



37TACD2023

Between

████████████████████

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“the TCA 1997”) brought on behalf of ██████████ (“the Appellant”) against Notices of Estimation of Amounts Due issued by the Revenue Commissioners (“the Respondent”) on 16 February 2021, in respect of the years of assessment 2016 and 2017. The total liabilities reflected in the Notices of Estimation of Amounts Due in respect of PAYE/PRSI/USC is in the sum of €36,873.72.
2. The liabilities arose as the Respondent disallowed deductions on the basis that such deductions were not incurred by the Directors of the Appellant *“travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties”* in accordance with section 114 TCA 1997.
3. On the 12 April 2021, the Appellant duly appealed to the Commission. The appeal proceeded by way of a remote hearing on 25 November 2022. The Appellant was represented by ██████████, Head of Accounts for the Appellant (“the Appellant’s

representative”) and the Respondent was represented by [REDACTED] and Gerry [REDACTED] for the Respondent.

Background

4. The Appellant was established in June 2016 and is a family business. The Appellant’s business is manufacturing wood burning and multi fuel stoves and it sells to trade. The Appellant’s customers are shops and businesses across the 32 counties of Ireland. During the requisite period, the Appellant had two Directors.
5. On 28 August 2019, the Respondent issued to the Appellant, a Notification of Revenue Audit of the Appellant’s books and records. On 10 February 2021, the Respondent wrote to the Appellant to inform it that the audit was being extended to cover all taxes for the period 1 July 2016 to 31 December 2019. The Respondent included in its correspondence, a computation of additional liability to tax for 2016 and 2017 and indicated that it would be raising assessments based on its calculations.
6. The Appellant contends that during the audit of the Appellant’s books and records it was unable to locate all of the information requested by the Respondent. Subsequent to the assessments being raised by the Respondent, further additional documentation was submitted to the Respondent by the Appellant’s representative. At the hearing of the appeal, the Appellant’s representative confirmed that the assessments which relate to Value Added Tax (“VAT”) and Corporation Tax (“CT”) are no longer under appeal. Consequently, the parties confirmed that the revised amount of tax at issue is the sum of €12,387.96, relating to travel and entertainment expenses.
7. The Respondent examined the books and records of the Appellant and found that while some expenses were in order and correctly related to the business of the Appellant, other expenses required explanation. In relation to travel and entertainment expenses claimed by the Appellant, on 10 February 2021 the Respondent issued correspondence to the Appellant stating *“as you are unable to provide evidence that business journeys were incurred and in order to take into account any bona fide business expenses. I propose to allow 50% of the above expenses and impose PAYE/PRSI/USC on.....23,823 Travelling & Entertainment for 6 mths ended 31 Dec 2016 at the marginal rate 52%.”*
8. The Appellant contends that all travel and entertainment expenses were incurred wholly and exclusively for the purpose of the business, in circumstances where the Directors of the Appellant were required to incur such expenses to ensure the survival of the Appellant’s business.

Legislation and Guidelines

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

10. Section 112 of the Taxes Consolidation Act 1997, Basis of assessment, persons chargeable and extent of charge, provides:-

(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

11. Section 114 of the Taxes Consolidation Act 1997, General rule as to deductions, provides:-

Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

12. Section 117 of the Taxes Consolidation Act 1997, Expenses allowances, provides:-

(1) Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.

(2) The reference in subsection (1) to any sum paid in respect of expenses includes a reference to any sum put by a body corporate at the disposal of a director or employee and paid away by him or her.

13. Section 118(1) TCA 1997 Benefits in Kind, General Charging provision, provides:-

- (a) *Subject to this Chapter, where a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of-*
- (i) *living or other accommodation,*
 - (ii) *entertainment,*
 - (iii) *domestic or other services, or*
 - (iv) *other benefits or facilities of whatever nature, and*
- (b) *apart from this section the expense would not be chargeable to income tax as income of the director or employee then, sections 112, 114 and 897 shall apply in relation to so much of the expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount of the expense had been refunded to the director or employee by the body corporate by means of a payment in respect of expenses, and income tax shall be chargeable accordingly.*

Submissions

Appellant

14. [REDACTED] gave sworn evidence on behalf of the Appellant. The Commissioner sets out a summary of his evidence hereunder:-
- (i) He said that the Appellant was established in June 2016 and that in 2019, he commenced employment with the Appellant, as Head of the Accounts Department. He said that in 2016, there was upheaval in the previous family business and thereafter the Appellant was established. He mentioned that at the time, it was critical for the success of the Appellant, that it maintain its customer base and the Directors of the Appellant “went out on the road” to conduct visits to customers with a view to generating sales for the Appellant.
 - (ii) He said that the Appellant’s customers are located throughout Ireland and the Directors of the Appellant spent 6 months from June 2016 to the end of December 2016, travelling the length and breadth of Ireland to ensure continuity of business. He said that this produced a number of expenses for the Appellant and its Directors including *inter alia* mileage, accommodation, gifts, postage, lunches, entertainment, trade show expenses, office expenses, dry cleaning and showroom expenses. He mentioned that all expenses have been vouched and documentation

has been provided to the Respondent. He said various documents outlining meetings/locations and/or other various details were provided to the Respondent. He said that he has provided documentation to the Respondent both during and after the audit of the Appellant's books and records. Nevertheless, the Respondent stood by its decision to allow only 50% of expenses claimed, rather than allowing all of the expenses claimed by the Appellant.

Respondent

15. The Respondent's representatives made the following submissions. The Commissioner sets out a summary of the submissions hereunder:-

- (i) An audit commenced in 2019 and the Respondent was not satisfied with the documentation submitted by the Appellant and the nature of the travel and entertainment expense claims. For example, there were credit card statements for fuel that appeared to be excessive, substantial claims for lunches/beverages and no explanations provided, in particular receipts from 8 & 9 October 2016 for food/beverages in [REDACTED] totalling €1,253.75, claims for clothing purchases and dry cleaning expenses.
- (ii) A total of €47,000 was submitted. Some of the expenses submitted were large round sum expenses claimed for example, on 19/08/2016, €1,000, on 13/09/2016, €5,000, on 20/12/2016 €3,000, on 20/12/2016, €1,059.15 and on 22/12/2016 €2,000. There was concern in relation to these numbers, where no documentation was submitted to support same.

16. At the conclusion of the hearing, the Appellant's representative stated that he had some further documents, namely a diary from 2016, which he said supports the locations the Directors had travelled to during this period. The Respondent agreed that if the document was submitted, it would consider the contents of same.

17. On 28 November 2022, a physical copy of the 2016 diary was furnished to the Respondent, with the Commission being furnished with a copy of the 2016 diary by email on the same date. The Commissioner considered the contents of the email and the attached diary entries. Thereafter, the Commissioner provided the Respondent with an opportunity to consider the 2016 diary and to make a submission in relation to the document.

18. On 1 December 2022, the Respondent corresponded by email with the Commission and the Appellant to state that *"having considered it's contents, Revenues position has not changed from that on the date of appeal and feel the assessments should stand"*.

Material Facts

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

- (i) The Appellant is a limited liability Company having been established in 2016.
- (ii) The Appellant is in the business of manufacturing wood burning and multi fuel stoves.
- (iii) The Appellant's customers are shops and businesses across the 32 counties of Ireland and it sells to trade.
- (iv) The Appellant did not provide vouched receipts for expenses in relation to the totality of the travel and entertainment expenses claimed.

Analysis

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

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

21. Section 117 of the TCA 1997 provides that travel and subsistence ("T&S") expenses paid by a Company to its Directors shall be treated as perquisites of the office or employment of those Directors and subject to tax in accordance with section 112 TCA 1997. However, there remains a corresponding entitlement to claim deductions against these deemed perquisites, for the very same T&S expenses, incurred necessarily in the performance of the duties of the office or employment pursuant to section 114 TCA 1997.

22. It is a strict requirement for the allowance of a deduction under section 114 TCA 1997, that there be an objective obligation arising from a duty that necessitates a taxpayer to incur an expense. This rules out expenses that arise from decisions that are "*personal*" to a taxpayer.

23. The phrase "*in the performance of those duties*" must be strictly interpreted. It does not mean "*in order to enable the duties to be performed*", and must refer to the duties of the

Director or employee. This long standing principle has been established in case law such as *Ricketts v Colquhoun (Inspector of Taxes)* [1926] AC 1, *Miners v Atkinson (Inspector of Taxes)* [1997] STC 58, *SP Ó Broin v Mac Giolla Meidhre, Lomax (HM Inspector of Taxes) v Newton* [1953] All ER 801, *Brown v Bullock* [1961] 1 WLR 1095. Necessity is determined objectively.

24. In order to succeed, therefore, the Appellant must show that the expenses in question, incurred by the Directors, were incurred in the performance of their duties, that they were incurred of necessity in the performance of their duties, and that they were incurred wholly and exclusively in the performance of their duties (in their entirety, and excluding any ancillary or personal purpose).
25. The evidence of the Director of the Appellant was that certain expenses were incurred by the Directors of the Appellant in order to ensure continuity of the business. The Commissioner heard evidence of the expenses claimed such as entertainment in hotels, food and beverages, dry cleaning expenses and the purchase of clothing namely suits. The Appellant's representative explained that the expenses were incurred entertaining customers and travelling to trade shows. In particular, a number of the round sum expenses are attributable to travel undertaken by the Directors to [REDACTED] and [REDACTED] to trade shows during the requisite period. The Respondent's submission was that not all business expenses were vouched and despite many expenses not being allowable expenses, in order to take into account any bona fide business expenses, 50% of the expenses were taken as personal and PAYE/PRSI/USC was imposed on the balance. In addition, the Commissioner has considered the documentation submitted subsequent to the hearing of the appeal, namely the 2016 diary and the Respondent's submissions in relation to same.
26. As set out above, in a tax appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. The Appellant, being the person with access to all of the facts and documents relating to its own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions (section 886 TCA 1997) but also to produce such documentation as may be required in support of an appeal, so as to meet the burden of proof.
27. The Appellant has not brought forward any additional evidence to demonstrate that the Notices of Estimation of Amounts Due are incorrect and that the totality of expenses claimed should be allowed. As set out above there is a statutory obligation to retain documentation relating to a person's tax affairs. The Commissioner considers it good

practice, that records relating to any business expense claimed, would include reasons why a particular expense is incurred and the purpose of that expense vis-a -vis the nature of the Appellant's business. The Commissioner finds that the Appellant has not succeeded in demonstrating that the travel and entertainment expenses claimed, were incurred by the Directors of the Appellant in the performance of the duties of that office nor has the Appellant succeeded in demonstrating that the expenses were expenses expended wholly, exclusively and necessarily in the performance of those duties, such that the Notices of Estimation of Amounts Due are incorrect.

28. Consequently, the Commissioner is satisfied that the Appellant has not succeed in proving on the balance of probabilities that the Notices of Estimation of Amounts Due raised by the Respondent are incorrect. Hence, then the Notices of Estimation of Amounts Due shall stand.

Determination

29. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in showing that the tax is not payable. Accordingly, the Commissioner finds that the Notices of Estimation of Amounts Due raised by the Respondent, the subject of this appeal, shall stand.
30. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax and duties.
31. This appeal is hereby determined in accordance with Part 40A of the TCA1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



Claire Millrine
Appeal Commissioner
22 December 2022