AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

55TACD2023

Between:

[redacted]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This matter comes before the Tax Appeal Commission (hereinafter the "Commission") as an appeal against Notices of Amended Assessment to Corporation Tax (hereinafter "CT") raised on 1 November 2017 by the Revenue Commissioners (hereinafter the "Respondent") and a Notice of Estimate to Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT) (hereinafter "PAYE/PRSI/USC/LPT") for the years 2013, 2014 and 2015 raised by the Respondent on 7 November 2017.

2. The total amount of tax under appeal is €304,136.33.

Background

3. [redacted] Limited (hereinafter the "Appellant") is a private company limited by shares and having its registered office at [redacted]. The Appellant is involved in the development and manufacture of [redacted]

4. An audit was carried out by the Respondent on the Appellant on 24 February 2017 and in the course of the audit an issue arose in relation to the operation by the Appellant of a director's current account in the name of Mr [redacted] which was overdrawn. Mr [redacted] is a director and 100% shareholder in the Appellant.

5. In the period ending 31 March 2013 a sum of €100,000 was credited to Mr [redacted]'s director's current account with the Appellant. Note 6 of the Appellant's audited accounts for the period ending 31 March 2014 contains the following commentary on "*Transactions with directors*":

   "*The company operated from premises at* [redacted]*. The building were owned by directors* [redacted] *before the transfer of the property to the company (see below).*

   Contracts were made between directors [redacted] *and* [redacted] *Limited, whereby the company agreed to purchase the two properties from* [redacted] *at the agreed market price of €975,090 and €199,599 respectively. The properties were accounted for in the company Balance Sheet Fixed Asset in 2012 and as title had not yet transferred, are disclosed as Advances on Property Acquisitions.*"

6. Mr [redacted] was the sole owner of patent number [redacted] (hereinafter the "IP") and on 22 March 2014 the Appellant entered into a Call Option Agreement whereby Mr [redacted] granted the Appellant an Option for a fifteen month period to acquire the IP for €2,000,000. The Call Option Agreement provided for the payment

by the Appellant to Mr [redacted] of an option fee of €1.00 and a deposit of €600,000 (hereinafter the "Deposit"). The full text of the Call Option Agreement is set out at Annex 1 of this determination.

7. In the period ending 31 March 2014 a sum of €600,000 was credited to Mr [redacted]'s director's current account with the Appellant and page 2 of the of the Appellant's audited accounts for the period ending 31 March 2014 contains the following commentary on "*Patent Acquisition*":

   "*The company has paid a deposit of €600,000 in accordance with contract for the acquisition of intellectual property patent number* [redacted] *being a* [redacted] *from* [redacted] *Esquire. This intellectual property is considered extremely valuable to the company as the company has derived substantial income from this intellectual property in the past and it is therefore in the best interest of the company to acquire this intellectual property so as to protect the interests of the company going forward".*

8. In addition Note 8 of the Appellant's audited accounts for the period ending 31 March 2014 *contains* the following commentary on *"Transactions with directors":*

   "*The company has paid a deposit of €600,000 for the acquisition of patented Intellectual Property to Mr* [redacted] *Esq. pending the finalisation of contracts and transfer of title.*"

9. By letter dated 17 October 2017 the Respondent advised the Appellant as follows:

   "*…*

   1. The €600,000 "deposit" is not regarded as a repayment of the director's loan.

   2. The full basis together with documentary support for the €100,000 adjustment in the year 31st March 2013 has not been set out and therefore that will not be regarded as a repayment of the director's current account.

   3. Income Tax / Benefit in Kind will be applied for the year 2010 as outlined.

   Assessments will be raised in the absence of an offer dealing with the above not later than 31st October 2017.

   …"

10. On 1 November 2017 the Respondent raised Notices of Amended Assessment to CT for the following periods and amounts:

Period	Amount
1 April 2012 to 31 March 2013	€76,236
1 April 2013 to 31 March 2014	€72,619
1 April 2014 to 31 March 2015	(€72,965) but as the Appellant's Notice of Amended Assessment reflected an over-payment of (€104,677) the disputed amount is €31,712

11. On 7 November 2017 the Respondent raised a Notice of Estimation to "Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT)" (hereinafter the "Notice of Estimation") as follows:

Period	Description	Amount of Estimate	Balance Unpaid	Balance Unpaid
1 Jan 2013 – 31 December 2013	PAYE	(27,380.00)	(45,914.54)	18,534.54
	PRSI	4,178.00	2,369.81	1808.19
	USC	20,724.00	17560.19	3163.81
	LPT	0.00	0.00	0.00
1 Jan 2014 – 31 Dec 2014	PAYE	28,159.00	(4,797.41)	32,956.41
	PRSI	10,338.00	7,122.15	3,215.85
	USC	5,584.00	(2,453.99)	8,037.99
	LPT	(1,040.75)	(1,040.75)	0.00
1 Jan 2015 – 31 Dec 2015	PAYE	37,563.10	(3,054.96)	40,618.06
	PRSI	6,564.24	2,502.56	4,061.68
	USC	11,810.32	640.52	11,169.80
	LPT	(956.66)	(958.66)	10.00
			Rounded Total	123,566.33

12. The Notice of Amended Assessment to CT and the Notice of Estimation were raised by the Respondent on the basis that the credits of €100,000 and €600,000 appearing in the director's current account in the periods ending 31 March 2013 and 31 March 2014 should be disregarded for the purpose of calculating the tax liabilities of the Appellant for the relevant periods and that the amounts credited should be regarded as loans from the Appellant to Mr [redacted].

13. On 28 November 2017 the Appellant submitted a Notice of Appeal to the Commission appealing the Notices of Amended Assessment to CT raised by the Respondent on 1 November 2017 and appealing the Notice of Estimation raised by the Respondent on 7 November 2017.

14. At the oral hearing of this appeal the Appellant indicated to the Commissioner that the Notice of Assessment to CT for the period ending 31 March 2013 in the amount of €76,236 was no longer being appealed by the Appellant.

15. The Commissioner has considered the legislation, case law, the submissions received both written and oral, the documentary evidence and the witness evidence at the oral hearing in making this determination.

Legislation and Guidelines

16. The legislation relevant to the within appeal is as follows:

"(1) (a) In this section—

"employee", in relation to an employer, means an individual employed by the employer in an employment to which Chapter 3 of this Part applies, 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 of the individual is 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 a loan, in respect of which no interest is payable or interest is payable at a preferential rate, made directly or indirectly to an individual or to the spouse of the individual by a person who in relation to the individual or the spouse is an employer, but does not include any such loan in respect of which interest is payable 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;

“preferential rate” means a rate less than the specified rate;

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

(i) in a case where—

(I) the interest paid on the preferential loan qualifies for relief under section 244, or

(II) if no interest is paid on the preferential loan, the interest which would have been paid on that loan (if interest had been payable) would have so qualified,

the rate of 7 per cent per annum or such other rate (if any) prescribed by the Minister for Finance by regulations,

(ii) in a 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 7 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 11 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 an individual has at any time during a year of assessment a preferential loan or loans made directly or indirectly to him or her 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, the individual shall, subject to subsection (4), be treated 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 as having received in that year of assessment as a perquisite of an office or employment with that person a sum equal to—

(a) if no interest is payable on the preferential loan or loans, the amount of interest which would have been payable in that year if interest had been payable on the loan or loans at the specified rate, or

(b) if interest is paid or payable at a preferential rate or rates, the difference between the aggregate amount of interest paid or payable in that year and the amount of interest which would have been payable in that year if interest had been payable on the loan or loans at the specified rate,

and the individual or, in the case of an individual whose spouse is chargeable to tax for the year of assessment in accordance with section 1017 , the spouse 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 Ill 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 whose spouse is chargeable to tax for the year of assessment in accordance with section 1017 , the spouse of the individual shall be charged to tax 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."

Section 430 of the Taxes Consolidation Act 1997 (hereinafter the TCA1997") "*Meaning of "close company"*":

"*(1) For the purposes of the Corporation Tax Acts, "close company" means a company under the control of 5 or fewer participators, or of participators who are directors, but does not include—*

(a) a company not resident in the State,

(b) a registered industrial and provident society, being a society within the meaning of section 698,

(c) a building society within the meaning of section 702,

(d) a company controlled by or on behalf of the State and not otherwise a close company, or

(e) a company within subsection (4) or section 431.

(2) For the purposes of this section—

(a) a company shall be treated as controlled by or on behalf of the State only if it is under the control of the State, or of persons acting on behalf of the State, independently of any other person, and

(b) where a company is so controlled, it shall not be treated as being otherwise a close company unless it can be treated as a close company by virtue of being under the control of persons acting independently of the State.

(3) A company resident in the State (but not within paragraph (b) or (c) of subsection (1)) shall also be a close company if, on a full distribution of its distributable income, more than 50 per cent of that income would be paid directly or indirectly to 5 or fewer participators, or to participators who are directors.

(4) A company shall not be treated as a close company—

(a) if—

(i) it is controlled by a company which is not a close company, or by 2 or more companies none of which is a close company, and

(ii) it cannot be treated as a close company except by taking as one of the 5 or fewer participators requisite for its being so treated a company which is not a close company,

or

(b) if it cannot be treated as a close company except by virtue of paragraph (c) of section 432 (2) and would not be a close company if the reference in that paragraph to participators did not include loan creditors who are companies other than close companies.

…"

Section 432 of the Taxes Consolidation Act 1997 (hereinafter the TCA1997") "*Meaning of "associated company" and "control"*":

"*…*

(2) For the purposes of this Part, a person shall be taken to have control of a company if such person exercises, or is able to exercise or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the foregoing, if such person possesses or is entitled to acquire—

(a) the greater part of the share capital or issued share capital of the company or of the voting power in the company,

(b) such part of the issued share capital of the company as would, if the whole of the income of the company were distributed among the participators (without regard to any rights which such person or any other person has as a loan creditor), entitle such person to receive the greater part of the amount so distributed, or

(c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle such person to receive the greater part of the assets of the company which would then be available for distribution among the participators.

(3) Where 2 or more persons together satisfy any of the conditions of subsection (2), they shall be taken to have control of the company.

(4) For the purposes of subsection (2), a person shall be treated as entitled to acquire anything which such person is entitled to acquire at a future date or will at a future date be entitled to acquire.

(5) For the purposes of subsections (2) and (3), there shall be attributed to any person any rights or powers of a nominee for such person, that is, any rights or powers which another person possesses on such person's behalf or may be required to exercise on such person's direction or behalf.

(6) For the purposes of subsections (2) and (3), there may also be attributed to any person all the rights and powers of—

(a) any company of which such person has, or such person and associates of such person have, control,

(b) any 2 or more companies of which such person has, or such person and associates of such person have, control,

(c) any associate of such person, or

(d) any 2 or more associates of such person,

including the rights and powers attributed to a company or associate under subsection (5), but excluding those attributed to an associate under this subsection, and such attributions shall be made under this subsection as will result in the company being treated as under the control of 5 or fewer participators if it can be so treated."

Section 433 of the Taxes Consolidation Act 1997 (hereinafter the TCA1997") "*Meaning of "participator", "associate", "director" and "loan creditor*":

"*(1) For the purposes of this Part, "participator", in relation to any company, means a person having a share or interest in the capital or income of the company and, without prejudice to the generality of the foregoing, includes—*

(a) any person who possesses, or is entitled to acquire, share capital or voting rights in the company,

(b) any loan creditor of the company,

(c) any person who possesses, or is entitled to acquire, a right to receive or participate in distributions of the company (construing "distributions" without regard

to section 436 or 437) or any amounts payable by the company (in cash or in kind) to loan creditors by means of premium on redemption, and

(d) any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for such person's benefit.

…"

Section 438 of the Taxes Consolidation Act 1997 (hereinafter the TCA1997") "*Loans to participators, etc*"

"*(1) (a)Subject to this section, where a close company, otherwise than in the ordinary course of a business carried on by it which includes the lending of money, makes any loan or advances any money to an individual who is a participator in the company or an associate of a participator, the company shall be deemed for the purposes of this section to have paid in the year of assessment in which the loan or advance is made an annual payment of an amount which, after deduction of income tax at the standard rate for the year of assessment in which the loan or advance is made, is equal to the amount of the loan or advance.*

(b)Section 239 shall apply for the purposes of the charge, assessment and recovery of the tax referred to in paragraph (a).

(c)The annual payment referred to in paragraph (a) shall not be a charge on the company's income within the meaning of section 243.

(2)For the purposes of this section, the cases in which a close company is to be regarded as making a loan to any person shall include a case where—

(a)that person incurs a debt to the close company, or

(b)a debt due from that person to a third person is assigned to the close company,

and in such a case the close company shall be regarded as making a loan of an amount equal to the debt; but paragraph (a) shall not apply to a debt incurred for the supply by the close company of goods or services in the ordinary course of its trade or business

unless the period of credit given exceeds 6 months or is longer than that normally given to the company's customers.

(3)Subsection (1) shall not apply to a loan made to a director or employee of a close company, or of an associated company of the close company, if—

(a)the amount of the loan, or that amount when taken together with any other outstanding loans which were made by the close company or any of its associated companies to the borrower, or to the spouse or civil partner of the borrower, does not exceed €19,050,

(b)the borrower works full-time for the close company or any of its associated companies, and

(c)the borrower does not have a material interest in the close company or in any associated company of the close company but, if the borrower acquires such a material interest at a time when the whole or part of any such loan remains outstanding, the close company shall be regarded as making to the borrower at that time a loan of an amount equal to the sum outstanding.

(4) (a)Where, after a company has been assessed to tax under this section in respect of any loan or advance, the loan or advance or any part of it is repaid to the company, relief shall be given from that tax or a proportionate part of that tax by discharge or repayment.

(b)Notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made, relief under this subsection shall be given on a claim which shall be made within 4 years from the end of the year of assessment in which the loan or advance, or any part of it, as the case may be, is repaid to the company.

…"

Submissions and Witness Evidence

Appellant's Submissions

17. It is the Appellant's position that the Call Option Agreement would not have been enforceable had the Appellant not paid the deposit.

18. The Appellant submitted that it is clear that where the payment of a deposit is a condition of an offer, non-payment of the deposit may result in the offer being revoked. In this regard, the Appellant submitted, *Clark; Contract Law in Ireland*[1] states as follows:

> *"The important decision of Lord Lowry C.J. in the Northern Ireland case of Walker v Glass provides an excellent analysis of the basic rules on offer and acceptance. Walker wished to purchase an estate owned by Glass and to this end persuaded Glass to consider selling it to him. The parties contracted solicitors to draw up a form of offer in which Glass offered to sell the estate for £400,000, a deposit of £40,000 being payable. The offer was declared to be open for acceptance until March 13, 1979. Acceptance was prescribed; Walker had to sign a form of acceptance and forward the deposit before that date. On March 1, Walker notified Glass of his intention to buy but failed to forward the deposit until March 12. In the meantime, Glass had "revoked" the offer. Walker's action for specific performance failed. Despite the statement to the contrary in the offer, revocation could be effective at any time before acceptance. Walker argued that the offer had been effectively accepted on March 1. By communicating acceptance before the purported withdrawal on March 2, this effectively "froze" the transaction which was concluded on payment of the deposit. Lord Lowry C.J. refused to accept this theory. He noted that the prescribed mode of acceptance had to be satisfied. Payment of the deposit was not a neutral act, as counsel for Walker contended, because the failure to proceed would result in any deposit paid being forfeited by the seller."*

19. It is the Appellant's contention that the terms of the Call Option Agreement are clear. The Appellant submitted that the payment of a deposit was in effect a condition precedent to the performance of the Call Option Agreement. *McDermott and McDermott, Contract Law*[2] states in relation to a condition precedent at [20.41]:

> *"The existence of contingent conditions means that the parties to a contract do not always become bound to carry out the promises they have made immediately upon the matching of offer with communicated acceptance. The law would be unsatisfactory if all contractual relationships had to fit this rigid model. For example a person wishing to buy property may well be able to complete the transaction only if suitable mortgage financing can be arranged.*

[1] 8th edition at 1-75
[2] 2nd edition at [20.41]

In such circumstances an unqualified contractual commitment to purchase would involve a high degree of risk. Yet to postpone contracting until financing is assured would risk the house being sold to a third party. What the would-be purchaser requires is a contract containing a term making the obligation to complete contingent upon the arrangement of financing by a specified date. Such a clause is known as a condition precedent. It is an expedient and frequently used mechanism in terms of contract planning. Sometimes the inclusion of a term may be a matter of necessity rather than choice, such as where some kind of statutory permission is required to do something. For example a sale may have to be approved by a particular government minister. Even where the parties contract in ignorance of some statutory requirement, courts have sometimes implied a condition precedent that the contract is subject to the satisfaction of that statutory provision."

20. The authors also refer at paragraph [20.47] to the High Court decision in *Maloney v Danske Bank A/S* [2014] IEHC 441 where they state:

> "*Cregan J explained that a condition precedent is one which must be fulfilled before other conditions are fulfilled such that, if the condition precedent is not fulfilled, 'then the other conditions fall away or become unenforceable'. Cregan J considered the distinction outlined above, between a condition precedent to the contract (there is no contract until the condition is met) and a condition precedent to performance (the contract exists but obligations thereunder are suspended pending fulfilment), to be 'illogical'. The creation of a condition precedent presupposed that the parties had reached agreement. As a matter of logic, a condition precedent could not 'prevent the coming into being of a contract at all'. Cregan J stated:*
>
> > '*… the essence of a condition precedent is that it is a condition which precedes other conditions or contractual obligations contained in the contract. By calling it a condition precedent the parties intend to mean that if this condition is not fulfilled then the other conditions of the contract are unenforceable.*'"

21. The Appellant submitted that Clause 1.3 of the Call Option Agreement provided that if the Appellant did not exercise the Call Option, the Deposit was refundable. Therefore, the Appellant submitted, the payment of the Deposit to Mr [redacted] by way of a credit to his

director's account was treated as an asset by the Appellant, on the basis that it was refundable.

22. The Appellant submitted that paragraph 2.15 of FRS 102 states:

> *"The financial position of an entity is the relationship of its assets, liabilities and equity as of a specific date as presented in the statement of financial position. These are defined as follows:*
>
> *(a) An asset is a resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.*
>
> *(b) A liability is a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits.*
>
> *(c) Equity is the residual interest in the assets of the entity after deducting all its liabilities."*

23. Paragraphs 2.17-2.18 of FRS 102 defines an asset as:

> *"2.17 The future economic benefit of an asset is its potential to contribute, directly or indirectly, to the flow of cash and cash equivalents to the entity. Those cash flows may come from using the asset or from disposing of it.*
>
> *2.18 Many assets, for example property, plant and equipment, have a physical form. However, physical form is not essential to the existence of an asset. Some assets are intangible.*
>
> *2.19 In determining the existence of an asset, the right of ownership is not essential. Thus, for example, property held on a lease is an asset if the entity controls the benefits that are expected to flow from the property*

24. Therefore, the Appellant submitted that in treating the deposit in the manner it did, the Appellant was following generally accepted accounting principles. The Appellant further

submitted that in debiting the deposit as an asset and crediting it to the director's account, the Appellant was following simple double entry principles.

25. The Appellant submitted that in *Carroll Industries plc and PJ Carroll & Co. Ltd v S. O'Culachain* [1988] IR 705 (hereinafter "*Carroll Industries*"), the taxpayer had changed its system of accounting for its stock in hand. The Revenue Commissioners rejected the new approach. Carroll J held that profits and gains were not defined by statute but had been interpreted judicially as being the difference between receipts and the expenditure laid out to earn them, ascertained by accounts framed consistently with the ordinary principles of commercial accounting as modified by relevant statutory provisions and, accordingly, methods which reflected expected future profits or expected future losses for tax purposes were contrary to this principle.

26. In *Carroll Industries***,** the dispute was between the application of two different accounting standards. In determining this dispute, the Court emphasised that it was whichever system which "*correctly ascertains the full profits for tax purposes being the receipts during the year and the expenditure laid out to earn those receipts*" which would succeed. Whatever system is used must give a true result for the particular accounting year:

> *"In my view, the correct approach… is that there is a basic premise that profit is to be taken as described in the Whimster case as the difference between receipts from the trade or business during the accounting period and the expenditure laid out to earn those receipts… It is clear that regardless of whether CCA is a prevailing system… it does not show the expenditure laid out to earn receipts in the accounting period… I do not think 'prevailing' system is the correct test… If there is a system of commercial accounting which is appropriate to the company involved and which correctly ascertains the full profits for tax purposes being the receipts during the year and the expenditure laid out to earn those receipts, then it is possible that the system may be accepted… if there is a system of commercial accounting which is appropriate to the company involved but which does not correctly ascertain the full profits for tax purposes then that system cannot be used for the computation of the tax."*

27. Carroll Industries followed the earlier decision of the Supreme Court in *Cronin v Cork and County Property Company Limited* [1986] 1 IR 559 where the Supreme Court had quoted from Lord Clyde in *Whimster & Co. v. IRC* (1925) 12 T.C. 813 where he said:

"Computing the balance of profits and gains for the purpose of income tax, two general fundamental common places have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertain that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable and in conformity with the Rules of the Income Tax Act…For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the accounts should be entered at cost and market value, whichever is the lower; although there is nothing about this in the taxing statute."

28. The Supreme Court also approved the dicta of Pennycuick VC in *Odeon Associated Theatres v. Jones* [1971] 1 W.L.R. 442:

"The effect of the principles laid down in Usher's Wiltshire Breweries Limited v. Bruce and other cases, including those in which the expression 'ordinary principles of commercial accountancy' is used is this: first one must ascertain the profits of the trade in accordance with ordinary principles of commercial accountancy. That, of course, involves bringing in as items of expenditure such items as will be treated as proper items of expenditure in a Revenue account made up in accordance with the ordinary principles of commercial accountancy. Secondly, one must adjust this account by reference to the express prohibitions contained in the relevant statute, those being now contained in [TCA, s81(2)]. That is to say an item of expenditure, even if it would be allowed as a deduction in accordance with the ordinary principles of commercial accountancy, must be struck out if it falls within any of those statutory prohibitions."

29. The Commissioner heard from three witnesses on behalf of the Appellant.

Witness 1 – Mr [redacted]

30. Mr [redacted] stated that he is the Appellant's Managing Director and that on [redacted] he filed an application No. [redacted] following which he was subsequently granted a 10 year patent [redacted]. He stated that the patent is just one aspect of the IP which was the subject of the Call Option Agreement and that the patent was accompanied by schematics, a lot of [redacted] which allows the Appellant to develop and supply a product known as [redacted] to [redacted] both directly and also to a company, [redacted], which in turn supplies the [redacted] to [redacted]. Mr [redacted] stated that the [redacted] is the only product which the Appellant produces.

31. Prior to March 2014, the date of the Call Option Agreement, Mr [redacted] was not in receipt of any payments from the Appellant in relation to the Appellant's use of the IP for the production of the [redacted].

32. In or around April / May 2014 [redacted] visited the Appellant with a view to buying the Appellant and on 5 May 2014 Mr [redacted] received an email from the Executive Vice President of [redacted] seeking details of a potential sale price for the Appellant and on 8 May 2014 Mr [redacted] replied indicating a price of €5,000,000 to include the Appellant's "*land and buildings, all* [redacted] *related IP, stock, fixtures fittings and equipment, development and support team, present and future business with* [redacted] *future business with* [redacted] *in the US and* [redacted]". The valuation of €5,000,000 was calculated through a collaboration between the Appellant and its accountant. Mr [redacted] stated that the most important aspect and key item of the sale was the IP.

33. Mr [redacted] stated that at the time of the Call Option Agreement in March 2014, he felt it was necessary for the Appellant to own or have an option to own the IP, prior to [redacted] coming.

34. Mr [redacted] stated that he understood that the Deposit payment of €600,000 was the start of the process of transferring the IP completely to the Appellant. After the payment of the Deposit and for the duration of the Call Option Agreement the Appellant was the only company that could use the IP. He stated that the sale price of the IP to the Appellant was €2,000,000 and this was the total price that the Appellant would pay to him for the IP.

35. Mr [redacted] confirmed that the Extension Agreement was entered into between him and the Appellant on 20 May 2015 and the Second Extension Agreement was entered into

between him and the Appellant on 16 May 2017. In the Second Extension Agreement the Deposit amount was increased by €300,000 to a total amount of €900,000 and his understanding was that in the event that the Call Option was not exercised the entire amount of €900,000 was refundable by him to the Appellant.

36. On 1 September 2017, the Appellant wrote to Mr [redacted] giving him notice that it was exercising the Call Option to acquire the IP in the amount of €2,000,000. In addition on 1 September 2017 Mr [redacted] and the Appellant entered into an agreement for the assignment from Mr [redacted] to the Appellant of all right, title and interest in the IP, the right to sue for past infringements of the patents [redacted] and to retain any damages obtained as a result of such action of the IP.

37. Mr [redacted] stated that at the time of the agreements he owed a lot of money to his bank and he feared that the bank might seek to enforce the debt against his assets, including the IP, if he continued to own it. This, he stated, was another incentive to ensure that the Appellant owned the IP.

Witness 2 – Mr [redacted]

38. Mr [redacted] is an accountant of 19 years standing with [redacted]. Mr [redacted]'s firm became the Appellant's accountants and auditors in 2017 and was not involved in preparing the Appellant's accounts for the years 2014, 2015 and 2016. Mr [redacted]'s firm was involved in preparing the Appellant's accounts in 2017 and 2018 however Mr [redacted] himself was not involved in such preparation.

39. Mr [redacted] gave direct evidence to the Commissioner that Financial Reporting Standard 102 (hereinafter "FRS102") is the accounting standard under which financial statements are generally prepared. He stated that paragraph 2.15 of FRS102 contains the standard for the information which needs to be included in a Balance Sheet.

40. In relation to the Deposit, Mr [redacted] stated that he considers that the Deposit paid by the Appellant to Mr [redacted] of €600,000 on foot of the Call Option Agreement meets the definition of an asset as contained in paragraph 2.15(a) of FRS102 which states:

> "*An asset is a resource controlled be the entity as a result of past events and from which future economic benefits are expected to flow to the entity.*"

41. Mr [redacted] stated that:

i. the "resource" is the Deposit which was under the control of the Appellant in that the Appellant could choose whether to exercise the Call Option Agreement. the "past event" is the entering into the Call Option Agreement by the Appellant with Mr [redacted]; and

ii. the "future economic benefits" which are expected to flow to the Appellant is either the use of the IP if the Call Option was exercised or the entitlement to recoup the refund if the Call Option was not exercised. This is based on the definition of the future economic benefit of an asset as contained in paragraph 2.17 of FRS102 which is "*The future economic benefit of an asset is its potential to contribute, directly or indirectly, to the flow of* ***cash*** *and* ***cash equivalents*** *to the entity. Those cash flows may come from using the asset or from disposing of it.*"

42. Mr [redacted] stated that on foot of the Call Option Agreement the payment of the Deposit was credited to the Director's account in the Appellant's accounts for the period ending 31 March 2014 and this, he stated, was in compliance with accounting standards. In addition Mr [redacted] stated that he believes that the Appellant's accounts for 2014 were completed in compliance with accounting standards.

43. In relation to how the payment of the Deposit to Mr [redacted] by the Appellant was handled in the Appellant's Financial Statements, Mr [redacted] stated that prior to the Call Option Agreement the payments made by the Appellant to Mr [redacted] were debited to the director's account and credited to the bank account within the Appellant's Financial Statements. On operation of the Call Option Agreement it was necessary to re-categorise those accounts on payment of the Deposit and this was done by crediting the director's account and debiting the bank account within the Appellant's Financial Statement for the period ending 31 March 2014.

44. The Deposit, Mr [redacted] stated, was included in the "Other debtors" figure contained in Note 13 of the Appellant's Financial Statement which rose from €480,000 for the period ending on 31 March 2013 to €935,010 for the period ending on 31 March 2014.

45. In relation to the Appellant's Financial Statement for the period ending 31 March 2015 Mr [redacted] stated that the Deposit transaction for the previous year is reflected at pages 5 and 8 and in Notes 8, 10, 11 and 13 of same where the Deposit is contained in "other debtors".

46. The Appellant's Financial Statement for the period ending 31 March 2016, Mr [redacted] stated, was prepared by [redacted] but not by him personally. He stated

that Note 22 entitled "Contingent Liabilities" reflects the fact that the Call Option Agreement had not, at that stage, been exercised by the Appellant and because of this the potential liability of €1,400,000 being the balance of the amount payable under the Call Option Agreement if exercised, was not contained within the Financial Statement. In addition Note 26 of this Financial Statement notes the Second Extension Agreement and the payment of €300,000 as an additional Deposit in relation to same is also noted. Mr [redacted] also stated that, although the extension agreement had been entered into on 16 May 2016 after the end of the period to which this Financial Statement relates, it was something which needed to be brought to the attention of a reader but that the €300,000 additional Deposit was not reflected in it.

47. In relation to the Appellant's Financial Statement for the period ending 31 March 2017, Mr [redacted] stated that Note 22 entitled "Post Balance Sheet Events" reflects the fact that on 1 September 2017 the Appellant purchased the IP from Mr [redacted] for €1,500,000. This, he stated, was a non-adjusting event for the period ending 31 March 2017 and was not reflected in the Financial Statement as it occurred after the end of the period and before the audited Financial Statement was finalised.

48. The Appellant's Financial Statements for all of the relevant periods, Mr [redacted] stated, reflect the purchase of the IP by the Appellant.

Witness 3 – [redacted]

49. Mr [redacted] gave evidence to the Commissioner and stated in his direct evidence that he is the Appellant's and Mr [redacted]'s solicitor and that he drafted the Call Option Agreement. He stated that the background to the Call Option Agreement was that Mr [redacted] had substantial banking issues and that he (Mr [redacted]) had concerns that the banking issues could escalate. He stated that Mr [redacted] was looking to a share sale in the Appellant and that it was important for the value of the company that the Appellant would have a right to the ownership of the IP. He stated that he advised Mr [redacted] that the most appropriate way to deal with those issues was by way of a call option.

50. In relation to the Deposit, Mr [redacted] stated that, as the Appellant was being given a right to acquire a substantial asset, and as the call option had to be capable of standing over any scrutiny by Mr [redacted]'s creditors, the Deposit amount of €600,000 was considered a fair value to put on the benefit to the Appellant in getting the call option. He stated that the Appellant was not going to get the call option for €1 and that the Deposit was effectively condition precedent in that the Appellant had to pay a refundable deposit in

order to gain the call option. In other words, Mr [redacted] stated, Mr [redacted] would not have entered into the agreement if the Deposit had not be contained in it.

Respondent's Submissions

51. The Respondent did not adduce any witness evidence at the oral hearing.

52. The Respondent submitted that it does not accept that the sum of €600,000 that was credited to the director's current account constituted a repayment made by or on behalf of the director towards the overdrawn balance of the account for the following reasons:

53. The first reason on which the Respondent relies is that, in the Respondent's opinion, the Appellant did not acquire anything in consideration of the sum being credited to the director's account. The Respondent submitted that the option to purchase the IP was secured by the payment of an option fee of €1.00 as provided for in the definitions section of paragraph 2 of the Call Option Agreement. The Respondent submitted that the Deposit of €600,000 was refundable in its entirety in the event that the option was not exercised and that the Deposit was not paid to secure any further interest in the IP. The Respondent submitted that the Deposit was an advance of the final purchase price made by the Appellant to Mr [redacted] and that it was not a contractual deposit in so far as it was never liable to forfeiture, either in whole or in part.

54. The Respondent submitted that there is no evidence that the Appellant acquired any interest in the IP commensurate with the payment to the director's current account of €600,000. There is no evidence that the Appellant acquired any right in or title to the intellectual property that it could exercise pending the exercise of the option and the completion of the sale.

55. The Respondent also submitted that there is no evidence adduced by the Appellant of a disposal by Mr [redacted] of any interest in the IP during the tax period 1 April 2013 to 31 March 2014.

56. The Respondent further submitted that there is no evidence showing where the €600,000 that was credited to the director's current account came from or how it was financed. The balance sheet for the year ending on the 31st of March 2014 shows that the Appellant had cash in the bank in the sum of €243,680. It does not appear from the accounts of the Appellant that it had sufficient funds within its own accounts to generate a credit of €600,000 in favour of [redacted]. Nor does it appear from the accounts of the Appellant that it borrowed the sum from any creditor since short term and long term creditors of the Appellant decreased between 2014 and 2015.

57. It was submitted by the Respondent that the sum of €600,000 that was introduced by the Appellant into its director's current account at some point between 22 March 2014 and 31 March 2014 did not constitute a repayment by the director to the Appellant and nor could it be deemed to be a repayment. It is the Respondent's position that in 2014 the sum in question was a gratuitous advance made by the Appellant to Mr [redacted] in the form of a credit put against the overdrawn balance of the director's current account towards the final purchase price specified in the option agreement but contingent upon the eventual exercise by the Appellant of the Call Option Agreement.

Material Facts

Agreed Material Facts

58. The following material facts have been agreed between the Parties and the Commissioner accepts same as material facts:

i. By audit notification letter dated 9 January 2017 the Appellant was informed that it was to be subject to an audit by the Respondent.

ii. By Notice of Amended Assessment made on 1 November 2017 the Appellant was assessed to CT in the following additional amounts:

Period	Amount
1 April 2012 to 31 March 2013	€76,236
1 April 2013 to 31 March 2014	€72,619
1 April 2014 to 31 March 2015	(€72,965) but as the Appellant's Notice of Amended Assessment reflected an over-payment of (€104,677) the disputed amount is €31,712

iii. On 7 November 2017 the respondent raised a Notice of Estimation to "*Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT)*" (hereinafter the "Notice of Estimation") as follows:

Period	Description	Amount of Estimate	Balance Unpaid	Balance Unpaid

1 Jan 2013 – 31 December 2013	PAYE	(27,380.00)	(45,914.54)	18,534.54
	PRSI	4,178.00	2,369.81	1808.19
	USC	20,724.00	17560.19	3163.81
	LPT	0.00	0.00	0.00
1 Jan 2014 – 31 Dec 2014	PAYE	28,159.00	(4,797.41)	32,956.41
	PRSI	10,338.00	7,122.15	3,215.85
	USC	5,584.00	(2,453.99)	8,037.99
	LPT	(1,040.75)	(1,040.75)	0.00
1 Jan 2015 – 31 Dec 2015	PAYE	37,563.10	(3,054.96)	40,618.06
	PRSI	6,564.24	2,502.56	4,061.68
	USC	11,810.32	640.52	11,169.80
	LPT	(956.66)	(958.66)	10.00
			Rounded Total	123,566.33

iv. Mr [redacted], a director of the Appellant, was the sole owner of patent number [redacted] which is described as a "[redacted]. The Appellant used the IP to assist it in manufacturing goods for a customer, [redacted].

v. On 22 March 2014 the Appellant entered into a Call Option Agreement with Mr [redacted] whereby Mr [redacted] as grantor, granted the Appellant, as grantee, an Option for a fifteen month period from 22 December 2014 to acquire the IP for €2,000,000.00. The Call Option Agreement *inter alia* provided for the payment of a Call Option Fee of €1.00 and a Deposit of €600,000.

vi. The operative provisions of the Call Option Agreement stated:

> "***NOW THIS AGREEMENT WITNESSETH*** *that in consideration of the mutual obligations assumed by the parties hereto and payment of the Call Option Fee and the Deposit to the Grantor by the Grantee (the receipt of which the Grantor hereby acknowledges) it is hereby* ***AGREED AND DECLARED*** *as follows:*

CALL OPTION

1.1 The Grantor ***GRANTS*** *to the Grantee the Call Option exercisable during the Call Option Period to serve the Option Notice and thereupon a contract shall be deemed to be in existence between the Grantor and the Grantee in accordance with the terms of the Contract. The Contract shall be deemed to be dated on the date the Option Notice is deemed to be received in accordance with the provisions of Clause 2.4"*

vii. The Call Option Fee was defined as €1 and the Deposit defined as the sum of €600,000.

viii. The Contract was defined as the "*Contract in the format of that contained in Schedule One hereto*". The Contract provided for the absolute assignment of Mr [redacted]'s IP.

ix. In particular it was a term of the Contract that:

"*On the Closing Date, Assignee shall pay to the Assignor the Consideration (less the Deposit which shall be deemed then to form part of the Consideration) and the Assignor shall then assign and transfer to the Assignee absolutely [the IP].*"

x. By agreement made on 20 May 2015 (hereinafter the "Extension Agreement"), Mr [redacted] granted the Appellant an extension to the original option period for a further two years in consideration of €1.

xi. The Extension Agreement refers to the Call Option Agreement made on 22 December 2014. This is an error as there was no Call Option Agreement made on that date. The only Call Option Agreement entered into prior to the Extension Agreement was the agreement of 22 March 2014.

xii. Note 8 of the Appellant's accounts for the year ended 31 March 2015 provides that €600,000 was paid to Mr [redacted] by way of deposit.

xiii. At this time Mr [redacted]'s director's account was overdrawn and so the Appellant effected the payment to Mr [redacted] by crediting the deposit against the director's account and debiting the assets on the balance sheet with the corresponding amount. This was a simple double entry to reflect the payment of the deposit by the Appellant to Mr [redacted].

xiv. By a further agreement made on 16 May 2017 (hereinafter the "Second Extension Agreement"), Mr [redacted] granted the Appellant a second extension to the option period for a further 12 months commencing on 19 May 2017.

xv. By written resolution made on 16 May 2017, the Appellant resolved to enter into the Second Extension Agreement and pay the deposit as agreed.

xvi. By letter dated 1 September 2017 the Appellant exercised the Option, the Appellant having passed a resolution pursuant to section 238 of the Companies Acts 2014.

xvii. In addition, on 1 September 2017 Mr [redacted] and the Appellant entered into a contract (hereinafter the "Final Contract"). The IP was defined in the Final Contract as the "*benefit of patent number* [redacted] *and Intellectual Property connections therewith.*"

xviii. On 21 September 2017, Mr [redacted] and the Appellant agreed a variation to the Final Contract and agreed that Mr [redacted] would assign 75% of the IP to the Appellant and that the consideration for the assignment would be 75% of the original consideration, that is to say that the consideration for 75% of the IP would be €1,500,000.

Material Facts at Issue

59. The following material facts are at issue between the Parties:

i. The €600,000 Deposit paid to Mr [redacted] was a payment on foot of the Call Option Agreement and not a loan or advance;

ii. The Appellant was a "close company" pursuant to section 430 of the TCA1997 and Mr [redacted] had control over the Appellant pursuant to section 432 of the TCA1997 and was a "participator" in the Appellant pursuant to section 433 of the TCA1997 during the relevant tax periods:

<u>The €600,000 Deposit paid to Mr [redacted] was a payment on foot of the Call Option Agreement and not a loan or advance:</u>

60. On the one hand, the Appellant asserts that in order to ensure that the Call Option Agreement was executed, it paid a non-refundable Call Option Fee of €1.00 to Mr [redacted] along with the Deposit of €600,000. This, the Appellant asserts, was a term and condition of the Call Option Agreement. The Appellant asserts that if it had not paid Mr [redacted] the Deposit of €600,000 the Call Option Agreement would not have had any effect and would have been inoperable.

61. On the other hand, the Respondent submits that because the Deposit of €600,000 was fully refundable under the Call Option Agreement, it was not a payment to Mr [redacted] but rather it was a loan from the Appellant to Mr [redacted].

62. The correct approach to interpreting the construction of a contract has been set out by the Supreme Court in the judgment of *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274 and was expressed by Laffoy J in *UPM Kymmene Corporation v BWG* unreported, High Court, Laffoy J, 11 June 1999 (hereinafter "*Kymmene*") as follows:

> *"[T]he basic rules of construction which the Court must apply in interpreting the documents which contain the parties agreement are not in dispute. The Court's task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties, the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties.*"

63. The principles of interpretation applicable to contracts or agreements generally are well known having been recorded by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 which was confirmed in the UK Supreme Court decision in *Rainy Sky SA v Kookmin Bank* [2011] I WLR 2900 and subsequently confirmed by Kelly J in *Dunnes Stores v Holtglen Limited* [2012] IEHC 93 (hereinafter "*Dunnes*") and summarised by Gross LJ in Al *Sanea Saad Investments Co* Limited [2012] EWCA Civ 313 where he stated as follows:

> "…
>
> - *The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would have reasonably been available to the parties in this situation in which they were in at the time of the contract.*
> - *The Court has to start somewhere and the starting point is the wording used by the parties in the Contract.*
> - *It is not for the Court to rewrite the party's bargain. If the language is unambiguous, the Court must apply it.*
> - *Where a term of a contract is open to more than one interpretation, it is generally*

appropriate for the Court to adopt the interpretation which is most consistent with the business common sense. A Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

- *The contract is to be read as a whole and an 'iterative process' is called for: '… involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'."*

64. In interpreting the Agreement the Commissioner must start by looking at the wording of the document.

65. The title of any document is an indication of its contents and is a distinguishing description given to the document at hand. It has been agreed between the Parties to this appeal that the operative provisions of the Call Option Agreement are as follows:

"***NOW THIS AGREEMENT WITNESSETH*** *that in consideration of the mutual obligations assumed by the parties hereto and payment of the Call Option Fee and the Deposit to the Grantor by the Grantee (the receipt of which the Grantor hereby acknowledges) it is hereby* ***AGREED AND DECLARED*** *as follows:*

CALL OPTION

1.1 The Grantor ***GRANTS*** *to the Grantee the Call Option exercisable during the Call Option Period to serve the Option Notice and thereupon a contract shall be deemed to be in existence between the Grantor and the Grantee in accordance with the terms of the Contract. The Contract shall be deemed to be dated on the date the Option Notice is deemed to be received in accordance with the provisions of Clause 2.4"*

66. The Commissioner has considered the wording of these provisions and in particular notes the language "*...in consideration of the mutual obligations assumed by the parties hereto and payment of the Call Option Fee and the Deposit to the Grantor by the Grantee…*". The Commissioner finds that this wording and language means that Mr [redacted] granted the Appellant the Call Option in consideration of the mutual obligations and the payment to him of both the Call Option fee and the Deposit.

67. Having considered the wording of the document the Commissioner must ascertain the intention of the Parties as confirmed by Laffoy J in *Kymmene*.

68. The Commissioner notes that Mr [redacted] could not give any evidence as to the character of the payment of the €600,000 and that he stated that he had left all matters in relation to this payment to the accountants and the solicitor.

69. In ascertaining the intention of the Parties, the Commissioner heard the evidence of the Appellant's solicitor, Mr [redacted], who advised the Appellant in relation to the impact of his then financial position with his bank and in relation to the impact of entering into the Call Option Agreement with the Appellant. Mr [redacted] stated that as the Appellant was being given a right to acquire a substantial asset, and as the call option had to be capable of standing over any scrutiny by Mr [redacted]'s creditors, the Deposit amount of €600,000 was considered a fair value to put on the benefit to the Appellant in getting the call option. He stated that the Appellant was not going to get the call option for €1 and that the Deposit was effectively condition precedent in that the Appellant had to pay a refundable deposit in order to gain the call option. In other words, Mr [redacted] stated, Mr [redacted] would not have entered into the agreement if the Deposit had not been contained in it.

70. On cross examination by Senior Counsel for the Respondent, Mr [redacted] agreed that if the Appellant had paid the Deposit to Mr [redacted] by cheque instead of by off-setting it against his director's account, Mr [redacted] would have been obliged to give the Deposit back to the Appellant if the call option had not been exercised by the Appellant. In addition however, Mr [redacted] stated under cross examination that the Call Option Agreement had not placed any restriction on the use of the Deposit by Mr [redacted] between the date of the Call Option Agreement and the exercise of the call option by the Appellant or the lapsing of the call option were that to have occurred. Mr [redacted] stated that if such a restriction were to have been placed on the use of the Deposit then those restrictions would have been included in the Call Option Agreement by way of a stakeholder provision. No such restrictions were included in the Call Option Agreement. Mr [redacted] further stated that if the time came and the option wasn't exercised and/or lapsed, then the company would call on [redacted] to make the payment. And unless and until that call is made, he could do what he wants with it.

71. On re-examination by counsel for the Appellant Mr [redacted] stated that, in his opinion, the Deposit was not a loan. The reason Mr [redacted] gave for this opinion was that if matters were to proceed in that way it would mean that any time there is a contract between an officer of a company and that company, that a deposit paid would amount to a loan or an advance. He stated that this could not be the case, that it wasn't characterised as an advance or a loan, it was a deposit.

72. Having considered the wording of the Call Option Agreement and having heard Mr [redacted]'s evidence and the evidence of Mr [redacted] who was central to the establishment of the Call Option Agreement and in advising both the Appellant and Mr [redacted], the Commissioner finds that the correct interpretation of the Call Option Agreement is that the

€600,000 paid by the Appellant to Mr [redacted] was a Deposit and that Call Option Agreement would not have been enforceable had the Appellant not paid the deposit. The Commissioner finds in particular that the wording of the Call Option Agreement is clear and that Mr [redacted] was granting the Appellant a Call Option over the IP in consideration for the payment of both the Call Option Fee of €1.00 and the Deposit of €600,000.

73. The Respondent has not adduced any evidence which supports its' claim that the Deposit was a loan or advance from the Appellant to Mr [redacted]. The payment of the Deposit secured the Call Option for the Appellant. The Commissioner accepts that the Deposit was refundable to the Appellant by Mr [redacted] in circumstances where the Call Option was not exercised or lapsed however, there is nothing in the Call Option Agreement, or in any other documentation or evidence adduced to the Commissioner, which establishes or tends to establish that the Deposit was a loan or advance.

74. Therefore the Commissioner finds as a material fact that the €600,000 Deposit paid by the Appellant to Mr [redacted] was a payment on foot of the Call Option Agreement and was not a loan or advance.

<u>The Appellant was a "close company" pursuant to section 430 of the TCA1997 and Mr [redacted] had control over the Appellant pursuant to section 432 of the TCA1997 and was a "participator" in the Appellant pursuant to section 433 of the TCA1997 during the relevant tax periods:</u>

75. Section 430 of the TCA1997 defines a "close company" as being a company under the control of five or fewer participators.

76. By virtue of section 432 of the TCA1997 a person is deemed to have control of a company, inter alia, if that person possesses the greater part of the issued share capital of the company or of the voting power in the company.

77. Section 433 of the TCA1997 provides that a person will be deemed to be a "participator" in a company if he or she has a share or interest in the capital or income of the company and if he or she possesses share capital or voting rights in the company.

78. Mr [redacted] was, it is not contested by the Parties to this appeal, the only person who had a share or interest in the capital or income of the Appellant and was the only person who possessed share capital or voting rights in the Appellant and the Commissioner therefore finds that Mr [redacted] had control of the Appellant pursuant to section 432 of the

TCA1997 and that Mr [redacted] was a participator in the Appellant company pursuant to section 433 of the TCA1997.

The payment of the €600,000 Deposit was correctly reflected in the Appellant's Financial Statements:

79. The Commissioner heard evidence from Mr [redacted], the accountant on behalf of the Appellant, who stated that in his professional opinion the payment of the €600,000 Deposit was correctly reflected in the Appellant's financial statements for the periods 1 April 2013 to 31 March 2014, 1 April 2014 to 31 March 2015, 1 April 2015 to 31 March 2016, 1 April 2016 to 31 March 2017 and 1 April 2017 to 31 March 2018. Mr [redacted] stated that the treatment of the transaction of the payment of the €600,000 Deposit by the Appellant to Mr [redacted] complied with accounting standards and in particular complied with FRS102. This part of Mr [redacted]'s evidence was not contested by the Respondent.

80. The Commissioner is satisfied that the Appellant has established that the payment of the €600,000 Deposit by the Appellant to Mr [redacted] was correctly reflected in the Appellant's Financial Statements for the periods 1 April 2013 to 31 March 2014, 1 April 2014 to 31 March 2015, 1 April 2015 to 31 March 2016, 1 April 2016 to 31 March 2017 and 1 April 2017 to 31 March 2018.

81. Therefore, the Commissioner finds that the payment of the €600,000 Deposit was correctly reflected in the Appellant's Financial Statements.

Findings of Material Fact:

82. For the avoidance of doubt the Commissioner finds the following as material facts in this appeal:

i. By audit notification letter dated 9 January 2017 the Appellant was informed that it was to be subject to an audit by the Respondent.

ii. By Notice of Amended Assessment made on 1 November 2017 the Appellant was assessed to CT in the following additional amounts:

Period	Amount
1 April 2012 to 31 March 2013	€76,236

1 April 2013 to 31 March 2014	€72,619
1 April 2014 to 31 March 2015	(€72,965) but as the Appellant's Notice of Amended Assessment reflected an over-payment of (€104,677) the disputed amount is €31,712

iii. On 7 November 2017 the respondent raised a Notice of Estimation to "*Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT)*" (hereinafter the "Notice of Estimation") as follows:

Period	Description	Amount of Estimate	Balance Unpaid	Balance Unpaid
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	LPT	0.00	0.00	0.00
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	PRSI	10,338.00	7,122.15	3,215.85
	USC	5,584.00	(2,453.99)	8,037.99
	LPT	(1,040.75)	(1,040.75)	0.00
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	PRSI	6,564.24	2,502.56	4,061.68
	USC	11,810.32	640.52	11,169.80
	LPT	(956.66)	(958.66)	10.00
			Rounded Total	123,566.33

iv. Mr [redacted], a director of the Appellant, was the sole owner of patent number [redacted] which is described as a "[redacted]

[redacted] The Appellant used the IP to assist it in manufacturing goods for a customer, [redacted]

v. On 22 March 2014 the Appellant entered into a Call Option Agreement with Mr [redacted] whereby Mr [redacted], as grantor, granted the Appellant, as grantee, an Option for a fifteen month period from 22 December 2014 to acquire the IP for €2,000,000.00. The Call Option Agreement *inter alia* provided for the payment of a Call Option Fee of €1.00 and a Deposit of €600,000.

vi. The operative provisions of the Call Option Agreement stated:

> "***NOW THIS AGREEMENT WITNESSETH*** *that in consideration of the mutual obligations assumed by the parties hereto and payment of the Call Option Fee and the Deposit to the Grantor by the Grantee (the receipt of which the Grantor hereby acknowledges) it is hereby* ***AGREED AND DECLARED*** *as follows:*
>
> ***CALL OPTION***
>
> *1.1 The Grantor* ***GRANTS*** *to the Grantee the Call Option exercisable during the Call Option Period to serve the Option Notice and thereupon a contract shall be deemed to be in existence between the Grantor and the Grantee in accordance with the terms of the Contract. The Contract shall be deemed to be dated on the date the Option Notice is deemed to be received in accordance with the provisions of Clause 2.4"*

vii. The Call Option Fee was defined as €1 and the Deposit defined as the sum of €600,000.

viii. The Contract was defined as the "*Contract in the format of that contained in Schedule One hereto*". The Contract provided for the absolute assignment of Mr [redacted]'s IP.

ix. In particular it was a term of the Contract that:

> "*On the Closing Date, Assignee shall pay to the Assignor the Consideration (less the Deposit which shall be deemed then to form part of the Consideration) and the Assignor shall then assign and transfer to the Assignee absolutely [the IP].*"

x. By agreement made on 20 May 2015 (hereinafter the "Extension Agreement"), Mr [redacted] granted the Appellant an extension to the original option period for a further two years in consideration of €1.

xi. The Extension Agreement refers to the Call Option Agreement made on 22 December 2014. This is an error as there was no Call Option Agreement made on that date. The only Call Option Agreement entered into prior to the Extension Agreement was the agreement of 22 March 2014.

xii. Note 8 of the Appellant's accounts for the year ended 31 March 2015 provides that €600,000 was paid to Mr [redacted] by way of deposit.

xiii. At this time Mr [redacted]'s director's account was overdrawn and so the Appellant effected the payment to Mr [redacted] by crediting the deposit against the director's account and debiting the assets on the balance sheet with the corresponding amount. This was a simple double entry to reflect the payment of the deposit by the Appellant to Mr [redacted].

xiv. By a further agreement made on 16 May 2017 (hereinafter the "Second Extension Agreement"), Mr [redacted] granted the Appellant a second extension to the option period for a further 12 months commencing on 19 May 2017.

xv. By written resolution made on 16 May 2017, the Appellant resolved to enter into the Second Extension Agreement and pay the deposit as agreed.

xvi. By letter dated 1 September 2017 the Appellant exercised the Option, the Appellant having passed a resolution pursuant to section 238 of the Companies Acts 2014.

xvii. In addition, on 1 September 2017 Mr [redacted] and the Appellant entered into a contract (hereinafter the "Final Contract"). The IP was defined in the Final Contract as the "[redacted] *and Intellectual Property connections therewith.*".

xviii. On 21 September 2017, Mr [redacted] and the Appellant agreed a variation to the Final Contract and agreed that Mr [redacted] would assign 75% of the IP to the Appellant and that the consideration for the assignment would be 75% of the original consideration, that is to say that the consideration for 75% of the IP would be €1,500,000;

xix. The €600,000 Deposit paid by the Appellant to Mr [redacted] was a payment on foot of the Call Option Agreement and was not a loan or advance;

xx. The Appellant was a "close company" pursuant to section 430 of the TCA1997 and Mr [redacted] had control over the Appellant pursuant to section 432 of the TCA1997 and was a "participator" in the Appellant pursuant to section 433 of the TCA1997 during the relevant tax periods;

xxi. The payment of the €600,000 Deposit was correctly reflected in the Appellant's Financial Statements.

Analysis

83. The burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, is on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

> "*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 Commissioner as to whether the taxpayer has shown that the relevant tax is not payable*."

84. As noted earlier in this determination, the Appellant has withdrawn its' appeal in relation to the Notice of Assessment to CT for the period 1 April 2012 to 31 March 2013. Therefore, the Notice of Assessment to CT for the period 1 April 2012 to 31 March 2013 in the amount €76,236 stands and does not form part of this determination

85. The Respondent submitted that the effect of section 438 of the TCA1997 is to impose a charge to income tax on a close company at the standard rate on a sum equivalent to the grossed-up amount of the loan or advance made to a participator. Income tax deducted pursuant to section 438 of the TCA1997 is part of the CT liability of a close company and it must be accounted for in the CT returns of a company.

86. The Commissioner has already found as material facts that the Appellant was a "close company" pursuant to section 430 of the TCA1997 that [redacted] had control over the Appellant pursuant to section 432 of the TCA1997 and was a "participator" in the Appellant pursuant to section 433 of the TCA1997 during the relevant tax periods.

87. The Notices of Amended Assessment to CT and the Notice of Estimation were raised by the Respondent on the basis that the €600,000 payment from the Appellant to Mr [redacted] was a loan or advance and that because Mr [redacted] was a participator in the Appellant, which is a close company, the provisions of section 438 of the TCA1997 apply to that transaction.

88. The Commissioner has already found as a material fact that the €600,000 Deposit paid by the Appellant to Mr [redacted] was a payment on foot of the Call Option Agreement and was not a loan or advance. Therefore, the provisions of section 438 of the TCA1997

which is entitled "*Loans to participators, etc*" do not apply to the payment of the €600,000 Deposit by the Appellant to Mr [redacted].

89. The Commissioner has also found as a material fact that the payment of the €600,000 Deposit was correctly reflected in the Appellant's Financial Statements.

90. It therefore follows that the basis on which the Respondent raised the Notices of Amended Assessment to CT and the Notice of Estimation was incorrect.

91. Subsequent to the hearing of this appeal the Parties wrote to the Commissioner in respect of an issue which had arisen in relation to the withdrawal by the Appellant of its' appeal in against the Notice of Assessment to CT for the period 1 April 2012 to 31 March 2013 and the impact this may have on the calculation of the correct amounts of CT the subject of the Notices of Amended Assessment to CT and correct amounts of PAYE/PRSI/USC/LPT the subject of the Notice of Estimation raised by the Respondent.

92. The Respondent submitted that in the event that the Commissioner determines that the €600,000 Deposit was correctly reflected in the Appellant's Financial Statements and therefore in the director's account balances contained therein for the period ending 31 March 2014 was €4,578 in credit and for the period ending 31 March 2015 was €152,188 overdrawn. The Appellant has accepted this position.

93. The Respondent then submitted that the consequence of those balances is that the Notice of Assessment to CT for the period ending 31 March 2014 should be reduced to nil and the Notice of Estimation to PAYE/PRSI/USC/LPT for the period ending 31 March 2014 should also be reduced to nil. The Appellant has accepted this position.

94. The Respondent then submitted that the consequence of those balances is that the Notice of Assessment to CT for the period ending 31 March 2015 should be reduced to €38,047 and the Notice of Estimation to PAYE/PRSI/USC/LPT for the period ending 31 March 2015 should be reduced to €10,683.

95. The Appellant disagrees with the Respondent's submission in relation to the Notice of Estimation to PAYE/PRSI/USC/LPT for the period ending 31 March 2015 and submits that it should be reduced to €5,502. The Appellant submits that with respect to the PAYE/PRSI/USC/LPT assessment for the period ending 31 March 2015, it would appear that the Respondent has calculated the benefit-in-kind on the director's loan account by utilizing the closing balance of the said account at the year-end of 31 March 2015. The Appellant submits that the method utilised by the Respondent would suggest that the

overdrawn amount of €152,188 is overdrawn in the entirety for the twelve-month calendar at 31 March 2015, which the Appellant submits is not the case. It is submitted that the computation should be calculated on an average balance basis as this is a reasonable and acceptable accounting basis for calculating the benefit-in-kind on the director's loan account.

96. The Appellant submits that the average balance basis constitutes the average of the amount outstanding throughout the financial year which is calculated by adding the opening balance plus the closing balance divided by two. It is submitted by the Appellant that the average balance basis accurately reflects the Appellant's loan account and the multiple withdrawals that occurred over the course of the financial year for 2015. The Appellant's loan account became overdrawn by €152,188 on a gradual basis over the course of the financial year ending 31 March 2015 and the said account was not overdrawn in its entirety and or by way of a lump sum 1 April 2014 as appears to be the approach submitted by the Respondent in its Supplemental Submissions.

97. In response the Respondent submitted that it is of the view the two acceptable methodologies when looking at when taxing overdrawn directors' account balances is either:

    i. Month by month BIK approach where a closing balance at the end of each month is subjected to the specified rate with an assessable amount (that is an annual figure in the first instance) being divided by 12 to get a monthly equivalent. This is then replicated for each overdrawn month. The various rates are then aggregated for the yearly outcome.

    ii. Applying the specified rate (13.5%) to the end of year balance and taxing the assessable amount produced

98. The Respondent submitted that the section option was the option relied on in its' supplemental submissions as it never received the closing balance of the directors account balance on a month by month basis.

99. The Commissioner has not been provided with the monthly closing balance of the director's account by the Appellant and as a result the Commissioner finds that the Appellant has not discharged the burden of proof in relation to the calculation of the correct amount of PAYE/PRSI/USC/LPT for the period ending 31 March 2015. As a result the Commissioner finds that the correct amounts of CT and PAYE/PRSI/USC/LPT to be

reflected in the Notices of Amended Assessment to CT and the Notice of Estimation of PAYE/PRSI/USC/LPT are as follows:

100. Notices of Amended Assessment to CT for the following periods and amounts:

Period	Amount
1 April 2013 to 31 March 2014	€ 0.00
1 April 2014 to 31 March 2015	€38,047.00

101. Notice of Estimation (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT)" for the following periods and amounts:

Period	Amount
1 April 2013 to 31 March 2014	€ 0.00
1 April 2014 to 31 March 2015	€10,683.00

Determination

102. The Commissioner determines that the Appellant has discharged the burden of proof in this appeal and it has succeeded in showing that the relevant tax was not payable.

103. The Commissioner therefore determines that :

i. The Notice of Amended Assessment to Corporation Tax for the period ending 31 March 2014 be reduced to nil;

ii. The Notice of Amended Assessment to Corporation Tax for the period ending 31 March 2015 be reduced to €38,047.00;

iii. The Notice of Estimation to Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT) for the period ending 31 March 2014 be reduced to nil;

iv. The Notice of Estimation to Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (LPT) for the period ending 31 March 2015 be reduced to €10,683.00.

104. This Appeal is determined in accordance with Part 40A of the TCA1997 and in particular sections 949AK and 949AL thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA1997.

Clare O'Driscoll
Appeal Commissioner
14 February 2023

Annex 1

Call Option Agreement dated 22 March 2014

"THIS AGREEMENT made on the 22 day of March, 2014

BETWEEN

2. [redacted] *of* [redacted] *(hereinafter call the "Grantor") of the one part AND*

3. [redacted] *having offices at* [redacted] *(hereinafter called the "Grantee") of the other part*

DEFINITIONS

*"**Call Option**" shall mean the option granted by the Grantor to the Grantee pursuant to the provisions of Clause 2 hereunder;*

***"Call Option Fee**" shall mean the sum of **One Euro (€1.00)**;*

***"Call Option Period**" shall mean the period of fifteen (15) months from the date hereof;*

***"Contract**" shall mean the Contract in the format of that contained in Schedule One hereto;*

***"Deposit**" shall mean the sum of **Six Hundred Thousand Euro (€600,000)** VAT exclusive;*

***"Intellectual Property**" shall mean the Intellectual Property as defined in the Contract;*

***"Option Notice**" shall mean a notice issued by the Grantee to the Grantor in the event that the Call Option is exercised in the format of that contained in the Schedule Two hereto;*

***"Option Price**" shall mean the Consideration as defined in the Contract.*

OPERATIVE PROVISIONS

NOW THIS AGREEMENT WITNESSETH that in consideration of the mutual obligations assumed by the parties hereto and payment of the Call Option Fee and the Deposit to the Grantor by the Grantee (the receipt of which the Grantor hereby acknowledges) it is hereby AGREED AND DECLARED as follows:

CALL OPTION

1.1 The Grantor GRANTS to the Grantee the Call Option exercisable during the Call Option Period to serve the Option Notice and thereupon a contract will be deemed to be in existence between the Grantor and the Grantee in accordance with the terms of the Contract. The Contract shall be deemed to be dated on the date the Option Notice is deemed to be received in accordance with the provisions of Clause 2.4.

1.2 The Call Option Fee is non-refundable in the event that the Call Option lapses and/or ceases to have any affect and/or the Call Option is not exercised or if exercised and thereafter the Contract is rescinded it shall be forfeited.

1.3 In the event that the Call Option is not exercised, the Deposit on expiry of the Call Option Period, shall be refunded by the Grantor to the Grantee without interest, costs or compensation thereupon. In the event that the Call Option is exercised and the Grantee does not complete the purchase in accordance with the terms of the Contract through no default of the Grantor, then the Grantor may forfeit the deposit in addition to any other remedy it may have against the Grantee. If any of the events specified in paragraph 4 and 5 hereunder apply, the Deposit shall be forfeited by the Grantor.

2. NOTICES

2.1 Notices of any communication given pursuant to this Agreement by any party to this Agreement to any other party to this Agreement shall be in writing and shall be sufficiently given if;

(i) Delivered by hand or sent by post to the address set forth herein of the party to which the Notice or communication is being given or to such other address as such party shall communicate to the party giving the Notice or communication; or

(ii) Sent by facsimile or other electronic means of reproduction to the correct facsimile number of the party to which it is being sent.

2.2 *Any Notice or communication given or sent by the post hereunder shall be sent by registered post.*

2.3 *Any party serving a Notice or making a communication by facsimile or other means of visible electronic reproduction shall promptly confirm such notice or communication by telephoning the party to whim it is addressed but the absence of such confirmation shall not affect the validity of any such Notice or communication.*

2.4 *Every Notice or communication given in accordance with this Clause shall be deemed to have been received as follows:-*

MEANS OF DISPATCH	*DEEMED RECEIVED*
Delivery by hand	*The day of delivery*
Post	*Seven business days after Posting*
Facsimile or other means of visible electronic reproduction	*On dispatch*

3. *NON ASSIGNMENT*

Neither party may assign its rights or obligations herein contained without the consent in writing of the other.

4. *LAPSING OF CALL OPTION*

The Call Option shall lapse in the event of a Receiver being appointed over the Grantee or in the event of any encumbrancer takes possession of or a Receiver Examiner Administrator Officer or similar Officer is appointed over all or any part of the assets of the Grantee or if a petition is presented for the appointment of a Receiver Examiner Administrator Officer or similar Officers to the Grantee and/or the Grantee is unable to pay its debts within the meaning of section 213 of the Companies Act 1963.

5. *LOSS OF CONTROL*

If any transaction or series of transactions is or are affected as a result of which any one person, firm, company or institution or group of persons, firms, companies and/or institutions acting on concert (A)

acquires or becomes entitled to acquire more than 50% of the voting power of the Grantee or becomes entitled to control directly or indirectly the affairs of the Grantee or becomes entitled to acquire more than 50% of the issues share capital of the Grantee the and in such case and at any time thereafter the Grantor may in its absolute discretion by written notice to the Grantee terminate the within Call Option thereby terminating/cancelling all or any of its obligations under the within Call Option.

IN WITHNESS WHEREOF the parties have hereunto executed this Agreement the day and year first herein WRITTEN.

SCHEDULE ONE

"FORM OF CONTRACT"

THIS AGREEMENT Dated the [ ] day of December 2014

BETWEEN

1. [redacted]) *of* [redacted] *(the "Assignor") and*

2. [redacted] *having offices at* [redacted] *(the "Assignee")*

BACKGROUND

The Assignor wishes to transfer to the Assignee all Intellectual Property Rights which it holds in the Intellectual Property.

1. *DEFINITIONS*

*"**Closing Date**" shall mean four (4) weeks from the date hereof;*

*"**Consideration**" shall meanthe sum paid under the Option Agreement;*

*"**Deposit**" shall mean the sum paid under the Option Agreement;*

*"**Option Agreement**" shall mean the Option Agreement made the 22nd December 2014 between the Assignor and the Assignee.*

2. *ASSIGNMENT*

On the Closing Date, Assignee shall pay to the Assignor the Consideration (less the Deposit which shall be deemed then to form part of the Consideration) and the Assignor shall then assign and transfer to the Assignee absolutely:-

2.1 All right title and interest in the Intellectual Property including all statutory and common law rights attaching to it;

2.2 The right to sue for past infringements and to retain any damages obtained as a result of such action to the Assignee;

2.3 All rights and benefits relating to the above including any rights to claim priority from any of the above.

3. *UNDERTAKING*

To the extent that the Assignor cannot assign any Intellectual Property Rights to the Assignee, it is agreed that any such right (including where applicable to any moral right, such as a right of paternity or integrity) shall be irrevocably and unconditionally waived by the Assignor and shall not be exercised against the Assignee.

4. *WARRANTY*

The Assignor represents and warrants that it is the legal and beneficial owner of all Intellectual Property Rights in the Intellectual Property; all such rights are unfettered and not subject to any charge, lien, encumbrance or any other adverse right or interest and the Assignor is entitled to enter in to this Agreement; that the Intellectual Property is valid and enforceable against Third Parties; and the use of the Intellectual Property does not infringe any Intellectual Property Rights of a third party.

5. *MISCELLANEOUS*

Each party shall do and execute, or arrange for the doing and executing of each necessary act, document that is reasonable within its power to implement this agreement

SCHEDULE TWO

(CALL OPTION)

(APPLICABLE IN THE EVENT THAT THE CALL OPTION IS EXERCISED)

To: [redacted]

Date: _____

RE: INTELLECTUL PROPERTY / PATENT AGREEMENT

Dear Sirs,

I refer to the Option Agreement entered into by you with me on the 22nd day of December 2014 (hereinafter called the "Agreement").

By this letter, we give you notice pursuant to Clause 1 of the Agreement to acquire the Intellectual Property described in the Agreement. I CONFIRM that pursuant to the terms of the Agreement, this letter and its service constitutes a contract between you and us in accordance with the terms of the Agreement.

Yours faithfully,

_____

[redacted]"