



92TACD2023

Between

[Redacted Name]

**Appellants**

and

**The Revenue Commissioners**

**Respondent**

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**Determination**

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### **Introduction**

1. These are appeals to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“TCA 1997”) brought on behalf of [Redacted Name] and [Redacted Name] (“the Appellants”) against Notices of Amended Assessment issued by the Revenue Commissioners (“the Respondent”) on 17 December 2020, in respect of the year 2015 and 20 November 2021, in respect of the years 2016 and 2017, withdrawing a claim by the Appellants for Transborder Workers Relief (“TWR”) pursuant to section 825A TCA 1997.
2. The liabilities arose as the Respondent disallowed TWR on the basis that it is the Respondent’s opinion that the Appellants are proprietary directors of [Redacted Name] (“the Company”), in accordance with section 472(1)(a) TCA 1997.
3. On 11 January 2021 and 17 December 2021, the Appellants duly appealed to the Commission the aforementioned Notices of Amended Assessment. The appeals proceeded by way of a hearing on 16 February 2023. The Appellants were represented by Senior Counsel and the Respondent was represented by Junior Counsel.

## Background

4. The Appellants are Irish residents and live in County [REDACTED]. They are both directors, shareholders and full-time employees of the Company, incorporated under the laws of the [REDACTED]. The Company's offices are located in [REDACTED] and all of the Appellants' employment duties are carried out exclusively in the [REDACTED]. The Appellants' [REDACTED] employment income is subject to [REDACTED] PAYE (Pay As You Earn) and [REDACTED].
5. The Appellants are tax resident in the State and claimed TWR for the tax years 2015, 2016 and 2017, in respect of their engagement by the Company registered in the [REDACTED] tax resident in [REDACTED]. The Appellants were each directors of the Company for the years 2015 – 2017 inclusive.
6. The issued share capital of the Company comprises of 6,000 authorised shares of which
  - 5,000 issued shares are divided into:
  - 1,000 Ordinary shares of £1.00 each; and
  - 4,000 "A" Ordinary shares of £1.00 each
7. The Articles of Association of the Company contain the rights, privileges and restrictions in respect of the "A" Ordinary Shares. As regards the Ordinary Shares, the Articles of Association impose no limitations. The relevant Articles of Association state that the "A" Ordinary Shares shall have the following rights, privileges and restrictions:
  - (i) "As to dividends"

*The holders of the "A" Ordinary Shares will be entitled to such dividends as may be declared from time to time by the Company for that class of share.*
  - (ii) As to redemption

*The Company shall have the right to redeem the "A" Ordinary Shares at par on giving the holders of the "A" Ordinary Shares not less than 14 days notice in writing.*
  - (iii) As to voting

*The holders of the "A" Ordinary Shares shall not be entitled to receive notice of or attend or vote at any general meeting of the Company.*
  - (iv) On a winding up

*The "A" Ordinary Shares shall confer upon the holder thereof the right to return of the capital at par value and to the extent paid up thereon but to no further or other right to share in any surplus assets."*

8. The shareholding of the Company in 2015 is set out in the table below:-

	Ordinary Shares	%	"A"Ordinary Shares	%	Total	%
██████ ██████	500	50 %		0%	500	10%
██████ ██████	500	50 %		0%	500	10%
Other Shareholders		0%	4,000	100%	4,000	80%
	1,000		4,000		5,000	

9. On 14 October 2016, there was a transfer of the Ordinary Shares of the Company and the table below sets out the shareholding of the Company after the transfer:-

	Ordinary Shares	%	"A"Ordinary Shares	%	Total	%
██████ ██████	300	30%		0%	300	6%
██████ ██████	300	30%		0%	300	6%
Other Shareholders	400	40%	4,000	100%	4,400	88%
	1,000		4,000		5,000	

10. The ordinary share capital of the Company consisted of 5,000 shares. During the years under appeal, the Appellants were the beneficial owners of 10% and subsequently 6% of the ordinary share capital of the Company.
11. The Appellants argue that as they were not the beneficial owners or in control of more than 15% of the ordinary share capital of the Company, they were not proprietary directors of the Company for the requisite years and the Respondent was wrong to deny their claim for TWR in accordance with the provisions of section 825A TCA 1997. The Appellants contend that the Respondent has conflated control of a Company with the control of the ordinary share capital of a Company.
12. The Respondent has disallowed the Appellants' claim for TWR under section 825A TCA 1997, for the aforementioned years, on the basis that "*on the objective evidence of the Appellants' ownership of shares in [the Company], each was a proprietary director*". The Respondent contends that for 2015, and up to 14 October 2016, the Appellants each held 10% of the ordinary share capital of the Company and 50% of the voting power. From 14 October 2016 and for 2017, the Appellants each held 6% of the ordinary share capital of the Company and 30% of the voting power.
13. In accordance with the provisions of section 472 TCA 1997, the question of whether an individual is a proprietary director can be answered either by reference to the "ownership" test" or the "control" test. The Respondent's case is that the Appellants were proprietary directors within the meaning of section 472 TCA 1997, having regard to the control test and as such, are not entitled to TWR in accordance with the provisions of section 825A TCA 1997.
14. On 9 August 2019 and 29 November 2019, the Respondent issued Aspect Queries in relation to the Appellants' claim for TWR under section 825A TCA 1997 in their income tax returns for 2015 to 2017 inclusive. Following the denial of relief by the Respondent, the above referenced Notices of Amended Assessment issued to the Appellants.
15. On 11 January 2021 and 17 December 2021, the Appellants duly appealed to the Commission, Notices of Amended Assessment raised by the Respondent as follows:-
  - 2016: ██████████ - €45,213
  - 2017: ██████████ - €311,600
  - 2015: ██████████ - €237,597
  - 2016: ██████████ - €10,331

- 2017: ██████████ - €161,692

16. The sole issue to be determined in this appeal is whether the Appellants were proprietary directors of the Company within the meaning of section 472 TCA 1997, such that they controlled more than 15% of the ordinary share capital of the Company (the “control” test).

### **Legislation and Guidelines**

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

18. Section 2 TCA 1997, Interpretation of Tax Acts, *inter alia* provides:-

*“ordinary share capital”, in relation to a company, means all the issued share capital by whatever name called) of the company, other than capital the holders of which have right to a dividend at a fixed rate, but have no other right to share in the profits of the company;*

19. Section 472 TCA 1997, Employee Tax Credit, *inter alia* provides:-

*1(a) In this Section –*

*“proprietary director” means a director of a company who is either the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company;*

*(b) For the purposes of the definition of “proprietary director”, ordinary share capital which is owned or controlled as referred to in that definition by a person, being a spouse, a civil partner, a minor child, or a minor child of the civil partner, of a director, or by a trustee of a trust for the benefit of a person or persons, being or including any such person or such director, shall be deemed to be owned or controlled by such director and not by any other person.*

20. Section 825A TCA 1997, Reduction in income tax for certain income earned outside the State, *inter alia* provides:-

*(1) In this section –*

*“proprietary director” has the same meaning as in section 472;*

*“qualifying employment”, in relation to a year of assessment, means an office including an office of director of a company which would be within the charge to corporation tax if it were resident in the State, and which carries on a trade or profession) or employment which is held-*

*(a) outside the State in a territory with the Government of which arrangements are for the time being in force by virtue of section 826(1), and*

(b) *for a continuous period of not less than 13 weeks, but excluding any such office or employment -*

(i) *the emoluments of which are paid out of the revenue of the State,*

(ii) *with any board, authority or other similar body established in the State by or under statute;*

(2) *This section shall not apply in any case where the income, profits or gains from a qualifying employment are-*

.....

(c) *income, profits or gains paid to a proprietary director or to the spouse of that person by a company of which that person is a proprietary director.*

(3) *Where for any year of assessment an individual resident in the State makes a claim in that behalf to an authorised officer and satisfies that officer that -*

(a) *he or she is in receipt of income, profits or gains from a qualifying employment,*

(b) *the duties of that qualifying employment are performed wholly outside the State in a territory, or territories, with the Government or Governments of which arrangements are for the time being in force by virtue of section 826(1),*

(c) *the full amount of the income, profits or gains from that qualifying employment is, under the laws of the territory in which the qualifying employment is held or of the territory or territories in which the duties of the qualifying employment are performed, subject to, and not exempt or otherwise relieved from, the charge to tax,*

(d) *the foreign tax due on that income, profits or gains from that qualifying employment has been paid and not repaid or entitled to be repaid, and*

(e) *during any week in which he or she is absent from the State for the purposes of the performance of the duties of the qualifying employment, he or she is present in the State for at least one day in that week,*

*he or she shall, where the amount of tax payable in respect of his or her total income or that year would, but for this section, exceed the specified amount, be entitled to have the amount of tax payable reduced to the specified amount.*

## Submissions

21. The parties' legal representatives informed the Commissioner that the appeals would proceed on the basis of legal submissions only and that the parties did not intend to call witnesses to give sworn evidence in respect of the matters under appeal. Therefore, the Commissioner heard legal argument only in respect of these appeals.

### *Appellant*

22. Senior Counsel made legal submissions on behalf of the Appellant. The Commissioner sets out hereunder a summary of the submissions made:-

- (i) Reference was made to the principles of statutory interpretation and the approach to be taken to the interpretation of a taxation statute. In that regard, reference was made to the decisions in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50, *Bookfinders v The Revenue Commissioners* [2020] IESC 60 and *Heather Hill Management Company CLG and Gabriel McCormack v An Bord Pleanala, Burkeway Homes Limited and The Attorney General* [2022] IESC 43 ("*Heather Hill*"). In terms of the decision in *Heather Hill*, the purpose undoubtedly comes into play in a taxing statute where there is an ambiguity. Nevertheless, you cannot use a purposive approach to create an ambiguity and ignore words or insert new words simply because you would like to do so in the circumstances. Taxation statutes must be construed strictly and a strict literal interpretation is applied as a starting point.
- (ii) Reference was made to TWR as provided for in accordance with section 825A TCA 1997 and the conditions to be satisfied. In particular, reference was made to section 2 TCA 1997 and the definition of "ordinary share capital" of a Company. Submissions were made in respect of the ordinary shares held by the Appellants and the "A" ordinary shares held by the Appellants' brother, Mr [REDACTED].
- (iii) Reference was made to section 472 TCA 1997 and the meaning of proprietary director. In particular, submissions were made in relation to the meaning of the word "control" in that section. Control is limited to control of the ordinary share capital and not control of the Company. The Respondent has conflated the control of shares with voting rights. The confusion by the Respondent of control of the Company and control of the issued share capital can be seen from the correspondence issued to the Appellants prior to the Notices of Amended Assessment being raised by the Respondent.

- (iv) The ordinary shares and the “A” ordinary shares form part of the ordinary share capital of the Company, having regard to the definition in section 2 TCA 1997. Therefore, on that basis and having regard to the shareholding of the Appellants and Mr ██████████, the Appellants cannot be said to control more than 15% of the ordinary share capital of the Company. Whilst there is no doubt that collectively the Appellants hold the voting rights in a general meeting and thus, have more than 15% control of the Company that is not the test to be applied.
- (v) As the Appellants did not hold more than 10% of the issued ordinary share capital at any time, they cannot be said to be proprietary directors. The definition of proprietary director in accordance with section 472 TCA 1997, does not relate to the level of ownership of a Company but to the level of ownership of the ordinary share capital of a Company.
- (vi) Reference was made to the decision in *Raymond Hughes v The Revenue Commissioners* [2019] IEHC 907 (“*Raymond Hughes*”) such that it is not applicable to the factual situation herein and in no way assists with the interpretation of section 472 TCA 1997. In this appeal, you do not have a scenario where one group of shareholders is in a position to adversely interfere with the rights of another class of shareholders. However, should that arise, section 88 of the Companies Act 2014 provides for a procedure to deal with such a scenario where class rights are to be interfered with. Reference was made to the decision in *Re Sam Weller & Sons Limited* [1990] BCLC 80.
- (vii) Reference was made to section 120 of the Companies Act 2014 which is an example of how it is articulated when legislation is talking about control of a body corporate. Reference was made to section 7 of the Companies Act 2014, which shows that you can have a situation where one could control shares or one could control rights attaching to shares, without necessarily being the owner of them. Reference was made to section 432 TCA 1997 by way of example of how different articulations of control can be adopted by the legislature as they see fit.

*Respondent*

23. Counsel made legal submissions on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-



- (i) Reference was made to the decisions in *Dunnes Stores v The Revenue Commissioners*, *Bookfinders v The Revenue Commissioners* and *Heather Hill* in the context of the approach to be taken to interpreting a taxation statute. In particular, reference was made to paragraph 108 of the decision in *Heather Hill* wherein Murray J. states that the “*literal and purposive approach to statutory interpretation are not hermetically sealed*”. The literal construction is the first point of contact in any exercise in statutory construction, but it is not a point of contact which stands by itself. It is an exercise in discerning the purpose of the section, principally from the words, but also from context at the same time.
- (ii) Reference was made to the definition of proprietary director in section 472 TCA 1997 and that it is described as "either/or", such that the tests are separate and distinct. The section poses two alternatives; it is either beneficial ownership or it is control. Therefore, you cannot conflate control and beneficial ownership, control is exercised through voting and it must be something different or else why would it be there at all.
- (iii) What is the ordinary and natural meaning of the word "control"? It is suggested that "control" means “*being able to exercise influence over or direct the course of events to an extent*”. A defined extent of control herein, being 15% control. Control can only be exercised over share capital by voting, it cannot be done in any other way, in circumstances where it is a concept that must be distinct from ownership.
- (iv) The duality of ownership on the one hand and control on the other is carried through into the Companies Act provisions in Section 220 and Section 7(2). Receiving dividend entitlements, receiving a return of capital is not control. That is simply receiving what those who exercise control have determined you are entitled to, but it is not control. It is not control as envisaged by Section 472 TCA 1997.
- (v) Reference was made to the *Raymond Hughes* decision and that it is a practical example of exercising control over share capital, such that the share rights were transferred by a special resolution and a special resolution arises by members of a Company with a vote passing it, it is control of share capital.
- (vi) Regard must be had to the purpose of Section 825A TCA 1997. It is to allow a distinction between ordinary employees and employees who are proprietary directors, such that they are either beneficial owners or have control of 15% or

more of share capital. They have a measure of ownership or a measure of control. They are not ordinary employees, they are something more.

- (vii) Section 472 TCA 1997 is trying to delineate an extent of control which takes you outside the realm of an ordinary employee/director, someone who is capable of directing, influencing or controlling affairs. It is fundamental that you do that by voting. So, to dilute the extent of control by saying, you must count in shares which have no control, is a fallacy.
- (viii) Reference was made to Keane on Contract Law and to pages 707 and 708 of the Appellants' Booklet of Documents in relation to the Articles of Association of the Company. In particular, reference was made to clause 2D on the allotment of shares in the Company.
- (ix) Reference was made to the accounts of the Company and the filings with the ■ Companies Registration Office ("CRO") which record the Appellants as directors with significant control.

#### **Material Facts**

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

- (i) The Appellants are directors, shareholders and full-time employees of the Company.
- (ii) For the years 2015, 2016 and 2017, the Appellants submitted their Irish income tax returns on time and claimed TWR in accordance with Section 825A TCA 1997.
- (iii) The Appellants are Irish residents and live in County ■.
- (iv) The Company's offices are located in ■ and all of the Appellants' employment duties are carried out exclusively in the ■.
- (v) The Appellants each have a "qualifying employment" with the Company, as their employments were held for a continuous period of significantly more than 13 weeks.
- (vi) The Appellants are tax resident in the State.
- (vii) The Appellants wholly exercised the duties of their employment in the ■.

- (viii) The Appellants ■ employment income was subject to ■ PAYE (Pay as You Earn) and ■
- (ix) The “ordinary share capital” of the Company as defined in Section 2 TCA 1997 consisted of 5,000 shares in the form of 1000 “ordinary shares” and 4000 “A ordinary shares”.
- (x) The Appellants’ brother holds 4000 “A” ordinary shares in the Company.
- (xi) In accordance with the Articles of Association, the holder of the “A” ordinary shares is not entitled to vote at any general meeting of the Company.
- (xii) The Articles of Association impose no limitations on the ordinary shares held by the Appellants, such that the ordinary shares carry voting rights in addition to other rights as assigned to them by the Articles of Association of the Company.
- (xiii) The ordinary share capital of the Company does not have a right to a dividend at a fixed rate.
- (xiv) The Appellants are not beneficial owners of more than 15% of the ordinary share capital of the Company.
- (xv) The definition of a proprietary director of a Company is determined either by an ownership test or a control test.

### **Analysis**

25. 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”.*

26. Section 825A TCA 1997 provides for TWR. TWR is available to workers who are tax resident in Ireland, but work in a country with whom Ireland has a double taxation agreement (hereinafter “DTA”). TWR is not available where an individual or their spouse is a proprietary director of the foreign Company. The definition of proprietary director is

contained in section 472 TCA 1997, which provides that “a director...who is either the beneficial owner of, or able, either directly or indirectly, or through the medium of other companies or by any other indirect means to control more than 15% of the ordinary share capital of the company.

27. The sole issue to be determined in this appeal is whether the Appellants control more than 15% of the ordinary share capital of the Company (the “control” test). In their statement of case and outline of arguments, the Appellants challenged the amended assessments on the basis that the statutory preconditions for issuing the Notices of Amended Assessment had not been satisfied and thus, the assessments were in effect, *ultra vires*, null and void. Nevertheless, in light of the decision of the Court of Appeal in *Kenny Lee v The Revenue Commissioners* [2021] IECA 18, which clarifies that the jurisdiction of an Appeal Commissioner in a tax appeal is confined to determining the charge to tax, the Appellants confirmed that they were not proceeding with this ground of appeal.

28. The Commissioner notes that the parties have submitted a “Statement of Agreed Facts/Issues in Dispute” dated 25 January 2022. The Commissioner is grateful to the parties for preparing such a document, as it has assisted the Commissioner with her determination. The Commissioner also commends the Appellants on the detailed, structured and overall organised approach to the bundles of documents and authorities submitted in these appeals. This also greatly assisted the Commissioner with her determination of the appeals and it ensured all parties were “on the same page” at the hearing of the appeal.

### **Statutory Interpretation**

29. The Commissioner notes the various decisions opened to her in relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point of which is generally accepted as being the judgment of Kennedy CJ in *The Revenue Commissioners v Doorley* [1933] IR 750 at page 765 who held that:

*"The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person is to be subject to taxation unless brought within the letter of the taxing statute, that is...as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament."*

30. The Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores* and

the judgment of O'Donnell J. in *Bookfinders*, as helpfully set out by McDonald J. in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, at page 74:

*"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*

*(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*

*(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "... context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*

*(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*

*(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*

*(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*

*(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

*(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

*“Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible”.*

31. The Commissioner is of the view that this is the most recent decision of the Courts in this jurisdiction, in relation to the approach to be taken to statutory interpretation and as such, is authoritative in this regard. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning. In addition, context is critical.

32. Furthermore, the Commissioner has noted the decision in *Heather Hill* also a recent decision of the Courts relating to statutory interpretation which considers that the approach to be taken to statutory interpretation must include consideration of the overall purpose of the legislative scheme. The Commissioner was directed to the dicta of Murray J. at paragraph 108 of his decision, wherein he opines that

*“it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is not clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular *Dunnes Stores and Bookfinders* – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed”.*

33. The Commissioner is satisfied that she must determine whether the Appellants were proprietary directors of the Company and in doing so, the meaning of the word “control” as provided for in section 472 TCA 1997 must be interpreted.

## Proprietary Director

34. The Commissioner has set out in the background section above, the Appellants roles in the Company and the location where the Company was incorporated. Consequently, the Appellants Irish income tax returns were filed on the basis that TWR, in accordance with Section 825A TCA 1997, applied. In order to determine this appeal, the Commissioner must consider the provisions of section 825A TCA 1997, which is an income tax relief for individuals who are resident in the State but who work outside the State. The relief effectively removes the earnings from a foreign employment from liability to Irish tax, where foreign tax is being paid.
35. In accordance with section 825A TCA 1997, there are a number of conditions to be satisfied in order to qualify for TWR. The key condition, and which is in dispute herein, is that the individual claiming the relief cannot be a “proprietary director” of the Company in which the individual has a “qualifying employment”. Specifically, section 825A(2) TCA 1997 states:- *“This section shall not apply in any case where the income, profits or gains from a qualifying employment are.....c) income, profits or gains paid to a proprietary director or to a spouse of that person by a company of which that person is a proprietary director”*.
36. The Commissioner notes that it is not disputed by the Respondent that the Appellants each have a “qualifying employment” with the Company, as they have carried out their respective executive duties, for a continuous period of significantly more than thirteen weeks per year, in [REDACTED] and elsewhere in the [REDACTED]. Consequently, the only matter at issue, is whether the Appellants are proprietary directors of the Company.
37. Before considering the specific facts in the within appeal, the Commissioner considers it appropriate to set out the test to be applied. Section 2(1) TCA 1997 defines the phrase “ordinary share capital” as meaning *“all the issued share capital (by whatever name called) of the company, other than capital the holders of which have a right to a dividend at a fixed rate, but have no other right to share in the profits of the company.”*
38. The Commissioner notes that in accordance with the “Statement of Agreed Facts/Issues in Dispute”, both parties are in agreement that the “ordinary share capital” of the Company as defined in Section 2(1) TCA 1997 consisted of 5,000 shares i.e. the “ordinary shares” as well as the “A ordinary shares”.
39. Section 472 TCA 1997 provides for the definition of “proprietary director”, namely that a proprietary director *“means a director of a Company who is either the beneficial owner of, or able, either directly or through the medium of other Companies or by any other indirect*

*means, to control, more than 15 per cent of the ordinary share capital of the company*". It is accepted that there are two possible bases on which to establish that a director is a proprietary director; either via a beneficial ownership test, or via a control test. The Respondent argues that the Appellants have misinterpreted sections 825A and 472 TCA 1997, such that a narrow and artificial interpretation is being taken to the legislative provisions.

40. In the context of a proprietary director, specific reference was made to section 472(1)(b) TCA 1997, such that it delimits the extent to which there can be a deemed extended control of or ownership of shares for the purpose of the section. Therefore, if the Appellants had minor children and the shares were vested in them or shares were in the name of the Appellants' spouse, they would be deemed to be controlled by the Appellants. However, of notable importance, the Appellants emphasised that shares that are held by the Appellants' brother, Mr [REDACTED], do not fall within the deemed extension for the purposes of the Act.
41. The Appellants submit that it is ordinary share capital that is at issue herein. It is not control of the Company or control of the voting rights in the Company that is specified in the legislative provisions, and that section 472 TCA 1997 provides only for the control of the ordinary share capital of the Company. The Appellants suggest that the Respondent has conflated control of the Company and control of the ordinary share capital and has fallen into error in that regard.
42. The Appellants directed the Commissioner to the definition of "ordinary share capital" as provided for in section 2(1) TCA 1997. It was submitted that shares are not ordinary share capital if there is a fixed limit by reference to a rate on the dividend to which you may be entitled. A share might be called a "preference share", nevertheless if it has an unlimited right to dividends, for the purposes of the tax code, it is deemed to be an ordinary share. In contrast, the Appellants state that a share may be called an "ordinary share" but if it is limited, for example to a dividend of 15% of par value, as there is a fixed limit on the right to a dividend, it strictly falls outside of the definition of "ordinary share capital".
43. It is the Appellants' contention that they consider it "*clear beyond doubt*" that the "A" ordinary shares form part of the ordinary share capital of the Company, in accordance with section 2(1) TCA 1997, because they are not shares which are restricted to a dividend at a fixed rate. The Commissioner has considered the Memorandum of Association of the Company which is contained at page 700 of the Appellants' Book of Documents. The Commissioner notes that the Company has 5,000.00 issued share capital divided into 1,000 ordinary Shares and 4,000 "A" ordinary Shares.



44. In addition, the Commissioner has considered the Articles of Association of the Company contained at page 707 of the Appellants' Book of Documents. The rights attaching to the shares are set out in the Articles of Association and the relevant rights are contained at pages 708 and 709 of the Appellants' Book of Documents. The Company's current Articles of Association were adopted on 18 May 2018. The earlier version of the Articles of Association of the Company ("the Original Articles of Association") were in force during each of the three tax years, the subject matter of these appeals.
45. The rights attaching to the ordinary shares and the "A" ordinary shares are set out in Clause 3 of the Original Articles of Association at page 708 of the Appellants' Book of Documents. As regards the "A" ordinary Shares, these have at all material times been held by the Appellants' brother, Mr [REDACTED]. As regards the ordinary shares, these were originally held as 500 shares each by the Appellants. However, the Commissioner notes that in October 2016, the Appellants each transferred 200 of their ordinary shares to their respective children, so that they now hold only 300 ordinary shares each. The Commissioner notes that the change in the Appellants' shareholding for subsequent years, only alters the mathematics but does not alter the principle, in that each brother transferred 200 shares to other adult children, leaving the Appellants with a holding of 300 ordinary shares each, rather than 500 ordinary shares each.
46. The Commissioner notes that the ordinary shares have full voting shares and have no limit in relation to the dividends that may be declared in respect of those shares. In contrast, there exists limits in respect of the "A" ordinary shares under different headings. Notably, the rights attaching to the "A" ordinary shares are described at page 708 as having "*An entitlement to such dividends as may be declared on the shares from time to time*", such that a potentially unlimited dividend can be paid in respect of the "A" ordinary shares. The Appellants contend, therefore, that despite being called "A" ordinary shares, they constitute part of the ordinary share capital for the purposes of the section 2(1) TCA 1997, as there exists no fixed limit on the right to a dividend. Also, of notable importance, is that the "A" ordinary shares do not have voting rights, as so described at page 709 under the heading "As to voting". The Commissioner has considered that it is this lack of voting rights that the Respondent say that the Appellants are in control of the Company through their voting rights and are thus, proprietary directors of the Company.
47. The Appellant argues that there can be no doubt that the holders of the ordinary shares, as opposed to the "A" ordinary shares, control the Company, as they have all of the voting rights in a general meeting. However, it is submitted that this is not the test that is to be applied. The test is not "do you control the Company", but "do you control more than 15%

of the ordinary share capital of the Company". The Appellants are steadfast in their argument that it cannot be said that the definition of control of the ordinary share capital of the Company must be determined by reference to control of the Company, because the definition of ordinary share capital, does not itself make reference to the control of the Company, through voting rights or otherwise.

48. The Commissioner notes that the Appellants submit that there is simply no basis for contending that the Appellants control any of the "A" ordinary shares, which form 80% of the ordinary share capital of the Company and that the corollary of this is that if neither Appellant controls any of the "A" ordinary shares, then the Respondent's case must fail and the Appellants' appeals succeed.
49. It is argued that the Respondent has conflated the concepts of control of a Company and control of shares. The Commissioner was directed to correspondence between the Appellants and the Respondent prior to the issuing of the Notices of Amended Assessment. In particular, reference was made to correspondence dated 18 June 2020 at pages 319 and 320 of the Appellants' Book of Documents wherein it states that "*It is our view that [REDACTED] is a director of [REDACTED] who directly controls more than 15 per cent of the company's ordinary share capital through his voting rights*".
50. The Commissioner has considered the Appellants' submission that instead of taking the literal approach to the interpretation of section 425 TCA 1997 such that, on no analysis can control of a Company be equated with control of a share, the Respondent has ignored the wording of the legislation altogether and contends that the requisite provision is not concerned with control of shares at all, but it is to do with control of the Company.
51. The Commissioner has considered the various sections of legislation opened to her by the Appellants in an attempt to show, by way of example, the different articulations of control that can be adopted by the legislature, such as section 432 TCA 1997 and sections 7 and 120 of the Companies Act 2014. The Appellants argue that had the legislature intended to state that you are a proprietary director when you control more than 15% of voting rights in a general meeting, it would have, but that the legislature did not state this. The Appellants submit that control of one class of shares does not amount to control of another class of shares and "*like it or not, the "A" ordinary shares are ordinary shares for the purposes of the section*".
52. Turning now to the Respondents position, the Respondent argues that the phrase "*control more than 15% of the ordinary share capital of the company*" was not intended to confine the concept to a narrow, highly technical meaning. The Respondent submits that importantly, the phrase "ordinary share capital" does not appear on its own and is

immediately preceded by the phrase more than 15%. Therefore, it is intended to define the extent of control exercised by a proprietary director, and not intended to suggest that control is only relevant insofar as it relates to shares. The Respondent argues that the Appellants' suggestion that control, is only control exercised in relation to shares, is not plausible.

53. The Respondent submits that in its ordinary and natural meaning, the phrase "*control more than 15% of the ordinary share capital of the company*" clearly implies control that extends beyond 15% of share capital which carry voting rights and it is the only sensible meaning taking into account the purpose of the section into which it is incorporated, its context and the words used in their totality.
54. The Commissioner has considered the decision of *Raymond Hughes* which the Respondent relies on to illustrate that shareholders who enjoy voting rights are not only capable of exercising control over the affairs of the Company, but also exercising control over its share capital too. The Respondent states that this is a "*graphic illustration of the fact that control of share capital and control of a company are not separate, discrete concepts*". The Appellant argues that this decision has no relevance to the application of TWR and the questions to be determined herein.
55. The Respondent states that the question that arises is the extent of control over the ordinary share capital and that control is voting. There is no other means of exercising control. The Respondent argues that the Appellants' brother, [REDACTED] has no control and the Appellants have all the control. The Respondent submits that the meaning of control within section 472 TCA 1997 is the ability to exercise influence or direct a course of events and a share only confers control in its ordinary and natural meaning where the share carries voting rights. It is submitted that there is no other way to read the section, as to read otherwise would effectively negate the control test i.e. when control is not interpreted in connection with a director of a Company.
56. The Commissioner has considered the Respondent's references to section 220 of the Companies Act 2014, such that it contends that section 220 of the Companies Act 2014 reinforces the point that control in the corporate context is exercised by voting shares. General meetings are conducted, and resolutions passed only by the exercise of voting rights attaching to shares, and the passing of resolutions accordingly. The Respondent submits that section 220 has a series of alternatives, each distinct from the other and each showing that control again is fundamentally exercised by voting. Section 220(5) states

*"For the purpose of this section a director of a company controls a body corporate if, but only if, he or she is alone or together with any other director or directors of the company, or any person connected with the director, or such other director or directors:*

*(a) interested in one half or more of the equity share capital of that body; or*

*(b) entitled to exercise or control the exercise of one half or more of the voting power at general meeting of that body".*

57. Furthermore, the Respondent submits that the purpose of section 825A TCA 1997 must be considered, such that its purpose is to effect a reduction in income tax for employee's tax resident in the State, but work in a country with whom Ireland has a DTA. The Respondent contends that the purpose of the section is to delineate, in the context of a reliving provision, employees who do not have any significant control, or economic interest in a Company which employs them, from those who do have significant control, or economic interest. Therefore, the proper interpretation of "control" acknowledges this intended distinction and an interpretation referring only to control of ordinary share capital is meaningless in that context. In addition, the Respondent directed the Commissioner to pages 609 and 650 of the Appellants' Booklet of Documents wherein the accounts of the Company and the filings with the [REDACTED] CRO record reflects that the Appellants, as directors, are individuals with significant control.

58. The Commissioner has considered the parties fulsome submissions in this appeal. The Commissioner is satisfied that that the starting point herein is interpretation, specifically the interpretation of section 472 TCA 1997 and the meaning of control in the context of a propriety director. The Commissioner has considered the Respondent's position that the interpretation of a section which has beneficial ownership on the one hand and control on the other is designed to describe the extent of control exercised and nothing more. The Commissioner agrees with that statement, but only in the context and to the extent that it refers to the ordinary share capital of the Company. The ordinary share capital of the Company is made up of *inter alia* the Appellants' shareholding and Mr [REDACTED] shareholding, both of which carry distinct rights in accordance with the Articles of Association of the Company, as aforementioned.

59. The Respondent urges the Commissioner to consider the word "control" in context of the overall section. The Commissioner is satisfied that on a plain and ordinary reading the word "control" is referring to the exercise of control over a Company's share capital by its directors, but specifically the "ordinary share capital" of the Company. The Respondent argues that context is critical. The Commissioner does not disagree with this statement. The context in which control is exercised in the definition in section 472 TCA 1997, is in

the context of a director controlling the ordinary share capital of the Company, not controlling the Company, which is an entirely separate matter. The Commissioner does not accept that this is “*an overly narrow and technical interpretation*” as contended for by the Respondent.

60. The well-established principles of statutory interpretation suggest, the purposive approach only arises where some ambiguity exists, which the Commissioner does not consider arises in this appeal, as there is no ambiguity to sections 472 or 825A TCA 1997. However, the Commissioner has considered the Supreme Court decision in *Heather Hill* wherein Murray J. states that “*the literal and purposive approaches to statutory interpretation are not hermetically sealed*”.
61. In considering the purpose of section 825A TCA 1997, the Commissioner accepts as correct the purpose contended for by the Respondent, but in considering that purpose, the Commissioner must consider the definition of proprietary director, a definition which stands itself as a separate section in the legislative scheme and which is not confined to the provisions relating to the availability of TWR.
62. Further, the Commissioner is satisfied that looking at the purpose of section 472 TCA 1997, the section deals with limitations on beneficial ownership and control of the ordinary share capital of the Company by a director and has nothing to do with the ownership of the Company. The definition of ordinary share capital in section 2 TCA 1997, is a technical definition, that makes no reference at all to voting rights and deals exclusively with the limitations, if any, that may or may not be attributed to the particular class of shares. The Commissioner finds no ambiguity to section 472 TCA 1997. The Appellant submits that the only person trying to create an ambiguity here is the Respondent. The words are plain and clear, yet the Respondent is seeking to read in words that do not exist and leave out words that actually exist.
63. Accordingly, the Commissioner is satisfied that based on a literal construction and having regard to the words used in their context and the purpose, as enunciated by Murray J. in the *Heather Hill* decision, the meaning of control in section 472 TCA 1997, means control of the ordinary share capital of a Company, not control of a Company, as contended for by the Respondent.
64. Ordinary share capital is not determined by reference to whether votes do or do not attach to the shares. The Respondent states that “*in its natural and ordinary meaning, the phrase “to control more than 15% of the ordinary share capital” plainly connotes one whose control extends beyond 15% of share capital, shares which carry voting rights*”. The Commissioner does not accept that as correct. The Commissioner is satisfied that

manifestly, ownership/control of the Company and ownership control of the ordinary share capital of the Company, as defined by section 2(1) TCA 1997, are not identical.

65. The Commissioner is satisfied that the only person who controls the rights attaching to Mr [REDACTED] shares is Mr [REDACTED]. Whilst between them, the Appellants have 100% of the voting rights in a general meeting and so collectively control the Company's affairs, but control of a Company's affairs, does not equate to control of a Company's ordinary share capital. Control is exercised over shares by being in a position to enjoy the rights attached to those shares. Mr [REDACTED] has no control over the Company but he has control over his own shares.
66. Consequently, having regard to the shareholding of the Appellants, the Commissioner is satisfied that the Appellants have shown on balance that they were not proprietary directors of the Company within the meaning of section 472 TCA 1997 such that they did not control more than 15% of the ordinary share capital of the Company. Accordingly, the Respondent was incorrect to refuse to allow TWR in accordance with the provisions of section 825A TCA 1997.

#### **Determination**

67. As such and for the reasons set out above, the Commissioner determines that the Appellants have succeeded in showing that the tax is not payable, as a consequence of the provisions of section 825A TCA 1997. Therefore, the Notices of Amended Assessment issued in respect of the Appellants for the years 2015, 2016 and 2017, shall be reduced to nil.
68. 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  
18 April 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**