



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

66TACD2024

Between



Appellant

and

The Revenue Commissioners

Respondent

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 Notices of Amended Assessment to Corporation Tax for the years 2010, 2011, 2012, 2013 and 2014 and Notices of Assessment to Divided Withholding Tax (“DWT”) for the years 2012, 2013 and 2014 raised by the Revenue Commissioners (“the Respondent”). The Commissioner sets out in a table hereunder the liabilities¹ at issue for each year:

Notices of Amended Assessment to Corporation Tax

Assessable period	Additional Tax Due	Date of Assessment
01/01/2010 - 31/12/2010	€505,000	16/05/2015
01/01/2011 - 31/12/2011	€312,500	01/07/2015
01/01/2012 - 31/12/2012	€263,312	22/12/2017
01/01/2013 - 31/12/2013	€375,000	31/12/2018
01/01/2014 - 31/12/2014	€317,968	31/12/2018

Notices of Assessment to DWT

Assessable period	Additional Tax Due	Date of Assessment
01/01/2012 – 31/12/2012	€505,005	22/12/2017
01/01/2013 – 31/12/2013	€404,000	31/12/2018
01/01/2014 – 31/12/2014	€708,750	31/12/2018

2. For the purposes of ensuring clarity, it is important to state that the Respondent had also raised Notices of Estimation of Amounts Due in relation to PAYE/PRSI/USC (“PREM”),

¹ Index to Revenue Book of Documentation, page 80

but prior to the hearing of the appeal, the Respondent indicated that it intended to vacate the Notices in relation to PREM as [REDACTED] ("GO") is not resident in this jurisdiction and is not an employee of the Appellant. Thus, GO is outside the charge to tax herein.²Moreover, at the hearing of the appeal the Respondent withdrew the Notice of Assessment to DWT, in relation to the year 2010.

3. Therefore, by agreement the appeal proceeded on the basis of the assessments to corporation tax for the years 2010, 2011, 2012, 2013 and 2014 and DWT for the years 2012, 2013, and 2014 ("the relevant years") only, as set out above in the preceding paragraphs.
4. The appeal proceeded by way of a hearing on 8, 9 and 10 November 2023. The Appellant was represented by Junior Counsel and the Respondent was represented by two Senior Counsel. In addition to submissions from the parties' representatives, the Commissioner heard sworn oral testimony from the Appellant's witness [REDACTED] ("the Appellant's witness").

Background

5. During the relevant years, the Directors of the Appellant were the Appellant's witness and [REDACTED]. In addition, during the relevant years, the Appellant's witness was also a Director of [REDACTED] (the original Trustee in 4 of 6 of the Employee Benefit Trusts ("EBTs") at issue), [REDACTED] ("the Appellant's tax agent") and [REDACTED], which provided secretarial services to the Appellant.
6. The Appellant's registered address for the relevant years, was the same registered address as [REDACTED].
7. The Appellant acquired various EBTs and certain statutory disclosures were made to the Respondent by the Appellant's tax agent. On 15 April 2011, [REDACTED] was submitted to the Respondent, by the Appellant's witness in his capacity of Director of [REDACTED], pursuant to section 817E TCA 1997. The form stated that an EBT was acquired "*for the benefit of employees of the employer only*"³ and references were made to sections 76A, 81 and 81A TCA 1997.

² Transcript of Evidence, Day 1, page 8

³ Index to Revenue Book of Documentation, page 216

8. On **27 March 2014**, Form PN1, was filed with the Respondent by the Appellant's witness in his capacity as the Appellant's tax agent pursuant to section 811A TCA 1997. The form referred to a payment being made of €2,020,000 to the Appointer of a pre-existing EBT. Moreover, the form states that this is "*part of an overall strategy to reward and incentivise employees the company [the Appellant]....by making the payment it has ensured that only its employees can benefit from the assets of the trust*"⁴.
9. A summary of the EBTs, the subject of this appeal, are set out hereunder:-

Employee Benefit Trust	
Date of Deed of Settlement	2 December 2010
Original Name of Trust	
Settlor	
Original Trustee	
First Appointor	
First Protector	
Trust Monies	€4,000,000
Date payment made to settlor	23 December 2010
Date of deed of appointment	23 December 2010
New Name of Trust	 Employee Benefit Trust
New Protector	
New Appointor	

⁴ Index to Revenue Book of Documentation, page 220

[REDACTED] Employee Benefit Trust 2012

Date of Deed of Settlement	24 September 2012
Original Name of Trust	[REDACTED]
Settlor	[REDACTED]
Original Trustee	[REDACTED]
First Appointor	[REDACTED]
First Protector	[REDACTED]
Trust Monies	€2,500,000
Date payment made to settlor	26 September 2012
Date of deed of appointment	26 September 2012
New Name of Trust	[REDACTED]
New Protector	[REDACTED]
New Appointor	[REDACTED]

[REDACTED] Employee Benefit Trust 2013

Date of Deed of Settlement	17 September 2013
Original Name of Trust	[REDACTED]
Settlor	[REDACTED]
Original Trustee	[REDACTED]
First Appointor	[REDACTED]

First Protector	[REDACTED]
Trust Monies	€2,000,000
Date payment made to Trustee	19 September 2013
Date of deed of appointment	19 September 2013
New Name of Trust	[REDACTED] [REDACTED]
New Protector	[REDACTED]
New Appointor	[REDACTED]

[REDACTED] Employee Benefit Trust 2013 No. 2

Date of Deed of Settlement	19 December 2013
Original Name of Trust	[REDACTED]
Settlor	[REDACTED]
Original Trustee	[REDACTED]
First Appointor	[REDACTED]
First Protector	[REDACTED]
Trust Monies	€2,000,000
Date payment made to Trustee	20 December 2013
Date of deed of appointment	20 December 2013
New Name of Trust	[REDACTED] [REDACTED]

New Protector	
New Appointor	

Employee Benefit Trust 2014

Date of Deed of Settlement	13 November 2014
Original Name of Trust	
Settlor	
Original Trustee	
First Appointor	
First Protector	
Trust Monies	€1,000,000
Date of deed of appointment	28 November 2014
New Name of Trust	
New Protector	
New Appointor	

Employee Benefit Trust 2014 No. 2

Date of Deed of Settlement	19 December 2014
Original Name of Trust	
Settlor	

Original Trustee	[REDACTED]
First Appointor	[REDACTED]
First Protector	[REDACTED]
Trust Monies	€2,500,000
Date of deed of appointment	24 December 2014
New Name of Trust	[REDACTED] [REDACTED]
New Protector	[REDACTED]
New Appointor	[REDACTED]

10. The Appellant argues that section 436A TCA 1997 does not apply to the Appellant, as there was no “settlement”, rather there was a payment to acquire a settlement, namely a pre-existing and pre-funded EBT. Moreover the Appellant argues that it is entitled to a corporation tax deduction for both the payment to acquire the EBTs and the professional fees associated with the transactions, on the basis that they are expenses incurred in accordance with the provisions of section 81 TCA 1997.
11. The Respondent contends that, as the EBTs were put in place for the benefit of GO only, the payments to the EBTs / purchase of the EBTs by the Appellant are deemed distributions, in accordance with section 436A TCA 1997. Consequently, the deduction is denied for corporation tax purposes, on the basis that no deduction is allowable in computing the profits of a trade in respect of a dividend and that the purpose of the expenditure was not “*wholly and exclusively for the purpose of the trade*”.
12. Following the above referenced assessments being raised by the Respondent for the relevant years, the Appellant duly appealed to the Commission.

Legislation and Guidelines

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

14. Section 436A TCA 1997, Certain Settlements made by close companies, *inter alia* provides that:-

(1)(a) *In this section—*

“member”, in relation to a company, includes a participator in the company other than a loan creditor of the company;

.....

“relevant settlement”, in relation to a close company, means a settlement made by, or on behalf of, the close company other than a settlement which—

(i) *is made expressly for the exclusive benefit of one or more than one person, who is neither a member of the company nor a relative of such a member, and*

(ii) *does not allow at any time for the possibility of providing any benefit to such member or relative;*

“settlement” has the same meaning as in section 10 and “settled” shall be read accordingly.

(2) *Where any amount, in money or money's worth, is settled by, or on behalf of a close company on or after 21 January 2011 in connection with a relevant settlement, that amount shall, for the purposes of the Tax Acts, be deemed to be a distribution by the company to the trustees of the settlement.*

15. Section 10(1) TCA 1997, Connected persons, *inter alia* provides that:-

(1) *“settlement” includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property.*

16. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides that:-

(1) *The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts*

(2) *Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—*

(a) *any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;*

.....

(e) *any loss not connected with or arising out of the trade or profession.*

17. Section 81A TCA 1997, Restriction of deductions for employee benefit contributions, *inter alia* provides that:

(1)(a) *In this section -*

“employee benefit scheme” means a trust, scheme or other arrangement for the benefit of persons who are employees of an employer;

(b) *For the purposes of this section –*

(i) *an employee benefit contribution is made if, as a result of any act or omission—*

(I) *any assets are held, or may be used, under an employee benefit scheme, or*

(II) *there is an increase in the total value of assets that are so held or may be so used (or a reduction in any liabilities under an employee benefit scheme),*

(2)(a) *This section applies where -*

(i) *a calculation is made of the amount of a person’s profits or gains to be charged to tax under Case I or II of Schedule D for a chargeable period beginning on or after 3 February 2005, and*

(ii) *a deduction would, but for this section, be allowed by the Tax Acts for that period in respect of employee benefit contributions made, or to be made, by that person (referred to in this section as the “employer”).*

18. Section 172K TCA 1997, Returns, payment and collection of dividend withholding Tax, *inter alia* provides that:

(1) *Any person (in this section referred to as “the accountable person”), being a company resident in the State which makes, or an authorised withholding agent who is treated under section 172H as making, any relevant distributions to specified persons in any month shall, within 14 days of the end of that month, make a return to the Collector-General which shall contain details of—*

19. Section 433 TCA 1997, Meaning of “participator”, “associate”, “director” and “loan creditor” *inter alia* provides:-

- (1) *For the purposes of this Part, “participator”, in relation to any company, means a person having a share or interest in the capital or income of the company and, without prejudice to the generality of the foregoing, includes—*
- (d) *any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for such person’s benefit.*

Submissions

Appellant’s evidence

20. The Appellant’s witness gave evidence on behalf of the Appellant. The Commissioner sets out hereunder, a summary of the evidence:-

- 20.1. The witness testified that he is a Director of the Appellant and joined the Appellant in or around 2009, as Director. The witness stated that the Appellant is a component manufacturer and supplier to the automotive industry across Europe and globally. The witness gave evidence that the parts are manufactured in Europe and distributed through a logistics centre, the Appellant has in [REDACTED] and that none of the parts arrive in this jurisdiction.
- 20.2. The witness testified that in 2010, the Appellant purchased an interest in an EBT. The witness stated that the Appellant was approached by a company who had settled money on trust and it had a wide class of beneficiaries, which included essentially employees of trading companies in Ireland. The witness said that the Appellant paid a sum of money to the Settlor of that EBT to change the Trustee and to limit the class of beneficiaries to employees of the Appellant and any other group companies.
- 20.3. The witness gave evidence that the Appellant wanted to provide a mechanism to reward and incentivise employees. The witness stated that the Appellant approached its advisers at the time namely, the Appellant’s tax agent, to understand how this could be done. The witness stated that the main beneficiary was GO, as he was essential to the business in that he had sourced a very large contract for the business which started in 2010 and which was a multi-year contract. The Appellant wanted to create a mechanism whereby it could take a certain amount of the profits it made from that contract and place them in a secure location from the beneficiary's point of view. The witness stated that the purpose of the arrangement was to reward GO, to incentivise him and to retain him.

- 20.4. The witness testified that the first EBT was purchased in 2010. The witness stated that he and GO looked at the profits that were generated in 2010 from the new contract and made a decision that a certain amount, namely the sum of around €4,000,000 would be used to acquire an EBT, which would be held for a number of years, until the Appellant gave the Trustees notice of intent in relation to it. The witness stated that the Appellant continued with the acquisition of EBTs over a period of time, and in late 2013, the first distribution was made. The witness testified that the Trustees were asked to consider making a distribution to GO. The witness stated that “we did not have control over it”.
- 20.5. The witness testified that the bank statement dated 23 December 2010 in the sum of €4,040,032 would have been the payment made to acquire the 2010 EBT. The witness stated that the payment was made to [REDACTED] to hold the funds on trust for the Appellant to acquire the 2010 EBT. Reference was made to a minute of a meeting of the Appellant which the witness said reflects a decision of the board to acquire the EBT, dated 17 December 2010. The witness testified that the monies moved on 16 December 2010 and he as Director would have made that decision, but that the minute might have been a day late in its preparation. The witness testified that the intention was that the Appellant would transfer the money to [REDACTED] would hold the money as Bare Trustee for the purpose of confirming to the Settlor of the EBTs that it held the money and that it would release it to the Settlor, once the Deed of Appointment was signed.
- 20.6. The witness confirmed that the Appellant acquired an interest in a number of different EBTs over the years, in order to incentivise and retain key employees and remunerate and reward them accordingly. The witness testified that the Appellant claimed as an expense for corporation tax purposes, the payment made to the Settlor at the time it was made as it related to remuneration. The witness confirmed that the payments made were recorded under “Staff Costs” in the Appellant’s accounts. The witness stated that he knew that GO was capable of benefitting under the EBTs, as he was an employee of a company that was under common control.
- 20.7. The witness was cross examined by Senior Counsel for the Respondent in relation to his first introduction to GO in 2008 and in relation to the previous Directors of the Appellant. The witness confirmed that as Director of the Appellant’s tax agent, he did not give advice to GO, but would have advised the

Appellant. The witness confirmed that GO owned the shares in the holding company, which held the Appellant. Reference was made to the engagement letter between the Appellant and the Appellant's tax agent,⁵ dated 8 December 2010.

- 20.8. The witness confirmed that the Appellant's tax agent is owned by [REDACTED] based in [REDACTED] and that whilst he is a director of [REDACTED], the same holding company owns [REDACTED] namely [REDACTED], which in turn is held by two trusts. The witness confirmed that both he and the other Director of the Appellant's tax agent, [REDACTED] and their families are the beneficiaries of the trusts. It was put to the witness that he is therefore the beneficial owner of [REDACTED] and the beneficial owner indirectly of the Appellant's tax agent. The witness stated that he is a beneficiary under the trust only, not an owner, as the Trustee is the owner, there is a legal separation. The witness said that he would not be defined as a beneficial owner, but the Trustee would be defined as the beneficial owner. He would have an interest only. The witness accepted he had an interest in the Appellant's tax agent.
- 20.9. The witness confirmed that during the relevant years, the Directors of the Appellant were himself and [REDACTED]. The witness confirmed that [REDACTED] was not an active Director and provided company secretarial services only. The witness agreed that at the time he was the only employee of the Appellant. It was put to the Appellant's witness, that it was the Appellant's witness that agreed to pay the Appellant's tax agent €150,000 in 2010 and €61,500 for the years thereafter, for advisory services in relation to the EBTs, because the witness was the only person in the Appellant. The witness stated that he would have spoken to GO in relation to this. The witness testified that it was not a case of GO directing him, but that they would have discussed the accounts and agreed between them what was appropriate in the circumstances.
- 20.10. The witness was asked why no minute existed of the decision to put €4,000,000 in an EBT in 2010. The witness testified that there was a minute. It was pointed out to the witness that the minute of the purported decision was after the decision was made.
- 20.11. The witness was asked why the letter of engagement is signed on behalf of the Appellant by GO, as the beneficial owner, and not the witness as Director of the

⁵ Index to Revenue Book of Documentation II, page 33

Appellant. The witness testified that he felt it was better to get confirmation from GO, to have a separation as such, as he did not want to sign both sides of the letter. It was put to the witness that there was no separation here, but that he was trying to mislead the reader of the document. The witness stated that it was better to have the confirmation of the beneficial owner to that arrangement.

20.12. The witness was cross examined in relation to the office location of the Appellant and its employees. The witness agreed that the Appellant had no employees in 2009 and that GO, as beneficial owner of the Appellant's retained reserves, was beneficially entitled to it in any event. It was put to the witness that there was no need to set up an EBT to benefit GO in those circumstances and it was open to the Appellant to distribute in the normal manner dividend sums to GO who either directly or indirectly would then gain the benefit of those distributions. The witness testified that the Appellant took a decision to put the money into the EBTs, so that it would be held for a period of time to secure the contract for three to five years, so that the money was set aside in an EBT to retain and to incentivise GO to keep the contract in being.

20.13. The witness was asked to explain the Appellant's logic, in effect financing through the EBT, the purchase of its own shares in [REDACTED] and making a payment of €4,000,000 to GO for those shares. The witness testified that it was a decision for the Trustees. It was put to the witness that there is no evidence of the Trustees exercising discretion contrary to the wishes of the Director of the Appellant. The witness agreed and testified that there may have been a discussion on it prior to the acquisition of the EBT, but that discussion would have been with GO who held the shares. The witness agreed that providing €4,000,000 to GO was probably the main benefit of the transaction.

20.14. The witness was directed to Form PN1⁶ wherein it states that "*As part of an overall strategy to reward and incentivise employees*". The witness agreed that no employees of the Appellant gained any benefit from the EBT, but that it would have included members of the overall associate companies or companies under common control. It was put to the witness that the document does not state that nor was it what the Appellant was informing the Respondent. The witness testified that GO was not an employee of the Appellant, but was an employee of an associate company, [REDACTED]. It was put to the witness that there is no

⁶ Index to Revenue Book of Documentation, page 220

evidence of this employment nor was any group structure provided. The witness agreed no group structure has been provided.

Appellant's submissions

21. Submissions were made by Counsel appearing on behalf of the Appellant. The Commissioner sets out hereunder, a summary of the submissions made:-

- 21.1. This case relates to a company which has traded in Ireland, a company that has been incorporated in Ireland and a company that has traded internationally. It trades internationally in the automotive industry. It has parts for the automotive industry manufactured, and it purchases those parts and sells them on, without bringing the product to Ireland.
- 21.2. It is quite clear from all of the information at hand that there was no loan arrangement, there was no fictitious activities; there was merely an EBT, a payment out from an EBT to a [REDACTED] resident individual and a claim for a corporation tax deduction regarding certain matters.
- 21.3. Each of the payments to the Settlor of each EBT does not constitute a distribution pursuant to section 436A TCA 1997. Hence, the deductions claimed in accordance with the provisions of section 81 TCA 1997, in respect of each payment, should not be denied on that basis.
- 21.4. In order for section 436A TCA to apply, there must be a "settlement". "Settlement" is defined in section 10 TCA 1997 as including "*any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property*".
- 21.5. Case law from the United Kingdom ("UK") has held, when considering an equivalent UK definition of "settlement", that notwithstanding this potentially broad definition, only transactions with an element of "bounty" fall to be regarded as a "settlement". There must be an intention on the part of one person to confer a benefit on another.
- 21.6. As a matter of fact, no "element of bounty" was involved in the payments by the Appellant to each Settlor. Each payment was a separate bona fide commercial transaction for full consideration. The making of each payment by the Appellant to each Settlor, cannot be regarded as a "settlement", nor as money being "settled". Therefore, section 436A TCA 1997 cannot be considered applicable.

- 21.7. It is a precondition for section 436A TCA 1997 to apply that the “settlement” must be made “by, or on behalf of, a close company”. Each EBT in question was not settled and/or constituted by the Appellant. Each EBT was settled and constituted by a third party Settlor independently of and without reference to the Appellant. The “settlement” as required by section 436A TCA 1997 was not made by, or on behalf of, the Appellant nor by any party connected to it. The only payments made by the Appellant, was each payment to each respective Settlor after each EBT was created, and in funds, and was not made in order to facilitate any of the settlements.
- 21.8. The original creation and funding of each EBT by each respective Settlor cannot be regarded as a “relevant settlement” for the purposes of section 436A TCA 1997. The EBTs were not made by or on behalf of the Appellant. Therefore, it is not possible for the requirements of section 436A (2) TCA 1997 to apply to the circumstances herein.
- 21.9. The expenses incurred were wholly and exclusively for the purposes of the Appellant’s trade, and were not otherwise specifically disallowed under any specific TCA provision. An analysis of the legislation and relevant case law will clearly support this.
- 21.10. The Appellant does not need to positively assert reliance on a specific provision in order to seek to deduct an item of expenditure properly recorded in accordance with Generally Accepted Accounting Principles (“GAAP”). Rather, the Appellant must demonstrate that a properly accounted for expense is not specifically disallowed under any specific provision of the TCA 1997. Reference was made to Section 76A TCA 1977.
- 21.11. Each payment to each Settlor (and any related fees, costs and expenses) was an expense incurred wholly and exclusively for the purposes of the Appellant’s trade. Each payment by the Appellant to each respective Settlor was clearly done “for the purpose of ensuring good, efficient and contented staff” and was made wholly and exclusively for the purposes of the trade.
- 21.12. Reference was made to section 81A TCA 1997. Section 81A TCA is not relevant and a corporation tax deduction in respect of each amount paid by the Appellant to each Settlor (and any related fees, costs and expenses), should not be denied on the basis of section 81A TCA.

Respondent's submissions

22. Submissions were jointly made by both Senior Counsel appearing on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made:-

- 22.1. There is no factual or legal support advanced for the contention that the EBTs were devised and operated for any other purpose than the avoidance of tax. It is difficult to conceive of any other purpose, particularly when regard is had to the full extent of the sequential steps involved.
- 22.2. Having regard to the quantum of the EBTs, in the context of the financial position of the Appellant, it could not reasonably be said that they were acquired in the best interests of the company or for the purposes of the Appellant's trade. The sole purpose of the EBTs was to extract funds from the Appellant in a tax free manner.
- 22.3. Reference was made to section 436A TCA 1997. As the EBTs were put in place to benefit GO, they are amounts settled on trust by the Appellant and which constitute a distribution.
- 22.4. Section 436A (1)(a) TCA 1997 provides that "settlement" has the same meaning as section 10 TCA 1997 and that "settled" shall have the same meaning, as follows: *"settlement" includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property*. It is clear from the definition of "settlement" that it is wide in its import and would include the payment made by the Appellant to acquire the EBTs. The payment by the Appellant to acquire the EBTs from the Settlor is regarded as the Appellant having made a settlement to the EBT.
- 22.5. DWT becomes payable in accordance with section 172B TCA 1997 on 20% of the amount settled into the EBT. DWT assessments have also been raised in accordance with section 172K TCA 1997.
- 22.6. The deduction claimed by the Appellant in respect of the purchase of the EBTs is denied for corporation tax purposes, on the basis that no deduction is allowable in computing the profits of a trade in respect of a distribution. In addition, reference was made to section 81 TCA 1997. The amounts were not wholly and exclusively laid out or expended for the purpose of the Appellant's trade.
- 22.7. The amounts invested in the EBTs represented capital expenditure and section 81 TCA 1997 precludes deductions in respect of capital expenditure in computing

such profits or gains. The payment of funds by the Appellant to acquire the EBTs constitute the acquisition of capital assets and therefore, cannot be claimed by the Appellant as an allowable deduction for corporation tax purposes.

Material Facts

23. Having read the documentation submitted, and having considered both the oral testimony and submissions at the hearing of the appeal, the Commissioner makes the following findings of material fact:

23.1. The Directors of the Appellant include the Appellant's witness.

23.2. During the relevant years, the Appellant's witness was also a Director of [REDACTED], the Appellant's tax agent and [REDACTED] which provided secretarial services to the Appellant.

23.3. During the relevant years, the Appellant's registered address was the same registered address as [REDACTED] the Appellant's tax agent and [REDACTED].

23.4. During the relevant years, the Appellant acquired various EBTs as set out at paragraph 9 of this Determination and certain statutory disclosures were made to the Respondent by the Appellant's tax agent and or [REDACTED]

23.5. On 15 April 2011, Form [REDACTED] was submitted to the Respondent by the Appellant's witness in the capacity of Director of [REDACTED] pursuant to section 817A TCA 1997. The form stated that an EBT was acquired "*for the benefit of employees of the employer only*"⁷. The evidence does not support that the EBT was for the benefit of the employees of the Appellant.

23.6. On 27 March 2014, Form PN1, was filed with the Respondent by the Appellant's witness in the capacity of the Appellant's tax agent pursuant to section 811A TCA 1997, in relation to the Appellant. The form referred to a payment being made of €2,020,000 to the Appointer of a pre-existing EBT. Moreover, the form states that this is "*part of the overall strategy to reward and incentivise employees of the company [the Appellant]....by making the payment it ensured that only its employees can benefit from the assets of the trust*".⁸ The evidence does not support the payment being made to an employee of the Appellant.

⁷ Index to Revenue Book of Documentation, page 216

⁸ Index to Revenue Book of Documentation, page 220

- 23.7. GO was the main beneficiary⁹ under the EBTs, who was not an employee of the Appellant.
- 23.8. The Appellant's profit and loss account for the year ended **31 December 2010** showed a gross profit of €5,103,316 before "staff costs" of €4,064,000 were deducted. In the notes to the financial statements it is stated that the "pension costs" "include an amount of €4,040,000 to an employee benefit trust." There was 1 employee, with "wages and salaries" in the sum of €24,000. The payment was not made for the purposes of a pension.
- 23.9. The Appellant's profit and loss account for the year ended **31 December 2011** showed a gross profit of €5,695,377 before "staff costs" of €2,524,578 were deducted. In the notes to the financial statements, it is stated that the "pension costs" "include an amount of €2,500,000 to an employee benefit trust." There was 4 employees, with "wages and salaries" at €24,500. The payment was not made for the purposes of a pension.
- 23.10. The Appellant's profit and loss account for the year ended **31 December 2012** showed a gross profit of €5,299,823 before "staff costs" of €2,092,031 were deducted. In the notes to the financial statements, it is stated that the "pension costs" "include an amount of €2,045,000 to an employee benefit trust." There was 4 employees, with "wages and salaries" at €30,000. The payment was not made for the purposes of a pension.
- 23.11. The Appellant's profit and loss account for the year ended **31 December 2013** showed a gross profit of €6,363,446 before "staff costs" of €3,047,032 were deducted. In the notes to the financial statements, it is stated that the "pension costs" "include an amount of €3,000,000 to an employee benefit trust." There was 4 employees, with "wages and salaries" at €30,001. 20. The payment was not made for the purposes of a pension.
- 23.12. The Appellant's profit and loss account for the year ended **31 December 2014** showed a gross profit of €5,754,314 before "staff costs" of €2,615,956 were deducted. In the notes to the financial statements it is stated that the "pension costs" "include an amount of €2,543,750 to an employee benefit trust." There was 4 employees, with "wages and salaries" at €54,236. 21. The payment was not made for the purposes of a pension.

⁹ Transcript, Day 1, page 39

- 23.13. In 2009, the Appellant had no employees. In 2010, the Appellant had one employee, the nominee Director, namely the Appellant's witness.
- 23.14. The Director of the Appellant was in receipt of a Directors allowance in the sum of €10,941 and was a nominee Director of the Appellant only.
- 23.15. GO was the beneficial owner of the Appellant.¹⁰
- 23.16. The correspondence dated 8 December 2010, from the Appellant's tax agent signed by the Appellant's witness for the Appellant's tax agent, setting out the basis of its appointment, purports to be signed by GO in the capacity of beneficial owner of the Appellant.
- 23.17. There is no documentary evidence submitted to establish the existence of a [REDACTED] contract.
- 23.18. There is no documentary evidence to support the testimony of the Appellant's witness that the said [REDACTED] contract was signed by the Appellant's witness and executed by him in Ireland.
- 23.19. There is no documentary evidence submitted to support the testimony of the Appellant's witness that GO was key to the success of the Appellant and was responsible for securing a [REDACTED] contract and potential future contracts.
- 23.20. There is no documentary evidence submitted, such as a contract of employment, to establish that GO was an employee of [REDACTED].
- 23.21. In 2010, the Appellant had a gross profit of €5,100,000, before €4,000,000 used to acquire the 2010 EBT.
- 23.22. In 2010, the Appellant's tax advisors charged the Appellant the sum of €150,000 and €65,000 for the relevant years thereafter, for the provision of tax advices, in relation to the acquisition of the EBTs.
- 23.23. The evidence adduced does not support the 2010 [REDACTED] being pre funded to the sum of €4,040,000.¹¹
- 23.24. The evidence adduced does not support the 2012 [REDACTED] being pre funded to the sum of €2,500,000.¹²

¹⁰ Transcript, Day 1, page 60-61

¹¹ Index to Revenue Book of Documentation, page 353

¹² Index to Revenue Book of Documentation, page 360

23.25. The evidence adduced does not support the 2013 [REDACTED] being pre funded to the sum of €2,000,000¹³

23.26. The evidence adduced does not support the 2013 [REDACTED] being pre funded to the sum of €2,000,000.¹⁴

23.27. The evidence adduced does not support the 2014 [REDACTED] being pre funded to the sum of €1,000,000.

23.28. The evidence adduced does not support the 2014 [REDACTED] being pre funded to the sum of €2,500,000.

23.29. In the document dated **5 September 2013**, purporting to be the minute of the Board of Directors of the Appellant and signed by the Appellant's witness, it states that it was agreed that the Trustees of the 2010 EBT would be asked to consider making a distribution to GO in the amount of €6.7m.

23.30. On **3 October 2013**, GO was awarded a distribution in the amount of €6,691,351.

23.31. In the document dated 25 August 2014, entitled Memorandum of Wishes, signed by the Appellant's witness, it states that it was agreed that the Trustees of the 2010 EBT would be asked to consider making a distribution to GO in the amount of €4,000,000.

23.32. On **25 August 2014**, a further distribution of €4,000,000 was made to GO.

23.33. There is no evidence of the Trustees of the EBTs exercising discretion contrary to the wishes of the Director of the Appellant.

Analysis

24. At the outset, the Commissioner considers that it is appropriate to examine the question of where the burden of proof falls in this appeal. It is trite law that 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* ("Menolly Homes") [2010] IEHC 49, at paragraph 22, Charleton J. states 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

¹³ Index to Revenue Book of Documentation, page 513

¹⁴ Index to Revenue Book of Documentation, page 858

Commissioners as to whether the taxpayer has shown that the relevant tax is not payable”.

25. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgment of Charleton J. in *Menolly Homes*, wherein he states that:

"Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute..."

26. It appears the statements regarding the evidential burden made by Charleton J. in *Menolly Homes* are premised on the information relating to the matter or matters which must be proved in a tax appeal, being within the particular knowledge of the Appellant. The passage at paragraph 22, as set out above by the Commissioner, is much quoted before the Commission, and means that in this appeal, all factual issues arising should stand to be proved by the Appellant.
27. At the commencement of the hearing, it became apparent that the Appellant had filed the entirety of its booklets absent page numbers or any definitive markers which would allow the parties to accurately consider the documentation furnished by the Appellant in this appeal. Moreover, the booklets that had been furnished to the Commissioner and the Respondent were not consistent in terms of their contents. The Commissioner provided considerable time to the Appellant at the commencement of the appeal to allow the booklets of documentation, upon which it was relying, to be put in proper order, so that the parties and the transcript of evidence could accurately reflect the documentation referred to over the course of the hearing of the appeal, which was listed for three days in total.
28. The central issues to be determined are whether section 436A TCA 1997 is applicable to the Appellant's circumstances herein and whether the payments made to the Settlers of the EBTs are deemed distributions for the purposes of section 172K TCA 1997. Should the Commissioner determine that section 436A TCA 1997 is not applicable to the Appellant's circumstances herein, to deem the payments distributions to the Trustees of the EBTs, then the Commissioner will proceed to consider the arguments made by both parties in relation to the application of section 81 TCA 1997.
29. For the sake of clarity, the Commissioner observes that throughout the hearing and associated documentation it became apparent that the Appellant's witness held a number of Directorships in the various companies referenced within this appeal, although no group structure was furnished to the Commissioner by the Appellant in relation to these matters and the many entities referenced. The Commissioner notes from the evidence

adduced, that the Appellant's witness holds the following roles: Director of the Appellant, Director of the Appellant's tax agent and holds a beneficial interest, Director of [REDACTED] and holds a beneficial interest and Director of [REDACTED] and holds a beneficial interest.

30. At the outset, the Commissioner considers it useful to set out in chronological order what is alleged to have occurred in relation to acquisition of the EBTs by the Appellant, during the relevant years, and the evidence adduced herein.

Sequence of events

31. It appears from the evidence of the Appellant's witness, in addition to its tax returns and the financial statements of the Appellant, that in 2009, the Appellant had no employees. The evidence of the Appellant's witness was that in 2009, he was introduced to GO, whom he met in [REDACTED] with a view to the Appellant's witness acting as a Director of the Appellant. The Appellant's witness gave evidence that GO was an employee of [REDACTED] an associate company.¹⁵ The Commissioner notes that no contract of employment between GO and [REDACTED] has been submitted in this appeal to support the evidence adduced nor has any group structure been furnished to the Commissioner in relation to the interaction of the various companies and individuals referenced herein.
32. It appears from the Appellant's financial accounts that in 2010, the Appellant's witness received a Director's fee in the sum of €10,691, in relation to the Appellant. The Respondent argues that his role was therefore no more than that of a nominee Director of the Appellant. The Commissioner observes that in 2010, the evidence suggests that the Appellant's witness was the sole employee of the Appellant, which at that time, in accordance with its financial accounts, had a gross profit of €5.1 million. During, cross examination, Senior Counsel for the Respondent put it to the Appellant's witness that he was in effect the Appellant, and the Appellant's witness agreed.
33. The Commissioner has considered the testimony of the Appellant's witness that GO secured a very valuable and potentially very profitable contract with [REDACTED] for the provision of parts to [REDACTED]. The Commissioner observes that there is no documentary evidence submitted by the Appellant to support the evidence adduced. Following, a question from the Commissioner, why a copy of the contract was not furnished with the documentation in this appeal, the Commissioner was told that the contract was a commercially sensitive document.¹⁶ It appears to the Commissioner that consideration could have been given to

¹⁵ Transcript of Evidence, Day 2, page 43

¹⁶ Transcript, Day 1, page 62

that document being submitted in redacted form to corroborate its existence and to support the Appellant's evidential burden in this appeal, in circumstances where the Appellant continually references the alleged [REDACTED] contract in the context of GO and both the contract and GO being so critical to the success and profitability of the Appellant.

34. Of note, the Appellant's Outline of Argument submitted in this appeal, states that in *"each of 2010, 2012, 2013 and 2014, the Corporate Appellant made a payment to a third party in order to secure appropriate access to an existing trust that was able to provide benefits to employees of the Corporate Appellant. This approach was considered by the Corporate Appellant to be attractive to potential beneficiaries and was considered to have a positive effect on employees, in terms of incentive via reward"*¹⁷
35. The Commissioner notes that it is contended for by the Respondent that the purchase of the EBTs had nothing to do with remunerating any other employee of the Appellant, or any associated company, or any company under common control, but that it was all for the benefit of GO. The Commissioner is satisfied there is no evidence that GO is an employee of the Appellant. In fact, the evidence adduced is that he was not an employee of the Appellant, but an employee of an entity called [REDACTED]. Thus, the Commissioner is satisfied that the purpose of acquiring the EBTs was not to reward employees of the Appellant, despite what is contended for by the Appellant.
36. The Commissioner has been furnished with correspondence dated **8 December 2010**, which is a letter of engagement between the Appellant and the Appellant's tax agent, which was signed by GO in the capacity of beneficial owner of the Appellant, agreeing to the terms of the engagement. It is notable that on 8 December 2010, the Appellant's witness was Director of the Appellant and Director of the Appellant's tax agent. Moreover, at that time he was the original Trustee of the 2010 EBT, which on **13 December 2010**, [REDACTED] [REDACTED] was offering for sale via the Appellant's tax agent. The correspondence dated 8 December 2010 sets out that *"the fee for the above advice will be €150,000 plus VAT payable at the point the interest in an employee benefit trust is procured. Included in this fee is the amount of €40,000 payable to a third party on acquisitions of the interest in the employment benefit trust"*.¹⁸
37. The Commissioner has considered the testimony of the Appellant's witness, that prior to the **8 December 2010**, it was decided that €4,000,000 of the profits made in that year would be used for the purposes of an EBT for the benefit of GO. The testimony of the Appellant's witness is that the decision was made to acquire the EBTs as recognition for

¹⁷ Index to Revenue Book of Documentation, page 46

¹⁸ Index to Revenue Book of Documentation II, page 35

the business that had come in thus far, but also a retention tool in terms of GO.¹⁹ Moreover, the evidence of the Appellant's witness was that he and GO would have discussed certain decisions prior to the acquisition of the 2010 EBT.

38. The Commissioner observes that on **2 December 2010**, the Appellant states that the 2010 EBT was settled by [REDACTED] for the sum of €4,000,000. The Appellant submits that the date is a typographical error, and should in fact reflect **3 December 2010**. The Commissioner when referring to the date of the EBT will hereinafter refer to the date of 3 December 2010 for consistency purposes. The Respondent submits that what is significant about that EBT is that the original Trustee is [REDACTED]. As set out above, the Appellant's witness is also a Director of [REDACTED].
39. The Respondent submits that the Appellant has not furnished any evidence to establish that on 3 December 2010, the sum of €4,000,000 was held by [REDACTED], the Trustee, for the benefit of every company in the world, which was the objects clause in the Third Schedule of the EBT, as of 3 December 2010.²⁰ The Commissioner has considered the documents entitled "Declaration of Bare Trust"²¹ purporting to be from [REDACTED] [REDACTED] the name that appears in the right hand corner of the pages in the document. However, the Commissioner observes that whilst the last page is purportedly signed by the representatives of the Appellant and [REDACTED] unusually, the document is not duly witnessed/executed, with the signature of the independent witness, witnessing the parties' signatures. It would be usual for such a document to bear the signature of the witness alongside the parties' signatures to the agreement.
40. The Commissioner notes that it is accepted by the Appellant's witness that on **3 December 2010**, which is prior to **8 December 2010**, arrangements had been made between the Appellant's witness and GO that €4,000,000 of the gross profit of €5,000,000 would be applied in relation to the EBT.²²
41. The Commissioner observes the correspondence dated on **13 December 2010**, from [REDACTED] to the Appellant's tax advisors, informing it that [REDACTED] [REDACTED] has established an EBT with funds settled into it, which is available for purchase and that [REDACTED] are seeking to achieve the amount of funds in the EBT plus 1.5%. It is submitted by the Appellant that this EBT was already in being and an EBT that was controlled by [REDACTED] as original Trustee, the Appellant's witness.

¹⁹ Transcript, Day 1, page 45

²⁰ Index to Revenue Book of Documentation, page 637

²¹ Index to Revenue Book of Documentation II, pages 38 & 66

²² Transcript Day 1, page 45

42. The Commissioner observes the Deed of Appointment²³ dated **23 December 2010**, executed between [REDACTED] (the Settlor), the Appellant (the Employer) and [REDACTED] (the Original Trustee). The Commissioner notes that the first recital at A states *"This deed is supplemental to a settlement made on 2nd December between (1) the Settlor as settlor and (2) the Trustee as original trustee and known as the [REDACTED]"*. The Respondent submits that this entire arrangement herein, is predicated on the EBT that was created on **3 December 2010**, namely the 2010 EBT.
43. Thereafter, on **30 December 2010**, the Appellant submits that the Trustees of the 2010 EBT, namely [REDACTED], used the funds available to purchase the entire issued share capital of [REDACTED], the parent company of the Appellant, and GO being the seller, for the sum of €3,999,025. On the same date, there is a separate agreement for the Trustees, namely [REDACTED], to acquire all of the issued share capital in [REDACTED] from the Seller GO, for the sum of €1,000. The Commissioner observes the documents submitted in this regard.²⁴ The Commissioner notes the testimony of the Appellant's witness that there may have been a discussion in relation to this transaction, prior to the acquisition of the EBT, but that discussion would have been with GO who held the shares. The Appellant's witness agreed that providing €4,000,000 to GO was probably the main benefit of the transaction.
44. Therefore, this means that between **23 December 2010** and **30 December 2010**, €4,000,000 is paid to GO, in consideration for the acquisition of the share capital in his company, [REDACTED]. The Commissioner notes that no evidence has been adduced as to the value of the shares and the evidence suggests that [REDACTED] as Trustee, determined that that was in the interests of the beneficiaries. The Commissioner notes that there exists no formal minute of any decisions made in relation to the acquisition of the 2010 EBT, the minute postdates²⁵ the decision to acquire the 2010 EBT, or the purchase of the shares in both [REDACTED] or [REDACTED].²⁶
45. In circumstances where it appears €4,000,000 went into the 2010 EBT and €4,000,000 was paid out of the 2010 EBT, at the end of 2010, there is no evidence that there are any assets in the 2010 EBT, despite it being contended for by the Appellant that this was for the purposes of rewarding and benefitting the employees of the Appellant. The

²³ Index to Revenue Book of Documentation, page 352

²⁴ Index to Book of Revenue Documentation II, pages 5 & 14

²⁵ Index to Book of Revenue Documentation II, page 79

²⁶ Transcript, Day 1, page 132

Commissioner notes that there is no documentary evidence submitted, such as a bank account associated with the 2010 EBT.

46. Moving to **2012**, the Commissioner has considered the document purporting to be a minute of the meeting of the Board of Directors of the Appellant, dated **1 December 2011**, and which purports to reflect a decision to purchase an existing EBT to the value of €2,500,000. Of note, the individuals present at the meeting again were the Appellant's witness and [REDACTED] of [REDACTED]. The Commissioner has considered the Deed of Settlement dated **24 September 2012** and the Deed of Appointment dated **26 September 2012**, in this regard.²⁷
47. The Commissioner notes that in 2012, €2,500,000 is used by way of the same mechanism to acquire the 2012 EBT. The Appellant submitted correspondence dated **24 September 2012**, purporting to be from [REDACTED] to the Appellant's tax agent stating that it had recently established an EBT which was available to be purchased for the amount of funds settled in the EBT plus 1%. In addition, the correspondence at Schedule 1 purports to set out the name of the Trust, the date being 24 September 2012 and the funds settled as €2,500,000.
48. The Deed of Settlement in relation to the 2012 EBT dated **24 September 2012** is between [REDACTED] ("Settlor") and [REDACTED] ("Trustee") and the Deed of Appointment at recital A states that *"This deed is supplemental to a settlement made on 24 September 2012 between (1) the Settlor as settlor and (2) the Trustee as original trustee and known as the [REDACTED]"*
49. The Commissioner observes that it is purported that on **18 April 2013**, the amount of €2,500,000 which was in the 2012 EBT was appointed by the Trustee, [REDACTED], to the 2010 EBT. The Commissioner has considered the documentation submitted in this regard.²⁸ Moreover, it is submitted that on **7 June 2013**, [REDACTED] ceases to be the Trustee of the 2010 EBT and [REDACTED] Trustees Limited is appointed in its place. The Commissioner notes the documentation submitted purporting to give effect to this change.²⁹ The Commissioner observes that there is no evidence adduced by the Appellant as to the company described as [REDACTED] Trustees Limited.
50. In **July 2013**, a dividend of €4,200,000 million is purported to be declared by the Appellant due to its parent company, [REDACTED].³⁰ It appears therefore to the

²⁷ Index to Book of Revenue Documentation, Pages 361 & 423

²⁸ Index to Book of Revenue Documentation III, page 11

²⁹ Index to Book of Revenue Documentation III, page 2

³⁰ Index to Book of Revenue Documentation II, page 31

Commissioner that there are now the amounts of €2,500,000 and €4,200,000 in the 2010 EBT. Again, however the Commissioner notes that no documentary evidence is submitted to support the amounts in the 2010 EBT in the form of any trust bank accounts.

51. The Commissioner has considered the document purporting to be a minute of the meeting of the Board of Directors of the Appellant, dated **5 September 2013**, and which purports to reflect a decision of the Appellant, to ask the Trustees of the 2010 EBT, namely [REDACTED] Trustees Limited, to exercise their discretion by way of an award to GO of up to €6,700,000 as a distribution from the EBT. The Commissioner notes the document states that *“having considered all relevant factors that the contribution of [GO], an employee of [REDACTED] a group company and so a potential beneficiary of the Employee Benefit Trust had been fundamental in the success of the company and that such contribution should be rewarded.”*³¹ The Commissioner observes that the individuals present at the meeting again were the Appellant's witness and [REDACTED]. The Commissioner notes the memorandum of wishes attached to the minute. The Commissioner has considered the evidence of the Appellant's witness in this regard, wherein he testified that he was in agreement that there is no evidence of the Trustees exercising discretion contrary to the wishes of the Director of the Appellant.³²
52. On **17 September 2013**, it is purported that the Appellant acquired the 2013 [REDACTED] EBT and on **19 September 2013**, in the same way, a Deed of Appointment is executed and, in consideration of that Deed of Appointment, it is purported that €2,000,000 is transferred by the Appellant to the 2013 [REDACTED] EBT. The Commissioner notes that process is repeated again in **December 2013**, when the sum of €2,000,000 is used in relation to the 2013 [REDACTED] EBT and the Commissioner notes the Deed of Settlement and the Deed of Appointment in that regard.³³
53. Therefore, it appears to the Commissioner that during 2013, the sum of €4,000,000 is purported to be used to acquire EBTs for the benefit of the employees of the Appellant. However, again no bank statements were submitted to support the amount of trust assets held in the trust accounts. On **25 August 2014**, €4,000,000 is appointed out of both 2013 EBTs into the 2010 EBT.³⁴
54. On **25 August 2014**, it is submitted that a further distribution in the sum of €4,000,000 was made to GO from the 2010 EBT. The Commissioner has considered the document purporting to be a minute of the meeting of the Board of Directors of the Appellant, dated

³¹ Index to Book of Revenue Documentation, page 428

³² Transcript, Day 2, page 9

³³ Index to Book of Revenue Documentation, page 858

³⁴ Index to Book of Revenue Documentation II, page 54

25 August 2014, and which purports to reflect a decision of the Appellant, to ask the Trustees of the 2010 EBT [REDACTED] Trustees Limited, to exercise their discretion by way of an award to GO of up to €4,000,000 as a distribution from the EBT. The Commissioner notes that the document states that *"having considered all relevant factors that the contribution of [GO], an employee of [REDACTED], a group company and so a potential beneficiary of the Employee Benefit Trust had been fundamental in the success of the company and that such contribution should be rewarded."*³⁵ The Commissioner observes that the individuals present at the meeting again were the Appellant's witness and [REDACTED]. The wording of the minute is identical to that of the minute of **5 September 2013**, in relation to the previous distribution. The Commissioner has considered also the memorandum of wishes attached to the minute.³⁶

55. On **13 November 2014**, and again on **19 December 2014**, by way of the same mechanism, it appears monies are transferred from the gross profits of the Appellant, in the amounts of €1,000,000 and €2,500,000 respectively, for the purposes of acquiring the 2014 [REDACTED] EBT and the 2014 [REDACTED] EBT. As had been the position in relation to the 2012 and 2013 EBTs, all of the funds in the 2014 EBTs were subsequently appointed to the 2010 EBT.³⁷

56. The Commissioner has considered the entirety of the documents submitted in this appeal in relation to the EBTs. The Appellant repeatedly made reference to the documents submitted being "public documents under common seal". Counsel for the Appellant submitted that there is *"proof and evidence of the transaction because you have the deeds that we have read in the course of the direct examination of the witness. I say that those deeds declare that the funds exist, existed prior to the date of the deed coming into being"*. Yet many of these documents are governed by the law of foreign jurisdictions, not witnessed/executed accordingly and cannot be said to be documents created in the normal course of business. Moreover, no witnesses were called to testify in relation to the documentation, but for the Appellant's witness, who was present at the hearing of the appeal in the capacity of Director of the Appellant only, as opposed to Director of [REDACTED] or otherwise. Hence, the Commissioner is satisfied that there is little evidential weight to be attached to much of the documentation submitted in this appeal. In addition, the Commissioner notes the errors highlighted in the documents for example, the error in the Deed of Settlement dated 2 December 2010, which is purported to be 3 December 2010. Moreover, the Commissioner notes the errors in the Appellant's outline

³⁵ Index to Book of Revenue Documentation II, page 61

³⁶ Index to Book of Revenue Documentation II, page 63

³⁷ Index to Book of Revenue Documentation II, page 54

of arguments *inter alia* in relation to the background of facts and the application of section 81 to the Appellant's case.³⁸

57. Furthermore, the Commissioner has carefully considered the evidence of the Appellant's witness. The Commissioner did not consider the Appellant's witness to be forthcoming with information in relation to this appeal. In addition, the Commissioner notes the multiple roles played by the Appellant's witness during the relevant years *inter alia* advisor, Director and Trustee. Having observed the witness give evidence, the Commissioner considers his credibility as a witness to be in doubt. Moreover, the Commissioner is satisfied that the Appellant's witness benefited from the overall arrangements on the basis of being not only the Director of the original Trustee, but also the Director of the Appellant's tax agent and Director of [REDACTED]. The evidence establishes that the Appellant's tax agent was paid €150,000 in fees in 2010 and €61,500 in each relevant year thereafter, of which the Appellant's witness was a Director and held a beneficial interest in. The Commissioner notes the testimony of the Appellant's witness that he agreed "*We made money out of it yes*",³⁹ when it was put to him by Senior Counsel for the Respondent, that it was a win-win position for not just GO, but also for the Director of the Appellant. In addition, the Commissioner notes that it was the Appellant's witness, as Director of [REDACTED], that completed the MD 1 and the PN1 forms submitted to the Respondent. The Appellant's witness eventually agreed that there was an error, as opposed to a misrepresentation which he did not accept, within those forms⁴⁰ in the terms of the transaction that was being alerted to the Respondent, because it was made clear within those forms by the Appellant's witness that the EBT was acquired for the benefit of employees of the employer only i.e. the Appellant, but his evidence herein is that it was always the intention that GO would benefit under the EBTs, an individual who was not an employee of the Appellant.
58. Nevertheless, what is clear from his evidence is that the EBTs had nothing to do with rewarding or incentivising the employees of the Appellant, but were put in place with the sole purpose of benefiting GO. The Commissioner notes that it was put to the Appellant's witness by Senior Counsel for the Respondent that "*this whole scheme was devised so that you could effectively make a distribution to [GO] and, at the same time, categorise it in a manner that it formed part of wages and salaries and claim a tax deduction*" and the Appellant's witness stated "*That's correct*".⁴¹

³⁸ Index to Book of Revenue Documentation, page 66

³⁹ Transcript, Day 2, page 23

⁴⁰ Transcript, Day 2, pages 62 & 63

⁴¹ Transcript, Day 2, page 66

Jurisdiction of an Appeals Commissioner

59. Counsel for the Appellant made opening submissions in relation to the Commissioner's jurisdiction. The Commissioner considers it appropriate to set out, that the Appellant submitted to the Commissioner that "*the extent that any criticism may be made of [the Appellant] for not being forthcoming with evidence of the inquiry, that is not a reason to uphold an assessment*".⁴² It was submitted by Counsel for the Appellant that it may be a reason that entitles the Respondent to raise an assessment, but once an assessment is appealed, the Commissioner must consider "*not the function as to whether [the Respondent] were correct in raising the assessment..... but your function is to assess the facts as presented over whatever period of time in advance that the Appellant wishes to submit those facts, either to [the Respondent] or before [the Commission], and as adduced during the hearing..... you are not a judicial review body, you are not looking at whether the raising of the assessment was correct in law, but you are looking at whether the actual assessment stands from a tax perspective based on the evidence that is now before you*".⁴³
60. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015. Section 6(2) of the Finance (Tax Appeals) Act 2015 sets out the functions of Appeal Commissioners appointed pursuant to that Act. Appeal Commissioners therefore have the jurisdiction set out in statute and do not have jurisdiction to consider or decide on the constitutionality of legislation or to set aside a decision of the Respondent based on alleged unfairness, breach of legitimate expectation or disproportionality, as such grounds of appeal do not fall within the jurisdiction of an Appeal Commissioner and thus, do not fall to be determined as part of this appeal. This comes within the jurisdiction and remit of the Courts.
61. The scope of the jurisdiction of an Appeal Commissioner, has been discussed in a number of cases, namely; *Lee v Revenue Commissioners* [2021] IECA 18 (hereinafter "*Lee*"), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] 1 I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577 and is confined to the determination of the amount of tax owing by a taxpayer, in accordance with relevant legislation and based on findings of fact adjudicated by the Appeal Commissioner or based on undisputed facts as the case may be.

⁴² Transcript, Day 2, page 106

⁴³ Transcript, Day 2, page 106

62. Most recently Murray J. in *Lee* held as follows:

“From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge. The ‘incidental questions’ which the case law acknowledges as falling within the Commissioners’ jurisdiction are questions that are ‘incidental’ to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment.”

63. Therefore, what is clear from the jurisprudence of the Superior Courts is that the jurisdiction of an Appeal Commissioner does not extend to the provision of equitable relief nor to the provision of remedies available in High Court judicial review proceedings.

Grounds of Appeal

64. The Appellant’s appeal relates to a number of grounds as set out in its Notice of Appeal. In its outline of argument,⁴⁴ the Appellant sets out its appeal points as follows:

“The Corporate Appellant appealed the Corporation Tax Assessments, on the basis, in overview, that:

2.2.1 the company incurred an expense for the purpose of its trade that correctly relates to the accounting period in question (a point accepted by the independent auditors) and as such the requirements of section 76A TCA are satisfied;

2.2.2 section 81 TCA does not restrict the relief claimed in any way and the nature of the expense means section 81A TCA does not apply to deny relief; and

2.2.3 the Respondents have disallowed the expenses incurred on professional fees. The Respondent has not stated the grounds for their decision. It is considered these costs are relevant to the trade and as such are allowable.

.....

2.4 The Corporate Appellant appealed the 2012, 2013 and 2014 DWT Assessments, on the basis, in overview, that:

⁴⁴ Index to Revenue Book of Documentation, page 44

2.4.1 section 436A TCA does not apply to the payments made by the Corporate Appellant, as the “settlement” as required by section 436A TCA, was not made by or on behalf of the Corporate Appellant or any party connected to it; and

2.4.2 section 436A TCA does not apply to the payments made by the Corporate Appellant, as section 436A TCA only applies where the purpose or one of the purposes of any settlement is tax avoidance.

2.4.3 no payments or distributions were made on the dates stated

2.4.3 section 436A TCA does not apply to the payments made by the Corporate Appellant, as section 436A TCA only applies where the purpose or one of the purposes of any settlement is tax avoidance.

2.4.4 section 436A TCA does not apply to the payments made by the Corporate Appellant, as the “settlement” as required by section 436A TCA, was not made by or on behalf of the Corporate Appellant or any party connected to it.”⁴⁵

65. The Appellant argues that the making of each payment by the Appellant to each Settlor of the EBTs, cannot be regarded as a “relevant settlement”, nor as money being “settled”. Therefore, the provisions of section 436A TCA 1997 cannot be considered applicable to the Appellant in the circumstances of this appeal. In addition, the Appellant argues that each payment by the Appellant to each Settlor of each EBT, was not an emolument of any employees of the Appellant from their employment or arising “therefrom” within the meaning of section 112(1) TCA 1997. Therefore, each payment made by the Appellant to each Settlor of each EBT was made “*wholly and exclusively for the purposes of the trade*” of the Appellant, was not otherwise disallowed and that the Appellant was entitled to treat each payment to each Settlor of each EBT, as a deductible expense, in accordance with section 81 TCA 1997. The Appellant contends that a significant body of case law supports the position adopted by the Appellant.

66. The Respondent argues that the circumstances arising herein, in relation to the acquisition of the various EBTs are careful, pre-engineered, and pre-sequenced steps all of which, taken collectively, constitute an arrangement for the purposes of section 436A TCA 1997 and consequently, the payments made by the Appellant to the Settlor of each EBT in 2012, 2013 and 2014 are deemed distributions and are liable to DWT, in accordance with the provisions of section 172K TCA 1997.

⁴⁵ Index to Revenue Book of Documentation, page 45

67. The Commissioner notes that it is the Appellant's contention that the evidence adduced establishes that there was commercial logic to the payments. The Appellant submits that the Appellant's witness supported the purchase of the pre funded EBTs, because of the [REDACTED] contract, and that the role of GO was so critical to the generation of the profits, it was appropriate to reward him through an EBT.
68. The Commissioner notes that Counsel for the Appellant submits that there was nothing raised in the audit report by the auditor of the Appellant's accounts and that *"it may very well be that the structuring of the EBT arrangement was structured in a clever way, but it was structured as set out in the documents"*.⁴⁶ Moreover, Counsel for the Appellant submits that *"it is not an offence under company law not to have a memorandum of wishes for a payment out of the fund that is agreed on a third party basis with the owner of shares. If the trustees are satisfied that the offer is a genuine offer and if the trustees are satisfied that it makes sense for the trust to acquire those shares, well, then that is what happened. That is the evidence that exists"*.⁴⁷
69. The Appellant argues that it was a valid arrangement that was entered into and payments were made to acquire various settled EBTs. Therefore, it was not a "settlement" of funds into an EBT by the Appellant and the Appellant does not satisfy the provisions of section 436A TCA 1997.
70. In contrast, the Respondent argues that in accordance with section 436A TCA 1997, as the EBTs were put in place to benefit GO only, the amounts "settled" by the Appellant constitute a deemed distribution. The Respondent states that the EBTs were put in place for the sole purpose of extracting funds from the Appellant in a tax free manner.
71. Before considering the competing arguments in relation to the application of the particular provisions of the taxing statute, the Commissioner considers it appropriate to initially set out herein, the jurisprudence establishing the well settled principles of statutory interpretation relating to taxation statutes.

Statutory Interpretation

72. 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:

⁴⁶ Transcript, Day 2, page 116

⁴⁷ Transcript, Day 2, page 117

"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...."

73. 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 Ltd. 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.”

74. 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.

75. Furthermore, the Commissioner is cognisant 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 dicta of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he states 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”.

76. 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”*.
77. 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.
78. 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 McKechnie J’s dictum in *Dunnes Stores* at paragraph 66, wherein he states 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.”*
79. The Commissioner will now in accordance with the guidance of statutory interpretation as summarised in *Perrigo* go through the various steps. The Commissioner must give the words their ordinary, basic and natural meaning and that should prevail. 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. Nonetheless, whatever approach is taken, as confirmed in *Perrigo*, the Commissioner must give each word and phrase used in the statute a meaning, as it is presumed that the Oireachtas did not intend to use words or phrases without meaning.

80. 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 should be given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.
81. The Commissioner is mindful of the recent decision of the Supreme Court in *O'Meara v the Minister for Social Protection, Ireland and the Attorney General* [2024] IESC 1. At pages 8 and 9 of the Judgment, Hogan J. when dealing with the interpretation of the constitutional provisions at issue, states that:

“18. *The search for meaning, therefore, is not for the subjective understanding of the drafters. What counts is the objective meaning of the words, not least given that the People in 1937 must be taken to have adopted the Constitution by reference to that objective meaning when they were voting in a plebiscite on whether to adopt that document. This process involves “the application of the relevant canons of interpretation, to ascertain what intention is evinced by the actual statutory words used.”: Director of Public Prosecutions v. Flanagan [1979] IR 265 at 282 per Henchy J. While these comments were made in the context of statutory interpretation, they apply a fortiori in the context of the words of a constitutional text.*

19. *In the case of the interpretation of an ordinary word such as “woman”, the canons of interpretation are perfectly clear. It is, after all “...the cardinal rule of.... interpretation that in the absence of some special reason, a word should be given its ordinary or natural meaning in its context”: Keane v. Irish Land Commission [1979] IR 321 at 324, per Henchy J. The rationale for this was well explained by the same judge in another judgment delivered about this time, Wilson v. Sheehan [1979] IR 423 at 429, where Henchy J. observed:*

“The reason for that rule is that when statutes or other public or formal documents directed to the public at large.... are being interpreted, it is to be assumed, in the absence of a counter-indication, that the words used in such documents have been used in their popular rather than in any specialised or technical sense.”

Section 436A TCA 1997

82. The Commissioner will now consider the application of section 436A TCA 1997 to the facts of the Appellant’s appeal. Section 436A TCA 1997 provides that where a close company settles money or money’s worth under a relevant settlement set up by the company for the benefit, or potentially for the benefit, of a member, the transfer is deemed to be a distribution by the company. The relevant sections are subsection (1) which is the definition section; subsection (2) which is the deeming section; and subsection (4), which for the purposes of this appeal, is the disapplication subsection.
83. The Commissioner considers that there are four requirements to be met for the deeming provision in subsection (2) to become operative, as follows: Firstly, there must be an amount of money; secondly, it must be settled within the meaning of the section by or on behalf of a close company; thirdly, that must be on or after 21 January 2011 and; fourthly, it must be in connection with a relevant settlement. The Commissioner is satisfied that if all four requirements are met, then there is deemed to be a distribution and a charge to tax arises in accordance with the provisions of section 172K TCA 1997. The Commissioner observes that the Respondent has raised assessments to DWT, on the basis that the requirements are met.
84. The Commissioner observes that what is not at issue between the parties in terms of these requirements, is that the Appellant is a close company, the distributions that have been assessed occurred after 21 January 2011 and that money was paid by or on behalf of the Appellant.
85. Therefore, there remain two requirements at issue between the parties which the Commissioner will refer to as requirement 1 at issue and requirement 2 at issue namely, requirement 1, that money was “settled” within the meaning of the section and requirement 4, whether or not that was in connection with a “relevant settlement”.

“Settlement” – requirement 1 at issue

86. Section 436A (1)(a) TCA 1997 provides that “settlement” has the same meaning as section 10 TCA 1997. Section 10 TCA 1997 provides that *““settlement” includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property*

or of any right to money or other property". Moreover, section 436A (1)(a) TCA 1997 states that "*settled*" shall be read accordingly. In addition, the Commissioner notes that "*member*" is defined in section 436A (1)(a) TCA 1997 as meaning, "*in relation to a company, includes a participator in the company other than a loan creditor of the company*".

87. The Commissioner has considered the Appellant's arguments in this regard. Both the Appellant and the Respondent contend that the literal interpretation of this provision favours their case. The Appellant submits that the natural and ordinary meaning of section 436A TCA 1997 is that the Appellant's actions herein, cannot amount to a deemed distribution in accordance with the provisions of section 436A TCA 1997. The Appellant contends that, as the section is clear and is in no way imprecise or ambiguous, further rules of construction, such as discerning the purpose of the provision, do not come into play. The Respondent argues that the provision is clear and the ordinary and plain meaning of section 436A TCA 1997 operates to deem the monies paid by the Appellant in relation to the acquisition of the EBTs to be a distribution, which falls squarely within the charge to tax in accordance with the provisions of section 172K TCA 1997.
88. The Appellant argues that in order for section 436A TCA 1997 to apply there must be a "*settlement*". However, it submits that the EBTs were fully constituted by an unconnected third party Settlor, were administered by an independent Trustee and fully constituted with funds. It is the Appellant's case that it negotiated with the Settlor of each EBT and payments were made by the Appellant to the Settlor of the various EBTs, to request that the terms of each EBT be altered so that the class of beneficiaries is restricted to the employees and the employees of any associate, parent, subsidiary or group company of the Appellant. The Commissioner has considered the various Deeds of Appointment, in this regard.
89. Counsel for the Appellant argues that in order to conclude that section 436A TCA 1997 applies to the Appellant's circumstances herein, either the arrangement or the express provisions of section 436A TCA 1997 must be recategorised. The Appellant states that there is no "*evidence before you as to the payment of funds, as documented within the deeds, which again is a public document signed under common seal, it is abundantly clear that the close company, [the Appellant], never made a settlement; it acquired a settlement. It acquired a trust that had already settled funds*".
90. Counsel for the Appellant argues that the section 436A TCA 1997 is not ambiguous, such that a "*relevant settlement*" in relation to a close company means a settlement made by or on behalf of a close company and that there is no evidence that the close company, the Appellant, ever made a settlement. Rather, the close company that settled the funds herein was [REDACTED] the

original Settlor of the EBTs, a company not established in Ireland. The Appellant argues that on no interpretation of section 436A TCA 1997 does it permit a finding that the actions of [REDACTED] were taken for and on behalf of the Appellant.

91. Counsel for the Appellant contends that the various EBTs were sold as a commercial arrangement and [REDACTED] obtained a fee from the Appellant. The Commissioner is satisfied that no evidence was adduced as to the motivations of [REDACTED] in this regard. The Commissioner is satisfied having regard to the evidence adduced, the Appellant has failed to identify any commercial rationale for the transactions, other than to reward GO in a tax free manner. The Commissioner deals with this in more detail hereunder.
92. The Appellant submits that the corollary of this is that having regard to the plain and ordinary meaning of the word "*settlement*" in section 436A TCA 1997, it cannot apply to the circumstances of the Appellant and each of the payments to the Settlor of each EBT cannot constitute a deemed distribution, in accordance with the provisions of section 436A (2) TCA 1997. The Commissioner notes that Counsel for the Appellant was in agreement that the term "settlement" is broadly defined. Nevertheless, Counsel for the Appellant submits that having regard to the funds that were settled, the plain and ordinary meaning of funds being settled, are most certainly the funds settled by the originator of each of the EBTs, namely [REDACTED]. The only payment by the Appellant was each payment to each respective Settlor after each EBT was created and in funds, and was not made in order to facilitate any of the settlements. Counsel for the Appellant submits that this is a matter of fact.
93. The Appellant argues that in each instance, a third party settled a sum of money on trust with a class of beneficiaries and that the basis for the Appellant making each payment to each third party, the Settlor, was in return for the third party agreeing to the stated changes to the existing EBTs and those changes were for clear commercial purposes, namely to secure the restrictions to each EBT to be used to benefit employees of the Appellant. The purpose was not to avoid tax, but to recognise and reward employee contributions to the business of the Appellant. In this regard, the Commissioner notes the testimony of the Appellant's witness, wherein he agreed that it was an investment to maintain the alleged [REDACTED] contract that GO had secured and any potentially new contracts that GO could secure. Moreover, the Commissioner notes the testimony of the Appellant's

witness that the only beneficiary from the EBTs was GO, who was not an employee of the Appellant and that the whole purpose of the arrangements was to reward GO.

94. With this in mind, the Commissioner has considered the submissions of Senior Counsel for the Respondent, in relation to the application of section 436A TCA 1997. The Respondent submits that the object of the deeming provision and the entirety of section 436A TCA 1997 is to prevent arrangements being utilised to enable profits available for distribution, to be distributed without incurring the imposition of tax.
95. The Respondent submits that “settlement” for the purposes of section 436A TCA 1997 is defined in section 10 TCA 1997 and includes an arrangement. The Respondent submits that the meaning of settlement ascribed in section 10 TCA 1997 is not an exclusive definition, it is an inclusive definition, and of wide application and it is equally clear that section 436A TCA 1997 is, likewise, intended to be of wide application.⁴⁸ The Commissioner agrees that there is wide application in terms of section 10 TCA 1997 and thus, the definition of “settlement” in section 436A (1) TCA 1997.
96. Furthermore, the Respondent states that the arrangement here, “*which was the positioning, ordering and sequencing of these matters, commencing in December of 2010*”,⁴⁹ was an arrangement within the meaning of section 10 TCA 1997 and therefore, a “*settlement*” within the meaning of subsection (2) of section 436A TCA 1997. The Respondent argues that section 436A TCA 1997 captures the transfer of funds from the Appellant to the Settlor of the EBTs, as it was undoubtedly a transfer of money and money was settled for the purposes of the first requirement of subsection (2) of the deeming provision in section 436A TCA 1997. The Respondent submits that from start to finish the acquisition of the EBTs is an arrangement within the meaning of section 10 TCA 1997 and settlement includes arrangement.
97. The Commissioner notes that it is argued that nothing could be clearer, such that there were carefully pre-engineered and pre sequenced steps which taken collectively constitute an arrangement for the purposes of section 436A TCA 1997. The Commissioner has considered the dictionary meaning of the word “arrangement”. The word arrangement is a noun and the Oxford English Dictionary meaning of the word “arrangement” is “*the action of arranging or disposing in order*”. The Commissioner considers that the meaning of the word “arrangement” is an ordinary word and is common parlance. The Commissioner is satisfied that there was an action of arranging and disposing in order, the EBTs over the various relevant years, with the 2012, 2013 and

⁴⁸ Transcript, Day 3, page 46

⁴⁹ Transcript, Day 3, page 48

2014 EBTs being appointed and transferred to the 2010 EBT, for the benefit of GO. As set out, the evidence adduced and the testimony of the Appellant's witness suggests that the sole purpose of the arrangement, was to benefit GO, who was not an employee of the Appellant.

98. Section 436A (1) TCA 1997 defines settlement as having the same meaning as section 10 TCA 1997 and "settled" shall be read accordingly. Applying the test as set out in subparagraph (a) of paragraph 74 of *Perrigo*, and having regard to the plain and ordinary meaning of the words in section 10 TCA 1997, the Commissioner is satisfied that when monies were transferred by the Appellant to the Settlor of each of the EBTs in 2012, 2013 and 2014, that constituted money that was "*settled*" for the purposes of section 436A TCA 1997, as section 10 TCA 1997 defines "*settlement*" as including an "*agreement or arrangement, and any transfer of money*" and section 436A(2) TCA 1997 states "*Where any amount in money or money's worth is settled*". Therefore, the Commissioner finds that the Appellant comes directly within the meaning of the first requirement that an amount of money is "settled" in accordance with the provisions of section 436A (2) TCA 1997.
99. The Commissioner finds that the Appellant has not shown on balance that the payment of monies during the relevant years do not come within the wide definition provided for in section 10 TCA 1997, such that they cannot be considered an arrangement or an agreement where monies are "*settled*". Aside from the lack of evidence adduced, supporting the argument that the EBTs were prefunded, the Commissioner does not accept the Appellant's argument that since these were prefunded EBTs, the payments made to the Settlor of the EBTs by the Appellant, do not constitute an amount of money being settled by a close company.

"Relevant Settlement" – requirement 4 at issue

100. Having regard to the provisions of section 436A TCA 1997, it is not enough that money is "settled" by or on behalf of a close company, it must be in connection with a "*relevant settlement*".
101. "*Relevant settlement*" in relation to a close company is defined in section 436A (1) TCA 1997 as "*a settlement made by, or on behalf of, a close company other than a settlement which - (i) is made expressly for the exclusive benefit of one or more than one person, who is neither a member of the company nor a relative of such a member, and (ii) does not allow at any time for the possibility of providing any benefit to such member or relative*".

102. The Appellant submits that the original creation and funding of each EBT by each respective Settlor cannot be regarded as a “relevant settlement” for the purposes of section 436A TCA 1997. The Appellant argues that *“it is a settlement, it is settled funds, and the settled funds were clearly moved by [REDACTED] in 2010 and then [REDACTED] sold on the benefit of that to the Appellant. I say that is the end of it”*.⁵⁰
103. The Commissioner notes the reference to the word “*member*” in the definition of “relevant settlement” in section 436A (1) TCA 1997. “*Member*” is defined in section 436A (1) TCA 1997 as including “*a participator in the company other than a loan creditor of the company*”.
104. In that regard, Senior Counsel for the Respondent directed the Commissioner to section 433(1) TCA 1997 which provides for the definition of “*participator*”. The Commissioner has considered section 433 TCA 1997 and notes that “*participator*” is defined as; *a person having a share or interest in the capital or income of the company and, without prejudice to the generality of the foregoing, includes— (d) any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for such person’s benefit.*
105. The Appellant submits that GO, the beneficiary of the payments that were settled in the EBTs, was not a participator. The Respondent argues that GO, as beneficial owner of the Appellant, was entitled to secure the income and assets of the Appellant for his own benefit or the benefit of third parties, thus he meets the definition of “*member*” and in addition, the definition of “*participator*”. Having regard to the evidence adduced in this appeal, the Commissioner finds that GO was a “*member*” of the Appellant, in accordance with section 436A (1) TCA 1997. As aforementioned, GO signed the correspondence dated 8 December 2010, from the Appellant’s tax agent, in his capacity as the beneficial owner of the Appellant.
106. Moreover, the Commissioner is satisfied that GO was a participator, in accordance with section 433(1) TCA 1997. The Respondent argued that the status of GO, as a participator, was not dependent on him being the beneficial owner of the Appellant, but rather, his status was referable to the fact that he could direct how the income or assets of the company were applied. The Commissioner notes the testimony of the Appellant’s witness which the Commissioner has set out in the preceding paragraphs, and which suggests that GO was extremely influential in terms of directing how the income of assets were applied.

⁵⁰ Transcript, Day, 3, page 140

107. The Commissioner is satisfied that having regard to the plain and ordinary words in context in the definition of "participator", it does not require an individual in question to have a beneficial entitlement in the shares of the company, rather, it turns on the ability of that individual to direct the affairs of the company. The Commissioner is satisfied that the evidence adduced does not suggest any waning of influence on the part of GO after 2010, or that his influence was in any way impaired or undermined as and from 2010. The evidence of the Appellant's witness was that GO continued to be central to the entirety of the arrangement.
108. Having regard to the evidence adduced in this appeal, it is pellucidly clear to the Commissioner, that each of the payments made in 2012, 2013 and 2014, by the Appellant to the Settlor of the various EBTs, all of which were appointed to the 2010 EBT, were monies "settled" in connection with a "relevant settlement".
109. For the sake of completeness, the Commissioner notes that Counsel for the Appellant had an additional argument to make in relation to the application of section 436A TCA 1997, namely that it does not apply in circumstances where it was not a settlement for bounty. Counsel for the Appellant explained that an element of bounty is essentially a non-commercial arrangement, whereby somebody gives a gift to a party and that herein, there was a commercial arrangement, whereby the motivation can be assumed from the documentation. The Appellant submits that the clear consensus which emerges from the decided cases on this point is that some element of bounty, that is, a benefit freely conferred, must exist before a settlement will be identified by the courts. Counsel for the Appellant submits that as a matter of fact, no "element of bounty" was involved in the payments by the Appellant to each Settlor, as each payment was a separate bona fide commercial transaction for full consideration.
110. The Appellant did not develop this point at the hearing of the appeal. Rather, Counsel for the Appellant referred to paragraph 5.3.5 onwards in his outline of arguments only. The Commissioner must point out that if a party at the hearing of an appeal before the Commission wishes to rely on a line of authority and to make an argument by reference to that, the authorities being relied upon must be before the Commissioner and the dictum relied on must be put in context. The Appellant was represented by Junior Counsel and it is not the Commissioner's role to articulate the Appellant's case nor is it the Commissioner's role to second guess the context upon which a party to an appeal makes an argument. The Commissioner is an independent decision maker whose role is to listen to the evidence and submissions presented by both sides, assess the facts, weigh the evidence and apply the applicable legal principles in determining the matter. The very

essence of fair procedures is that the parties submit documentation, including any case law or legislation it is relying on, so that the parties to the appeal and the Commissioner understand the arguments being made. The Respondent submits that the Appellant was furnished with its book of authorities in advance of the hearing and asked the Appellant if it would exchange its authorities or whether it wanted to furnish any additional authorities and the response was no, it would rely on the Respondent's booklet of authorities. Accordingly, the Commissioner has no authorities referenced in the Appellant's outline of arguments or the mentioned UK equivalent legislation. It is the Commissioner's opinion that the Appellant has not articulated this point sufficiently or at all, in support of its appeal that the Respondent was incorrect to raise the assessments to DWT.

Conclusion

111. The Respondent contends that no evidence has been adduced in this appeal to support the contention that the EBTs were prefunded and that the Deeds of Appointment do not support this. The Commissioner accepts this submission. Hence, when an amount of money was transferred by the Appellant to the various EBTs, the motivation was for the tax free benefit of GO and to secure a tax deduction for the entire amount from the gross profit. The Commissioner notes the evidence of the Appellant's witness, wherein having been asked by Senior Counsel for the Respondent in cross examination that, "*the whole scheme was devised so you could effectively make a distribution to [GO] and at the same time categorise it in a manner that it formed part of wages and salaries and claim a tax deduction..*",⁵¹ he stated "*that's correct*".⁵²

112. Of note, Counsel for the Appellant made no submissions in relation to section 436A(4) TCA 1997 which states that "[t]his section shall not apply as respects a relevant settlement, where the settlement was not made as part of a scheme or arrangement, the purpose or one of the purposes of which was the avoidance of tax".

113. Accordingly, the Commissioner finds that when monies were transferred in 2012, 2013 and 2014 by the Appellant to the Settlers of the respective EBTs, that constituted money that was settled by a close company in connection with a relevant settlement, in accordance with the provisions of section 436A (2) TCA 1997.

114. As set out in detail at above, in an appeal before the Commission, the burden of proof is on the Appellant to show that the tax is not payable. Having considered the entirety of the evidence adduced in this appeal and in addition, having considered the evidential deficits

⁵¹ Transcript Day 2, page 66

⁵² Transcript Day 2, page 66

in this appeal, the Commissioner is satisfied that the Appellant has failed to show on the balance of probabilities that the Respondent was incorrect to raise the assessments, the subject of this appeal. The Commissioner finds that the Appellant comes within the provisions of section 436A(2) TCA 1997 for the reasons set out above and thus, the Respondent was correct to raise the notices of assessment to DWT in accordance with section 172K TCA 1997. Hence, the Appellant's appeal fails in relation to this ground.

115. Consequently, in circumstances where the Commissioner finds that section 436A (2) TCA 1997 applies to the Appellant herein and the money settled is a deemed distribution in accordance with subsection (2), the deduction claimed by the Appellant in respect of the EBTs is denied for corporation tax purposes, on the basis that no deduction is allowable under section 81 TCA 1997. The Commissioner finds that the Respondent was correct to raise the notices of assessment to corporation tax. Hence the Appellant's appeal fails on this ground also.

Determination

116. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal and has not succeeded in showing that the tax is not payable.

117. Therefore, the Notices of Amended Assessment to corporation tax for the years 2010, 2011, 2012, 2013 and 2014 and Notices of Assessment to DWT for the years 2012, 2013 and 2014, raised by the Respondent, shall stand.

118. 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

119. 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

120. 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
28 March 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