AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between 60TACD2023

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") against the Revenue Commissioners ("the Respondent") decision on 3 April 2017 to issue a Notice of Amended Assessment for the year ending [redacted], in the sum of €72,728.35.
2. The liabilities arose as the Respondent assessed the Appellant as being the recipient of farm payment entitlements, namely the Single Payment Scheme (hereinafter "SPS"), paid by the Department of Agriculture, Food and Marine (hereinafter "DAFM"), and which has not been included in the Appellant's income tax returns for the year 2011.
3. The Appellant contends that the Respondent is out of time to raise the amended assessment having regard to section 955 and 956 TCA 1997, which provides for a four year time limit.
4. On 12 May 2017, the Appellant duly appealed to the Commission. The appeal proceeded by way of a hearing on 27 January 2023. The Appellant was represented by [redacted] and the Respondent was represented by Junior Counsel.

Background

5. The Appellant has a number of land interests. Prior to 1 June 2011, the Appellant famed the land personally and was in receipt of the SPS payment from the DAFM relating to the aforesaid lands.

6. On 31 May 2011, the Appellant incorporated his farming business under the company name [redacted] and a copy of the minutes of the first meeting of the Directors of [redacted] has been submitted by the Appellant. From 1 June 2011 onwards, [redacted] commenced trading, it carried out all farming activates and the Appellant transferred all stock and machinery of the farming trade to [redacted].

7. On 8 June 2011, the Appellant and his wife entered into a lease agreement with [redacted] for a period of 4 years and 7 months, in relation to 35 acres of land that they owned jointly. In addition, the Appellant entered into a lease agreement with [redacted] for 4 years and 7 months, in relation to 20 acres of land of which he had a life interest. On 1 October 2012, [redacted] entered into a lease agreement with [redacted] for a period of 3 years, for 303 acres of land at [redacted].

8. On 29 June 2011, the herd number was transferred to [redacted] and correspondence from the DAFM was submitted in support of the transfer. However, the SPS entitlements were not transferred to [redacted] and remained in the Appellant's name until 2012, as all payment applications must be made to the DAFM prior to 15 May and amendments made up to 31 May, in any given year.

9. In October 2011, the 2011 SPS payment from the DAFM in the sum of €140,656 was paid to the bank account of the Appellant, then subsequently transferred to the bank account of [redacted]. The Appellant did not include the SPS payment in his income tax return for 2011. Rather, the SPS payment was included in [redacted] Corporation Tax return for the year ended 31 May 2012. In May 2012, the Appellant applied to the DAFM to transfer the SPS entitlements to [redacted].

10. On 28 May 2014, a Notification of Revenue Audit issued to the Appellant. The correspondence informed the Appellant that the scope of the audit was all relevant taxes and duties and that the period of audit was 1 January 2011 to [redacted]. Between the date of notification of audit and 31 January 2017, the parties liaised in relation to the tax treatment of the SPS payment. Subsequently, on 3 April 2017, in accordance with section 955 TCA 1997, the Respondent issued a Notice of Amended Assessment, the subject matter of this appeal.

11. The Appellant argues that the Respondent is precluded from raising the assessment as it is outside of the four year period provided for in section 955 TCA 1997. The Appellant argues that there was a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period.

12. Aside from the matter of the four year time limit for raising an assessment, the core substantive issue in this appeal is whether the SPS payment from the DAFM, during the year under appeal, is taxable as income in the hands of the Appellant, as contended by the Respondent, or is instead taxable as income received by a company formed, owned and managed by the Appellant, namely [redacted], as contended by the Appellant.

Legislation and Guidelines

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

Section 955 TCA 1997, Amendment of and time limit for assessments, *inter alia* provides:-

(1) Subject to subsection (2) and to section 1048, an inspector may at any time amend an assessment made on a chargeable person for a chargeable period by making such alterations in or additions to the assessment as he or she considers necessary, notwithstanding the tax may have been paid or repaid in respect of the assessment and notwithstanding that he or she may have amended the assessment on a previous occasion or on previous occasions, and the inspector shall give notice to the chargeable person of the assessment as so amended.

(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return.

(b) Nothing in this subsection shall prevent the amendment of an assessment –

(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a)…

(iii) to take account of any factor matter arising by reason of an event occurring after the return is delivered…

and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804 (3).

14. Section 956 TCA 1997, Inspector's right to make enquiries and amend assessments, *inter alia* provides:-

(1) (a) For the purpose of making an assessment on a chargeable person for a chargeable period or for the purpose of amending such an assessment, the inspector-

(i) may accept either in whole or in part any statement or other particular contained in a return delivered by the chargeable person for that chargeable period, and

(ii) may assess any amount of income, profits or gains or, as respects capital gains tax, chargeable gains, or allow any deduction, allowance or relief by reference to such statement or particular.

(b) The making of an assessment or the amendment of an assessment by reference to any statement or particular referred to in paragraph (a)(i) shall not preclude the inspector-

(i) from making such enquiries or taking such actions within his or her powers as he or she considers necessary to satisfy himself or herself as to the accuracy or otherwise of that statement or particular, and

(ii) subject to section 955(2)*, from amending or further amending an assessment in such manner as he or she considers appropriate.*

(c) Any enquiries and actions referred to in paragraph (b) shall not be made in the case of any chargeable person for any chargeable period at any time after the expiry of the period of 4 years commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period unless at that time the inspector has reasonable grounds for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner.

(2) (a) A chargeable person who is aggrieved by any enquiry made or action taken by an inspector for a chargeable period, after the expiry of the period referred to

in subsection (1)(c) in respect of that chargeable period, on the grounds that the chargeable person considers that the inspector is precluded from making that enquiry or taking that action by reason of subsection (1)(c) may, by notice in writing given to the inspector within 30 days of the inspector making that enquiry or taking that action, appeal to the Appeal Commissioners, and the Appeal Commissioners shall hear the appeal in all respects as if it were an appeal against an assessment.

(b) Any action required to be taken by the chargeable person and any further action proposed to be taken by the inspector pursuant to the inspector's enquiry or action shall be suspended pending the determination of the appeal.

(c) Where on the hearing of the appeal the Appeal Commissioners –

(i) determine that the inspector was precluded from making the enquiry or taking the action by reason of subsection (1)(c), the chargeable person shall not be required to take any action pursuant to the inspector's enquiry or action and the inspector shall be prohibited from pursuing his enquiry or action, or

(ii) decide that the inspector was not so precluded, it shall be lawful for the inspector to continue with his or her enquiry or action.

15. Section 18(1) TCA 1997, Schedule D, *inter alia* provides:-

(1) The Schedule referred to as Schedule D is as follows:

SCHEDULE D

1. Tax under this Schedule shall be charged in respect of –

(a) the annual profits or gains arising or accruing to –

(i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere,

(ii) any person residing in the State from any trade, profession or employment, whether carried on in the State or elsewhere,

(iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and

(iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State,

and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specially exempted from tax,

in each case for every one euro of the annual amount of the profits or gains

……...

(2) Tax under Schedule D shall be charged under the following Cases: Case I – Tax in respect of –

(a) any trade

……

Case IV – Tax in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule."

Submissions

Appellant

16. Mr. [redacted] gave sworn evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of his evidence:-

(i) He mentioned that he is an Agricultural Consultant, holds a Bachelor of Science and is also a licensed auctioneer and valuer. He stated that he has 35 years' experience working as an Agricultural Consultant, and his specialty is working as a management consultant to dairy farmers. He relayed the historical background to the SPS payment from the DAFM.

(ii) He said that a farmer must apply for the SPS payment prior to the 15 May each year and that it is a stressful time for the sector, as any amendments are only permitted up to 31 May in any year. He stated that if either of the deadlines are missed, then the application or transfer will not be effected.

(iii) He stated that the ideal time to set up a company is in January, because a farmer has from January until 15 May, "to get his ducks in order". He said what normally has to be done in that scenario, is that you have to transfer the herd number from the individual into the company's name and which it submitted to the District

Veterinary Office, one leg of the Department that you must deal with. He stated that the next leg, is that you have to transfer the SPS payment entitlements from the individual into the company, because the company is going to commence trading and the individual is going to cease trading as a farmer. That transfer has to be done by the deadline of 15 May. He said that you must transfer the herd number, transfer the entitlements and if you manage to get that done, then you must make the application in the company's name before the deadline of 15 May.

(iv) He mentioned that in relation to the Appellant, it is clear that this individual ceased trading as an individual and commenced trading as a company sometime in early June. He confirmed that he cannot transfer the entitlements on the Department's system into the company name because the date has past, so he said that he would normally recommend, to ensure the flow of money continues, that he would not make the application to transfer the herd number from the individual to the company until after [redacted] even though the company would have commenced trading. He confirmed that there would usually be one year where the payments will arrive into the sole trader's own bank account at the back end of the year, even though he would commenced trading in a company earlier on in the year. He said that would be common enough. He mentioned that he would always advise, do not lose the entitlements.

(v) He stated that at that time in 2011, not many farmers had incorporated. He confirmed that the DAFM would not have been overly familiar dealing with companies and that farmers were dealing with three different sections in the DAFM. He said that in his view the farmer is the person controlling the land, the stock, the machinery, the entitlements and the bank account and the entitlements are in that list, it is all a package.

(vi) He stated that there is no provision for apportioning the entitlements, you get one payment based on the application at the relevant date being 15 May. He said that this is done from an administrative point of view, as the DAFM has so many applications. During cross examination, he accepted that if a company is incorporated after that date, then it could not be the company that could get that payment, because the company does not hold the entitlements. He mentioned that it cannot draw down the payment, but the individual might make a legal decision to draw up a document to transfer the payment. He confirmed there is no grace period after 15 May.

(vii) He said that he is not a tax consultant, he is an Agricultural Consultant, and so he would advise his clients to obtain taxation advice in relation to the payments.

17. The Appellant gave sworn evidence in relation to his appeal. The Commissioner sets out hereunder a summary of his evidence:-

(i) He stated that when he discussed setting up a company with his accountant, there were very few companies at the time. He said that his accountant had an awful lot of knowledge in this area and he was advised to establish the company and change the herd number to [redacted].

(ii) He mentioned that with the SPS payment, things can change, so he would often have to clarify matters because it is not always in "layman's language". He said specifically, he would seek to clarify matters with the DAFM offices in [redacted] He relayed that he told the representative in the DAFM that he was establishing a company at the end of May, but was told that he had to apply for the SPS before the 15 May. He said that he was told to change the herd number but as it would not be changed by that date, he was told to apply for the SPS payment in his own name using his herd number and that the Department would then change the herd number. He stated that he was told that if he did not do this, he might lose the SPS entitlement.

(iii) He said that [redacted] was established on the 30 May 2011. He confirmed that this was new at the time and that [redacted] was one of the first companies set up. He stated that he has worked for 35 years to build his entitlements and he relied on those entitlements. He mentioned that he would not do anything to risk losing the entitlements and would not do anything to put them at risk.

(iv) He confirmed that he requested that from May 2011, any SPS payment would be paid to [redacted] and he sent on details of [redacted] bank account number to the DAFM. He stated that he wanted to ensure that that payment was sent to [redacted] bank account and not his personal account. He confirmed that everything was 100% above board and that he was relying on the advice of the DAFM, IFAC and Teagasc.

(v) He said that the advice was that the entitlements were linked to the herd number and that in circumstances where the herd number had been transferred, he did not own the entitlements. He stated that it was a clerical issue that the payment was made to his account, as opposed to the bank account of [redacted], which had been provided to the DAFM.

18. Mr [redacted] gave sworn evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of his evidence:-

    (i) He stated that unti[redacted], he was the [redacted] with IFAC. He confirmed that IFAC was set up as the Irish Farm Accounts Co-operative, when Ireland joined the EU, to prepare management accounts for the purposes of farm schemes, but that in the early eighties, it moved into preparing accounts and acting as tax compliance agents. He said that it is the largest farm accountancy firm in the country, completing over 18,000 farm returns.

    (ii) He stated that the herd number is an identifier within the DAFM of activity that is carried on, that it is akin to a PPS number, as an identifier of the activity by a farmer. He said that the problem with the entitlements is that there are two dates set down for administration purposes, 15 and 31 May and the entitlements follow the herd number. He confirmed that here we have the identical herd number that was with the individual and with the company, so the same herd number as the individual had continues on to the company.

    (iii) He mentioned that in 2011, the authority on the SPS payment was the DAFM and that you deferred to the DAFM on anything to do with the SPS entitlements. He confirmed that even presently, IFAC would link in with advisors on herd numbers, transfer of entitlements and matters relating to SPS entitlements.

    (iv) During cross examination, he confirmed that is was his view that the entitlements in this case had travelled with the herd number, because when the herd number was transferred in June 2011, it was the same herd number. The entitlements were paid under that herd number. He stated that it was his view that an applicant cannot be paid, unless an applicant has a herd number. The Appellant's herd number had transferred to [redacted]. It was the identical herd number.

    (v) He relayed that, for administrative purposes, there is only one time in the year that a farmer can transfer entitlements, namely prior to 31 May.

19. The Appellant's Agent made submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions:-

    (i) The time limit for making inquiries expired on [redacted] and the Respondent has no basis for making further inquiries as no reasonable grounds exist "*for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner*".

(ii) Reference was made to the decision of *The Revenue Commissioners v Hans Droog* [2016] IESC 55 ("*Hans Droog")* in relation to section 955 and 956 TCA 1997 and reference was made to the decision of *Tobin v Foley* [2011] IEHC 432 ("*Tobin v Foley"*) in relation to what amounts to negligence. Reference was made to the decision in *Michael Burgess & Brimheath Developments Limited v The Commissioners for HM Revenue and Customs* [2015] UKUT 0578 (TCC) and *Kenny Lee v The Revenue Commissioners* [2021] IECA 18, in relation to the onus of proof being on the Respondent to establish the grounds for issuing an assessment outside of time.

(iii) The fact that the parties were not in agreement indicates a complexity to this matter. The *Tobin v Foley* decision can be distinguished, as that was an "open and shut" situation, wherein the particular taxpayer sold a property which, of course, had to be included in a return. This is a different scenario. Here, the SPS payment was received at the end of the year and was included in [redacted] Corporation Tax return.

(iv) Section 955 and 956 cannot be separated and that fraud or negligence is a pre requisite for issuing an assessment outside of the four year period provided for in section 955 TCA 1997.

(v) The Appellant established [redacted], transferred the herd number and all machinery to [redacted], leased land to [redacted], established a bank account for [redacted], which the SPS payment was transferred to, but the Appellant was not in a position to transfer entitlements to the [redacted] to the following year, due to the administrative workings of the DAFM. The Appellant attempted to transfer the entitlements, but was told that he had missed the transfer window, which was prior to May 2011.

(vi) It is an administrative matter that an application must be made on or before 15 May as there were 186,000 applicants at that time.

(vii) Reference was made to the decision in *EP O'Coindealbhain v. The Honourable Mr. Justice Sean Gannon* [1986] IR 154 and 79TACD2021. It is a completely different situation here. In addition, the decision in *J D Dolan (Inspector of Taxes) v "K" National School Teacher* [1943] IR 470 can be distinguished on its facts.

(viii) The Appellant derived no benefit from the entitlements which were paid directly to [redacted] and utilised by [redacted]. [redacted] held the herd number and was the active farmer. Therefore, the Appellant was not entitled to utilise the payment.

(ix) It was the Appellant's clear understanding that once [redacted] was incorporated on 30 May 2011, and started trading on 1 June 2011, the fact that the DAFM could not change the registration, was due to an administration error. The entitlements went with [redacted].

(x) Consideration should be given to the use of accounting treatment, so that the SPS payment would be an accrual of up to for five twelfths to the individual and seven twelfths to the [redacted]. Further, costs must be considered if the SPS payment is determined to be income in the hands of the Appellant.

Respondent

20. Mr. [redacted] gave sworn evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by [redacted]:

(i) He said that he was a Higher Executive Officer with the Respondent in the [redacted] office, but [redacted] He said that he became involved with the Appellant's file in early to mid-2016, but that there was another employee of the Respondent dealing with the file prior to this date.

(ii) He relayed that there were ongoing discussions between the parties as to the correct tax treatment of the SPS payment and that the Respondent was of the view that the SPS payment was income in the hands of the Appellant and not [redacted]. He said that every effort was being made to reach agreement on this point.

(iii) He submitted that it was agreed that the assessment would not issue until discussions had concluded. He mentioned that there were several conversations conducted by telephone in early 2017, wherein the Appellant's representatives requested that the assessment not issue at that point. He confirmed that a meeting took place in [redacted] with the Appellant Agents and the Respondent but no agreement was reached. Consequently, the assessment issued thereafter.

(iv) Under cross examination he accepted that the four year timeline was important. He said that the delay in issuing the assessment was due to the discussions that were taking place. He submitted that the Respondent agreed not to issue the assessment until the discussions had been exhausted, as there was hope that an agreement could be reached.

(v) He stated that the original return was incorrect, as the income received was excluded from the Appellant's income tax return. He said that he accepted there were valid reasons for not including the income in the return, but it was nonetheless

absent from the Appellant's original return, thus the return was not a full and true disclosure.

21. Counsel on behalf of the Respondent made the following submissions:-

(i) The four year time period expired on [redacted]

(ii) Reference was made to section 955 and 956 TCA 1997 and to the decision in *Hans Droog*. If the Inspector is of the view that there is not a complete return, then he is entitled to raise an assessment "at any time". These are the words of the section.

(iii) Reference was made to the decision in *Tobin v Foley*. It is not the case of the Appellant not being truthful, the income tax return of the Appellant was incomplete. That is the basis of the amended assessment and it is clear that the assessment was incomplete, as it did not reflect money received into the taxpayer's account, which was subsequently transferred on, but that is a separate issue.

(iv) Even if the Respondent must show negligence, which is not accepted, it is more than carelessness because the payment was excluded from the Appellant's return on the basis of advice. Clearly, that it is not carelessness. It was done purposely, on foot of advice, but simply because someone obtains advice, advice can be right or wrong and we say it's wrong in this instance (*Tobin v Foley*). The point being that it didn't reflect income received into his account and that wasn't reflected in his return.

(v) It is accepted in the Appellant's Outline of Arguments that the return was not complete. That correlates with the evidence of the Respondent's witness that there was discussion in relation to how to address the payment, with the Appellant's advisor stating that it can be apportioned. Further, it is acknowledged in the Appellant's submissions, that the portion of the entitlements which relate to the period pre-incorporation of the farm, are properly taxable in the name of the Appellant.

(vi) There was no portion of the SPS payment reflected in the return filed by the Appellant. Therefore, the ground for raising the assessment outside the four-year time limit is on the basis that the return was not accurate.

(vii) Reference was made to the Respondent's Tax Briefing number 61. In particular reference was made to paragraph 1.3, 1.4, 1.5, 1.6, 2.1, 2.7, 2.12 and 2.17. Reference was also made to the European Council Regulation 1782/2003, establishing common rules for direct support schemes under the common

agricultural policy and establishing certain support schemes for farmers and various sections therein.

(viii) The argument that due to the herd number being changed by the Appellant, the payment belongs to [redacted], is misconceived and wrong. There was no application to transfer the SPS entitlement and no basis in law for the transfer of entitlement to [redacted] for 2011. The Appellant made the application, he was the person that was entitled to receive the payment based on his application, based on his holding, based on his declaration, based on his herd number, at the critical date of 15 May 2011. No transfer of entitlement was made at any time prior to that critical date. The guidelines have not been complied with and the European Council Regulation has not been complied with. The person that was entitled to the SPS payment was the Appellant, not [redacted]. Reference was made to the decision in *Dolan v K.*

Material Facts

22. 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) Prior to 1 June 2011, the Appellant personally farmed his lands.

(ii) On 31 May 2011, the Appellant incorporated his farming business under the company name [redacted] and [redacted] held its first meeting.

(iii) From 1 June 2011 onwards, [redacted] commenced trading, it carried out all farming activates and the Appellant transferred all stock and machinery of the farming trade to [redacted]

(iv) On 8 June 2011, the Appellant and his wife entered into a lease agreement with [redacted] for a period of 4 years and 7 months for 35 acres that they owned jointly. In addition, the Appellant entered into a lease agreement with [redacted] for 4 years and 7 months for 20 acres of which he had a life interest. On 1 October 2012, [redacted] entered into a lease agreement with [redacted] for 303 acres at [redacted] for a period of 3 years.

(v) On 29 June 2011, the herd number was transferred to [redacted].

(vi) In May 2012, the Appellant applied to the DAFM to transfer the SPS entitlements to [redacted].

(vii) SPS payment applications must be made to the DAFM prior to 15 May and transfer or amendments made up to 31 May in any given year.

(viii) The SPS payment from the DAFM was paid directly into the bank account of the Appellant and immediately transferred to the bank account of [redacted].

(ix) The SPS payment from the DAFM for 2011, was returned by [redacted] in its Corporation tax return.

(x) The relevant date for the purposes of section 955 TCA 1997 and the four year time limit for raising an assessment is [redacted].

(xi) The Appellant has made what he believed to be a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011.

Analysis

23. 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".*

24. The Appellant's appeal relates to the correct tax treatment of the SPS payment received from the DAFM. Before addressing the competing arguments in relation to the SPS payment, the appropriate starting point is to address the arguments in relation to section 955 and 956 TCA 1997.

25. Section 955 of the TCA 1997 was deleted by section 129(2) of the Finance Act 2012 with effect from 1st January 2013. However, this deletion does not have retrospective effect and applies to returns made for the years 2013 and onwards. The judgment in *Hans Droog* supports this interpretation. Accordingly, it is section 955 TCA 1997 that is relevant to this return made in 2012, for the year 2011.

Section 955 and section 956 TCA 1997

26. By way of background, Part 41 TCA 1997 deals with the taxes regime which is subject to self-assessment. A tax payer is required to make a return of all matters relevant to the calculation of the amount of tax which ought to be paid on foot of that return. Section 951

TCA 1997, creates an obligation on all relevant persons to make a return. Section 954(2) then provides that, subject to subsection (3), an assessment is to be made by reference to the particulars contained in that return. The raising of an assessment gives rise to an obligation to pay the tax or additional tax assessed.

27. Section 955(2) TCA 1997 provides that a general time limit of four years is applicable in respect of income tax covered by the self-assessment regime. Subject to certain exceptions, such as where it can be said that a tax payer acted fraudulently or negligently, the Respondent is not entitled to seek additional income tax from a self-assessed tax payer, more than four years after the tax year concerned.

28. Section 956(1)(b)(ii) TCA 1997 allows an inspector to amend an assessment and to make inquiries or take actions to satisfy himself as to the accuracy or otherwise of a statement or particular in a return. Nevertheless, that power is expressly stated to be subject to section 955(2) TCA 1997 which provides for the time limit. Mirroring that provision is section 956(1)(c) TCA 1997 which imposes a time limit on inquiries and actions outside the four year period, unless an inspector has reasonable grounds "*for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner*".

29. Thus, in general terms, sections 955 and 956 TCA 1997 are designed to prevent the reopening of the tax affairs of a taxpayer, in respect of tax covered by Part 41, outside of a four year period, except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable suspicion exists, no exposure to adverse tax consequences can be placed on the taxpayer concerned, unless it is ultimately established that the relevant return was in fact not full and true in its disclosure.

30. As a result, it is necessary for the Respondent to show that the four year statutory limitation period regarding the raising of assessments and amended assessments is dis-applied. Therefore, a person who makes a full and true disclosure and pays tax on foot of an assessment raised thereon, cannot have their tax affairs reopened after four years have elapsed and an inspector is precluded from engaging in an inquiry outside the four year period, unless an inspector has reasonable grounds for believing that the original return was fraudulent or negligent.

31. Both parties referred the Commissioner to the relevant decision of the Supreme Court in *Hans Droog*, wherein Mr Justice Clarke considered the matter of section 955 and section 956 TCA 1997 and opined that *"..it is ss.955 and 956 TCA which are at the heart of the issue that arises on this appeal. Section 955(1) allows an inspector "at any time" to amend an assessment notwithstanding that tax "may have been paid or repaid" in respect of the*

assessment previously issued. The purpose of that provision would appear to be to ensure that a tax payer could not argue that the fact that they had made a return and had paid tax in accordance with an assessment raised on foot of that return might mean that their tax affairs for the fiscal period concerned were irrevocably finalised. However, s.955(1) is expressly stated to be subject to subs.(2) which is in the following terms:-

> *"(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and –*
>
> *(i) no additional tax shall be payable by the chargeable person, after the end of that period of 4 years, and*
>
> *(ii) no tax shall be repaid to the chargeable person after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered, by reason of any matter contained in the return.*
>
> *(b) Nothing in this subsection shall prevent the amendment of an assessment—*
>
> *(i) where a relevant return does not contain a full and true disclosure of the facts referred to in paragraph (a),*
>
> *(ii)to give effect to a determination on any appeal against an assessment,*
>
> *(iii)to take account of any fact or matter arising by reason of an event occurring after the return is delivered,*
>
> *(iv) to correct an error in calculation, or*
>
> *(v) to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person, and tax shall be paid or repaid where appropriate in accordance with any such amendment, and nothing in this section shall affect the operation of section 804(3)."*
>
> *The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant "facts". In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return*.

There are, of course, the exceptions contained in subs. (b) but none of these apply in the circumstances of this case.

It is easy to understand the reasoning behind that provision. Where a tax payer has made a "full and true" disclosure of all relevant facts, the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen the amount of tax due after the relevant four year period. It is also of some relevance to note the provisions of subs.(4) which allows for the expression of doubt where a tax payer is unsure as to the law in any particular relevant regard but makes a return to the best of their ability while expressing doubt. Unless that expression of doubt is found to be ungenuine then the person will be regarded as having made a "full and true disclosure" even though it may turn out that their view of the law was wrong. Thus a person who makes an incorrect return, but expresses what is found to be a genuine doubt, will be held to have made an appropriate return thus triggering the time limit but, equally importantly, that facility cannot be abused by ungenuine expressions of doubt.

Section 956 is also of relevance. Section 956(1)(b) allows an inspector to make inquiries or take action necessary to verify the accuracy of a return…..but, importantly, that power is expressly stated to be subject to s.955(2) to which reference has already been made and which provides for the time limit. Consistent with that provision is subs.(3) which imposes a time limit on inquiries and actions outside the four year period unless the inspector has reasonable ground "for believing that the return is insufficient due to its having been completed in a fraudulent or negligent manner".

32. In addition, both parties referred the Commissioner to the decision in *Tobin v Foley* wherein Mr Justice Peart in the High Court considered whether the Respondent was liable to penalty by reason of her having negligently submitted a tax return. Peart J., in considering what amounts to negligence, stated that "*by completing the tax return in a way that failed to disclose that disposal in 2003, the respondent was at best negligent. This is simply not careless oversight…. Negligence is a term that implies more culpability than mere carelessness or oversight…. Negligence in the context of this legislation means that a person having a duty to made a tax return truthfully and honestly fails to make all appropriate inquiries in order to ensure that the details continued in the return were complete, accurate and truthful. A person completing such a return must be expected to make appropriate enquires if she herself does not have the necessary facts and information in order to complete the return. If she has to rely on others for information, she*

is under an obligation to ensure as far as reasonable possible that the information given is truthful".

33. The Appellant sought to distinguish the decision in *Tobin v Foley* on grounds that the Appellant herein made appropriate inquiries and in his mind, was making a complete, accurate and truthful return, having accounted for the SPS payment from the DAFM in [redacted] Corporation Tax return, as per the advice that the Appellant had received from the DAFM, Teagasc and his tax Agent.

34. As is clear from the Supreme Court judgment in *Hans Droog*, the test of '*reasonable grounds'* is a legal prerequisite to the validity of inquiries or actions taken outside the four year statutory period. Nonetheless, Counsel for the Respondent emphasised that the Respondent's inquiries were conducted without the assistance of section 956 TCA 1997 and consequently, the Respondent did not have to establish reasonable grounds for believing the return for the tax year 2011 to have been "*insufficient due to its having been completed in a fraudulent or negligent manner*". The Commissioner assumes that this is because inquiries commenced by way of audit on 28 May 2014. Conversely, the Appellant argued that you cannot separate section 955 and 956 TCA 1997, that fraud and/or negligence must be established and that this nexus is supported by the decision in *Hans Droog*.

35. The Commissioner is satisfied that the amended assessment in this appeal was raised on the basis that the returns are not "a *full and true disclosure*". The Respondent engaged section 955 TCA 1997 and has raised an amended assessment without raising inquiries under section 956 TCA 1997. This is because, as the evidence suggests, inquiries took place within time and during a protracted period of discussion between the parties. Consequently, the Commissioner is satisfied that the Respondent did not have to establish fraud and/or negligence in this appeal and that inquiries were conducted and actions taken following an audit notification letter within the requisite period. Therefore, what is at issue is whether the Respondent was entitled to issue an amended assessment, on the grounds that the Appellant has not made a full and true discourse of all material facts.

36. The Commissioner now turns to the particular facts of this appeal and the circumstances surrounding the raising of the amended assessment. The evidence suggests that the Appellant established a company in May 2011, namely [redacted], to farm the lands. Furthermore, the evidence was that he transferred his stock and machinery to [redacted]. On 29 June 2011, the herd number was transferred to [redacted] and lands were leased to [redacted]. The testimony of the Appellant was that he took all steps necessary to ensure that it was [redacted] and not the Appellant that was the farmer. The Commissioner considers that the

Appellant was a credible witness and his evidence believable, such that it was the Appellant's intention that [redacted] was to engage in the farming trade and that in his mind, he was no longer the farmer, rather [redacted] was the farmer.

37. In addition, the evidence suggests that in or around May/June 2011, the Appellant communicated at length with the DAFM around the transfer of the SPS payment entitlement to [redacted], and certainly well in advance of the SPS payment being made by the DAFM in October 2011. The Commissioner notes the evidence of the Appellant was that he had in effect "missed the transfer window", as such transfers of entitlements, according to the DAFM, had to be effected prior to 31 May in any year. The Appellant's witness corroborated that evidence, such that he confirmed that any transfer of entitlements must be completed prior to 15 May in any year and it was not possible to effect a transfer of entitlements after 31 May in any given year. He said this was due to administrative purposes within the DAFM. Consequently, the SPS entitlement was not transferred from the Appellant's name to [redacted] until May 2012, despite attempts by the Appellant to effect the transfer following his decision to establish [redacted].

38. The Commissioner has considered the evidence that there were protracted discussions taking place between the parties as to the tax treatment of the SPS payment. Further, the Commissioner notes the evidence that, in or around the date of expiry of the four year period at the end of 2016, the Respondent was asked not to issue the assessment until negotiations had been exhausted. The Commissioner notes that it is not accepted by the Appellant that there are admissions in the Appellant's Outline of Arguments that the original return was filed incorrectly or that a portion of the payment should be apportioned to the Appellant.

39. The Commissioner would take a dim view of an Appellant who sought to gain any sort of advantage as such by entering into an agreement with the Respondent, not to issue an assessment, then challenging the Respondent's powers to raise an amended assessment outside of the four year period, thus placing the onus then on the Respondent to justify why the four year rule does not apply. Nonetheless, the Commissioner assumes that the Respondent was acutely aware of the operation of the time limits provided for in section 955 TCA 1997.

40. Moreover, the provisions of section 955 TCA 1997 do not provide for agreement in relation to the time limit. The use of the word "shall" as set out in section 955(2) TCA 1997, indicates an absence of discretion in the application of this provision. The Commissioner is satisfied that the wording of section 955(2) TCA 1997 is clear and unambiguous, such that section 955(2)(a)(i) provides that no additional tax shall be payable by the chargeable

person after the end of the relevant four year period. The section clearly prohibits the imposition of any additional tax burden outside the four year period in the case of a person who has made a fully compliant return. The wording of the provision does not provide for extenuating circumstances in which the four-year rule might be mitigated and the Commissioner has no authority or discretion to disapply the timelines.

41. Again, the Commissioner assumes that the Respondent was aware of the mandatory nature of the section. Thus, if such an agreement was entered into, the result is that the Respondent now bears an additional burden in terms of justifying the raising of an amended assessment outside of the time limit prescribed in section 955 TCA 1997, by reference to the original income tax return not being a full and true disclosure of all material facts. Consequently, the Commissioner must now consider the matter of whether there has been a full and true disclosure on the Appellant's part, before any substantive arguments in relation to the correct tax treatment of the SPS payment are considered. Had the amended assessment issued within the four year period, then the Appellant's appeal would have been solely confined to the issue of the tax treatment of the SPS payment from the DAFM.

42. The Commissioner is satisfied that the Appellant considered that but for what he described as the administrative step of transferring the SPS entitlement, for all intents and purposes, he was not the farmer and not entitled to the SPS payment as he was not the holder of the herd number. The Commissioner accepts that as a result, the Appellant considered the SPS payment as income of [redacted] not income of the Appellant. Further, he was advised that this was the case by his tax Agent and the DAFM advised him to apply in his own name due to the looming time limes involved namely 15 May and the risk that the entitlement might be lost.

43. Consequently, based on those facts, the Commissioner finds that the Appellant's income tax return did contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period 2011. The Commissioner has considered that the Appellant in making the return, made a full and true disclosure of the material facts and that the omission of the payment on his return, does not amount to a default in the disclosure of material facts, as per the provisions of section 955 TCA 1997. In coming to this conclusion the Commissioner has also considered the dictionary meaning of "full" and "true". The Commissioner considers that this is not a situation where the SPS payment from DAFM was simply not declared. The evidence is that in the Appellant's mind, the payment was in the hands of the company, [redacted] and not the Appellant, thus the income was returned by [redacted] and not the Appellant. The Commissioner is further

persuaded by the following passage from the decision in *Hans Droog* such that "*The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant "facts". In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return"*

44. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by the parties, the Commissioner has concluded that the Respondent was incorrect to issue a Notice of Amended Assessment for the year ending [redacted], in the sum of €72,728.35, outside of the time limits contained in section 955 TCA 1997. The Commissioner is satisfied that the Appellant's income tax return for 2011, was complete, accurate and truthful having regard to the facts of this particular appeal.

45. In circumstances where the consideration of section 955 TCA 1997 determines the appeal in favour of the Appellant, determination of the substantive issue namely, whether the SPS payment from the DAFM, is taxable as income in the hands of the Appellant or is instead taxable as income received by [redacted], does not arise.

Determination

46. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded in showing that the tax is not payable as a consequence of the provisions of section 955 TCA 1997. Therefore, the Notice of Amended Assessment for the year ending [redacted], in the sum of €72,728.35, shall be reduced to nil.

47. 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
24 February 2023

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997