



Between

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**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This matter comes before the Tax Appeals Commission (hereinafter “the Commission”) as an appeal against a Notice of Estimation of Amounts Due (“the Estimation”) for Income Tax (PAYE), Social Insurance Contributions (PRSI), Universal Social Charge (USC) and Local Property Tax (“LPT”) – (hereinafter “PREM”) raised by the Revenue Commissioners (“the Respondent”) on 16<sup>th</sup> December 2021. The Estimation relates to the year of assessment 2016 and the quantum of tax at issue is €10,811 exclusive of interest and penalties. The Appellant makes its appeal in accordance with the provisions of section 990 of the Taxes Consolidation Act 1997 (“TCA 1997”).
2. The appeal seeks to establish whether certain expenses paid for by the Appellant qualify as eligible deductions against the Appellant’s Schedule D, Case II income or whether those expenses ought to be considered as part of ████████████████████ (“the Appellant Director”) emoluments and if so, whether the Appellant is liable to PREM on those payments. In addition, the Commission is required to establish if payments made to ████████████████████ (“the Second Director”) were paid to him in accordance with the provisions of the TCA 1997.

## **Background**

3. The Appellant is owned 99% by the Appellant Director and 1% by the Second Director. In the period under appeal, the Appellant facilitated the services of the Appellant Director who operated as a ██████████ to the ██████ and certain United Kingdom (“UK”) ██████████. In return for these services the Appellant was paid sums for those services and from these payments it remunerated both the Appellant Director and the Second Director.
4. The Appellant was selected for an audit by the Respondent on 20<sup>th</sup> February 2019 (“the Audit”). During the course of the Audit, the Respondent formed the view that certain payments for expense deductions claimed in the Appellant’s 2016 Financial Statements were not eligible deductions and that some of the remuneration paid to the Second Director was incorrectly appropriated to him rather than the Appellant Director.
5. As the Appellant and the Respondent were unable to facilitate agreement, the Respondent proceeded to issue the Estimation to PREM in the sum of €10,811 on 16<sup>th</sup> December 2021.
6. The Appellant who was not in agreement with the PREM Estimation lodged an appeal with the Commission on 9<sup>th</sup> January 2022. The appeal was heard remotely by the Commissioner on 17<sup>th</sup> January 2023 with the Appellant Director representing the Appellant. The Respondent was represented by Counsel, its solicitor and members of its staff. The Commissioner had the benefit of written submissions from both parties in addition to the oral evidence and submissions presented at the hearing.

## **Legislation and Guidelines**

7. The following legislation is relevant to this appeal.

### **Section 81 TCA 1997 – General rule as to deductions**

- (1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.*
- (2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—*
  - (a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;*

- (b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession;*
- (c) the rent of any dwelling house or domestic offices or any part of any dwelling house or domestic offices, except such part thereof as is used for the purposes of the trade or profession, and, where any such part is so used, the sum so deducted shall be such as may be determined by the inspector and shall not, unless in any particular case the inspector is of the opinion that having regard to all the circumstances some greater sum ought to be deducted, exceed two-thirds of the rent bona fide paid for that dwelling house or those domestic offices;*
- (d) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade or profession, over and above the sum actually expended for those purposes;*
- (e) any loss not connected with or arising out of the trade or profession;*
- (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade or profession;*
- (g) any capital employed in improvements of premises occupied for the purposes of the trade or profession;*
- (h) any interest which might have been made if any such sums as aforesaid had been laid out at interest;*
- (i) any debts, except bad debts proved to be such to the satisfaction of the inspector and doubtful debts to the extent that they are respectively estimated to be bad and, in the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debts shall be deemed to be the value of any such debts;*
- (j) any average loss over and above the actual amount of loss after adjustment;*
- (k) any sum recoverable under an insurance or contract of indemnity;*
- (l) any annuity or other annual payment (other than interest) payable out of the profits or gains;*
- (m) any royalty or other sum paid in respect of the user of a patent;*

- (n) *without prejudice to the preceding paragraphs any consideration given for goods or services, or to an employee or director of a company, which consists, directly or indirectly, of shares in the company, or a connected company (within the meaning of section 10), or a right to receive such shares, except to the extent—*
- (i) *of expenditure incurred by the company on the acquisition of the shares at a price which does not exceed the price which would have been payable, if the shares were acquired by way of a bargain made at arm's length,*
  - (ii) *where the shares are shares in a connected company, of any payment by the company to the connected company for the issue or transfer by that company of the shares, being a payment which does not exceed the amount which would have been payable in a transaction between independent persons acting at arm's length, or*
  - (iii) *of other—*
    - (I) *expenditure incurred, or*
    - (II) *payment made to the connected company,*

*by the company in connection with the right to receive such shares which is incurred or, as the case may be, made for bona fide commercial purposes and does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is the avoidance of liability to income tax, corporation tax or capital gains tax;*
- (o) *any sum paid or payable under any agreement or understanding whereby a person is obliged to make a payment to a connected person resident in any territory outside the State for an adjustment made, or to be made, to the profits of the connected person for which relief may be afforded under the terms of an arrangement entered into by virtue of subsection (1) or (1B) of section 826, or for a similar adjustment made to the profits of a connected person resident in a territory in respect of which there are not for the time being in force any arrangements providing for such relief;*
- (p) *any taxes on income.*

### **Section 112 TCA 1997 - Basis of assessment to Income Tax under Schedule E**

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

### **Section 114 TCA 1997 – General rule on deductions**

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

### **Section 117 TCA 1997**

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

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

### **Section 886 TCA 1997**

*(1) In this section*

*“linking documents” means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;*

*“records” includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to—*

*(a) all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,*

*(b) all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,*

*(c) the assets and liabilities of the trade, profession or other activity referred to in paragraph (a) or (b), and*

*(d) all transactions which constitute an acquisition or disposal of an asset for capital gains tax purposes.*

*(2)(a) Every person who—*

*(i) on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,*

*(ii) is chargeable to tax under Schedule D or F in respect of any other source of income, or*

*(iii) is chargeable to capital gains tax in respect of chargeable gains,*

*shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.*

### **Documentation Presented to the Commission**

8. The following documentation was presented to the Commission.

8.1. A copy of an employment contract entered into between the Appellant and the Second Director. This employment contract was dated 26<sup>th</sup> December 2015 and provided that the employment was to commence on 1<sup>st</sup> January 2016. The job title of the employee was “R & D Manager and Investment Advisor”. Included within the duties section of the contract is the requirement for the employee to *“develop research programs incorporating current developments to improve existing products and study potential new products, to oversee all aspects of*

*research and development programmes and experiments*". In addition, the employee was required to repair and maintain [REDACTED] devices and to report to senior management on company product technical issues as well as technical developments within the market. The remuneration listed for the performance of those duties was shown as €32,000 per year. The employee's place of employment was shown within the employment contract as "[REDACTED], [REDACTED]".

- 8.2. A copy of an appointment letter with the [REDACTED] addressed to the Appellant Director at his home address which was shown as [REDACTED]. This letter confirms that the Appellant Director was required to attend the [REDACTED] of that Hospital on [REDACTED].
- 8.3. Copies of the Appellant's bank statements for the period 1<sup>st</sup> January 2016 to 31<sup>st</sup> January 2016. These bank statements chiefly show cheque payments and round sum cash withdrawals being withdrawn from that account in addition to payments received for the Appellant's services.
- 8.4. A copy of the Appellant Director's P60 for the tax year 2016. This disclosed a gross wage of €11,031 paid and that the sum of €6 was paid in income tax for that year.
- 8.5. A copy of the Second Director's P60 for the tax year 2016. This disclosed a gross wage of €32,000 paid and that the sums of €4,200 in income tax, €1,053 in USC, and €1,280 in PRSI were deducted for that year. The employer details listed on the P60 was that of the Appellant.
- 8.6. Inward payment Advices from AIB which detailed the lodgements made to the Appellant's bank account during the year 2016.
- 8.7. Expense receipts for the Appellant for the calendar year 2016. The Respondent allowed these expenses as deductions against the Appellant's income for the financial year ended 31<sup>st</sup> December 2016 (see below at 8.10).
- 8.8. A copy of a mortgage interest statement in the Appellant Director's name for the calendar year 2016. This listed the Appellant's Director's home address and showed mortgage payments during that year of €11,232.
- 8.9. A schedule of correspondence between the Appellant and the Respondent. This correspondence covered the period from the commencement of the audit to the

date the Respondent issued its notice of assessment. The correspondence shows that the Appellant failed to engage with the Respondent on multiple occasions and further contained the Respondent's summary of expenses which it had allowed and disallowed following an examination of the Appellant's financial statements for the year ended 31<sup>st</sup> December 2016.

8.10. That summary of expenses is as follows:

Expense	Amount	
	Disallowed	Allowed
UK Accomodation	€4,840	
UK Car Rental	€3,960	
Weekly Fuel Allowance (Irl.)	€1,600	
Gift Vouchers	€1,000	
Energy	€1,700	
Car Insurance	€1,055	
Oxfam Donation	€241	
Property Tax	€597	
Internet	€600	
Mobile Phone	€600	
Loan Interest	€1,826	
Courses	€1,500	
GP Visits	€500	
Difference from CT1	€570	
Irish ██████████		€605
██████████		€542
██████████		€1,115
Appraisal Fee		€804
Accountancy Fee		€942
Bank Charges		€26
<b>Total</b>	<b>€20,589</b>	<b>€4,034</b>
<b>Balance</b>	<b>€16,555</b>	

9. At the conclusion of the appeal hearing and following submissions from the Appellant, the Commissioner requested that the Appellant provide copies of the Second Director's bank statements for 2016 to the Commission and the Respondent. That request was made in order to establish if payments made to the Second Director were lodged into his bank account and as such verified the Appellant's claims that the salary paid to the Second Director was in fact received by him.
10. In response to that request, the Appellant furnished copies of a bank account in the name of the Second Director for the year 2016 addressed to him at his home address. These bank statements contained a number of lodgements described as "ATM LDG" and totalled €10,600 for that year. There were various other lodgements into that account



which appeared to be bank transfers but which did not reconcile to the Appellant's bank statements.

11. In order to ensure due process, a copy of these bank statements were forwarded to the Respondent for comment. In reply, the Respondent's Counsel submitted that:

11.1. The Second Director was not in attendance at the appeal hearing and as such he was not available for cross examination on the nature of the lodgements.

11.2. The payments identified in the Second Director's bank account were not consistent with the purported salary paid to him.

11.3. Even if the payments were deemed to be payments from the Appellant that as the Appellant was unable to demonstrate what the Second Director's duties were then those payments were unconnected with the Appellant's business and as such disallowable.

11.4. Those bank statements showed continuous activity in the [REDACTED] area and as such this discredited the Appellant's submissions that the Second Director was required to perform some of his duties in the UK.

12. The Respondent submitted despite the information furnished by the Appellant after the hearing the documentation was of no evidential value given the Respondent was deprived the opportunity of cross examining the Second Director.

## **Submissions**

### *Appellant*

13. The Appellant Director submitted that despite sharing a common surname with the Second Director that both he and the Second Director were not related in any way and as such the Second Director was independent of him and the Appellant.

14. The Appellant Director submitted that the Second Director was an electronic engineer and in addition to the duties outlined in his employment contract, he was required to conduct a multitude of other duties which included property maintenance on a property in [REDACTED] and as a driver for the Appellant Director. The Appellant Director further submitted that as the law required the Appellant to pay the Second Director a minimum wage, by virtue of the Respondent seeking to reduce the salary payments from the amount paid to €3,198, that this exposed the Appellant to sanctions.

15. The Appellant Director explained in 2016 that he spent 22 weeks working in [REDACTED] in [REDACTED] and while there the Appellant was required to rent a car at a cost of

€3,960 and accommodation of €4,840 to enable these duties to be performed. He further explained as he was unable to drive as he had [REDACTED], that the Second Director was required to transport him to and from [REDACTED] so that he could attend work. In those circumstances, the Appellant Director requested the Commission to allow those expenses and a further portion of the Second Director's salary in respect of the driving duties undertaken by him.

16. The Appellant Director explained that all of the UK income was transferred into the Appellant's bank account and in addition to this income, work conducted for the [REDACTED] in Ireland was also transferred into that account. He submitted relevant to the amount of income generated by the Appellant that the expenses claimed in its Financial Statements for 2016 were reasonable and as such ought to be allowed.
17. In summation, the Appellant Director submitted that the salary payments paid to the Second Director were conducted for the Appellant's business activities and ought to be allowed in full and taxable upon him. In addition, as the expenses claimed by the Appellant were reasonable and commensurate to the income generated, the Appellant Director submitted that they ought to be allowable in accessing the Appellant's taxable income. In those circumstances, the Appellant Director requested that the Appellant's appeal be allowed.

*Respondent*

18. Counsel for the Respondent submitted that following an examination of the Appellant's bank statements, the Respondent was unable to trace the salary payments made to the Second Director. In addition, having established the nature of the Appellant's income, the Respondent was of the view that the work undertaken was required by its nature to be performed solely by the Appellant Director (who held a [REDACTED] degree) and as such could not have been performed by the Second Director (as he did not hold the appropriate qualifications).
19. The Respondent's Counsel submitted that the Respondent formed the view that the activities of the Second Director were largely unrelated to the business of the Appellant as its activities were performed in various [REDACTED] and as such there was no equipment provided or research and development work undertaken by the Second Director as detailed in his supplied employment contract.
20. In noting the small salary paid to the Appellant Director relative to his outgoings, the Respondent's Counsel advised that the Respondent formed the view that all but €3,198 paid to the Second Director was actually income of the Appellant Director and as such

the Respondent sought to assess the Appellant Director on this income. The Respondent's Counsel advised in arriving at the figure of €3,198 paid to the Second Director that the Respondent conceded that the Second Director actually worked 5 hours a week for the Appellant at a rate of €12.30 per hour which it deemed was an appropriate rate of pay given the Second Director's tax record showed that he had only previously worked in a convenience store.

21. In support of the submission that the Appellant Director should be assessed to tax on the majority of the earnings returned by the Second Director, the Respondent's Counsel opened the cases of *O'Ciondealbháin v Gannon* [1986] IR 154 ("*Gannon*") and *Dolan v K* [1944] IR 470 ("*Dolan*") which held that emoluments arising or deriving from a person's efforts in their office or employment, even if they are redirected, still fall to be taxed on the person who earned the income.
22. The Respondent's Counsel submitted that section 117 TCA 1997 makes it clear that payments made to an employee in the name of "expenses" is a perquisite of their employment/office in the first place. Counsel submitted that it is only where the test under section 114 TCA 1997 is met does the sum become deductible for the company and not taxable for the recipient. The Respondent's Counsel submitted that as the un-vouched expenses claimed by the Appellant did not meet this criteria, then those expenses should be disallowed.
23. The Respondent's Counsel submitted that the "wholly and exclusively" rule means that where an expense serves both a personal and a trade purpose, it is not an allowable expense. In support of this submission, Counsel opened the case of *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665, in which the taxpayer, a barrister, purchased dark clothes to comply with Bar Council rules for court appearances. The Court in disallowing the claimed expense held that as the expense was found to have a dual purpose (preserving warmth and decency as well as satisfying the Bar Council rules) it was not tax deductible. Counsel submitted as the same principles applied to a portion of the Appellant's disallowed expenses, then those expenses should be similarly disallowed as deductions against the Appellant's assessable income.
24. The Respondent's Counsel further submitted that as the majority of disallowed expenses related to round sum figures, which the Appellant was unable to vouch or demonstrate to the satisfaction of the Respondent were incurred "wholly, exclusively and necessarily" in the performance of the Appellant's duties then the Commission should similarly find that those expenses were not deductible by the Appellant.

25. Having regard to the travelling expenses claimed by the Appellant for transport of the Appellant Director to and from work, the Respondent's Counsel opened the case of *Miners v Atkinson (Inspector of Taxes)* [1997] STC 58 in which the court quoted and approved *Taylor v Provan* [1975] AC 194 at 227 which held that "*Expenses incurred in travelling to and from work are not deductible*". The Respondent's Counsel submitted that as the Appellant Director's duties were conducted on site at the various [REDACTED] where he worked and as there was no requirement for transport in that role, then the Commission ought to find that the Appellant's travel expenses were not incurred in the performance of its duties and hence should be disallowed.
26. In summation, the Respondent's Counsel submitted as the Appellant had not established that the relevant expenses were incurred in the performance of its activities, then those expenses ought to be disallowed when establishing the Appellant's liability to Corporation Tax and taxable on the Appellant Director as assessable income. In addition, as the Appellant failed to establish that the purported payments made to the Second Director were actually paid to him and were not payments of moneys earned by the Appellant Director and paid for his benefit and/or were not incurred in the performance of the Appellant's taxable activities, the Respondent's Counsel submitted that the Commission ought to uphold the PREM assessments raised by the Respondent in their entirety. In those circumstances, Counsel for the Respondent requested the Commission to refuse the Appellant's appeal.

### **Material Facts**

27. The Commissioner finds the following material facts:
- 27.1. The Appellant's activities are the facilitation of [REDACTED] to various [REDACTED] in Ireland and the UK.
- 27.2. The income returned by the Appellant in its financial statements for the year ended 31<sup>st</sup> December 2016 relates solely to this activity.
- 27.3. Owing to the nature of the activities undertaken by the Appellant, those activities are required to be performed by the Appellant Director.
- 27.4. The nature of the activities performed by the Appellant requires them to be performed on the individual [REDACTED] premises.
- 27.5. The Appellant employs the Second Director who is engaged by it as a Director and owns 1% of its business.

- 27.6. No evidence was presented to the Commission which demonstrates that the Second Director performed any of the duties specified in his contract of employment.
- 27.7. Furthermore, the Appellant failed in its submissions to demonstrate that any of the activities of the Second Director relate to the activities of the Appellant's business.
- 27.8. The salary payments to the Appellant Director and the Second Director are not ascertainable from the Appellant's supplied bank statements. Much of the withdrawals from those bank accounts are lump sum payments.
- 27.9. The lodgements into the Second Director's bank account do not correspond with either his contractual entitlements under his employment contract with the Appellant or payments from the Appellant's bank account.
- 27.10. The Appellant Director was paid the sum of €11,031 for his services to the Appellant in 2016 and the Second Director was purportedly paid the sum of €32,000 for the same year in respect of his provided services.
- 27.11. The Appellant claimed a number of expenses in calculating its assessable profits chargeable under Schedule D, Case II.
- 27.12. A number of these claimed expenses were not vouched and the Respondent disallowed those expenses.
- 27.13. The Respondent claims that a number of other claimed expenses were personal in nature and/or were unrelated to the activities of the Appellant and as such are not claimable by the Appellant.
- 27.14. Included within those expenses is mortgage payments which relate to the Appellant's Director's private residence in the sum of €11,232.

### **Analysis**

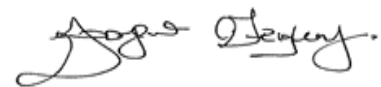
28. As with all appeals before the Commission the burden of proof lies with the Appellant. As confirmed in *Menolly Homes v Appeal Commissioners* [2010] IEHC 49, the burden of proof is, as in all taxation appeals, on the taxpayer. As confirmed in that case by Charleton J at paragraph 22:-

*"This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioner as to whether the taxpayer has shown that the tax is not payable."*

29. The Appellant submits that certain expenses defrayed ought to be allowable deductions in computing the amount of its profits chargeable under Schedule D, Case I. In order for these expenses to be so allowable, the provisions of section 81 TCA 1997 require that those expenses are incurred “wholly and exclusively” for the use in the Appellant’s business and section 886 TCA 1997 further requires that linking documents are retained by the Appellant for a period of six years from the date they relate so that the Respondent can verify such claims.
30. As the disallowed expenses claimed by the Appellant were not incurred “wholly and exclusively” for use within its business and/or as linking documentation was not provided to the Commission in respect of these expenses (see paragraph 8.10 above), the Commissioner finds that the Respondent was correct in refusing the Appellant a deduction in respect of these sums. Furthermore, as these expenses are disallowed the Commissioner finds by the nature of those expenses that the portion of the PREM assessment referable to these expenses should be upheld.
31. As the Appellant was unable to provide any linkage between the excess payments made to the Second Director and the duties performed for the Appellant, the Commissioner further determines that these additional payments, if they occurred, were properly for the benefit of the Appellant Director rather than the Appellant. In line with the findings in *Gannon* and *Dolan* which requires that redirected payments are assessable on the “*person who earned the income*”, the Commissioner finds that the balance of the income forming the PREM assessment is properly assessed on the Appellant Director. In coming to this finding the Commissioner notes that the Appellant Director’s original returned salary was incapable of covering the mortgage repayments he made on his private residence let alone the additional income required to support his lifestyle.
32. Having regard to the quantum of the PREM assessments, the Commissioner is satisfied that the calculations were properly conducted by the Respondent and that it gave due credit for the PREM paid by the Second Director in calculating the overall PREM liability arising from the adjustments to both of the director’s salaries. Furthermore, the Commissioner determines that no adjustment is required to the Appellant’s 2016 corporation tax liability by virtue of the “switching of the salary” between the Appellant Director and the Second Director and the reclassification of expenses as salary for the Appellant Director.

## **Determination**

33. For the reasons set out above, the Commissioner determines that the within appeal has failed and that it has not been shown that relevant tax is not payable. Therefore, the Respondents assessment in the sum of €10,811 is upheld by the Commission.
34. This Appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.



**Andrew Feighery**

**Appeal Commissioner**

**9<sup>th</sup> May 2023**