessment is raised. In the first instance the avoidance provision can only be activated by the Revenue, who, for the provision to have effect, must arrive at a view that the scheme or arrangement is captured by it. They must assess a violation and do so by issuing a notice of opinion to that effect. Such a notice*

can only issue if, by reference to certain specified matters, they have reached a definite conclusion. This exercise is conducted by way of objective assessment. In addition, they assert not simply a breach of the section, but also what, in their opinion and judgment, are the tax consequences which arise if such an arrangement had not taken place. All of these steps involve positive assertions on the part of the Revenue. In such circumstances, noting the wording and structure of the section, and in the absence of any provision to the contrary, it seems to me that if the notice is challenged the normal evidential rule of "he who asserts must prove" applies."

53. Counsel submitted that in the instant appeal, I was not deciding an appeal against an assessment; it was instead a case where the Respondent had made a positive assertion that the Appellant's doubt was not genuine, and so the Respondent should assume the burden of proof in that regard.

54. Turning to the substantive aspects of the appeal, Counsel submitted that it was common case that the Appellant was a large company engaged in the sale of imported [redacted] and the sale of Irish [redacted]. [redacted] was often a long-[redacted] product, and accordingly one could have depreciation which was in effect allocated to stock in the balance sheet while the product was [redacted] Part of the Appellant's annual depreciation charge and fixed assets was not ultimately expensed in the annual profit and loss account in the year in which that depreciation was reduced or written off from the fixed asset in the balance sheet but was instead allocated to closing stock. Depreciation in the normal way was subsequently released to the profit and loss account when that stock was sold.

55. There was also a reclassification within the profit and loss account whereby some of the current year depreciation on items such as [redacted] (where the [redacted] took place before [redacted]) was taken out of operating expenses and put into the cost of goods sold. This, however, had no net effect in terms of the disallowance or the add back figure or the adjustment figure in the tax computation.

56. It was also common case that there were adjustments made from the balance sheets to the profit and loss accounts, and Counsel referred me to the email to the Respondent dated 14 December 2015 detailing the relevant journal entries. These showed, in essence, that during 2014, €19 million in respect of total depreciation of fixed assets had been moved out of the balance sheet and into the profit and loss account. Then, €14 million was credited out of the profit and loss account back into the balance sheet in respect of [redacted] stock. Some €9 million was then taken out of the balance sheet and charged into the profit and loss as cost of goods sold in respect of [redacted] which had [redacted] and was now ready for sale. The end result was that the net depreciation which hit the Appellant's profit and loss account for the year was €14 million.

57. Counsel submitted that this gave rise to the question of what was the correct add back for the purposes of section 81. He indicated that the issue had been considered by the Special Commissioners and the courts in England and Wales and Scotland in the ***William Grant & Sons Distillers*** and ***Mars*** cases. There, the Special Commissioners had initially decided that it was the profit and loss figures that should be adjusted in computing the tax payable. On appeal, a different conclusion was reached by Lightman J in the High Court in England and by the Inner House of the Court of Session in Scotland, which held instead that the balance sheet method was preferable. On further appeal, Lord Hoffman, giving the leading judgment in the House of Lords, agreed with the decisions of the Special Commissioners that the profit and loss adjustment method was correct. Counsel submitted that the various decisions made it clear that this was a complicated and difficult area of law. He further noted that HMRC had issued a guidance note following the House of Lord's decision in ***William Grant & Sons***, but no equivalent guidance had been issued in this jurisdiction. In so far as the Respondent had sought to characterise any doubt on the part of the Appellant as being a question of doubt rather than a matter of law, Counsel submitted that it was clear from the proceedings in the UK that there was considerable doubt as to the legal application of the provisions of

the Taxes Acts, and submitted that it was only when that doubt had been resolved that one could apply the legislation to the undisputed debit and credit entries.

58. In so far as the Respondent had sought to disaggregate the two strands of doubt, Counsel submitted that it was one overall issue with two strands of doubt and it was clear, for example, from the figures discussed in the email of 14 December 2015 discussed *supra* that dealing with a current year adjustment necessarily involved a mix of the current year depreciation from the balance sheet and prior year depreciation amounts brought forward. Counsel submitted that the two issues were intimately bound up as it was a single disallowance that was being considered, and the key question was how one adjusted within one overall adjustment for depreciation for previous years' miscalculations and for the current year's depreciation as well. The ***William Grant and Mars*** methodology meant that of its nature, any current year treatment had a prior year element, and that informed one's view of whether a cumulative adjustment in respect of a prior year or years arose. Accordingly, he reiterated that there was a single expression of doubt with two separate strands.

59. In relation to the second strand of doubt, the Appellant accepted that there were historical errors, and that those errors were sought to be corrected as part of the expression of doubt, and part of the motivation for this was a potential concern about time limits. However, the Appellant's motive was, he submitted, irrelevant; the issue was instead whether the doubt was genuine.

60. Counsel pointed out that there was no Revenue guidance in relation to IAS 8 and no guidance as to how immaterial errors should be treated. He submitted that there was certainly a case for adjusting for immaterial inadvertent errors in the same way as one would do in accounting. He submitted that this was entirely in accordance with section 76A(1) and there was no basis for saying that there was no doubt that tax adjustments cannot be dealt with in the same way as one dealt with accounts.

61. Counsel submitted that the fact that the Appellant had not expressed a doubt in the years prior to 2014 was simply irrelevant.

62. Counsel further pointed out that the Appellant had a history of overpaying tax to the Respondent, reflective of its conservative approach to tax issues, and that this was factor to which I could have regard in deciding on the genuineness or bona fides of the Appellant's expression of doubt.

63. Counsel further referred me to the correspondence exchanged between the parties subsequent to the Appellant's expression of doubt, and submitted that it showed that the Appellant had provided full answers to all of the queries raised by the Respondent. He stated that the Appellant took strong exception to the Respondent's characterisation of the Appellant's Statement of Case as "*misleading*".

64. Counsel submitted that it appeared from the Respondent's Statement of Case that the Respondent was mixing up the accounting policy with the tax methodology. I was concerned in this appeal with the tax methodology. In the ***William Grant and Mars*** cases, the House of Lords was dealing with the meaning of the words contained in the UK equivalent of section 81 as applied to the facts of those cases. The meaning of the words was a question of law, and it was simply incorrect to say that the question of what is added back is a question of fact. It was clear from the decision in ***William Grant and Mars*** that there had been extensive argument as to what the actual charge in the profit and loss account should be, and it was simply incorrect for the Respondent to assert that a taxpayer simply had to select a net depreciation figure. It was equally clear from **WITNESS 2**'s evidence that there were a number of potential approaches to the figure included in the profit and loss account, and he had explained this to **WITNESS 1**. While the discovery of the historical errors might have tipped the balance in favour of expressing a doubt, there were genuine doubts on the part of the Appellant in relation to both strands and the Appellant wished to have both aspects clarified. Counsel

submitted that the letter of expression of doubt fully complied with the legislative requirements necessary to seek such clarification.

65. Counsel further submitted that there was no dispute about whether an expression of doubt had been submitted; the only question was whether the expression of doubt was genuine. He submitted that it had not been put to either of the Appellant's witnesses that the doubt was not genuine.

66. In relation to the ***William Grant and Mars*** decision, Counsel submitted that it was common case that the facts were very similar to those of the instant appeal. He pointed out that HMRC in that case had argued that the total depreciation was what hit the profit and loss account, and a subsequent adjustment out in respect of [redacted] stock did not stay as depreciation and did not affect the tax charge. This, he pointed out, was wholly contradictory to the position adopted by the Respondent in this appeal.

67. Counsel further pointed out that the Special Commissioners had held that the part of the cost of unsold trading stock which is represented by capitalised depreciation ought not to be recognised as effectively a taxable receipt in the computation of trading profits for the purposes of Case I. This was because, as a matter of law, it was in the nature of capital and its capital nature was not altered by its absorption into the cost of trading stock for accountancy purposes any more than the capital nature of depreciation is altered by its treatment as a periodic charge in the profit and loss account. The Special Commissioners concluded that the UK equivalent of section 81(2) required the computation of profits for tax purposes to be made without any deduction in respect of capital. This excluded any deduction for depreciation. This required that any depreciation charged to the profit and loss account be added back for tax purposes. They also considered that for tax purposes any element of depreciation must be removed from the carrying amount in the balance sheet of unsold stock. Counsel submitted that it was apparent from their decision that it was not necessarily the net depreciation figure charged to the profit and loss account that had to be charged back; instead, they found that

the gross amount of depreciation had to be taken to have been actually charged in the profit and loss account, and then this amount had to be adjusted by the amount of a contra item in order to avoid that capital amount becoming chargeable to corporation tax on income in the period.

68. On appeal, Lightman J reversed the decision of the Special Commissioners. He held that the application of the UK equivalent of section 81 did not turn on accountancy practice; instead, it turned on the construction of the section and its application to the established facts as revealed in the accounts. The judge went on to state that by adding the capital depreciation to closing stock, the taxpayer had, by its own choice, turned it into income. It had become an income receipt just by being part of the closing stock value. Counsel pointed out that the majority decision of the Court of Session in Scotland had reached a similar conclusion to Lightman J and Lord Osbourne held that the amount of gross depreciation transferred to stock effectively lost its character as depreciation, because stock was not simply a collection of costs. Counsel pointed out that Lord Reed, in the minority, had reached a different conclusion, which was consistent with the stance taken by the Respondent in the instant appeal.

69. In the House of Lords, Lord Hoffman restored the decision of the Special Commissioners and held that, in respect of the year under consideration, it was the net depreciation which was to be added back. However, Counsel for the Appellant submitted that the decision left an unanswered question in relation to the correct future tax treatment of stock which came out of the balance sheet and was written back into the profit and loss. He further submitted that even if the decision of the House of Lords was clear, which he did not accept, the long history of reversals and differing opinions from experienced decision makers was evidence in itself that the issue could not be said to be free from doubt.

70. In relation to the second strand of doubt, Counsel reiterated that the evidence was clear that there was no case law and no Revenue guidance in relation to

IAS 8. He submitted that the Respondent agreed that one makes cumulative adjustments through accounting adjustments to the current year profit. He submitted that there was obviously a doubt in relation to correct treatment of that cumulative issue from a tax perspective in terms of tax methodology.

71. Counsel further submitted that once the Respondent stated in its letter of 11 May 2016 that it did not accept as genuine the Appellant's expression of doubt, it thereupon was estopped from contending that the Appellant's letter did not constitute an expression of doubt by reason of any non-compliance with subsections 959P(1) to (3). Even if I did not accept this argument, he submitted that the Appellant had fully complied with the requirements of the section.

H. Submissions of the Respondent

72. A Statement of Case was delivered by the Respondent on 8 November 2016. This pointed out that the Appellant's letter of expression of doubt stated that the "*expression of doubt specifically relates to the method by which the depreciation adjustment in the corporation tax computation is calculated historically and in the current and future periods for the purposes of Section 81 TCA 1997".* The Respondent submitted that, apart from that sentence, there was no other reference or indication in the letter as to what the doubt actually was.

73. The Respondent further submitted in this regard that:-

(i) the letter referred to section 81, but it did not specify how the application of that section was in doubt;

(ii) the letter did not refer to any other "law" as defined in section 959P(1), being a provision of the Taxes Acts;

(iii) the letter did not set out full details of all the facts and circumstances of the matter, as required by section 959P(1)(a);

(iv) no calculations were provided with the letter in relation to the make-up of the €12.3m "cumulative adjustment" made in the return for the year ended 30th June 2014; and,

(v) the letter did not specify the doubt and the basis for the doubt, as required by section 959P(1)(b).

74. The Statement of Case further asserted that the statutory facility for making an expression of doubt only arises where a chargeable person is in doubt as to the correct application of the law to any matter to be contained in a return. The Respondent was not aware of any doubt as to the correct application of section 81 in connection with the question of adding back depreciation. The Respondent submitted that it is a matter of fact, not law, as to what amount of depreciation is charged to the profit and loss account, in computing the profits in accordance with generally accepted accounting practice.

75. The Statement of Case further submitted that it was apparent from an examination of the supporting documentation furnished by the Appellant that the methodology adopted by the Appellant in calculating the add-back for depreciation did not change in 2014. The Appellant had always added back a "net" amount of depreciation in its corporation tax computations, being the amount actually charged to the profit and loss account for the period, rather than the "gross" depreciation charge disclosed in the property, plant and equipment note in the financial statements for the period. This was confirmed by the letter of expression of doubt, which had stated that *"the somewhat unusual methodology has been followed by the company for a number of years and certainly as far back as our records are available (2000 and we believe it applied beyond this also)".*

76. The Statement of Case further observed that the Appellant had never previously expressed doubt in respect of its approach, and the Respondent did not challenge the approach at any time over the period in question. The methodology used in 2014 did not change from that used before. The Respondent further pointed out that the ***William Grant and Mars*** case, which

had not been referred to in the letter of expression of doubt, had been decided as far back as 2007.

77. The Statement of Case further stated that the Respondent's understanding was that the €12.3m adjustment made to the depreciation add back for the year ended 30 June 2014 was made in order to correct errors in the calculation of the "net" depreciation charge to the profit and loss account for each period from 2007-2014 inclusive. In making a cumulative adjustment in the year ended 30 June 2014, the Appellant was attempting to obtain the benefit of correcting errors made in tax computations for periods which were outside the relevant time limit for repayment claims. The elements of the €12.3m adjustment which related to amendments to the depreciation add backs in the years 2007-2010 inclusive were out of time, as they were not made within four years after the end of the chargeable period to which the claim relates, as required by section 865.

78. The Respondent's Statement of Case further submitted that the letter of expression of doubt did not set out the provision of the Taxes Acts in respect of which there was doubt as to the correct application. In that regard, the Respondent submitted that it was common case that depreciation included in accounts has to be added back as an adjustment in the calculation of taxable profits, and there was no controversy or doubt arising therefrom. The Appellant had calculated its depreciation add-back erroneously in previous years and now sought in its 2014 return to correct the historical errors. This was not, the Respondent submitted, a matter of construction of a provision of the Taxes Acts and was therefore not a valid expression of doubt in the context of Section 959P TCA 1997.

79. The Respondent submitted that the position was no different than if a taxpayer realised when preparing its 2014 corporation tax return that in each of the previous 7 years it had over-calculated the client entertainment add back (not being a deductible expense) when calculating its taxable profits, due to some internal calculation error or classification error. It would not then be

open for the taxpayer to allege an expression of doubt and lump the historical correction in the latest year, as it had nothing whatsoever to do with construction of a provision of the Taxes Acts. In such a scenario, as was the case with the Appellant, it would be open to the tax payer to amend its earlier returns, subject to the four year time limit.

80. In summarising the Respondent's position on the letter of expression of doubt, the Statement of Case stated that the Respondent did not accept as genuine the expression of doubt in relation to the year ended 30 June 2014 because:-

(i) there had been no change in how the Appellant had applied section 81 to the depreciation charge; depreciation had always been added back. It was only the calculation of the quantum of the add back for the years 2007 to 2014 that was amended, on a cumulative basis, in the return for the year ended 30 June 2014;

(ii) there was no doubt as to the correct application of the law regarding the non-deductibility of depreciation; and,

(iii) there was no doubt that calculation errors made in corporation tax computations should be corrected in the return for the year in which the error was made, within the relevant time limits, rather than on a cumulative basis.

81. Turning to the Appellant's Notice of Appeal and Statement of Case, the Respondent's Statement of Case submitted that section 959P(1) defines "*law*" as being "*one or more provisions of the Acts*". Subsection (2) provides that where a chargeable person *"is in doubt as to the correct application of the law"* to any matter contained in a return, they may make an expression of doubt.

82. The Respondent submitted that it was significant that the Appellant's Statement of Case did not make reference to any section of TCA 1997 with which it was alleged there was a doubt as to the correct application. Rather, the Statement of Case stated that the Appellant's doubt *"was in relation to the appropriate depreciation amount to be adjusted for in the corporation tax*

computation of the Appellant given the company's method of accounting for depreciation."

83. The Respondent submitted that it was clear that the doubt which the Appellant allegedly had was a doubt as to an amount or figure, and not a doubt as to the application of a provision of the Taxes Acts. The Respondent did not believe that there was any doubt on the part of the Appellant regarding the tax treatment of depreciation as an add back and no such case had been made.

84. The Statement of Case reiterated that the depreciation policies which were followed throughout the relevant years, including 2014, remained constant in accordance with recognised accounting standards. The real issue was that, for whatever reason, the Appellant decided to recalculate the depreciation add back (using the same methodology as before) and had identified historical calculation errors, and now sought to classify same as doubt regarding the interpretation of section 81.

85. The Respondent submitted that the points advanced in the Appellant's Notice of Appeal appeared to ground the doubt in the broad question of whether the "net" approach to calculating the depreciation add back for each year was correct. No reference was made to the rationale for including €12.3m cumulative adjustment in the corporation tax computation for the year ended 30 June 2014.

86. The Respondent further submitted that the Appellant's Statement of Case appeared to focus on the €12.3m cumulative adjustments and to advance a rationale for its inclusion in the 2014 return. The "two alternatives" referred to in the Statement of Case had not previously been advanced on behalf of the Appellant. The adjustment at (b) offered therein as an alternative was without basis, as same was formulated in the manner of correcting earlier years' errors and had been phrased in a misleading manner. The Respondent pointed out that in accordance with section 949I(6), the Appellant was confined to the grounds of appeal specified in the Notice of Appeal.

87. The Statement of Case further took issue with the Appellant's assertion that the ***William Grant and Mars*** case was relevant, in circumstances where the depreciation practice the subject matter of that case was upheld. That depreciation policy, that only depreciation charged to the profit and loss account be added-back as a tax adjustment when calculating taxable profits, had always been accepted by the Respondent. Consequently, no issue of interpretation arose in respect of the provisions of the TCA 1997 in respect of this UK decision, which dated back to 2007. Furthermore, the Appellant did not change its depreciation policies or practices; instead, having realised that they had historically calculated their figures incorrectly, the Appellant sought to remedy same in 2014 with a large adjustment.

88. At the hearing of the appeal, Counsel for the Respondent submitted that the Appellant had failed to show that there was, as required by section 959P, a provision of the Taxes Act in respect of which the Appellant had a doubt. A distinction had to be drawn between issues which fell within the Taxes Acts and those which fell without. Counsel submitted that the Appellant was effectively seeking to amend historical errors; those errors, no matter how they arose, were issues of fact, and had no bearing whatsoever on any provisions of the Taxes Acts.

89. The Appellant had sought to rely upon section 81 in this regard. That section provided, as Lord Hoffman noted in his consideration of the equivalent UK provision, that in computing profits for tax purposes, no sum shall be deducted in respect of any sum employed or intended to be employed as capital in the trade. He stated that although the language was by no means clear, this had always been taken to prohibit deductions for the depreciation of capital assets. Accordingly, any sum which has been deducted for depreciation in the computation of profits must therefore be added back; the question was to identify which sums have been so deducted.

90. Counsel submitted that it was common case between the parties that section 81 simply provided that if you have included an expense of depreciation in

your calculation of profits, that expense must be added back. He submitted that there could be no element of doubt as to the application of section 81. Similarly, while the Appellant had latterly sought to rely upon section 76A, that provision merely stated that in compiling a profit figure, a taxpayer should have regard to generally accepted accounting principles. Again, no issue of controversy or doubt or ambiguity could arise in relation to same.

91. Counsel submitted that the evidence before me was that the Appellant had applied the same accounting treatment in terms of dealing with depreciation and of capitalising any depreciation in relation to stocks since at least 2000, if not earlier. The Appellant's Chief Financial Officer was satisfied that this was an appropriate accounting treatment, and the Appellant's tax agent had stated that he did not have any issue with it as an accounting practice.

92. Counsel submitted that the Appellant was effectively seeking to treat historical issues of fact in relation to accounting treatment and calculation errors as arising from a question of law or of the interpretation of the Taxes Acts. The Respondent submitted that this was inappropriate, and that a clear line should be drawn between the two types of issues.

93. In relation to the letter of expression of doubt, Counsel for the Respondent submitted that it failed to set out full details of the facts and circumstances of the matter as required by section 959P(1). He referred in particular to the absence of any mention of the historical errors which had been discovered in respect of prior years. He submitted that there was no proper or direct explanation, and the Respondent was left unclear as to the precise doubt and the basis for the doubt. The Appellant had now submitted that the doubt related to the methodology by which the depreciation adjustment was calculated; Counsel for the Respondent submitted that there was in reality no doubt on the part of the Appellant in relation to the method used to calculate the depreciation adjustment. There had been a historical error in the factual calculation of the depreciation add back, and this could in no way be said to be an issue of incorrect accounting policy. Counsel reiterated that it could not be said that the letter specified the basis for any doubt on the part of the

Appellant when it made no reference whatsoever to the ***William Grant and Mars*** decision. Similarly, there was no reference whatsoever to the IAS 8 and the absence of any guidance or case law in relation to the application of same.

94. Counsel for the Respondent further submitted that **WITNESS 2** had accepted in his evidence that the discovery of the historical errors had tipped the balance in favour of submitting an expression of doubt, and had further accepted that the desire to avoid the potential impact of the statutory four-year time limit on making claims for repayment was a factor that the Appellant had taken into consideration.

95. Counsel further submitted that the Respondent's letter of 11 May 2016 made it clear that the Respondent did not accept that the Appellant had satisfied the requirements of section 959P in relation to the submission of a valid expression of doubt.

96. In relation to issue of genuineness, Counsel adopted the definition of "*genuine*" in Blacks's Law Dictionary as meaning "*authentic or real.*" He submitted that the Appellant could not have had a genuine or real doubt following the decision of the House of Lords in ***William Grant and Mars***. That final decision, delivered as far back as 2007, "*displaced*" all of the earlier decisions and was 'categoric' in nature. The decision was further reflected in the guidance note issued by HMRC. Counsel submitted that the Appellant and its advisors could only have derived comfort from same in relation to their approach to depreciation.

97. In relation to the onus of proof, Counsel referred me to paragraph 149 of the judgment of McKechnie J in ***O'Flynn Construction***, where he stated that legislative provisions which are analogous to exemption provisions are likely to be relied upon by the taxpayer. Accordingly, it was proper in his view to treat such provisions as akin to exemption provisions and accordingly, following well established law, the onus of the burden of proof should be on the taxpayer.

98. Counsel submitted that the effect of section 959P was that, if a proper expression of doubt was made and accepted as genuine by the Respondent, the taxpayer was sheltered from the risk or burden of interest or penalties. He submitted that it was therefore analogous to an exemption provision, and therefore the burden of proof lay on the Appellant in the instant appeal. In the alternative, if I accepted the Appellant's arguments in relation to this issue, he submitted that the evidence given on behalf of the Respondent had more than discharged the onus of proof.

I. Analysis and Findings

(a) Onus of Proof

99. Historically, in any appeal against an assessment, the onus was on the tax payer to produce evidence acceptable to the Commissioners that the assessment made by the Respondent was excessive. This was considered by Charleton J in ***Menolly Homes*** where he stated that:-

> *"Under the Value Added Tax Act, 1972 the burden of proof that the amount due is excessive rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland.*
>
> *…*
>
> *The burden of proof in this appeal process is as in all taxation appeals is on the tax payer. 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. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J, in TJ V Criminal Assets Bureau [2008] IEHC 168."*

100. The reason that the burden of proof in a tax appeal falls on the taxpayer was stated by the English Court of Appeal in ***Eagerpath -v- Edwards*** **[2001] BTC 12** to be as follows:-

"On appeal to the commissioners the burden of proof is on the Appellant taxpayer, because the taxpayer can be expected to know all about his own financial affairs, whereas the inspector may have little or no knowledge about them apart from the taxpayer's return."

101. I agree with the Respondent's submission that the portion of McKechnie J's judgment in ***O'Flynn Construction*** dealing with the burden of proof under legislative provisions analogous to exemption provisions is apposite and of assistance in deciding where the burden of proof lies in appeals brought pursuant to section 959P(8). There is clearly a potential benefit to a taxpayer in making an expression of doubt pursuant to section 959P because, if the expression of doubt is accepted as genuine by the Respondent, the taxpayer is to be treated as having made a full and true disclosure with regard to the matter involved. The section is therefore, in my view, analogous to an exemption provision and should be considered accordingly in deciding where the burden of proof lies.

102. I would further observe that if the Appellant's submissions in this regard are correct, and the onus of proof in appeals under section 959P(8) rests on the Respondent, the Respondent would be placed in the position of having to prove a negative, namely that a doubt expressed by a taxpayer was not genuine. It would further be required to prove this negative by adducing evidence and arguments in relation to the taxpayer's thinking and state of mind at the time the expression of doubt was made. This would, I believe, place an exceptionally difficult, if not impossible, burden on the Respondent in many cases and I cannot accept that this was the intention of the legislature in enacting section 959P. In my view, the more correct interpretation is that it is for the taxpayer, who seeks to avail of the benefits afforded by section 959P(5), who asserts that the expression of doubt is genuine, and who is in a position to give evidence as to the thinking and reasoning that resulted in the expression of doubt, to prove that the expression of doubt is genuine.

103. Accordingly, I find that the burden of proof in appeals pursuant to section 959P(8) generally, and in this appeal in particular, rests upon the taxpayer and not upon the Respondent.

(b) Estoppel

104. A second preliminary issue which falls to be determined is whether, as contended by the Appellant, the Respondent by its letter of 11 May 2016 effectively accepted that the requirements for a letter of expression of doubt contained in section 959P(1) had been met, and therefore the only issue before me for determination was whether the expression of doubt was genuine.

105. The Respondent's letter is clear in its terms. It states that, having reviewed all of the information provided, the Respondent:-

(a) understood that the Appellant had always added back a net amount of depreciation in its corporation tax computations, being the amount actually charged to the profit and loss account, rather than the gross depreciation charge listed in the Property, Plant & Equipment note to the financial statements;

(b) understood that an adjustment was made to the depreciation add back for the year ended 30 June 2014 in order to correct an error in the calculation of the net depreciation charge for each period from 2007 to 2014 inclusive;

(c) expressed the view that it did not appear that there was any doubt as to the correct application of section 81 in connection with the adjustment;

(d) expressed the view that it was a matter of fact as to what amount of depreciation was charged to the profit and loss account when computing the profits in accordance with generally accepted accounting practice; and,

(e) understood that there had been no change in how the company had applied section 81 to the depreciation charge.

106. The letter then went on to state that:-

> *"On the basis that we do not believe that there is a doubt as to the correct application of the law regarding the non-deductibility of depreciation, we do not accept as genuine the expression of doubt in relation to the year ended 30 June 2014. We note that a similar doubt was expressed in the return for the year ended 30 June 2015. It follows that we do not accept this doubt as genuine."*

107. The letter then advised the Appellant of its right under section 959P(8) to appeal to the Commission if it was aggrieved by the decision that the expression of doubt was not genuine.

108. I believe it is relevant to point out that there was no reference in the letter of 11 May 2016 to any alleged failure on the part of the Appellant to meet the requirements of section 959P(1) in relation to the contents of a letter of expression of doubt. Equally, the correspondence sent by the Respondent to the Appellant and its agent between 23 March 2015 and 11 May 2016 did not assert or even suggest that there had been a failure by the Appellant to comply with the provisions of section 959P(1).

109. It was submitted by Counsel for the Respondent that it was implicit from the letter of 11 May 2016 that the Respondent was of the view that the Appellant had failed to give full details of the facts and circumstances of the matter (and in particular failed to disclose the historical computation errors), and had furthermore failed to specify its doubt, the basis for the doubt and the law giving rise to the doubt. Counsel submitted that the letter of 11 May 2016 effectively said "*…look, I don't accept your letter* [of 23 March 2015] *as being valid…*"

110. I cannot accept this submission as correct. In the first instance, I do not accept that it is sufficient for the Respondent to tacitly or by implication assert or suggest that a letter has failed to meet the requirements of section 959P(1). If the Respondent is of the view that a communication purporting to be a letter

of expression of doubt is invalid by reason of a failure to meet one or more of the requirements of section 959P(1), it is incumbent on the Respondent to clearly inform the taxpayer that it has reached this view. The requirements of natural justice impose, in my view, an obligation on the Respondent to inform a taxpayer of the reasons why it believes the taxpayer is not entitled to avail of the provisions of section 959P. Such an obligation is consistent with the duties assumed by the Respondent under its Customer Service Charter, and with the views expressed by the Supreme Court in ***Keogh –v- Criminal Assets Bureau*** **[2004] 2 I.R. 159**.

111. Secondly, even if it was legally permissible for the Respondent to tacitly or by implication express the view that a taxpayer had failed to comply with the requirements of section 959P(1), the letter of 11 May 2016 did not do so in the instant case. Each of the points made in that letter were more consistent with a view that the expression of doubt was not genuine than with a view that there had been a failure to satisfy the requirements contained in section 959P(1) regarding the information that has to be included in a letter of expression of doubt. Most importantly in this regard, the letter expressly stated that the Respondent had decided that the Appellant's expression of doubt was not genuine, and expressly advised the Appellant of its right to appeal against this decision pursuant to section 959P(8).

112. The Respondent has subsequently, in its Statement of Case and in the course of the hearing of this appeal, has sought to broaden the grounds on which it says the Appellant is not entitled to the benefit of section 959P(5) by asserting a failure to comply with the requirements of section 959P(1) as well as the assertion that the doubt expressed by the Appellant was not genuine. This approach is not, in my view, correct or permissible. It is the Respondent's decision of 11 May 2016 that is the subject of this appeal. The letter communicating that decision to the Appellant stated clearly and unambiguously that the reason why it was not allowing the Appellant the benefit of section 959(5) was because it did not accept as genuine the Appellant's expression of doubt. It further advised the Appellant that it had a

right of appeal against this decision pursuant to section 959P(8). That subsection provides for an appeal against a Revenue officer's decision that the person's expression of doubt is not genuine; it does not provide for an appeal against any other decision made by the Respondent in the context of an expression of doubt submitted by a taxpayer.

113. Accordingly, I am satisfied that the only issue which falls to be determined in this appeal is whether or not the Appellant's expression of doubt was a genuine expression of doubt; the question of whether or not the Appellant's letter of expression of doubt satisfied the requirements of section 959P(1) falls outside the scope of the appeal.

114. For the sake of completeness, I should record the findings I would have made if I had been persuaded by the Respondent's submission that I could and should consider the issue of whether the Appellant had complied with the requirements of section 959P(1).

115. Firstly, I believe that the Appellant's letter of 23 March 2015 contained sufficient information to satisfy the requirement that the Appellant give full details of the facts and circumstances, as required by section 959P(1)(a). The Respondent placed significant emphasis on the fact that the letter did not disclose that historic calculation errors had been discovered by the Appellant. However, the letter did disclose that the Appellant had had identified a need for a cumulative adjustment to be included in the depreciation add back to reconcile to the depreciation included in the profit and loss account for the periods ending from June 2007 to June 2014.

116. Secondly, I would further have decided that the letter met the requirement in section 959P(1)(b) that it specify the Appellant's doubt, the basis for the doubt and the law (being the relevant provision(s) of the Taxes Acts) giving rise to the doubt. The Appellant's letter identified the doubt, which it said related to the method by which the depreciation adjustment in the corporation tax computation was calculated historically and in the current and future periods. It further specified section 81 as the law giving rise to the doubt; while the

Respondent does not accept that section 81 could give rise to doubt, it was specified by the Appellant and so satisfied this aspect of section 959(1)(b). Finally, while I did initially question whether the letter could be said to have specified the basis for the Appellant's doubt, I accept as correct the submission by Counsel for the Appellant that his client satisfied this requirement by setting out the methodology adopted by the Appellant in relation to depreciation and inquiring of the Respondent if it agreed with the Appellant's treatment.

117. No issue was raised by the Respondent in relation to any alleged non-compliance with the requirements of section 959P(1)(c) to (e).

118. Accordingly, had it been necessary for me to reach a decision on this issue, I would have found that the Appellant had satisfied the requirements for a valid letter of expression of doubt contained in section 959P(1).

(c) Genuine doubt

119. In approaching the question of whether not the doubt expressed by the Appellant was genuine, it must first be noted that there is no definition in section 959P, or indeed elsewhere in TCA 1997, of what constitutes a "*genuine doubt.*" Accordingly, I must apply the principles of statutory interpretation detailed by McKechnie J in ***Dunnes Stores –v- Revenue Commissioners*** **[2019] IESC 50** and by O'Donnell J in ***Bookfinders –v- Revenue Commissioners*** **[2020] IESC 60**. I have the benefit of and gratefully adopt the following summary of the relevant principles given by McDonald J in ***Perrigo Pharma International Designated Activity Company –v- John McNamara & Ors*** **[2020] IEHC 552**:-

"(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 paragraph 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…"

120. Applying the first of these principles, I am satisfied and find that the words "*doubt*" and "*genuine*" are plain and self-evident in their meaning, and they can and should therefore be given their ordinary and natural meaning; there is no compelling reason in TCA 1997 for a different approach to be taken.

121. Even without having regard to the dictionary definitions to which I was referred by Counsel for the Appellant, I believe that the ordinary and natural meaning of "*genuine*" is something true and authentic and real. Similarly, I believe that the ordinary and natural meaning of "*doubt*" is uncertainty or a cause to question something's correctness.

122. I further believe that this interpretation of these words is consistent with the statutory context in which they are used; the purpose of section 959P is, in my view, to encourage taxpayers to bring to the attention of Revenue issues where there is a real lack of certainty as to how one or more provisions of the

Taxes Acts apply to a given set of facts. My interpretation of the word is, I believe in accordance with a desire to ensure that only taxpayers with a *bona fide* concern as to the correct approach to a tax issue are afforded the benefits of the section.

123. Applying the foregoing, in order for the Appellant to succeed in this appeal, I must be satisfied on a balance of probabilities basis that the Appellant had, as of 23 March 2015, a true, authentic and real uncertainty in relation to, or cause to question the correctness of, the method by which it calculated the depreciation adjustment in its corporation tax computations.

124. I accept as correct the submission made on behalf of the Appellant that there is a strong element of subjectivity in relation to this issue. I must determine what was in the mind of the Appellant at the time of the expression of doubt. Any view that the Respondent may have had as to the genuineness or otherwise of the expression of doubt is irrelevant to the issue. Equally, I am not required to decide whether the Appellant had good grounds or a reasonable basis to be concerned about whether its methodology was correct; the statute merely requires me to be satisfied that the Appellant genuinely believed that there was a doubt in relation to whether the methodology used was correct in law.

125. The Respondent placed significant emphasis on its submission that it was the discovery of the historical errors which led to the Appellant submitting its expression of doubt. The Appellant accepted, as it had to, that there had been historical errors and **WITNESS 2** fairly accepted in his evidence that the discovery of those errors might have 'tipped the balance' in the Appellant deciding to submit the expression of doubt. Both **WITNESS 1** and **WITNESS 2** also accepted in their evidence that a potential concern about the application of the statutory time limit for the making of a repayment claim was a factor in seeking to correct the historical errors in the context of the expression of doubt.

126. I believe, however, that these are matters which go primarily to Appellant's motive in submitting the expression of doubt. Counsel for the Appellant went too far, in my view, in his submission that the Appellant's motive was entirely irrelevant. The motive of a taxpayer in submitting an expression of doubt may well be relevant to a decision on whether or not that doubt is genuine. However, it does not follow that a doubt is not genuine merely because the taxpayer was motivated by something other than or in addition to a pure desire to obtain clarification on the correct application of the Taxes Acts.

127. In the instant case, I am satisfied that the Appellant was partly motivated to submit its expression of doubt by the discovery of the historical calculation errors, and a desire to correct those errors in a manner which might not be subject to the statutory time limit. However, my conclusion that the Appellant was so motivated does not preclude a finding that the Appellant had a genuine doubt.

128. The evidence given by **WITNESS 1** and **WITNESS 2** is obviously of key importance in deciding whether or not the Appellant's doubt was genuine. I accept as correct and accurate the evidence given by **WITNESS 1** that, following the discussions with his team and with **WITNESS 2** on 23 March 2015, he believed that there was "*a big question mark*" regarding the methodology used to calculate the depreciation add back and in relation to whether the Appellant could take a cumulative adjustment in the period ending 30 June 2014. The Appellant's tax agent had discussed with him the various stages of and decisions in the ***William Grant and Mars*** litigation, and had informed him that there was no case law or Revenue guidance in relation to the issue in this jurisdiction.

129. I further accept as correct **WITNESS 1**'s evidence that, following these discussions, he wanted to obtain clarity from the Respondent in relation to the two strands of doubt identified. His evidence in this regard is, in my view, supported by the uncontroverted evidence that the Appellant had consistently taken a conservative approach to tax issues, and had regularly overpaid tax.

130. I further accept as correct **WITNESS 1**'s evidence that, in relation to the second strand of doubt, he believed that the historical errors arose through inadvertence and believed that, in the context of the Appellant's turnover, profit before tax and overall financial position, the errors were immaterial.

131. I also accept as accurate the evidence given by **WITNESS 2** in relation to the advice he gave the Appellant in the course of his telephone conversation with **WITNESS 1** on 23 March 2015. **WITNESS 2** is a tax advisor of considerable experience and expertise and had been advising the Appellant for many years. I accept his evidence that he advised the Appellant in relation to the first strand of doubt that, particularly having regard to the various decisions given in the course of the ***William Grant and Mars*** litigation, there were at least three ways in which the Appellant's depreciation methodology could be treated for tax purposes. He believed that the Appellant's 'middle of the road' approach was fair and reasonable, but advised the Appellant that the matter was certainly not free from uncertainty.

132. In relation to the second strand of doubt, I accept that **WITNESS 2** advised the Appellant that, because the historical errors were immaterial and irrelevant, because section 81 did not specify the time at which add backs had to be made, and because section 76A provided for the application of generally accepted accounting practice in the calculation of tax, there was a good argument to be made for treating the adjustment in the same manner as the Appellant could treat the correction of technical errors in the accounts themselves. He described this as taking a 'balance sheet approach', and advised the Appellant that such an approach would be consistent with IAS 8 and section 76A.

133. I further accept as correct **WITNESS 2**'s evidence that he advised **WITNESS 1** that the Appellant had three options in relation to the two strands of doubt, namely making a cumulative adjustment in 2014 accompanied by an expression of doubt, or doing the same cumulative adjustment without any expression of doubt, or correcting previous years' returns
50 instead of doing a cumulative adjustment. I further accept that he advised that the Appellant take the first course of action, which was consistent with the approach the

Appellant had traditionally taken in relation to tax matters, and that his advice was accepted by the Appellant.

134. In addition to the oral evidence, I have also had regard to the fact that the ***William Grant and Mars*** cases had an impact on the Appellant's state of mind in relation to the first strand of doubt. Counsel for the Respondent submitted that the fact that the Lord Hoffman had delivered what Counsel described as a "*categoric*" decision in the House of Lords, the fact that that decision had been reached some eight years prior to the submission of the expression of doubt, and the fact that the decision had resulted in HMRC issuing a guidance note in relation to the effect of the decision all meant that it was at best unlikely that the Appellant could have had a genuine doubt as to whether the methodology it used was correct.

135. I do not believe this submission to be correct. The decision of the House of Lords would certainly have persuasive value in this jurisdiction but it was not a binding precedent. Equally, the fact that a number of conflicting and contradictory decisions had been reached by the various decision makers illustrated in and of itself that the question in issue was difficult and complex. I also agree with the point made by Counsel for the Appellant that while Lord Hoffman's judgment dealt with the correct treatment of depreciation for current year purposes, it appeared to leave open the issue of how depreciation might be treated at a future date when [redacted] stock was released for sale. Overall, I accept the Appellant's submission that the ***William Grant and Mars*** decision fell a long way short of providing a definite answer to the Appellant's concerns in relation to the first strand of doubt; the Appellant could only derive thin comfort therefrom.

136. It was also submitted on behalf of the Respondent that the issue decided in the ***William Grant and Mars*** case was an issue of fact. I cannot accept this submission as correct; I believe it is apparent from even the most cursory review of the various judgments that the decision makers carried out a detailed consideration of questions of law, and in particular the correct interpretation of section 74 of the Income and Corporation Taxes Act 1988.

137. I further agree with the point made by **WITNESS 2** that the fact that the Respondent had not questioned or challenged the Appellant's methodology in any of the years prior to 2014 did not mean that the Respondent had accepted that the Appellant's approach was correct. I also accept his evidence that the Respondent had never issued any guidance in relation to the correct methodology, either by reference to the ***William Grant and Mars*** case or otherwise.

138. In relation to the second strand of doubt, I believe it is relevant to have regard to the fact that the Appellant was advised by **WITNESS 2** that there was no case law and no Revenue guidance in relation to the potential impact of section 76A and/or IAS 8 on the Appellant's ability to make a cumulative adjustment in 2014.

139. The Respondent also drew my attention to the fact that the Appellant had never in the years prior to 2014 submitted an expression of doubt in relation to its depreciation methodology. While this is factually correct, I do not believe that it is of particular relevance. I agree with the Appellant that circumstances, including the approach taken by the Respondent or a taxpayer's attitude to risk, can change over time, and the fact that a taxpayer may not have had or may not have expressed a doubt in a particular year or years does not in any way mean that it cannot have a genuine doubt in subsequent years.

140. Similarly, I cannot agree with the Respondent's submission that the fact that the Appellant had not changed its methodology at any time prior or subsequent to the expression of doubt means that it cannot, or was unlikely to, have had a genuine doubt in relation to the correctness of its approach.

141. Having carefully considered all of the oral and documentary evidence before me as well as the submissions made by the parties, and having particular regard to the matters discussed in paragraphs 119 to 140 *supra*, I am satisfied and I find as a material fact that the Appellant had as of 23 March 2015 a

genuine doubt in relation to the method by which the depreciation adjustment in its corporation tax computations was calculated historically and for the current and future periods for the purposes of section 81. This was a doubt as to a matter of law and it was one which, to use the Respondent's terminology, fell within the Taxes Acts.

142. Finally, I would observe for the sake of completeness that I do not accept the Respondent's assertion that a portion of the Appellant's Statement of Case was phrased in a 'misleading manner' is well-founded. That description is premised, in my view, on a misreading of the arguments advanced by the Appellant. While nothing turns on the assertion or my views in relation to same, I believe it appropriate that a criticism of the manner in which the Appellant's arguments were presented should not go unaddressed.

D. Conclusion

143. For the reasons outlined above, I have found that:-

(a) the onus of proof in appeals brought pursuant to section 959P(8) rests on the taxpayer bringing the appeal;

(b) having regard to the contents of the letter sent by the Respondent on 11 May 2016, the sole substantive issue for determination in this appeal is whether the doubt expressed by the Appellant in its letter of expression of doubt dated 23 March 2015 was a genuine doubt; and,

(c) the Appellant had a genuine doubt as of 23 March 2015 in relation to the method by which the depreciation adjustment in its corporation tax computations was calculated historically and for the current and future periods for the purposes of section 81.

144. I therefore find that the Appellant is entitled to succeed in this appeal and I determine pursuant to section 949AL that the decision made by the Respondent on 11 May 2016 that the Appellant's expression of doubt made on 23 March 2015 was not genuine should be varied accordingly.

Dated the 14th of December 2022

MARK O'MAHONY
Appeal Commissioner
15th December 2022