



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

19TACD2024

Between:

[REDACTED]

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This appeal relates to a refusal by the Revenue Commissioners (hereinafter the "Respondent") of a claim for exemption from pursuant to section 195 of the Taxes Consolidation Act 1997 (hereinafter the "TCA1997") in accordance with the guidelines drawn up under that section by the Arts Council and the Minister for Culture, Heritage and the Gaeltacht (hereafter the "Guidelines").
2. Section 195 of the TCA1997 is entitled "*Exemption of certain earnings of writers composers and artists*" (hereinafter the "Artists' Exemption").
3. This appeal has been determined, by agreement of the Parties, without an oral hearing pursuant to section 949U of the TCA 1997.

Background

4. On 10 October 2022 Ms [REDACTED] (hereinafter the "Appellant") submitted an application to the Respondent for certain of her works to be included in the Artists' Exemption scheme.
5. The Appellant seeks the Artists' Exemption in relation to original and creative work as defined by section 195(1) of the TCA1997 within category (d) "a painting or other like picture" thereof. The application was in relation to certain work which the Appellant describes as "stone art" (hereafter the "Work"). In support of same the Appellant submitted a number of images of samples of her work along with written testimonials from customers.
6. On 13 October 2022 the Respondent issued a determination to the Appellant indicating that they did not consider that the Appellant's Work met the required criteria set out in section 195 of the TCA1997 and the Guidelines to qualify to be granted an Artists' Exemption. In particular the letter of 13 October 2022 stated that the Respondent considered that the Appellant's Work is decorative in nature and is excluded from the Artists' Exemption scheme under the provisions of paragraph 8(v) of the Guidelines.
7. The Appellant submitted a Notice of Appeal to the Commission on 7 December 2023.
8. On 28 February 2023 the Appellant and the Respondent (hereinafter collectively referred to as "the Parties") were notified that, pursuant to section 949U of the TCA1997, the Commissioner intended to determine this appeal based on the information already provided to the Commission by the Parties and without the necessity of an oral hearing. The correspondence gave the Parties 21 days from that date to submit a request for an oral hearing. On 28 February 2023 the Appellant indicated that she was in agreement that

this appeal be determined pursuant to section 949U of the TCA1997. No response was received from the Respondent.

9. This determination, therefore, is made without an oral hearing, pursuant to section 949U of the TCA1997.

Legislation and Guidelines

10. The relevant legislation is contained at section 195 of the TCA1997 which is set out in full at **Annex I** of this determination.

11. In considering this appeal, the Commissioner is obliged, in compliance with section 195(13)(b) of the TCA1997 to have regard to the Guidelines for the time being in force under section 195(12) of the TCA1997. In order to qualify for an Artists' Exemption the Work must satisfy the mandatory requirements of those Guidelines which are set out in full at **Annex II** of this determination.

12. Section 195 of the TCA1997 exempts from income tax certain earnings of writers, composers and artists that would otherwise be chargeable to tax under Case II of Schedule D. The exemption relates to types of works, including "*a painting or other like picture*", by such persons that are both "*original and creative*" and of "*cultural or artistic merit*".

13. Paragraph 4 of the Guidelines provides that a work shall be classed as original and creative:-

"... only if it is a unique work of creative quality brought into existence by the exercise of its creator's imagination."

14. Paragraph 5 of the Guidelines provides that a work shall be classed as having cultural merit:-

"... only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture."

15. Paragraph 6 of the Guidelines provides that a work shall be regarded as having artistic merit:-

"... only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category."

16. Paragraph 8 of the Guidelines provides that the following shall not be regarded as being original and creative and of cultural or artistic merit:-

“(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes,”

Submissions

Appellant’s Submissions

17. The Appellant submitted the Artists’ Exemption Claim Form which she submitted to the Respondent. The Claim Form included the following work sample images:

- i. “ [REDACTED] ”;
- ii. “ [REDACTED] ”;
- iii. “ [REDACTED] ”;
- iv. “ [REDACTED] ”;
- v. “ [REDACTED] ”;
- vi. “ [REDACTED] ”.

18. The Appellant submitted the following in her Notice of Appeal:

“I submitted a claim to Revenue for the Artist's Exemption under Section 195 of the Taxes Consolidation Act 1997 under category (1)(d) 'a painting or other like picture'.

However, my application was refused on the grounds that my work was not considered to be 'both original and creative and a work which has, or is generally recognised as having, either cultural or artistic merit.' Instead, it was thought to be 'decorative' in nature and excluded under Section 8 (v) of the guidelines'.

I disagree with the conclusion that my work is 'decorative' in nature for all the reasons set out below.

I am appealing this decision on the grounds that my work is both original and creative, and has cultural or artistic merit and have attached a 17-page document which includes work samples, descriptions of each work and testimonials from customers.

Background: All my work to date has been individual commissions and I take a full brief from each customer. Each piece is individual, original, and comes from my imagination.

I get photos of the subjects so that the proportions are right and [REDACTED]. I ask where they are from, the subject's occupation (if relevant), hobbies, favourite colours (for the mount choice), the specific occasion, etc. The customer and I create a vision for the portrait together and we discuss ideas until we come up with something that the customer is happy with. [REDACTED]

[REDACTED]. I place them standing [REDACTED].

A note on the back of each portrait tells the recipient where [REDACTED] are from and my most recent [REDACTED] and this is also mentioned.

The majority of my pieces are family portraits and are of artistic or cultural merit because:

1) They reflect the importance placed on family history and heritage in Ireland. These are pieces that will be passed down through generations.

2) One sample reflects the importance to Irish people of memorialising their departed loved ones (Sample No. 1).

3) Those portraits incorporating [REDACTED] reflect the importance placed on the connection to the sea in Ireland, being an island country.

4) Ireland was once a land of trees so the inclusion of a [REDACTED] in portraits reflects the importance of woodland in Irish culture and the love of each of the recipients for [REDACTED].

5) They strengthen communities through art.

6) [REDACTED].

If you need any more information, I would be delighted to hear from you."

19. The Appellant submitted the following in her Statement of Case:

"I registered as a sole trader with the CRO on 25 July 2022. So far, my work has all been individual commissions and I take a full brief from each customer.

Each piece is individual, original, and comes from my imagination. I ask my customers for photos/descriptions of the subjects to match [REDACTED]. I also find out where they are from, the subject's occupation (if relevant), hobbies, favourite colours (for the mount choice), the specific occasion, etc. My customer and I discuss ideas until we come up with a vision for the portrait that the customer is happy with.

I usually handpick [REDACTED]. [REDACTED]. [REDACTED]. A note on the back of each portrait tells the recipient where their [REDACTED] are from.

On 10 October 2022, I submitted a claim to Revenue for the Artists' Exemption under Section 195(1)(d) of the Taxes Consolidation Act 1997, in respect of 'a painting or other like picture'. Before submitting, I telephoned the Artists' Exemption Unit to see what level of detail was required in my application and was told that I should include any supporting information I had in the body of the email. My email mentions that I initially started experimenting with [REDACTED]

On 14 October 2022, I received a letter via email from [REDACTED] in the Artists' Exemption Unit, indicating that my application was refused. The grounds given were that my work was not considered to be 'both original and creative and a work which has, or is generally recognised as having, either cultural or artistic merit.' Instead, it was thought to be "decorative in nature and excluded under Section 8 (v) of the guidelines."

Upon re-reading [REDACTED] letter, she indicated in the fourth paragraph that she was "prepared to consider any further submissions that [I] wished to make in support of how [I] consider that [my] work comes within the criteria..." However, I misinterpreted this and submitted my further submissions as an appeal (based on the information in the sixth paragraph) rather than directly to her (based on the fourth paragraph).

I submitted my appeal to the Tax Appeals Commission on 7 December 2022 and it included a 17-page document, entitled 'Work Samples with Descriptions and Testimonials'. It includes only two of the work samples submitted with my original application. Instead, I have included work samples linked to the customer testimonials in it. [REDACTED]

I received a Request for a Statement of Case on 24 January 2023 and received a copy of Revenue's Statement of Case on 9 February 2023. In it, I note a new ground (No. 2.9) mentioned that "it was determined by the Revenue that the works did not come within the ordinary meaning of the term "a painting or [other] like picture". However, there is no mention of what they interpret the ordinary meaning of other "like picture" to be. The Merriam-Webster dictionary defines the word 'picture' to mean: "a design or representation made by various means (such as painting, drawing, or photography)." The mediums used in my portraits are pen drawing, découpage and found objects including [REDACTED]. I am aware of a textile artist, [REDACTED] who uses recycled fabric, i.e., found objects in her art and she was awarded the Artist's Exemption under Section 195(1)(d) in respect of 'a painting or other like picture'.

No. 2.12 of the Revenue's Statement of Case, indicates that "even if the appellant's work did come within the ordinary meaning of the term "a painting or like picture" that the works were primarily of a decorative nature and therefore did not qualify for a determination by virtue of paragraph 8(v) of the guidelines."

I am appealing this decision on the grounds that my work comes within the ordinary meaning of the term "a painting or other like picture," is both "original and creative," and has "cultural or artistic merit". In support of this, I refer to the 'Work Samples with Descriptions and Testimonials' document submitted with my initial appeal, containing work samples, descriptions of each work and testimonials from those customers which substantiate it.

I disagree with the conclusion that my work is 'decorative' in nature based on both the content of the 'Work Samples with Descriptions and Testimonials' document submitted with my initial appeal and for the reasons outlined below:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

- [Redacted list item]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[REDACTED]

21. The Appellant also submitted various testimonies which she stated came from the customers for each of the works submitted in her Statement of Case.

Respondent's Submissions

22. The Respondent submitted the following in its Statement of Case:

"2.1 An application dated 10 October 2022, for a determination under section 195(2) TCA 1997, was submitted to Revenue in respect of the appellant's work.

2.2 The application was in respect of works that are described by the appellant in the mail which accompanied her application as [REDACTED]."

2.3 Section 195(1) states that the scheme shall apply to original and creative works which come within a number of listed categories.

2.4 The appellant's application was made under category (d), "a painting or other like picture"

2.5 Section 195(12) TCA 1997 provides for the drawing up of guidelines for the Artists Exemption scheme by the Arts Council and the then Minister for Arts Heritage and the Gaeltacht (referred to hereafter as the guidelines).

2.6 Section 195(12) TCA 1997 states that guidelines may include specifications of the types or kinds of works that are not original or creative or that have not, or are not generally recognised as having, cultural or artistic merit, including a specification of works that are published, produced or sold for a specified purpose. The section further states that the guidelines may specify criteria by reference to which the questions whether works are original and creative and whether they have or are generally recognised as having cultural or artistic merit are to be recognised.

2.7 Section 195(13) states that where an application for a determination is made to Revenue, that Revenue shall not make a determination in respect of a work unless it complies with the guidelines. This provision is also extended to the Appeal Commissioners and the High Court in the case of appeals.

2.8 The current version of the guidelines are effective for all determinations made by Revenue on or after 30 November 2013.

2.9 On examination of the appellants work, it was determined by Revenue that the works did not come within the ordinary meaning of the term “a painting or other like picture”.

2.10 Paragraph 8 of the guidelines state that a work shall not be regarded as original and creative and shall not be recognised as generally having cultural and artistic merit if the works come within a range of criteria set out within subparagraphs (i) to (vi).

2.11 Paragraph 8(v) refers to “types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes”

2.12 It was determined even if the appellant’s work did come within the ordinary meaning of the term “a painting or like picture” that the works were primarily of a decorative nature and therefore did not qualify for a determination by virtue of paragraph 8(v) of the guidelines.

2.13 Revenue issued a letter to the appellant on 13 October 2022 stating that they were unable to make a determination under section 195 in respect of the Appellant’s works.

2.14 Pursuant to section 195(6), on 7 December 2022 the appellant appealed the decision of Revenue not to make a determination in respect of her works.”

Material Facts

23. The following material facts are not at issue in the within appeal and the Commissioner accepts same as material facts:

- i. The Appellant is a person who creates works out of [REDACTED] and [REDACTED] which are handpicked by the Appellant;
- ii. The works are created in consultation with customers whereby the Appellant and the customer create a vision for the works together and they discuss ideas until they agree on a work which the customer is happy with;
- iii. The Appellant submitted an application for the Artists’ Exemption in relation to original and creative work as defined by section 195(1) of the TCA1997 within the categories (d) “a painting or other like picture and (e) a sculpture and submitted an application to the Respondent on 10 October 2022;

- iv. The Appellant submitted a number of images of samples of her work in support of her application;
- v. On 13 October 2022 the Respondent issued a letter to the Appellant stating that they were unable to make a determination pursuant to section 195 of the TCA1997 in respect of her works. The letter of 13 October 2022 indicating that the Respondent did not consider that the Appellant's work met the required criteria set out in legislation and the Guidelines;
- vi. The Respondent determined, on examination of the Appellants works, that the works did not come within the ordinary meaning of the term "a painting or other like picture";
- vii. The Respondent determined that, even if the appellant's works did come within the ordinary meaning of the term "a painting or other like picture", the works were primarily of a decorative nature and therefore did not qualify for a determination by virtue of paragraph 8(v) of the guidelines;
- i. The Appellant submitted a Notice of Appeal to the Commission on 7 December 2022.

24. The following material facts are at issue in the within appeal:

- i. The works are a painting or other like picture pursuant to section 195(1)(d) of the TCA1997;
- ii. The works fall within paragraphs 4 of the Guidelines;
- iii. The works fall within paragraphs 5 and 6 of the Guidelines and have either "cultural merit" or "artistic merit".

The works are a painting or other like picture pursuant to section 195(1)(d) of the TCA1997.

25. The Appellant has submitted that the works, on which her claim for the Artists' Exemption is based, are paintings or other like pictures pursuant to section 195(1)(d) of the TCA1997.

26. The Respondent has submitted at paragraph 2.9 of its Statement of Case that "*On examination of the appellants work, it was determined by Revenue that the works did not come within the ordinary meaning of the term "a painting or other like picture".*

27. The Respondent's letter of 13 October 2022 did not communicate to the Appellant that a determination had been made that the works did not come within the ordinary meaning of the term "*a painting or other like picture*".

28. The Respondent's letter of 13 October 2022 to the Appellant stated:

"...

I refer to your claim for artists exemption in category (d), a painting or other like picture.

The criteria used by Revenue to make a determination to grant artists exemption are contained in section 195 of the Taxes Consolidation Act 1997 and in the guidelines drawn up under that section by the Arts Council and the Minister for Culture, Heritage and the Gaeltacht.

I have considered the work submitted by you and I regret that the work does not meet the required criteria set out in the legislation and the guidelines. In particular I would consider your work decorative in nature and excluded under Section 8 (v) of the guidelines.

..."

29. In the judgment of the High Court in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 (hereinafter "*Perrigo*"), McDonald J., reviewed the most up to date jurisprudence and summarised the fundamental principles of statutory interpretation at paragraph 74 as follows:

"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”.

30. These principles have been confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 (hereinafter “*Heather Hill*”).
31. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*, the Commissioner finds that the word “*painting*” contained section 195 of the TCA1997 is plain and its meaning is self-evident, such that a literal interpretation is sufficient. The Commissioner has considered the meaning of “*painting*” and notes that Cambridge dictionary states that a painting is “*a picture made using paint*”. The Commissioner further notes that the Merriam-Webster dictionary states that a painting is “*a product of painting*”.
32. Having considered the images submitted by the Appellant in support of this appeal, the Commissioner finds that the works are not created using paint.
33. The Commissioner must then consider whether the works are “*other like pictures*” as set out in section 195(1)(d) of the TCA1997. The Commissioner notes that, from the images submitted, the Appellant’s works are representations of people using [REDACTED] and [REDACTED]. As such, the Commissioner is satisfied that the works submitted fall under the category of “*other like pictures*” as set out in section 195(1)(d) of the TCA1997.
34. The Commissioner therefore finds as a material fact that the Appellants works fall within the category of “*painting or other like picture*” as set out in section 195(1)(d) of the TCA1997.

The works fall within paragraph 4 of the Guidelines.

35. In considering this material fact, the question which arises for the Commissioner in this appeal is whether the works which the Appellant has exhibited as part of her appeal are original and creative as defined by paragraph 4 of the Guideline which states:

“A work shall be regarded as original and creative only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.”

36. At the outset, the Commissioner wishes to stress that this decision is not a comment on the inherent quality of the Appellant’s work or the skill needed to produce it. All which the

Commissioner must assess is whether the works fall within the parameters of the legislation and the Guidelines.

37. The Commissioner has considered whether the Appellant's works are original and creative.

38. By the Appellant's own submissions the following steps occur in the creation of her works on receipt of a commission from a customer:

- i. She takes a full brief from each customer in relation to a work;
- ii. She would get photos of the subjects of the work to ensure that the proportions of the subjects are correct and to match their heights and hair colours in [REDACTED]
- iii. She takes a detailed background of the subjects to include where they live, their occupation, hobbies, favourite colours (for the mount choice) and the specific occasion for the commission.;
- iv. The customer and the Appellant create a vision for the together and they discuss ideas until they come up with something that the customer is happy with.

39. The Commissioner finds that, the Appellant works in collaboration with her customers to create a vision for each individual work.

40. Thereafter, by the Appellant's own submission, she picks [REDACTED] on different beaches and goes through her collection to perfectly match up the right [REDACTED] to the subjects. She then places the [REDACTED] standing on either a [REDACTED] picked in her local wood or a piece of [REDACTED] handpicked on the beach, depending on the recipient's values. A note on the back of each work tells the recipient where their [REDACTED] [REDACTED] or [REDACTED] are from. [REDACTED]
[REDACTED].

41. The Commissioner has considered whether the works are "original and creative", that is to say whether they are unique works of creative quality brought into existence by the exercise of its creator's imagination. On the basis of the Appellant's own submissions, the works come about following a process of consultation between the Appellant and her customers where information in relation to the subjects of the works is gathered and that information is used to the production of the works.

42. The Commissioner must find, therefore, that the Appellant has not established that the works which are the subject of this appeal were brought into existence by the exercise of the Appellant's imagination. Rather, the Commissioner finds that the works were brought into existence following a process of consultation between the Appellant and her

customers, where information in relation to the subjects of the works is gathered and that information is used to inform the production of the works

43. As a result the Commissioner finds as a material fact that the Appellant's works are not original and creative as set out in paragraph 4 of the Guidelines.

The works fall within paragraph 5 of the Guidelines and have "cultural merit":

44. Paragraph 5 of the Guidelines deals with "cultural merit" and states that:

"A work shall be regarded as having cultural merit only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture."

45. In support of her claim that the works have "cultural merit", the Appellant has stated that:

"1) They reflect the importance placed on family history and heritage in Ireland. These are pieces that will be passed down through generations.

2) One sample reflects the importance to Irish people of memorialising their departed loved ones (Sample No. 1).

3) Those portraits incorporating ██████ reflect the importance placed on the connection to the sea in Ireland, being an island country.

4) Ireland was once a land of trees so the inclusion of a ██████ in portraits reflects the importance of woodland in Irish culture and the love of each of the recipients for ██████.

5) They strengthen communities through art.

██
██
██

46. The Guidelines set out that, in order to be considered to have cultural merit, a work must "by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture".

47. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*, the Commissioner finds that the words “*enhances to a significant degree*” contained section paragraph 5 of the Guideline are plain and its meaning their self-evident, such that a literal interpretation is sufficient.
48. The Commissioner has considered the meaning of the word “enhance” and notes that it is defined in the Collins dictionary as meaning “*to improve its value, quality, or attractiveness.*” In addition, the Commissioner has considered the meaning of the word, “significant” and notes that it is defined in the Collins dictionary as meaning “*A significant amount or effect is large enough to be important or affect a situation to a noticeable degree.*”
49. No evidence has been submitted to the Commissioner which tends to support a claim that the Appellant’s works by reason of their quality of form and/or content enhance to a significant degree one or more aspects of national or international culture. In the Commissioner’s view, the images of the Appellant’s works submitted do not suggest that they have such an enhancing effect.
50. The Appellant has submitted testimonials from individual customers which indicate their satisfaction with the works which they have received from the Appellant. The Commissioner has considered the testimonials and notes that, whilst all of them are complimentary of the Appellant’s work, they all remark on the personal and private nature of the pieces.
51. The Commissioner notes the points made by the Appellant in support of her works having cultural merit as set out in paragraph 43 of this determination and finds that the points made by the Appellant do not support a claim that works by reason of their quality of form and/or content enhance to a significant degree one or more aspects of national or international culture. In particular, the Commissioner finds that the importance of family history, the importance to Irish people of memorialising their departed loved ones, the importance placed on the connection to the sea in Ireland, the importance of woodland in Irish culture and the love of each of the recipients for [REDACTED], strengthening communities through art and/or the reflection of [REDACTED] in the Appellant’s works do not in and of themselves establish that the works enhance to a significant degree one or more aspects of national or international culture.
52. Therefore, the Commissioner finds as a material fact that the Appellant’s works do not have cultural merit as set out in paragraph 5 of the Guidelines.

The works fall within paragraph 6 of the Guidelines and have “artistic merit”:

53. Paragraph 6 of the Guidelines deals with “artistic merit” and states that:

“A work shall be regarded as having artistic merit only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.”

54. Having regard to the principles of statutory interpretation affirmed by McDonald J in *Perrigo* and confirmed in the more recent decision of the Supreme Court in its decision in *Heather Hill*, the Commissioner finds that the words “*enhances to a significant degree*” contained section paragraph 5 of the Guideline are plain and its meaning their self-evident, such that a literal interpretation is sufficient.

55. The Commissioner notes that the definition of “canon of work” as contained in the Cambridge dictionary is “*the writings or other works that are generally agreed to be good, important, and worth studying*”.

56. No evidence has been submitted by the Appellant which tends to suggest that her works are generally agreed to be good, important and worth studying. In the Commissioner’s view the images of the Appellant’s works submitted in support of this appeal do not suggest that they have such an enhancing effect.

57. This definition of artistic merit would exclude many a work done by a capable and skilled person. It is no criticism of the Appellant whatsoever to find, as the Commissioner does as a fact material to the determination of this appeal, that the works exhibited as part of the Notice of Appeal do not enhance the broad canons of painting and sculpture to the “significant degree” necessary to avail of the exemption.

58. Therefore, the Commissioner finds as a material fact that the Appellant’s works do not have artistic merit as set out in paragraph 6 of the Guidelines.

59. For the avoidance of doubt the Commissioner accepts and finds the following as material facts in this appeal:

- i. The Appellant is a person who creates works out of [REDACTED] and [REDACTED] which are handpicked by the Appellant;
- ii. The works are created in consultation with customers whereby the Appellant and the customer create a vision for the works together and they discuss ideas until they agree on a work which the customer is happy with;

- iii. The Appellant submitted an application for the Artists' Exemption in relation to original and creative work as defined by section 195(1) of the TCA1997 within the categories (d) "a painting or other like picture and (e) a sculpture and submitted an application to the Respondent on 10 October 2022;
- iv. The Appellant submitted a number of images of samples of her work in support of her application;
- v. On 13 October 2022 the Respondent issued a letter to the Appellant stating that they were unable to make a determination pursuant to section 195 of the TCA1997 in respect of her works. The letter of 13 October 2022 indicating that the Respondent did not consider that the Appellant's work met the required criteria set out in legislation and the Guidelines;
- vi. The Respondent determined, on examination of the Appellants works, that the works did not come within the ordinary meaning of the term "a painting or other like picture";
- vii. The Respondent determined that, even if the Appellant's works did come within the ordinary meaning of the term "a painting or like picture", the works were primarily of a decorative nature and therefore did not qualify for a determination by virtue of paragraph 8(v) of the guidelines;
- viii. The Appellant submitted a Notice of Appeal to the Commission on 7 December 2022;
- ix. The Appellant's works are a painting or other like picture pursuant to section 195(1)(d) of the TCA1997;
- x. The Appellant's works are not original and creative as set out in paragraph 4 of the Guidelines;
- xi. The Appellant's works do not have cultural merit as set out in paragraph 5 of the Guidelines;
- xii. The Appellant's works do not have artistic merit as set out in paragraph 6 of the Guidelines.

Analysis

60. In order to become eligible for the Artists' Exemption, works must satisfy a two stage test in that (i) they must be original and creative and (ii) they must have cultural merit or artistic merit. This is provided for in section 195 of the TCA1997.
61. For the reasons already set out, the Commissioner has already found as a material fact that the Appellant's works are not original and creative as defined in paragraph 4 of the Guidelines. As such, the Commissioner is not required to go any further in determining whether the Appellant's works are eligible for the Artists' Exemption by reason of the fact that the Appellant's works do not satisfy the first stage of the test contained in section 195 of the TCA1997.
62. However, if the Commissioner is wrong in determining that the Appellant's works are original and creative, the Commissioner has further considered whether the works have cultural merit or artistic merit and has already found as material facts that they do not.
63. As a result of the findings of material fact that the Appellant's works are not original and creative and that the Appellant's works do not have cultural merit or artistic merit as defined in the Guidelines, the Commissioner must therefore determine that the Appellant is not eligible for the Artists' Exemption pursuant to the provisions of section 195 of the TCA1997 in respect of the works the subject matter of this appeal.

Determination

64. For the reasons set out above, the Commissioner determines that the Appellant in this appeal has not succeeded in showing that she is entitled to the Artists' Exemption pursuant to section 195 of the TCA1997. The Appellant has, therefore, not succeeded in her appeal.
65. It is understandable that the Appellant will be disappointed with the outcome of her appeal.
66. The Commissioner wishes to reiterate that the outcome of this appeal in no way reflects on the quality of the Appellant's works or the skills or craftsmanship required to produce the works.
67. The Appellant was correct to check to see whether her legal rights were correctly applied.
68. This appeal is determined in accordance with Part 40A of the TCA1997 and in particular, sections 949AL and section 949U thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA1997.

Notification

69. This determination complies with the notification requirements set out in section 949AJ of the TCA1997, in particular section 949AJ(5) of the TCA1997 and section 949AJ(6) of the TCA1997. For the avoidance of doubt, the Parties are hereby notified of the determination under section 949AJ of the TCA1997 and in particular the matters as required in section 949AJ(6) of the TCA1997. This notification under section 949AJ of the TCA1997 is being sent via digital email communication only (unless the Appellant opted for postal communication and communicated that option to the Commission). The Parties shall not receive any other notification of this determination by any other methods of communication.

Appeal

70. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Clare O'Driscoll
Appeal Commissioner
29 November 2023

Annex I

Section 195 of the TCA 1997:

“(1)In this section—

“work” means an original and creative work which is within one of the following categories:

- (a) a book or other writing;*
- (b) a play;*
- (c) a musical composition;*
- (d) a painting or other like picture;*
- (e) a sculpture.*

(2)(a) This section shall apply to an individual—

(i) who is—

(I) resident in one or more Member States, or in another EEA state, or in the United Kingdom, and not resident elsewhere, or

(II) ordinarily resident and domiciled in one or more Member States, or in an other EEA state, or in the United Kingdom, and not resident elsewhere, and

(ii) (I) who is determined by the Revenue Commissioners, after consideration of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, to have written, composed or executed, as the case may be, either solely or jointly with another individual, a work or works generally recognised as having cultural or artistic merit, or

(II) who has written, composed or executed, as the case may be, either solely or jointly with another individual, a particular work which the Revenue Commissioners, after consideration of the work and of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, determine to be a work having cultural or artistic merit.

(b) The Revenue Commissioners shall not make a determination under this subsection unless—

(i) the individual concerned duly makes a claim to the Revenue Commissioners for the determination, being (where the determination is sought under paragraph (a)(ii)(II)) a claim made after the publication, production or sale, as the case may be, of the work in relation to which the determination is sought, and

(ii) the individual complies with any request to him or her under subsection (4).

(3) (a) An individual to whom this section applies and who duly makes a claim to the Revenue Commissioners in that behalf shall, subject to paragraphs (aa) and (b), be entitled to have the profits or gains arising to him or her from the publication, production or sale, as the case may be, of a work or works in relation to which the Revenue Commissioners have made a determination under clause (I) or (II) of subsection (2)(a)(ii), or of a work of the individual in the same category as that work, and which apart from this section would be included in an assessment made on him or her under Case II of Schedule D, disregarded for the purposes of the Income Tax Acts.

(aa) The amount of the profits or gains for a year of assessment which an individual shall be entitled to have disregarded for the purposes of the Income Tax Acts by virtue of paragraph (a) shall not exceed €50,000 for the year of assessment 2015 and each subsequent year of assessment.

(b) The exemption authorised by this section shall not apply for any year of assessment before the year of assessment in which the individual concerned makes a claim under clause (I) or (II) of subsection (2)(a)(ii) in respect of which the Revenue Commissioners make a determination referred to in clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(c) The relief provided by this section may be given by repayment or otherwise.

(4) (a) Where an individual makes a claim to which subsection (2)(a)(ii)(I) relates, the Revenue Commissioners may serve on the individual a notice or notices in writing requesting the individual to furnish to them within such period as may be specified in the notice or notices such information, books, documents or other evidence as may appear to them to be necessary for the purposes of a determination under subsection (2)(a)(ii)(I).

(b) Where an individual makes a claim to which subsection (2)(a)(ii)(II) relates, the individual shall—

(i) in the case of a book or other writing or a play or musical composition, if the Revenue Commissioners so request, furnish to them 3 copies, and

(ii) in the case of a painting or other like picture or a sculpture, if the Revenue Commissioners so request, provide, or arrange for the provision of, such facilities as the Revenue Commissioners may consider necessary for the purposes of a determination under subsection (2)(a)(ii)(II) (including any requisite permissions or consents of the person who owns or possesses the painting, picture or sculpture).

(5) The Revenue Commissioners may serve on an individual who makes a claim under subsection (3) a notice or notices in writing requiring the individual to make available within such time as may be specified in the notice all such books, accounts and documents in the individual's possession or power as may be requested, being books, accounts and documents relating to the publication, production or sale, as the case may be, of the work in respect of the profits or gains of which exemption is claimed.

(6) (a) In this subsection, "relevant period" means, as respects a claim in relation to a work or works or a particular work, the period of 6 months commencing on the date on which a claim is first made in respect of that work or those works or the particular work, as the case may be.

(b) Where—

(i) an individual—

(I) has made due claim (in this subsection referred to as a "claim") to the Revenue Commissioners for a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works or a particular work, as the case may be, that the individual has written, composed or executed, as the case may be, solely or jointly with another individual, and

(II) as respects the claim, has complied with any request made to the individual under subsection (4) or (5) in the relevant period,

and

(ii) the Revenue Commissioners fail to make a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to the claim in the relevant period,

the individual may appeal to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the end of the relevant period on the grounds that—

(A) the work or works is or are generally recognised as having cultural or artistic merit, or

(B) the particular work has cultural or artistic merit,

as the case may be.

(8) (a) On the hearing of an appeal made under subsection (6), the Appeal Commissioners may—

(i) after consideration of—

(I) any evidence in relation to the matter submitted to them by or on behalf of the individual concerned and by or on behalf of the Revenue Commissioners, and

(II) in relation to a work or works or a particular work, the work or works or the particular work,

and

(ii) after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them,

determine that the individual concerned has written, composed or executed, as the case may be, either solely or jointly with another individual—

(A) a work or works generally recognised as having cultural or artistic merit, or

(B) a particular work which has cultural or artistic merit,

and, where the Appeal Commissioners so determine, the individual shall be entitled to relief under subsection (3)(a) as if the determination had been made

by the Revenue Commissioners under clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(10) For the purposes of determining the amount of the profits or gains to be disregarded under this section for the purposes of the Income Tax Acts, the Revenue Commissioners may make such apportionment of receipts and expenses as may be necessary.

(11) Notwithstanding any exemption provided by this section, the provisions of the Income Tax Acts regarding the making by the individual of a return of his or her total income shall apply as if the exemption had not been authorised.

(12) (a) An Comhairle Ealaíon and the Minister for Arts, Heritage, Gaeltacht and the Islands shall, with the consent of the Minister for Finance, draw up guidelines for determining for the purposes of this section whether a work within a category specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having, cultural or artistic merit.

(b) Without prejudice to the generality of paragraph (a), a guideline under that paragraph may—

(i) consist of a specification of types or kinds of works that are not original and creative or that have not, or are not generally recognised as having, cultural or artistic merit, including a specification of works that are published, produced or sold for a specified purpose, and

(ii) specify criteria by reference to which the questions whether works are original or creative and whether they have, or are generally recognised as having, cultural or artistic merit are to be determined.

(13) (a) Where a claim for a determination under subsection (2) is made to the Revenue Commissioners, the Revenue Commissioners shall not determine that the work concerned is original and creative or has, or is generally recognised as having, cultural or artistic merit unless it complies with the guidelines under subsection (12) for the time being in force.

(b) Paragraph (a) shall, with any necessary modifications, apply to—

- (i) a determination by the Appeal Commissioners under subsection (8) on an appeal to them under subsection (6) in relation to a claim mentioned in paragraph (a), and
 - (ii) a determination by the High Court under section 949AR.
- (14) Where a determination has been or is made under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works of a person, subsection (3)(a) shall not apply to any other work of that person that is in the same category as such work or works and is or was first published, produced or sold on or after the 3rd day of May, 1994, unless that other work is one that complies with the guidelines under subsection (12) for the time being in force and would qualify to be determined by the Revenue Commissioners as an original or creative work and as having, or being generally recognised as having, cultural or artistic merit.
- (15) On application to the Revenue Commissioners in that behalf by any person, the Revenue Commissioners shall supply the person free of charge with a copy of any guidelines under subsection (12) for the time being in force.
- (16) (a) The Revenue Commissioners may publish, or cause to be published, the name of an individual who is the subject of a determination under subsection (2).

(b) Publication under paragraph (a) may, as appropriate, include the title or category of the work of an individual.”

Annex II

“Guidelines drawn up under Section 195 (12) of the Taxes Consolidation Act 1997 for the Artists Exemption Scheme by An Comhairle Ealaíon and the Minister for Arts, Heritage and the Gaeltacht.

Introduction

These Guidelines have been drawn up under the provisions of section 195 of the Taxes Consolidation Act 1997 for the purposes of determining whether a work within a category specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having cultural or artistic merit.

General

1. *Section 195(1) provides that a “work” for the purposes of the section must be both an original and creative work in one of the following categories, namely:
 - (a) a book or other writing,
 - (b) a play,
 - (c) a musical composition,
 - (d) a painting or other like picture,
 - (e) a sculpture.*
2. *To secure exemption under section 195, a work must be determined by the Revenue Commissioners to be a work which is both original and creative and a work which has, or is generally recognised as having, either cultural or artistic merit.*
3. *In making a determination under section 195, the Revenue Commissioners may, as provided for in that section, consult with such person or body of persons as may, in their opinion, be of assistance to them.*

Original and Creative

4. *A work shall be regarded as original and creative only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.*

Cultural Merit

5. *A work shall be regarded as having cultural merit only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.*

Artistic Merit

6. *A work shall be regarded as having artistic merit only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.*

Criteria for Non-fiction Work

7. (1) *This paragraph specifies criteria, in accordance with subsection (12)(b)(ii) of section 195, by reference to which the questions whether a work, being a nonfiction book or other non-fiction writing, is original and creative and whether it has, or is generally recognised as having, cultural or artistic merit are to be determined.*

(2) *The criteria are:*

(a) *that the work, in the opinion of the Revenue Commissioners, following consultation with the Arts Council, is a work in one or more of the following categories:*

- (i) *arts criticism,*
- (ii) *arts history,*
- (iii) *arts subject work, being a work the subject matter of which is, or is any combination of, visual arts, theatre, literature, music, dance, opera, film, circus or architecture,*
- (iv) *artists' diaries,*
- (v) *belles-lettres essays,*
- (vi) *literary translation,*
- (vii) *literary criticism,*
- (viii) *literary history,*

(ix) *literary diaries,*

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(b) that the work, in the opinion of the Revenue Commissioners, is a work in one of the following categories:

(i) a biography,

(ii) an autobiography,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on the person or by changing the generally accepted understanding of the person,

or

(c) that the work, in the opinion of the Revenue Commissioners following consultation with the Heritage Council,

(i) is a work related to a function or functions of the Heritage Council as described in the Heritage Act 1995, and

(ii) incorporates the author's unique insight into the subject matter and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(d) that the work, in the opinion of the Revenue Commissioners, relates to archives which are more than 30 years old relating to Ireland or Irish people, is based largely on research from such

archives, incorporates the author's unique insight into the subject matter, and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(e) any combination of (a), (b), (c) or (d) above.

Types of Works Excluded from the Artists Exemption Scheme.

8. Notwithstanding anything else in these Guidelines, a work-

(a) shall not be an original and creative work, and

(b) shall not have, or shall not be generally recognised as having, cultural or artistic merit

if, in the opinion of the Revenue Commissioners following, where appropriate, consultation with the Arts Council, it is a work of any of the types or a combination of the types, specified in subparagraphs (i) to (vi) below –

(i) a book or other writing published primarily for, or which is or will be used primarily by-

(I) students pursuing a course of study, or

(II) persons engaged in any trade, business, profession, vocation or branch of learning as an aid to trade or business related practice, or to professional, vocational or other practise in connection with a trade, business, profession, vocation or branch of learning,

(ii) any work of journalism, published in a newspaper, journal, magazine, or other similar medium or published on the internet or on any other similar medium,

(iii) any writing, visual or musical work, or other like work, created for advertising or publicity purposes,

(iv) any arrangement, adaptation or version of musical composition, or other like work, which is not of such musical significance as to amount to an original composition,

(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes,

(vi) types or kinds of works of sculpture which primarily serve a utilitarian function.

The above Guidelines were drawn up by An Comhairle Ealaíon and the Minister of Arts Heritage and the Gaeltacht, with the consent of the Minister for Finance, in accordance with section 195(12) of the Taxes Consolidation Act 1997 and are effective for all determinations made by the Revenue Commissioners on or after 30 November 2013.”