

Background

4. The Appellant was a Director of the group of companies [REDACTED] a proprietary Director of [REDACTED] ("the companies") and an employee of the companies. The companies were engaged in the business of [REDACTED].
5. Prior to 2012, the companies were in financial difficulty and a Chief Executive Officer (hereinafter "CEO") was appointed to run the companies at the insistence of [REDACTED] who was the main creditor at the time.
6. In 2012, the Appellant stepped down as Director of the companies, on appointment of the CEO to the companies, but remained on the Board of Directors. [REDACTED], the companies entered Receivership and a Receiver was appointed over all companies in the group.
7. The Appellant had a director's loan from [REDACTED]. [REDACTED] was part of the group structure with [REDACTED]. The Appellant contends that as he was owed funds from the group, the tax as assessed by the Respondent is not due and owing. Moreover, as the accounts were not finalised for 2015, he is precluded from showing the offsets of the director's loans in any financial statements.
8. The Respondent maintains that there was an outstanding director's loan which was not repaid and in accordance with the provisions of section 112 TCA 1997, an income tax assessment was raised. The Respondent treated the director's loan as a preferential loan at the rate of 13.5%.

Legislation and Guidelines

9. The legislation relevant to this appeal is as follows:-
10. Chapter 5, Sections 410 – 429 TCA 1997, Group Relief.
11. Part 41(a) TCA 1997, Assessing Rules Including Rules for Self-Assessment.
12. Section 122 of the TCA 1997, Preferential loan arrangements, provides:-

(1) (a) In this section –

"employee", in relation to an employer, means an individual employed by the employer in an employment –

(a) to which Chapter 3 of this Part applies, or

(b) *(b) the profits or gains of which are chargeable to tax under Case III of Schedule D including, in a case where the employer is a body corporate, a director (within the meaning of that Chapter) of the body corporate;*

"employer", in relation to an individual, means

- (i) a person of whom the individual or the spouse or civil partner of the individual is or was an employee*
- (ii) a person of whom the individual becomes an employee subsequent to the making of a loan by the person to the individual, and while any part of the loan, or of another loan replacing it, is outstanding, or*
- (iii) a person connected with a person referred to in paragraph (i) or (ii);*

"loan" includes any form of credit, and references to a loan include references to any other loan applied directly or indirectly towards the replacement of another loan;

"preferential loan" means, in relation to an individual, a loan in respect of which no interest is paid or interest is paid at a preferential rate, made directly or indirectly to an individual or to the spouse or civil partner of the individual by a person who in relation to the individual or the spouse or civil partner is an employer, but does not include any such loan in respect of which interest is paid at a rate that is not less than the rate of interest at which the employer in the course of the employer's trade makes equivalent loans for similar purposes at arm's length to persons other than employees or their spouses or civil partners;

"preferential rate" means a rate less than the specified rate;

"qualifying loan" has the meaning assigned to it by section 244(1)(a);

"the specified rate", in relation to a preferential loan, means—

- (i) in a case where the preferential loan is a qualifying loan the rate of 4 per cent per annum or such other rate (if any) prescribed by the Minister for Finance by regulations*
- (ii) in the case where*
 - (I) the preferential loan is made to an employee by an employer,*

- (II) *the making of loans for the purposes of purchasing a dwelling house for occupation by the borrower as a residence, for a stated term of years at a rate of interest which does not vary for the duration of the loan, forms part of the trade of the employer, and*
- (III) *the rate of interest at which, in the course of the employer's trade at the time the preferential loan is or was made, the employer makes or made loans at arm's length to persons, other than employees, for the purposes of purchasing a dwelling house for occupation by the borrower as a residence is less than 4 per cent per annum or such other rate (if any) prescribed by the Minister for Finance by regulations,*

the first-mentioned rate in subparagraph (III), or

- (iii) *in any other case, the rate of 13.5 per cent per annum or such other rate (if any) prescribed by the Minister for Finance by regulations.*

(b) For the purposes of this section, a person shall be regarded as connected with another person if such person would be so regarded for the purposes of section 250.

(c) In this section, a reference to a loan being made by a person includes a reference to a person assuming the rights and liabilities of the person who originally made the loan and to a person arranging, guaranteeing or in any way facilitating a loan or the continuation of a loan already in existence.

(2) Where, for the whole of part of a year of assessment, there is outstanding, in relation to an individual, a preferential loan, the individual shall, subject to subsection (4), be treated for the purposes of section 112 or a charge to tax under Case III of Schedule D, as having received in that year of assessment, as a perquisite of the office or employment with the employer who made the loan, a sum equal to the difference between the aggregate amount of interest paid in that year and the amount of interest which would have been payable in that year, if interest had been payable on the loan at the specified rate and the individual or, in the case of an individual-

(a) who is a wife or husband whose spouse is chargeable to tax for the year of assessment in accordance with the provisions of Chapter 1 of Part 44, the spouse of the individual, or

(b) who is a civil partner whose civil partner is chargeable to tax for the year of assessment in accordance with the provisions of section 1031C, the civil partner of the individual, shall be charged to tax accordingly

(3) Where an individual has a loan made to him or her directly or indirectly in any year of assessment by a person who at the time the loan is made is, or who at a time subsequent to the making of the loan becomes, an employer in relation to the individual and the loan or any interest payable on the loan is released or written off in whole or in part—

(a) the individual shall be deemed for the purposes of section 112 or, in a case where profits or gains from an employment with that person would be chargeable to tax under Case III of Schedule D, for the purposes of a charge to tax under that Case to have received in the year of assessment in which the release or writing off took place as a perquisite of an office or employment with that person a sum equal to the amount which is released or written off, and

(b) the individual or, in the case of an individual-

(i) whose spouse is chargeable to tax for the year of assessment in accordance with section 1017, the spouse of the individual, or

(ii) whose civil partner is chargeable to tax for the year of assessment in accordance with section 1031C, that civil partner

shall be charged accordingly.

(4) Where for any year of assessment a sum is chargeable to tax under subsection (2) in respect of a preferential loan or loans or under subsection (3) in respect of an amount of interest written off or released, the individual to whom the loan or loans was or were made shall be deemed for the purposes of section 244 to have paid in the year of assessment an amount or additional amount of interest, as the case may be, on the loan or loans equal to such sum or the individual by whom the interest written off or released was payable shall be deemed for those purposes to have paid in the year of assessment the interest released or written off.

(5) *This section shall not apply to a loan made by an employer, being an individual, and shown to have been made in the normal course of his or her domestic, family or personal relationships.*

(6) *Any amount chargeable to tax by virtue of this section shall not be emoluments for the purpose of section 472*

(7) *Every regulation made under this section shall be laid before Dáil Éireann as soon as may be after it is made and, if a resolution annulling the regulation is passed by Dáil Éireann within the next 21 days on which Dáil Éireann has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.*

13. 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.

(2) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.

14. FRS 102, The Financial Reporting Standard applicable in the UK and Republic of Ireland, provides:-

11.38A *A financial asset and a financial liability shall be offset and the net amount presented in the statement of financial position when, and only when, an entity:*

(a) currently has a legally enforceable right to set off the recognised amounts; and

(b) intends either to settle on a net basis, or to realise the asset and settle the liability simultaneously.

Submissions

Appellant

15. The Commissioner sets out hereunder a summary of the evidence given by the Appellant:-

- (i) He has been a Director of the companies since ██████ was established in ██████. He said that ██████ was established in ██████ said that the companies were placed in Receivership in 2016. However, prior to this in 2012, he stated that ██████ insisted that an external person be appointed to run the business, effectively as CEO. He confirmed that the companies required funding after the downturn of the economy and that the CEO's responsibility was to establish a clear line of vision and control over the companies. He mentioned that it was at this point that he resigned as Director and voluntarily stepped aside leaving him no control over the companies. He gave evidence that he did remain on the Board of Directors.
- (ii) He confirmed that a golden share agreement was established in 2000, to enable funds to move effectively between the various companies. He said that in December 2015, the bank appointed another person to act as Director of all companies in the group. He stated that when the companies were placed in Receivership in 2016, he lost all access to the company's premises, including company documentation and information.
- (iii) He relayed that he understands that the Director appointed in 2015, disclosed to the Respondent that he had a directors loan, but failed to inform the Respondent that he had other monies in the companies that offset any director's loan. He mentioned that he now finds himself in a difficult position, as the accounts were not finalised for 2015 and he cannot show this offset. He stated that others are now controlling the companies and he has no access to documentation or financial statements in relation to the director's loans in the companies. He said that had the accounts been prepared for 2015, the director's loan would have been balanced with the amounts he was due within the group. He confirmed that he derived no benefit from the loan and it is unfair on the part of the Respondent to raise the assessment.
- (iv) Submissions were made by the Appellant's Agent. He said that the companies were de facto in Receivership since 2012, when the Director was asked to step aside voluntarily and allow a firm of accountant's to take control. He confirmed that while the group is not a group for tax purposes, it is a group in terms of the transfer

of funds between the companies. He stated that since 2012, [REDACTED] have been conducting "housekeeping" for what would ultimately be a Receivership situation.

- (v) He submitted that there is an absence of documentation in this appeal, as the Appellant has no access to the books and records of the companies to support his appeal. Since 2012, he has had no control over the financial accounts of the companies and therefore had no control over the director's loan account. The Respondent cannot levy tax on the Appellant personally in respect of these monies, as the Appellant lost control of the companies in 2012. He said that despite the liabilities at issue in this appeal being discharged in March 2022, the assessment should not have been raised in respect of the Appellant, as he derived no benefit from the loan.

Respondent

16. The Commissioner sets out hereunder a summary of the submissions made by the Respondent's representative:-

- (i) The Appellant is a proprietary director of [REDACTED] and based on the statement filed by the Receiver appointed over the companies, it showed an outstanding balance in the director's loan account in the sum of €252,910. Therefore, the sum was treated as a preferential loan and assessment issued to the Appellant on that basis. He stated that as the companies were placed in Receivership, the loan was not repaid. He submitted that having reviewed the Receiver's statement of affairs dated 13 June 2016, the loan of €252,910 had not been repaid.
- (ii) He submitted that there is not a group relationship between the companies for tax purposes. Therefore, he stated that the outstanding loan was treated as a preferential loan to the Director at a rate of 13.5%. He confirmed that the provisions of section 112 TCA 1997 apply to the situation herein and an income tax assessment was raised to reflect this.
- (iii) He mentioned that the tax payable as set out in the Respondent's Notice of Amended Assessment to Income Tax for the year ending 2015, in the sum of €17,248 was paid in full by the Appellant, on 10 March 2022, by way of offset.

Material Facts

17. 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) Since its incorporation in 1984, the Appellant was a proprietary Director of [REDACTED]
- (ii) The Appellant was a Director of [REDACTED], since its incorporation in 2000.
- (iii) In 2012, the Appellant voluntarily stepped down as Director of the companies but remained on the Board of Directors.
- (iv) In 2012, a CEO was appointed to the companies at the request of [REDACTED]
- (v) In 2015, a new Director was appointed to the companies.
- (vi) In June 2016, the companies were placed in Receivership.
- (vii) There is an outstanding director's loan of the Appellant with [REDACTED] in the sum of €252,910.
- (viii) The liabilities as outlined in the Notice of Amended Assessment to Income Tax issued by the Respondent for the year ending 2015, in the sum of €17,248, has been discharged in full, by way of offset in March 2022.

Analysis

18. 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 paragraph 22, Charleton J. stated:-

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

19. The Appellant gave evidence that he was involved with the companies initially as Proprietary Director of [REDACTED] in 1984 and thereafter, in 2000, he was appointed Director of [REDACTED]. The Commissioner notes that the evidence was that in 2000, a group structure was created in relation to the companies. This was done by way of a "Golden Share".

20. Golden shares are generally assigned as Ordinary 'A' shares. This type of share, issued using a special resolution within a company, gives the holder the right to control the composition of the Board of Directors of the company that created the golden share. Generally, this is implemented through clauses in a company's articles of

association. Simply put, a golden share is a nominal share which is able to out vote all other shares in certain specified circumstances.

21. A golden share is a common way of creating a group structure and is typically used to facilitate inter-company lending so that it does not breach the rules regarding loans to directors and connected persons. It is also commonly used where there is intention to form a group structure. By assigning the share within a corporate parent, the companies become linked as part of a group. The golden share held and the granted group structure, allow the companies to loan money within the group and still comply with companies legislation.
22. The evidence herein was that the Appellant was the holder of the golden share and it was created in order to facilitate inter-company lending. The Commissioner notes the submissions of both parties that while the companies were a group structure for Company Law purposes, there is no group relationship for the purposes of tax.
23. The Commissioner notes the Appellant's evidence that the director's loan with [REDACTED] was offset, as the director's account in [REDACTED] was in credit. Nevertheless, the Appellant states that he is unable to corroborate this with documentary evidence, as a Receiver was appointed in June 2016, and he lost all access to the companies' accounts and documentation. In Receivership, a company's powers and the authority of its directors are suspended in relation to the assets affected by the receivership. The evidence was that a Receiver was appointed over all of the assets of the companies.
24. The Commissioner has considered the Respondent's evidence that having considered the Receiver's report, it treated the outstanding director's loan with [REDACTED] as a preferential loan and assessed the Appellant accordingly. Company loans made to Directors may be liable to BIK and the evidence was that the Respondent applied section 112 TCA 1997 in this regard. This is because, an overdrawn director's loan account is effectively an interest free loan. In accordance with section 122 TCA 1997, a preferential loan means a loan, made by an employer to an employee in respect of which no interest is payable, or interest is payable at a rate lower than the "specified rate".
25. The Commissioner notes the Appellant's evidence that the director's loan can be offset against a credit due from another company in the group. Despite acceptance by the parties that the group was not a group structure for tax purposes, there was no evidence brought before the Commissioner of any sums capable of being offset against the director's loan in the sum of €252,910, the basis of the Respondent's assessment.

26. The Commissioner notes that it transpired at the hearing of the appeal, that the Appellant has discharged in full the liabilities in respect of the assessment, the subject matter of this appeal. The Appellant's Agent made inquiries with his office. It was confirmed that this is the situation and that the liabilities were discharged by way of offset, by agreement. Nevertheless, the Appellant's Agent submitted that it is still the Appellant's contention that the assessment should not have been raised and the Appellant should not be liable for the tax paid.
27. The Commissioner has considered the Appellant's reference to unfairness and that the assessment should not have been raised. It is important to state that the scope of the jurisdiction of an Appeal Commissioner is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Commissioner or based on undisputed facts as the case may be. It is discussed in a number of cases, namely; *Lee v Revenue Commissioners* [IECA] 2021 18, *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.
28. The jurisdiction of the Commission does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings. Insofar as the Appellant seeks that the Commissioner set aside a decision of the Respondent based on the alleged unfairness, breach of legitimate expectation, disproportionality or repugnance to the Constitution of Ireland, such grounds of appeal do not fall within the jurisdiction of the Commissioner and thus, do not fall to be determined as part of this appeal.
29. As stated above, the burden of proof in a tax appeal before the Commission is on the Appellant. The Appellant has not brought forward any additional evidence to demonstrate that the assessment raised by the Respondent is not payable and that the director's loan should not be treated as a preferential loan, as contended for by the Respondent.
30. The Commissioner heard the Appellant's evidence in relation to his access to the records of the companies and appreciates the difficult position that the Appellant may find himself in. Nevertheless, the Commissioner is satisfied that the Appellant in this appeal has not succeeded in proving on the balance of probabilities that the assessment to income tax, in the sum of €17,248, raised by the Respondent is incorrect. Hence, the assessment shall stand.

Determination

31. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in his appeal and has not succeeded in showing that the assessment to income tax is incorrect. Therefore, the Notice of Amended Assessment to Income Tax issued by the Respondent for the year ending 2015, in the sum of €17,248, shall stand.
32. It is understandable that there will be disappointment with the outcome of this appeal. This is an unfortunate situation and the Commissioner has every sympathy with the position the Appellant finds himself in. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax and duties.
33. 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
8 February 2023