AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

149TACD2024

[redacted]

**Appellant**

and

**The Revenue Commissioners**

**Respondent**

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**Determination**

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**Introduction**

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") in relation to a Notice of Amended Assessment for Corporation Tax dated 9 March 2023, raised by the Revenue Commissioners ("the Respondent") for the year ended 30 April 2019, in the amount of €132,000 and a Notice of Amended Assessment for Corporation Tax dated 9 March 2023, raised by the Respondent, for the year ended 30 April 2020 in the amount of €264,000 ("the notices of assessment"). The total sum was in the amount of €396,000.00.

2. The liabilities arose in circumstances where the Respondent submitted that an election for the purposes of section 434(3A) TCA 1997, is only available to taxpayers who have submitted corporation tax returns, on time, in accordance with Chapter 3 of Part 41A TCA 1997 and that any election made in any return that is filed late, not in accordance with Chapter 3 of Part 41A TCA 1997, is deemed to be an "invalid" election.

3. A hearing of the appeal took place on 17 June 2024. The Appellant was represented by senior counsel and Respondent was represented by junior counsel. The hearing proceeded on the basis of legal submissions only and no witnesses were called in this appeal. The Commissioner has set out hereunder under the heading "Submissions" a summary of the legal submissions made by counsel for the Appellant and Respondent.

**Background**

4. The Appellant is an [redacted] company and the Appellant is a close company.

5. The Appellant was incorporated on 14 September 2015 and registered for corporation tax.

6. On 27 April 2022, the Respondent wrote to the Appellant notifying it that it had failed to file its corporation tax returns for the periods 30 April 2018 (due on 23 January 2019), 30 April 2019 (due on 23 January 2020) and 30 April 2020 (due on 23 January 2021) ("the relevant periods") and that the returns were outstanding on the Revenue Online System ("ROS").

7. On 29 July 2022, the Appellant filed its corporation tax returns for the relevant periods. It is not in dispute between the parties and an agreed material fact in this appeal, that the Appellant's corporation tax returns for the relevant periods were filed late.

8. The corporation tax returns filed by the Appellant did not include the close company surcharge for the relevant periods, on the basis that the Appellant elected for a relief from the application of the surcharge, in accordance with section 434(3A) TCA 1997.

9. By notices of amended assessment dated 9 March 2023, the Respondent assessed the Appellant to the close company surcharge as follows[1]:

| **CT Period Ending** | **Close Company Surcharge** | **Late CT Surcharge** | **Total for the Period** |
|---|---|---|---|
| 30/04/2019 | €120,000.00 | €12,000.00 | €132,000.00 |
| 30/04/2020 | €240,000.00 | €24,000.00 | €264,000.00 |
| **Total** | €360,000.00 | €36,000.00 | €396,000.00 |

10. The Respondent contended that the Appellant was not capable of making an election in accordance with section 434(3A) TCA 1997, as it filed its corporation tax returns late, thus it was prevented from making the election in accordance with Chapter 3 of Part 41A TCA 1997, as is required by section 434(3A)(c) TCA 1997.

11. The Appellant submitted that on a literal interpretation of section 434(3A) TCA 1997 it does not provide for a time limit for making the election. Moreover, the Appellant argued that it is not appropriate to read into or assume an implied term in section 434(3A) TCA 1997, such that an election is only available to taxpayers who have submitted a corporation tax return on time and that any election made in any return that is filed late is deemed to be "invalid".

12. On 19 July 2023, the Appellant duly appealed to the Commission.

**Legislation and Guidelines**

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

14. Section 440 TCA 1997, Surcharge on undistributed investment and estate income, *inter alia* provides that:

[1] Respondent's Outline of Argument, Index to Book of Documents, page 55.

*(1)* *(a) Where for an accounting period of a close company the distributable estate and investment income exceeds the distributions of the company for the accounting period, there shall be charged on the company an additional duty of corporation tax (in this section referred to as a "surcharge") amounting to 20 per cent of the excess.*

15. Section 434 TCA 1997, Distributions to be taken into account and meaning of "distributable income", "investment income", "estate income", etc., *inter alia* provides that:

*"investment income" of a company means income other than estate income which, if the company were an individual, would not be earned income within the meaning of section 3, but, without prejudice to the meaning of 'franked investment income' in this section, does not include –*

*(a)* *any interest or dividends on investments which, having regard to the nature of the company's trade, would be taken into account as trading receipts in computing trading income but for the fact that they have been subjected to tax otherwise than as trading receipts, or but for the fact that by virtue of section 129 they are not to be taken into account in computing income for corporation tax, and*

*(b)* *any dividends or other distributions received by the company in respect of shares at a time when any gain on a disposal of the shares would not have been a chargeable gain by virtue of section 626B or would not have been a chargeable gain by virtue of section 626B if paragraphs (a) and (b) of subsection (3) of that section were deleted.*

*……*

*(3A)* *(a) Where a close company pays a dividend, or makes a distribution, to another close company, the companies may jointly elect, by giving notice to the Collector-General in such manner as the Revenue Commissioners may require, that the dividend, or as the case may be the distribution, is to be treated for the purposes of section 440 as not being a distribution.*

*(b) Where notice is given in accordance with paragraph (a), the dividend, or as the case may be the distribution, shall be treated –*

*(i) for the purposes of section 440 as not being a distribution, and*

*(ii) for the purposes of subsection (5) as not being franked investment income.*

*(c) An election by a company under paragraph (a) as respects an accounting period shall be included with the return under Chapter 3 of Part 41A which falls to be made by the company for the accounting period.*

16. Chapter 3 Chargeable Persons: Returns, under Part 41A TCA 1997, includes sections 959I to 959Q TCA 1997.

17. Section 959I(1) TCA 1997, Obligation to make a return, *inter alia* provides that:

*(1) Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*.

18. Section 959K TCA 1997, Requirements for returns for corporation tax purposes, provides *inter alia* that:

*In the case of a chargeable person who is chargeable to corporation tax for an accounting period, the return required by this Chapter shall include –*

*(a) all such matters, information, accounts, statements, reports and further particulars in relation to the accounting period as would be required to be contained in a return delivered pursuant to a notice given to the chargeable person under section 884, and*

*(b) such information, accounts, statements, reports and further particulars as may be required by the prescribed form*.

19. Section 959A TCA 1997, Interpretation, provides *inter alia* that:

*"specified return date for the chargeable period" means –*

*(a) in relation to a tax year for income tax or capital gains tax purposes, 31 October in the tax year following that year,*

*(b) in relation to an accounting period of a company –*

*(i) subject to subparagraphs (ii) and (iii), the last day of the period of 9 months starting on the day immediately following the end of the accounting period, but in any event not later than day 21 of the month in which that period of 9 months ends*,

……

"tax year" means a year of assessment

20. Section 1085 TCA 1997, , provides *inter alia* that:

*(1) (a) In this section –*

*"chargeable period" means an accounting period of a company;*

*"return of income" means a return which a company is required to deliver under Chapter 3 of Part 41A;*

*"specified return date for the chargeable period" has the same meaning as in section 959A.*

*(b) Subparagraphs (i), (ia), (ib), (ii) and (iii) of paragraph (b) of subsection (1) of section 1084 shall apply for the purposes of this section as they apply for the purposes of that section.*

*(2) Notwithstanding any other provision of the Tax Acts, where in relation to a chargeable period a company fails to deliver a return of income for the chargeable period on or before the specified return date for the chargeable period, then, subject to subsections (3) and (4), the following provisions shall apply:*

*……..*

*(3) Subject to subsection (4), any restriction or reduction imposed by paragraph (a), (b), (ba), (c), (ca) or (cb) of subsection (2) in respect of a chargeable period in the case of a company which fails to deliver a return of income on or before the specified return date for the chargeable period shall apply subject to a maximum restriction or reduction, as the case may be, of €158,715 in each case for the chargeable period*.

**Evidence and Submissions**

*Appellant's evidence*

*Appellant's submissions*

21. The Commissioner sets out hereunder a summary of the submissions made by the Appellant, both at the hearing of the appeal and the documents submitted in support of this appeal:

    21.1. Reference was made to the principles of statutory interpretation and the decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43, where Murray J. outlined "*four basic propositions*" when considering any departure from a strict literal interpretation of legislation. Reference was made to the decision in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 and the summarised relevant principles of statutory interpretation.

    21.2. An election must be made jointly in a corporation tax return, but section 434(3A) TCA 1997 does not state that such election becomes "invalid" if one or both tax returns of the companies are filed late. It is accepted in this instance, for reasons of [redacted], that the Appellant's corporation tax returns for the relevant periods were filed late. The legislature have specifically addressed the impact of the late filing of a corporation tax return in section 1085 TCA 1997. The legislature have not determined in section 1085 TCA 1997 that another impact of the filing of a late corporation tax return is that any election made pursuant to section 434(3A) TCA 1997 is deemed invalid with the consequent impact of the imposition of a close company surcharge.

    21.3. This contention that there is some "inherent conditionality" in section 434(3A) TCA 1997 is unsustainable. The Respondent maintains that it is appropriate to read into or assume an implied term of section 434(3A) TCA 1997, that such election is only available to taxpayers who have submitted their corporation tax returns on time and that any election made in any return that is filed late is deemed "invalid". In order to make such a determination, it is necessary to depart from a literal reading of section 434(3A) TCA 1997 and there can be no basis for maintaining that such departure is necessary. A literal interpretation of section 434(3A) TCA

1997 does not provide for any time limit for making the election and otherwise would lead to an absurdity.

21.4. There are numerous instances where the legislature have set out specific time limits for making an election in the TCA 1997. If the legislature wanted to include such a phrase in section 434(3A) TCA 1997 it could have done so, but would also have to clarify whether both companies would have to make the election "*before the specified return date*" or if not, the consequence of just one of the parties making the election within such time limit.

21.5. The issue of the imposition of a surcharge was considered in *129TACD2020*. In that matter, the appellant unsuccessfully sought to amend a CT return that had been filed to allow for the retrospective input of the election. In this appeal the respondent had exercised its discretion not to allow the appellant to make an election on a retrospective basis pursuant to section 434(3A) TCA 1997. It was the exercise of this discretion that the appellant sought to contest.

21.6. This appeal must succeed as there is no legislative basis whatsoever for the determination that the section 434(3A) TCA 1997 election made was "invalid" and the concept of "inherent conditionality" is an unknown principle of Irish tax law.

*Respondent's submissions*

22. The Commissioner sets out a summary hereunder of the submissions made by the Respondent, both at the hearing of the appeal and in the documents submitted in support of this appeal:

22.1. The burden of proof to show that an appellant is entitled to the relief claimed falls on the taxpayer. Reference was made to the decision in *Menolly Homes Ltd. v Appeal Commissioners & Revenue Commissioners* [2010] IEHC 49;

22.2. The Appellant is seeking to obtain a relief from the imposition of tax and so the Appellant must demonstrate that it meets all the requirements to be so relieved of that imposition. Reference was made to the decision in *Revenue Commissioners v Doorley* [1933] I.R. 750;

22.3. In order to make a valid election, a taxpayer must give notice in such manner as the Respondent may require and section 434(3A)(c) TCA 1997 mandates that the election shall be made in the return under Chapter 3 of Part 41A TCA 1997. Chapter 3 of Part 41A includes sections 959I to 959Q TCA 1997.

22.4. The Appellant's corporation tax returns for the relevant periods were filed late on 29 July 2022. The Appellant positively indicated that it was "making an election under Section 434(3A)(a)" and so was aware that the prescribed form for making the election was the CT1.

22.5. However, the Appellant failed to make this election in "the return under Chapter 3 of Part 41A", because the Appellant did not make the election in a return that was filed in time. A return made "under Chapter 3 of Part 41A" can only be a return made in time.

22.6. Section 959I(1) TCA 1997 (within Chapter 3 of Part 41A) states that: "*Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*."

22.7. Section 959A TCA 1997 (within Chapter 3 of Part 41A) defines the "*specified return date for the chargeable period*" as "*in relation to an accounting period of a company –*

> *"(i) subject to subparagraphs (ii) and (iii), the last day of the period of 9 months starting on the day immediately following the end of the accounting period, but in any event not later than day 21 of the month in which that period of 9 months ends*"

22.8. The Appellant failed to "*deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*." As the Appellant failed to comply with section 959I(1) TCA 1997, it therefore did not comply with the requirement to include the election with "*the return under Chapter 3 of Part 41A which falls to be made by the company for the accounting period*."

22.9. The Appellant suggests that section 1085 TCA 1997 does not state that an election is invalid in the event it is filed late. The Respondent does not consider section 1085 TCA 1997 to be relevant, as it is specified to apply to the restriction of a relief where certain conditions are not met. Section 1085 TCA 1997 does not apply here.

22.10. The Appellant has been properly assessed to the close company surcharge and its appeal must fail.

**Material Facts**

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

    23.1. The Appellant is a close company.

    23.2. On 27 April 2022, the Respondent wrote to the Appellant notifying it that it had failed to file its corporation tax returns for the relevant periods.

    23.3. On 29 July 2022, the Appellant filed its corporation tax returns for the relevant periods.

    23.4. The Appellant's corporation tax returns for the relevant periods were not filed on or before the specified return date for the chargeable period, meaning those returns were filed late for the relevant periods.

    23.5. The Appellant filed its returns in the manner prescribed by the Respondent, namely a CT1 Form.

    23.6. The Appellant notified the Respondent that an election was being made, on the completed CT1 Form it submitted when it filed its late returns on 29 July 2022.

    23.7. The corporation tax returns filed by the Appellant on 22 July 2022, for the relevant periods, did not include the close company surcharge for the relevant periods, on the basis that the Appellant's joint election for a relief from the application of this surcharge.

    23.8. The Appellant ticked the box on its corporation tax returns for the relevant periods, indicating that it was making an election under section 434(3A)(a) TCA 1997, in relation to surcharges under section 440 and section 441 TCA 1997.

**Analysis**

*The burden of proof*

24. 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 that:

*"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".*

25. However, when an appeal relates to the interpretation of the law only, Donnelly J. and Butler J. clarified the approach to the burden of proof, in their joint judgment for the Court of Appeal in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*"). At paragraphs 97-99, the Court of Appeal held that:

*"97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..*

*98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation……."*

26. The Appellant's appeal herein relates to the interpretation of section 434(3A) TCA 1997 and whether the Appellant has filed its corporation tax returns in accordance with Chapter 3 Part 41 TCA 1997. These are matters of statutory interpretation and hence, what is required here is that the Commissioner carry out an objective assessment of what the law is and the Commissioner cannot be swayed by a consideration of who bears the burden. It is the interpretation of the law that is at issue. Thus, before the Commissioner proceeds to consider the legal arguments made by the parties in this appeal, the Commissioner considers it appropriate to set out the well settled principles of statutory interpretation.

*Statutory interpretation*

27. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the judgment of Kennedy CJ. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he 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 or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament*…."

28. In relation to the relevant decisions applicable to the interpretation of taxation statutes, 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 v The Revenue Commissioners* [2019] IESC 50 and the Judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 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 Ltd. v The Revenue Commissioner [2020] IESC 60. 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.""*

29. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgments. It is a clear methodology to assist with interpreting a statute. 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 as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

30. Furthermore, the Commissioner is mindful of the recent decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("Heather Hill") and that the approach to be taken to statutory interpretation must include consideration of the overall context and

purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he stated 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 now 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".*

31. To a certain degree it might be said that these cases suggest that the "literal" and "purposive" approaches to statutory interpretation are no longer hermetically sealed. To the extent that the line between what is now permissible has become blurred, Murray J. in *Heather Hill* sets out "*four basic propositions that must be borne in mind"* from paragraphs 113 to 116 as follows:-

> "*113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects*.
>
> *114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276)*.

*115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.*

*116. Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."*

32. The *dictum* of Murray J. in *Heather Hill* was considered and approved by the Court of Appeal in the decision in *Hanrahan*. The Court of Appeal noted that the trial judge had cited and relied on the approach to the interpretation of taxation legislation that Murray J. in the Court of Appeal identified in the decision of *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298. Murray J., when considering the provision at issue, at paragraph 162 of the Judgment stated that:

*"[it] falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute."*

*33.* Moreover, the Court of Appeal in *Hanrahan* at paragraph 83 held that:

"*Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant.*"

*34.* Of note, the Court of Appeal in *Hanrahan* at paragraph 79, when referring to the *dictum* of Murray J. in *Heather Hill,* in relation to the analysis of context and purpose, stated that:

> "*Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken…..….He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown…"*

35. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words 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*".

36. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

37. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of the *dictum* of McKechnie J. in *Dunnes Stores* at paragraph 66, wherein he stated that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning.*"

38. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general

principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

39. The Commissioner will now proceed to consider the statutory provisions articulated in this appeal.

*Section 434 TCA 1997*

40. It was not in dispute that the Appellant is a close company pursuant to section 430 TCA 1997 and that it filed its corporation tax returns late for the relevant periods. It was also not in dispute that the Appellant's corporation tax returns did not include the close company surcharge for the relevant periods. This it was submitted, was due to the fact that an election was made pursuant to section 434(3A) TCA 1997, for relief from the application of the surcharge under section 440 TCA 1997. The Commissioner has set out above under the heading "Relevant legislation", section 440 TCA 1997 which provides for a surcharge in circumstances where, in an accounting period of a close company the distributable estate and investment income exceeds the distributions of the company, for the accounting period.

41. What was in dispute was whether the Appellant elected for relief from the application of the surcharge, in accordance with the provisions of section 434(3A) TCA 1997. The Commissioner has found as a material fact that the Appellant's corporation tax returns filed for the relevant period, did not include the amount of the surcharge under section 440 TCA 1997.

42. The Respondent argued that the Appellant failed to jointly elect for relief from the application of the close company surcharge in the manner prescribed by section 434(3A) TCA 1997, as its corporation tax returns for the relevant periods, being filed late, did not accord with a return under Chapter 3 of Part 41A TCA 1997, a mandatory requirement of section 434(3A)(c) TCA 1997. Consequently, the Respondent contended, that the Appellant was subject to the close company surcharge for the relevant periods and it was on this basis that it issued the Notices of Amended Assessment for the relevant periods.

43. The Appellant argued that it included an election pursuant to Section 434(3A) TCA 1997 in its corporation tax returns for the relevant periods, to disregard the dividends received from its wholly owned subsidiary [redacted]. The Appellant stated

that its corporation tax returns for the relevant periods were filed late due to a combination of [redacted].

44. Thus, in this appeal the interpretation of section 434(3A) TCA 1997 is relevant. The Commissioner is satisfied that the pertinent question herein is whether a valid election was made by the Appellant, having regard to the facts of this appeal. The Commissioner has already stated that it was not in dispute that the Appellant's corporation tax returns for the relevant periods were filed late or that the box on the CT1 Forms was ticked by the Appellant indicating that it was making an election under section 434(3A) TCA 1997.

45. As set out above, the Commissioner must consider the plain and ordinary meaning of the words in context and the overall purpose of the statutory scheme must be considered. The Commissioner is mindful of the dictum of Murray J. in *Heather Hill* in this regard, such that the "literal" and "purposive" approaches to statutory interpretation are no longer hermetically sealed.

46. Section 434(3A)(a) TCA 1997 provides for a joint right of election by a close company where a close company pays a dividend or distribution to another close company, once notice is given in the manner required by the Respondent. The Commissioner is satisfied that the plain and ordinary meaning of the words in context, are such that the consequences of an election is that the dividend or distribution is not to be treated, for the purposes of section 440 TCA 1997, as a distribution. Moreover, the Commissioner observes that the notice must be given in the manner prescribed by the Respondent, which herein is the CT1 Form, and no dispute arises that the CT1 Form is the appropriate manner. The Commissioner has found as a material fact in this appeal that the Appellant notified the Respondent that an election was being made, on its completed CT1 Forms it submitted when it filed its late corporation tax returns. It is the fact of the returns being filed late, that the Respondent submitted "invalidates" the election made by the Appellant. There is nothing unambiguous about this section and it is capable of being understood, having regard to the plain and ordinary meaning of the words.

47. Section 434(3A)(b) TCA 1997 provides that where the notice at (a) is given, such that the joint election is made in the prescribed manner, the dividend or distribution shall be treated for the purposes of section 434(3A) TCA 1997, as not being a distribution. The Commissioner notes the use of the word "shall" in section 434(3A)(b) TCA 1997 which is a term frequently used in legislation to indicate the mandatory nature of a requirement. The Commissioner is satisfied that the plain and ordinary meaning of subsection (b) is that where notice is given in accordance with section 434(3A)(a) TCA 1997, the dividend or distribution must be treated as not being a distribution.

48. However, section 434(3A)(c) TCA 1997 is relevant and must be considered herein. Section 434(3A)(c) TCA 1997 provides that an election by a close company under paragraph (a) as respects an accounting period, shall be included with the return under Chapter 3 of Part 41A, which falls to be made by the company for the accounting period. [Emphasis added] Again, the Commissioner notes the use of mandatory language with the use of the word "shall".

49. The Commissioner is satisfied that subsection (a) and (b), on a literal interpretation and having regard to the context, provide that where an election is jointly made to treat a distribution or dividend as not being such, then once notice is given in the prescribed form, namely the CT1 Form, then the distribution or dividend shall be treated distribution, for the purposes of section 440 TCA 1997, as not being a distribution. If both subsections were the only requirements herein, then it would appear that the requirements have been met by the Appellant. However, the Oireachtas chose to include subsection (c) in section 434(3A) which in addition to subsections (a) and (b), requires that an election is included with the return under Chapter 3 of Part 41A. Therefore, this subsection must also be considered and interpreted in this appeal.

50. Whilst it is true to state, as the Appellant did, that the section imposes no specific numeric time limit for making an election, it is specific that notice of an election by a company must be included with the return under Chapter 3 of Part 41A TCA 1997, which falls to be made by the company for the accounting period. Again, the Commissioner observes the use of the word "shall" in subsection (c) and the mandatory nature of the language used, that the election must be included with the return under Chapter 3 of Part 41A TCA 1997. In order to interpret subsection (c), the Commissioner must proceed to consider, what constitutes a return made under Chapter 3 of Part 41A, as subsection (c) can only be interpreted in the context of this requirement.

51. The Commissioner observes that Chapter 3 of Part 41A TCA 1997 includes sections 959I to 959Q TCA 1997. Section 959I(1) states that: "*Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*." [Emphasis added]

52. The Commissioner notes that it is the Respondent's contention that the election made by the Appellant on its CT1 Form was invalid, as it did not comply with the provisions of section 434(3A)(c) TCA 1997, such that the notice of election was not included with the return under Chapter 3 of Part 41A, as its corporation tax returns were late returns. The Respondent submitted that the consequence of this is that the Appellant did not comply

with sections 959A and 959I TCA 1997, and its corporation tax returns for the relevant periods were therefore not returns made in accordance with Chapter 3 of Part 41A TCA 1997.

53. Section 959A TCA 1997 defines the "*specified return date for the chargeable period*" as

> (b) *in relation to an accounting period of a company –*
>
> *(i)subject to subparagraphs (ii) and (iii), the last day of the period of 9 months starting on the day immediately following the end of the accounting period, but in any event not later than day 21 of the month in which that period of 9 months ends*.

54. The Respondent submitted that having filed its corporation tax returns late for the relevant periods, the Appellant failed to "*deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*." Thus, as the Appellant failed to comply with s959I(1), it therefore did not comply with the requirement in subsection (c) of section 434(3A) TCA 1997 to include the election with "*the return under Chapter 3 of Part 41A which falls to be made by the company for the accounting period*."

55. The Appellant submitted that there exists no time limit in section 434(3A) TCA 1997 and it is not open to the Respondent to read into the section a mandatory time limit. The Appellant argued that it was open to the legislature to expressly state that an election is conditional on a corporation tax return being filed on time, but that is not what is provided for in the section. The Commissioner was directed by the Appellant to a number of other sections of the TCA, which the Appellant submitted was illustrative of the legislature setting out specific time limits on particular matters. For example, the Commissioner notes the following the sections submitted by the Appellant which make express reference to timelines, namely, section 299(3) TCA 1997 which states that: "*by giving notice in writing to the inspector on or before the specified return date for the chargeable period*" and section 835H(5) TCA 1997 which states that: "*an election can be made on or before the specified return date for the chargeable period*". The Appellant submitted that clearly if the legislature wanted to include such a phrase in section 434(3A) TCA 1997, it could have done so.

56. Furthermore, the Appellant directed the Commissioner to section 1085 TCA 1997 which provides for certain restrictions on claims for relief when a corporation tax return is filed late. The Appellant argued that the legislature could have included a restriction on a notice of election under section 434(3A) TCA 1997, within section 1085 TCA 1997, given no

such time limit had been expressly included in section 434(3A) TCA 1997, but it did not. The Commissioner notes that the Appellant argued that "*there is no legislative basis whatsoever for the determination that the Section 434(3A) election made was "invalid" and the concept of "inherent conditionality" is an unknown principle of Irish tax law*".

57. The Commissioner is mindful of the *dictum* of Mr Justice McKechnie in *Dunnes Stores* wherein he concluded that a "*provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended*". The Commissioner is satisfied that the meaning and import of the words and reference to Chapter 3 of Part 41 in subsection (c) of section 434(3A) TCA 1997, is that it expressly imposes a mandatory obligation on a taxpayer to comply with the provisions of Chapter 3 of Part 41 TCA 1997. It is those provisions that are therefore engaged in subsection (c) and as set out above, sections 949A and 949I are relevant herein. The Commissioner is satisfied that the Appellant did not comply with the provisions of section 949I TCA 1997, when it filed its corporation tax returns late for the relevant periods and hence, it was not in compliance with the mandatory requirements of subsection (c) of section 434(3A) TCA 1997. The Commissioner accepts that the Appellant ticked the box on the CT1 Form and made the election in that regard. However, that election was not a valid election as it did not comply with the provisions of section 434(3A)(c) TCA 1997, as it was not included with the return under Chapter 3 of Part 41A. The Commissioner is satisfied that the plain and ordinary meaning of the words in section 434(3A)(c) TCA 1997 are clear and self-evident and make sense in that meaning in the context of the provision itself and the wider tax provisions.

58. The Commissioner listened to the arguments of the Appellant in relation to certain other sections of the TCA, that it stated specially refer to time limits. The Commissioner is satisfied that section 434(3A)(c) TCA 1997 also specifically refers to and imposes a time limit on the election being made, such that it must be included with a return under Chapter 3 of Part 41, a return which must be filed, *on or before the specified return date for the chargeable period,* which the Commissioner is satisfied did not occur herein.

59. The Commissioner is satisfied that as the Appellant failed to comply with section 959I(1) TCA 1997, it therefore did not comply with the requirement to include the election with "*the return under Chapter 3 of Part 41A which falls to be made by the company for the accounting period*", in accordance with section 434(3A)(c) TCA 1997.

60. The Commissioner finds that there is no ambiguity to section 434(3A)(c) TCA 1997 and the words in the section are capable of being interpreted having regard to their plain and ordinary meaning, in context. Applying those principles of statutory interpretation, the

Commissioner accepts the Respondent's submission that this was not a return made in accordance with Chapter 3, Part 41, and thus the election made by the Appellant in its corporation tax returns for the relevant period, despite the box being ticked, was not in compliance with the provisions of section 434(3A)(c) TCA 1997. The Commissioner is satisfied that the Appellant failed to "*deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*."

61. The Commissioner is satisfied that any other interpretation of subsection (c) of section 434(3A) TCA 1997 would render its inclusion in the section nugatory. Thus, if a taxpayer does not notify the Respondent "*on or before the specified return date for the chargeable period"*, then it does not benefit from such an election and the surcharge is imposed. This interpretation accords entirely with a rational and common sense application of the ordinary meaning of the words in the section. Hence, the Appellant's appeal fails.

62. For completeness, the Appellant referred to the determination in *129TACD2020*. In that appeal, the appellant unsuccessfully sought to amend a CT return that had been filed to allow for the retrospective input of an election under section 434(3A) TCA 1997. The Commissioner notes that it is submitted that the respondent had exercised its discretion not to allow the appellant to make an election on a retrospective basis pursuant to section 434(3A) TCA 1997. It was the exercise of this discretion that the appellant sought to contest. However, the Commissioner is satisfied that in this appeal, it is not the discretion of the Respondent that is under appeal or consideration, it is whether the Appellant complied with the requirements of section 434(3A) TCA 1997. Therefore, the Commissioner is satisfied the determination referred to has little relevance to this appeal.

**Determination**

63. As such and for all the reasons set out above, the Commissioner determines that the Appellant has not succeeded in its appeal and has not shown that the tax, as set out in the Notices of Amended Assessment dated 9 March 2023, is not payable.

64. Therefore, the Commissioner determines that the Notices of Amended Assessment for corporation tax dated 9 March 2023, raised by the Respondent for the year ended 30 April 2019 and 30 April 2020, in the amounts of €132,000 and €264,000 respectively, **shall stand.**

65. The Commissioner appreciates this decision will be disappointing for the Appellant. However, the Commissioner is charged with ensuring that the Appellant pays the correct tax and duties. The Appellant was correct to appeal to have clarity on the position.

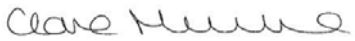
66. This Appeal is determined in accordance with Part 40A TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) TCA 1997.

**Notification**

67. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ(5) and section 949AJ(6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ(6) TCA 1997. This notification under section 949AJ TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

**Appeal**

68. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Claire Millrine
Appeal Commissioner
9 August 2024

**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**