AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

99TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This determination concerns the Appellant's appeals of PAYE/PRSI/USC Notices of Estimation of Amounts Due for the years 2012, 2014, 2015 and 2016 made by the Revenue Commissioners ("the Respondent") under section 990 of the Taxes Consolidation Act 1997 ("the TCA 1997").

2. The Appellant is an unlimited company incorporated in [redacted]. The amounts assessed as due from it in the Notices of Estimation arise from untaxed payments that it made to its shareholder, director and employee, [redacted], which the Respondent decided in each instance were chargeable to tax under the PAYE system. The Respondent views these payments as remuneration paid to [redacted], chargeable to the year of receipt, in respect of which the Appellant had a duty to pay to it the tax owed. The Appellant accepts that the payments made were taxable, but contends that they were in each instance preferential loans giving rise under section 122 of the TCA 1997 to the receipt by [redacted] of perquisites chargeable to tax under section 112 of the TCA 1997. The consequence of findings that some or all of the payments at issue were preferential loans would be that for each year they were outstanding as a perquisite, income tax, PRSI

and USC would be chargeable only on the difference between the interest actually paid in respect of each loan and that which would have been paid had the "specified rate" under section 122 of 13.5% been applied.

Background

The 2012 Notice of Estimation

3. At all times material to the within appeals the Appellant supplied [redacted] services, which were performed by its employee, director and owner, the aforementioned [redacted], who is a [redacted]. The Appellant paid [redacted] a salary under Schedule E in respect of the duties performed in the course of his employment.

4. On 13 November 2012 the Appellant transferred the sum of €1,177,000 from its own bank account to a personal account of [redacted].

5. In its P35 end of year return for 2012, the Appellant disclosed to the Respondent that its sole employee was [redacted], to whom it paid €50,000 in emoluments. From this, income tax of €20,500 was deducted and returned to the Respondent under the PAYE system, along with USC of €2,818.52 and PRSI of €2,000.04.

6. Page 11 of the Appellant's "*Director's report and unaudited financial statements for the year ended 31 December 2012*" lists its debtors as owing it €178,466. These debtors are stated to be "*Trade debtors"* (€59,679), "[redacted] *debtors*" (€60,032), "[redacted] *debtors* (€58,724) and *"Called up share capital not paid"* (€11). [redacted] is not listed as owing the company any sum.

7. Page 7 of the same unaudited financial statements of the Appellant lists "*Current Assets"* and, under that heading, *"Cash at bank in hand"* at the end of 31 December 2012 of €1,289,367. Cash at bank in hand for the previous year is listed as €691,035.

8. The financial statements for 2012 further indicate that the turnover of the Appellant for that year was €923,341. Its operating profit was €810,731.

9. It was not in dispute that no tax was returned to the Respondent by the Appellant in respect of the sum of €1,177,000 paid to [redacted].

10. It also was not in dispute that the existence of a loan by the Appellant to [redacted], its director, employee and shareholder, was not disclosed on its CT1 corporation tax return filed for 2012.

11. Following an enquiry conducted in relation to the Appellant's PAYE/PRSI/USC affairs, the Respondent issued its Notice of Estimation of Amounts Due for 2012 on 12 December

2017. Therein the payment of €1,177,000 was assessed by the Respondent as remuneration paid to [redacted], with income tax of €588,278.52 due to it for the year 2012. When added to PRSI for the same period of €49,080.04, the total unremitted amount owed by the Appellant to the Respondent was assessed to be €612,039.

12. This Notice of Estimation was appealed by the Appellant to the Commission by way of Notice of Appeal in the form of a letter dated 8 January 2018. The full extent of the grounds specified therein were:-

> "*1. PAYE figure of €637,358.56 is incorrect and excessive; and*
>
> *2. Certain items of expenditure incurred wholly and exclusively for the purpose of the trade have been disallowed."*

13. In the course of the hearing of the appeal the Respondent indicated that it accepted that [redacted] had made certain payments to the Appellant in 2018 or 2019 totalling €210,000.[1] The relevance, or otherwise, of such payments to the receipt by [redacted] of €1,177,000 in 2012 is discussed further on in this Determination.

The 2014, 2015 and 2016 Notices of Estimation

14. On 17 December 2019, the Respondent issued a Notice of Estimation to the Appellant in respect of the year 2014 assessing it as having PAYE/PRSI/USC payable of €99,329.25.

15. On 15 December 2020 the Respondent issued a Notice of Estimation to the Appellant in respect of the year 2015 assessing it as having PAYE/PRSI/USC payable of €121,730.26.

16. On 18 December 2021 the Respondent issued a Notice of Estimation to the Appellant in respect of the year 2016 assessing it as having a PAYE/PRSI/USC payable of €118,646.

17. Each of the foregoing Notices were appealed by the Appellant. In respect of 2014 and 2016, the Notices of Appeal stated only that the amounts assessed were incorrect and overstated. In respect of 2015 the Appellant stated in its grounds section that:-

> "*We are lodging this appeal on the basis that this amount is incorrect and excessive. The liability appears to relate to a benefit in kind arising on a Director's loan, the details of which are disputed with Revenue."*

18. It was not in dispute that [redacted] received untaxed payments from the Appellant totalling €32,733 in 2014, €77,705 in 2015 and €31,293 in 2016.[2] Part of the amounts assessed as due in the Notices of Estimation arose from the view taken by the Respondent

[1] Transcript of hearing, day 2, 21-13 to 21-26.
[2] Transcript of hearing, day 2, 45-25 to 45-27.

that these payments constituted remuneration chargeable in the year of receipt to income tax, PRSI and USC. The tax assessed as due in this regard was €17,021 for 2014, €40,407 for 2015 and €16,272 for 2016.

19. The remainder of the amounts assessed as due in the appealed Notices of Estimation arose from the Respondent's decision to treat the aforementioned payment of €1,177,000 as an outstanding preferential loan made by the Appellant to [redacted], chargeable to income tax, USC and PRSI as a perquisite. In this regard, counsel for the Respondent referred to this portion of the amounts assessed as "alternative assessments" that should stand only if the issue in the appeal of the 2012 Notice of Estimation, in which the payment was taxed as remuneration paid in that year, was determined against it.

20. It is necessary to record at this point of the Determination that the Notices of Appeal delivered to the Commission were each somewhat lacking in the specificity of their grounds. In the course of the proceedings, the Appellant clarified that it would be its case that the payments of €32,733, €77,705 and €31,293 were in consideration for the transfer by [redacted] in 2010 of the goodwill attaching to his [redacted] practice, which up to then he carried on as a sole practitioner. On foot of this alleged transaction [redacted] became an employee of the Appellant and the goodwill supposedly acquired, valued at €750,000, was reflected in its accounts. This consideration was, however, not paid by the Appellant to [redacted] upon the transfer. Instead, the Appellant's case was that it had received a director's loan from [redacted] in the amount of €750,000, which was repayable over time. The aforementioned payments in 2014, 2015 and 2016 to [redacted], its shareholder, director and employee, constituted repayments of this loan, and were recorded in the director's loan account in the debit column, thus reducing the sum owed by it to [redacted]. These payments to [redacted] were ones in respect of which he might be liable to Capital Gains Tax, but were not, contrary to the Respondent's assessments, chargeable to income tax, PRSI or USC.

21. This raising of the issue of goodwill was somewhat noteworthy given that, by correspondence of 18 October 2016, the Appellant's agent stated to the Respondent that "[all] *goodwill has been reversed in our clients account and none is being claimed".*

22. Submissions filed by the Respondent relating solely to the question of the goodwill put the Appellant on proof to show that goodwill existed in respect of [redacted] sole-trader [redacted] practice; that any goodwill was in fact disposed of; that the consideration paid by the Appellant was actually €750,000; and that this was the open market value of any goodwill.

23. In a Case Management Conference held less than two weeks before the hearing of the appeals, the agent for the Appellant indicated that his client was proceeding on the basis that there had been a transfer of goodwill from [redacted] to the Appellant in 2010. Nevertheless, at 16.36 on the eve of the hearing the agent submitted updated outline written submissions in which it omitted the argument that the payments in 2014, 2015 and 2016 were made in consideration for the transfer in 2010 of goodwill attaching to [redacted] practice.

24. At the outset of the hearing, the agent for the Appellant let it be known that he would not be calling any witnesses to give evidence in relation to the appeals. The agent clarified that he was not proceeding with the argument relating to the alleged transfer of goodwill. This left it unclear what stance the Appellant was adopting in respect of the tax assessed on the payments made to the Appellant in 2014, 2015 and 2016. In the event, the agent for the Appellant made oral submissions as to why the tax assessed in respect of these payments should be reduced. These are set out further on in this Determination. Counsel for the Respondent argued that, in respect of the 2015 appeal, the oral submissions made by the Appellant's agent constituted the introduction of a new ground not included in the Notice of Appeal for that year. Counsel objected, in the first instance, to the acceptance by the Commissioner of this ground in the appeal of the 2015 Notice of Estimation. Lest, however, the Commissioner find against him in relation to the objection, counsel also made legal submission as to why the argument made by the Appellant's agent was, in any event, without merit in respect of each of the relevant years, 2015 included. The Commissioner's ruling in relation to this objection is contained in paragraph 53 of this Determination and is final and conclusive.

Legislation and Guidelines

25. Section 112 of the TCA 1997 provides that income tax shall be charged on all salaries, fees, wages, perquisites or profits falling under Schedule E that are earned by an individual in a given year.

26. Section 122 of the TCA 1997 is entitled "*Preferential loan arrangements"* and provides that where there is outstanding for the whole or part of a year a loan from an employer to a Schedule E employee, the employee will be treated as having received a perquisite under section 112 of the TCA 1997. In this regard section 122(2) provides:-

> "*Where, for the whole or part of a year of assessment, there is outstanding, in relation to an individual, a preferential loan, the individual shall, subject to subsection (4), be treated for the purposes of section 112 or a charge to tax under Case III of Schedule*

D, as having received in that year of assessment, as a perquisite of the office or employment with the employer who made the loan, a sum equal to the difference between the aggregate amount of interest paid in that year and the amount of interest which would have been payable in that year, if interest had been payable on the loan at the specified rate and the individual […] *shall be charged to tax accordingly.*"

27. The *"specified rate on the loan"* referred to in section 122(2) of the TCA 1997 is defined under subsection 1(a) as, in relation to a loan other than a home loan, 13.5%.

28. Section 990 of the TCA 1997 provides that where an inspector or other officer of the Respondent has reason to believe that an employer has overpaid or underpaid tax due to be paid under the PAYE system, they may make an assessment of the total amount of tax so due by that employer.

29. Section 949I of the TCA 1997 provides:-

"(1) Any person who wishes to appeal an appealable matter shall do so by giving notice in writing in that behalf to the Appeal Commissioners.

(2) A notice of appeal shall specify–

[…]

(d) the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds.

[…]

(6) A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice."

Submissions

Appellant

The 2012 Notice of Estimation

30. The agent for the Appellant submitted that the payment made by his client to [redacted] on 13 November 2012 should be treated as a loan given at a preferential rate to an employee and taxed as a perquisite. This followed on from the factual assertion, made somewhat unusually at paragraphs 33 and 34 of the Appellant's written outline legal submissions, that:-

"[…] *this withdrawal is an out of course loan withdrawn from the company to facilitate the purchase of some investment properties, the income from which would be used by the Appellant in his retirement.*

We are instructed that there was a misunderstanding by the Appellant in that he did not fully understand that, irrespective of bona fide purpose of the withdrawal, this transaction had tax implications for him and his company. Once this was brought to his attention, he repaid the funds to the company in a number of instalments between 2018 and 2020"

31. Earlier in the proceedings, in an un-agreed Statement of Facts delivered to the Commission by the Appellant's agent on 5 May 2021, the Appellant had asserted:-

"[…] *the Appellant borrowed the sum of €1.177m from his company to purchase certain retirement assets;*

[…] *the Appellant repaid the funds in full by way of introduction of funds to the company, waived salary, and discharging certain third party debts on behalf of the company."*

32. Despite the foregoing factual assertions made in advance of the hearing, there was ultimately no evidence proffered to the Commissioner by or on behalf of the Appellant in which the 2012 payment was described as a loan, let alone any relating to the purpose of the payment. Nevertheless, the agent for the Appellant drew attention to a combination of undisputed facts from which he said the inference could and should be drawn that the 2012 payment was one that his client was required to repay. One such fact was that the turnover of the company for 2012, being €923,341, was a sum less than the actual amount supposedly paid to [redacted] as income. It would, he submitted, be "incongruous" for remuneration in a given year to exceed turnover. Moreover, he suggested that the size of the payment was not in keeping with the expected earnings of a person in [redacted] line of work. It was too large. In the agent's view, the salary of €50,000 returned in the Appellant's P35 for 2012 was, when added to other un-evidenced income supposedly received from different sources in respect of his practice, more reflective of what one might expect a [redacted] to receive. The Appellant's agent pointed also to the cash at bank in the amount of €1,289,367 held by the Appellant at the end of this period. While the accounts recorded the existence of no loan made to [redacted], he submitted that the Commissioner should conclude that the loan amount was included in this figure.

33. The Appellant's assertion that [redacted] repaid the €1,177,000 in instalments between 2018 and 2020 was not accepted by the Respondent. As noted already however, the

Respondent did accept that [redacted] had made payments to the Appellant in 2018 or 2019 in the amount of €210,000. Whatever the quantum involved, the agent for the Appellant submitted that the accepted payments post-dating the issuing of the Notices of Estimation should be taken by the Commissioner as having been for the purpose of repaying the €1,177,000 and as proof that it constituted a loan to [redacted] when paid to him by the Appellant in 2012.

The 2014, 2015 and 2016 Notices of Estimation

34. The agent for the Appellant submitted that the effect of the Respondent's refusal to accept that there had been a goodwill disposal for which consideration of €750,000 was paid, was that the "loan" supposedly given to it by [redacted] had to be removed from the director's loan account. The consequence of this was, the agent said, that [redacted] moved from being in a positon where he was a creditor of the Appellant to one where he was overdrawn and in debt to it. This change in status meant that the payments needed to be treated not as remuneration, but rather as preferential loans that were to be repaid.[3] Were they to be so treated, they would, under section 122 of the TCA 1997, be perquisites in respect of which income tax, PRSI and USC would be due only on the difference between the amount of interest charged to [redacted] in each year at a preferential rate (in each instance interest at 0%) and the amount charged at the "specified rate" prescribed under that provision, namely 13.5%.

35. In relation to the remainder of the sums assessed for 2014, 2015 and 2016, the agent for the Appellant did not take issue with charges arising as a consequence of the 2012 payment to [redacted] being treated as a perquisite in the form of a preferential loan. The agent observed, however, that as things stood the Appellant had been subjected to double taxation as the Respondent had also assessed this payment as remuneration in the amount of €1,177,000 received in 2012, chargeable to income tax, PRSI and USC. Consequently, the Commissioner would need to make adjustments to amounts assessed in the Notices of Estimation, whatever the determination made regarding the nature of the 2012 payment.

Respondent

36. Counsel for the Respondent placed emphasis, firstly, on the judgment of the High Court in *Mennolly Homes v Revenue Commissioners [2010] IEHC 49,* where Charleton J held at paragraph 22 that:-

[3] Transcript of hearing, day 2, 45-15 to 46-19 and 79-22 to 80-21.

"*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*."

37. Counsel also referred in submission to the earlier judgment of the High Court in *TJ v Criminal Assets Bureau [2008] IEHC 168*. There, Gilligan J, in refusing what was in essence a request for an order requiring the Respondent to make disclosure of material it held relevant to the appellant's tax appeal, observed that the tax system in Ireland is one grounded on the principle of self-assessment. It is thus the taxpayer who is, in the normal course, in a position to know their own affairs and produce the information relevant to their challenge to the accuracy of an assessment.

38. The Respondent also opened *Hudson v Hudson (HM Inspector of Taxes) 42 TC 380*, a judgment of the High Court of England and Wales. In that case, an enquiry carried out by the Revenue and Customs Commissioners of the United Kingdom ("the Revenue") in respect of several years revealed Mr Hudson to have increases in capital and living expenses considerably in excess of his known income. The Revenue, on foot of a capital statement prepared by the Inspector of Taxes, made an additional assessment finding Mr Hudson to have received income from the company which he controlled and of which he was a director. The additional assessment was made outside of the statutory six-year time limit then applicable in that jurisdiction on the grounds that there had been "wilful default" triggering the 'proviso' disapplying the time limit. There was no legal dispute that the Revenue bore the burden of proving, on a prima facie basis, that there had been the wilful default permitting it to make its assessment. There was also no factual dispute that Mr Hudson had, in the relevant years, received sums for which he could give no satisfactory account. There was, however, disagreement between the parties as to whether it was incumbent on the Revenue to demonstrate to the prima facie standard that the unexplained sums were in the nature of income. In finding that there was no such obligation, Pennycuik J held at page 387:-

"[The Revenue's] *contention appears to be in accordance not only with the terms of the proviso but with the justice and common sense of the matter. The taxpayer knows the full facts, and the Revenue does not. In the nature of things, it must often be the case that, even if the Revenue can show a prima facie case that receipts have not been satisfactorily accounted for, it has no material upon which to set up a prima facie case for bringing the receipts in question under one or other source of income. On the other hand, it is always open to the taxpayer to challenge the assessment, not only on*

the ground that there has been no wilful default but also on the ground that the receipts did not represent income from the particular source selected by the Revenue."

39. Counsel for the Respondent emphasised that *Hudson v Hudson* was not relevant insofar as it concerned the question of the right to raise an assessment out of time and the burden of proving wilful default. Rather, its relevance lay in the finding that a person looking to appeal an assessment bears the burden of proving that unaccounted for sums received did not constitute income where assessed as such. Mr Hudson had offered no evidence in his appeal regarding the provenance of the sums received calculated by reference to the increase in his capital and living expenses. Counsel submitted that if the Appellant in the instant appeals wished to challenge successfully the Respondent's assessments of the various payments at issue as income, he too was obligated to proffer some evidence in this regard.

The 2012 Notice of Estimation

40. In relation to the 2012 payment, the Respondent submitted that there was no evidence to support the assertions made by the Appellant's agent that the sum was a preferential loan. [redacted], the controller and employee of the Appellant had chosen not to attend the appeal to give evidence. Mere assertions by the Appellant's agent did not constitute evidence.

41. Moreover, none of the documentary material relied on at hearing by the Appellant actually supported the proposition that the payment was a perquisite and should be taxed as such. In fact, such documentary evidence as was available, in particular the 2012 financial statements and the Appellant's end of year return, ran directly contrary to the suggestion that there was any loan payment. While [redacted] made payments of €210,000 to the Appellant on or about 2018 or 2019, after the raising of the assessment in respect of the untaxed €1,177,000, these could not be taken to be repayments or retrospectively change the character of the payment made in 2012.

42. Counsel for the Respondent accepted that were the Commissioner to agree with his submission regarding the status of the 2102 payment as remuneration in the form of salary, the Notices of Estimation for 2014, 2015 and 2016 would be inaccurate assessments of the Appellant's liability for those years because they included "in the alternative" tax on the 2012 payment as a perquisite. Conversely, if the Commissioner sided with the Appellant's argument, the Notice of Estimation for 2012 would need to be adjusted so that the payment was taxed as a perquisite given by the Appellant to [redacted] for the months of November and December only. The Notices of Estimation for the years 2014, 2015 and

2016 would not need to be adjusted insofar as they assessed tax on the 2012 payment based on it constituting a perquisite.

The 2014, 2015 and 2016 payments

43. In relation to the appeal of the 2015 Notice of Estimation, counsel for the Respondent submitted that the ground advanced at hearing should not be accepted by the Commissioner as it was not specified in its Notice of Appeal, contrary to section 949I(6) of the TCA 1997. It was submitted that the reference to a "*benefit in kind arising on a Director's loan"* could not be taken to be in reference to the payments in 2015 amounting to €77,705. This ground had never been canvassed previously, it was submitted. Counsel argued that section 949I of the TCA 1997 was mandatory in its terms and if the argument made orally could not fit within the ground in the Notice of the Appeal then the Commissioner must refuse to allow it to proceed.

44. Counsel for the Respondent submitted that, in any event, there was no evidence whatever to support the assertion made by the agent for the Appellant at hearing that the 2015 payments, or those made in 2014 amounting to €32,733 or 2016 amounting to €31,293, constituted preferential loan payments within the meaning of section 122 of the TCA 1997. The Respondent had decided to assess these sums as remuneration paid to [redacted] that were chargeable to income tax, which the Appellant had an obligation to remit under the PAYE system. There was, it was submitted, simply no basis on which it could be held that the Appellant had satisfied the burden resting on it to succeed in its appeal against these sums assessed.

Material Facts

45. No oral evidence was called by either side in the hearing of these appeals. The facts material to the appeals are as follows:-

- the Appellant is a company incorporated in [redacted] which at the times relevant to the within appeals provided [redacted] services in the State;
- the Appellant is owned and controlled by [redacted];
- [redacted] is a director and employee of the Appellant;
- [redacted] is a [redacted]. Prior to becoming an employee of the Appellant in 2010 he had practiced as a sole-trader in the same occupation;

- the [redacted] services provided by the Appellant were at the times relevant to the within appeals carried out by [redacted] in the performance of his duties as its employee;
- [redacted] was paid a salary of €50,000 by the Appellant for 2012. This salary was reflected in the Appellant's P35 end of year return for that year;
- on 13 November 2012 the Appellant transferred the sum of €1,177,000 from its own bank account to a personal account of [redacted];
- the Appellant's CT1 Corporation Tax Return for 2012 did not record this payment either as remuneration paid to [redacted] as an employee or as a loan;
- on or about 2018 – 2019 [redacted] made payments to the Appellant totalling €210,000;
- on 12 December 2017 the Respondent issued a PAYE/PRSI Notice of Estimation to the Appellant assessing it as having amounts due to it of €612,039 arising from the payment of the sum of €1,177,000 to [redacted];
- in 2014 the Appellant made certain payments to [redacted] totalling €32,733;
- on 17 December 2019 the Respondent issued a Notice of Estimation for 2014 to the Appellant assessing it as having amounts due to it of €99,329.35. Of this sum, €17,021 of PAYE, PRSI and USC was charged on the payments totalling €32,733. The remainder of the sum assessed arose from the 2012 payment of €1,177,000, which the Respondent assessed as a perquisite in the form of a preferential loan chargeable to PAYE, PRSI and USC on the difference between the interest actually charged for that year and the "specified rate" of 13.5%;
- in 2015 the Appellant made certain payments to [redacted] in the amount of €77,705;
- on 15 December 2020 the Respondent issued a Notice of Estimation for 2015 to the Appellant assessing it as having amounts due to it of €121,730. Of this sum, €40,407 of PAYE, PRSI and USC was charged on the payments totalling €77,705. The remainder of the sum assessed arose from the 2012 payment of €1,177,000, which the Respondent assessed as a perquisite in the form of a preferential loan chargeable to PAYE, PRSI and USC on the difference between the interest actually charged for that year and the "specified rate" of 13.5%;

- in 2016 the Appellant made certain payments to [redacted] in the amount of €31,293;
- on 16 December 2021 the Respondent issued a Notice of Estimation for 2016 to the Appellant assessing it as having a balance due to it of €118,646. Of this sum, €16,272 of PAYE, PRSI and USC was charged on the payments totalling €31,293. The remainder of the sum assessed arose from the 2012 payment of €1,177,000, which the Respondent assessed as a perquisite in the form of a preferential loan chargeable to PAYE, PRSI and USC on the difference between the interest actually charged for that year and the "specified rate" of 13.5%.

Analysis

46. Before proceeding to deal with the separate matters under appeal, it is appropriate to observe at this point that in any appeal of an assessment such as those at issue here, the onus falls on the Appellant to furnish evidence sufficient to prove that on the balance of probabilities the Respondent erred in its decision. This is clear from passage of the judgment of Charleton J in *Menolly Homes v Revenue Commissioners,* cited by the Respondent and quoted at paragraph 35 of this Determination.

The 2012 Notice of Estimation

47. The sole issue that falls to be determined in the appeal of this Notice of Estimation is whether the sum of €1,177,000 paid to the Appellant in 2012 constituted a preferential loan, taxable as perquisite received for the months November and December, or simply remuneration the whole of which was chargeable to income tax in that year. For the reasons set out hereunder, the Commissioner finds that the Appellant has failed to establish that it was a preferential loan. Indeed, the Commissioner further finds as a matter of fact that the documentary evidence available suggests that it was not a loan.

48. As already noted, the Appellant did not attend the hearing to give evidence. Instead, the Appellant's agent made factual assertions on his client's behalf, purportedly based on instructions, while being asked to address the Commissioner on legal issues. This was not satisfactory as the assertions made by the agent could not be tested in cross-examination and they cannot be accepted as evidence in this appeal.

49. The documentary material opened to the Commissioner by the Appellant's agent, in particular the 2012 financial statements, gave no indication of the existence of a loan having been made by the Appellant to [redacted] in the sum of €1,177,000. The height of the argument made on behalf of the Appellant was that the Commissioner could infer

the existence of a loan from other information contained in the material. This information included the size of the payment made to [redacted] against what one might expect a [redacted] to earn in a single given year; the turnover and operating profit of the Appellant for 2012 being less than the payment at issue; and the Appellant's recording of €1,289,367 cash at bank in hand in 2012.

50. The Commissioner finds that none of the information contained in the documentary material proffered, whether taken in isolation or in combination, can form the basis of a finding that the sum paid to [redacted] was in reality a loan chargeable as a perquisite over several years, rather than remuneration paid in 2012 chargeable to that year alone. On the contrary, the content of the documentary material in fact leaves the Commissioner in no doubt that for the Appellant to succeed in establishing that it gave a preferential loan of €1,177,000, [redacted], the recipient of the loan and the Appellant's owner and controller, would have needed to have given cogent evidence explaining why the supposed loan, on which no tax as a perquisite was paid, was not recorded in clear terms in the Appellant's accounts, or indeed its CT1 corporation tax return. [redacted] did not do so, leaving the Commissioner to conclude that not only has the Appellant failed to meet the burden of proof resting with it, the documentary evidence available points to there having been no preferential loan at all.

51. Finally in respect of this appeal, the Respondent accepted that certain payments from [redacted] to the Appellant post-dating the issuing of the Notice of Assessment for 2012 took place. There was, however, a lack of clarity on the part of the parties as to exactly when this was paid, with the Respondent indicating that it accepted that payments of €210,000 occurred in 2018 or 2019. It is clear to the Commissioner that whatever the quantum and exact date involved, payments made at that remove from the transaction, and after the raising of an assessment, cannot give rise simply by their existence to the inference that what happened in 2012 was that the Appellant advanced [redacted] a loan of €1,177,000 and that they were made for the purposes of redeeming this sum.

52. For these reasons the Appellant fails in its appeal of the 2012 Notice of Estimation of Amounts Due.

The 2014, 2015 and 2016 Notices of Estimation

53. The first thing to address in this context is the Respondent's objection to the acceptance of the ground advanced by the Appellant at hearing regarding the payments at issue received in the year 2015. Counsel for the Respondent cast doubt in his application on whether the Appellant, in referring to "*a benefit in kind arising on a Director's loan*", could possibly have meant the director's loan arising from the 2015 payments totalling €77,705.

His view was that this was, instead, reference to the payment 2012 payment of €1,177,000. The Commissioner is not minded to refuse acceptance of this ground on the basis that in his view the nature of the argument advanced in the appeal actually does fall within the parameters of what was included in the grounds section of the Notice of Appeal of 27 May 2021. Moreover, it is notable that the appeals for 2014 and 2016 were grounded on the assessments in the Notices being "incorrect and excessive". While it is possible that this does not fit with the specificity requirements of section 949I of the TCA 1997, no objection was raised in respect of the formulation of the grounds in these appeals. It seems to the Commissioner that the Respondent was in no worse a position in relation to the 2015 appeal to meet the case made by the Appellant. For these reasons the objection to acceptance of the ground specified in the 2015 appeal is refused. This decision is final and conclusive and cannot be appealed by way of case stated to the High Court on a point of law.

54. Having dealt with this question, the next matter to note is that the effect of the finding of the Commissioner in relation to the Notice of Estimation for 2012 is that the Notices of Estimation for 2014, 2015 and 2016 must be reduced so that they do not include tax in respect of the 2012 payment.

55. Thus, what remains to be determined is whether the 2014, 2015 and 2016 payments at issue, totalling €32,733, €77,705 and €31,293 in each year, constituted preferential loans or remuneration.

56. Yet again it bears repetition in the context of these appeals that it is the Appellant that must prove that the Respondent erred in its assessments. The assertion of the Appellant's agent was that the payments were understood to be in respect of the sum owed by it to [redacted] arising from an alleged transfer of goodwill. These had reduced the Appellant's indebtedness to him, which reduction was reflected in the director's loan account. Once this indebtedness was eliminated from the director's loan account, the Appellant moved from owing money to [redacted] to being owed money by him. The effect of [redacted] being overdrawn, according to the Appellant's agent, was that the payments in 2014, 2015 and 2016 at issue should be deemed to be loans constituting perquisites and, as such, the sum chargeable to tax in each year should be only the difference between the interest actually payable in each year and that which should have been payable on the application of the specified rate of interest of 13.5% under section 122 of the TCA 1997.

57. The first thing to note is that the Respondent in its pleadings and at hearing put the Appellant on full proof that there was in fact any goodwill transaction at all. The Appellant, despite indicating until late in the day that there was such a transaction and that the value

of the goodwill was €750,000, sought to adduce no evidence in support of this and at hearing abandoned the argument. The Commissioner finds that the fact that the payments made to [redacted] were accounted for as debit in the director's loan account does not mean that the refusal of the Respondent to accept the existence of a goodwill transaction has the effect that they should be treated as loan payments. The payments to [redacted] in 2014, 2015 and 2016 were, at the time they were made, either loans which he was obligated to repay or they were not. They cannot, by virtue of the fact that the Appellant abandoned its case that they were payments constituting consideration for goodwill of €750,000, take on a character that they did not previously possess. No evidence was proffered by or on behalf of the Appellant which suggested that it was a term of the payments made in 2014, 2015 and 2016 that [redacted] be required to repay them. Consequently, it is impossible for them to be deemed preferential loans chargeable to tax a perquisite, rather than simple remuneration paid in each year. The fact that the payments were accounted for in the director's loan account has no impact in this regard. For this reason, the Appellant's appeals against the income tax assessed in respect of the 2014, 2015 and 2016 payments at issue, forming part of the overall balances payable assessed in the Notices of Estimation, fails.

Determination

58. The various appeals dealt with in this hearing are determined as set out hereunder:-

a. *The 2012 Notice of Estimation*

The Commissioner determines that the sum of €1,177,000 paid by the Appellant to [redacted] on 13 November 2012 constituted remuneration chargeable to income tax and PRSI for that year. Accordingly, the amount of €612,039 assessed by the Respondent as due in its Notice of Estimation of 12 December 2017 was correct and is affirmed.

b. *The preliminary objection in respect of the appeal of the 2015 Notice of Estimation*

The Commissioner decides that the ground advanced by the Appellant at hearing in respect of the payments of €77,705 in 2015 fell within the parameters of what was specified in the Notice of Appeal and should be accepted. This decision on acceptance is final and conclusive.

c. *The 2014, 2015 and 2016 Notices of Estimation*

The Commissioner determines that amounts of €32,733, €77,705 and €31,293 paid by the Appellant to [redacted] in 2014, 2015 and 2016 respectively

represented remuneration chargeable to income tax, PRSI and USC in those years. No tax is due in respect of these years arising from the 2012 payment of €1,177,000 made by the Appellant to [redacted]. The amounts due for 2014, 2015 and 2016 are to be adjusted by the Respondent to give effect to the findings herein, in accordance with section 949AM of the TCA 1997.

59. The issues in this appeal other than the question of acceptance have been determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and law in respect of these issue. Any party dissatisfied with the determination in this regard has the right to appeal on a point or points of law only within a period of 42 days from receipt of this Determination in accordance with the provisions of the TCA 1997.

60. As noted already, the decision on the acceptance of the Appellant's ground in respect of the appeal of the 2015 Notice of Estimation is final and conclusive and cannot be appealed to the High Court on a point of law.

Conor O'Higgins
Appeal Commissioner
11 May 2023