AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

157TACD2025

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. These are appeals to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("TCA 1997") brought on behalf of [redacted] ("the Appellant") in respect of a Notice of Determination dated 4 March 2024 ("the Determination") issued by the Revenue Commissioners ("the "Respondent") in accordance with section 864(1) TCA 1997.

2. The Determination purports to deny future claims in respect of trading losses that may be made by the Appellant in calculating its corporation tax liability in future years. The matters in dispute relate to deductions for foreign royalty withholding tax ("RWHT") in its corporation tax returns filed for the period ended 31 December 2019 ("the relevant period"). The total amount of the Determination under appeal is in the amount of €6,677,815.

3. The Appellant in calculating its adjusted taxable trading income for the relevant period treated the foreign RWHT it suffered as a deductible expense. The Respondent has objected to this treatment.

4. On 28 March 2024, the Appellant duly appealed to the Commission, the Determination of the Respondent. On 5 November 2024, the parties submitted their respective Outline of Arguments. Thereafter, on 29 November 2024, both parties delivered supplemental submissions. On 4 February 2025 and on 10 March 2025, the parties delivered final submissions.

Section 949AN TCA 1997

5. On 1 August 2023, the Commissioner issued a determination in favour of the Appellant, namely *128TACD2023*. The determination concerned appeals against Notices of Determination which refused the same deduction for foreign RWHT, in respect of the accounting periods ending 31 December 2015 to 31 December 2018 inclusive.

6. Consequent to the Commissioner's determination in *128TACD2023,* the Respondent made a request in writing pursuant to section 949AP TCA 1997 that the Commissioner state and sign a case for the opinion of the High Court. In accordance with section 949AQ TCA 1997, the Commissioner completed and signed a Case Stated dated 12 December 2023 and sent it to the parties. The Case Stated was transmitted to the High Court by a Notice of Transmission, dated 18 December 2023. The Case Stated is currently awaiting a hearing before the High Court.

7. Subject to certain conditions being fulfilled, section 949AN of the TCA 1997, which is entitled "Appeals raising common or related issues", provides that where an Appeal Commissioner considers it appropriate, the Appeal Commissioner may determine an

appeal having regard to a previous determination issued by the Commission (hereinafter the "similar appeal") where the matter under appeal and the similar appeal share common or related issues.

8. Where those provisions apply, the Commission is required to send a copy of the similar appeal determination, redacted for privacy, to the Appellant and the Respondent. The Commission is also required to request arguments from the parties, to be received within 21 days after the date of the request, in relation to why it would not be appropriate for the Appeal Commissioner to have regard to the similar appeal determination in determining the appeal. In addition, the Commission is required to request each of the parties to state whether they wish the Appeal Commissioner to hold a hearing in their appeal and, where a party so wishes, to explain why such a hearing is considered to be necessary or desirable.

9. On 17 May 2024, the Commissioner wrote to the parties to this appeal to inform them that:

    9.1. the Commissioner was considering the determination of this appeal pursuant to the provisions of section 949AN TCA 1997;

    9.2. the Commissioner was seeking the parties' views as to why it would not be appropriate to have regard to the previous determination and whether either party wanted the Commissioner to hold a hearing, and where a party wanted a hearing held, to explain why such a hearing was considered necessary; and

    9.3. the Commissioner was enclosing the similar appeal, *128TACD2023* for consideration;

10. The submissions of the parties reflected that it was the Appellant's position that this appeal should be determined consistently with *128TACD2023*. The Appellant submitted that evidence was not necessary to be given in this appeal, as the matters in issue are technical or interpretive in nature. That was so, the Appellant stated, as in common with the previous appeals, the material facts are incapable of serious dispute, as they are identical to the facts in the previous appeals. However, the Respondent submitted that the approach adopted by the Commissioner in *128TACD2023* was incorrect and should not be followed. Rather, the Commissioner should stay the appeal in accordance with section 949W TCA 1997, pending the decision of the High Court in the Case Stated.

11. On 2 July 2024, having considered detailed written submissions from both parties on the application of section 949AN TCA 1997 to this appeal, the Commissioner wrote to the parties to inform them that the Commissioner was exercising her discretion to proceed in accordance with section 949AN TCA 1997 on the basis that she was of the view that it

would not be appropriate to disregard *128TACD2022* and that it was not necessary, having regard to the common or related issues herein, to hold a hearing to determine this appeal. Thus, the Commissioner determined that section 949AN TCA 1997 applied to this appeal and that it was proper to proceed to determine the appeal, rather than delaying the outcome of the appeal before the Commission, for the Appellant. The Commissioner was satisfied that there were no compelling reasons why this appeal should be the subject of a stay. The Commissioner had refused the Respondent's application for a stay, in accordance with section 949W TCA 1997, on 17 May 2024, prior to her consideration of section 949AN TCA 1997.

12. This appeal is, therefore, determined without an oral hearing and is in accordance with the provisions of section 949AN TCA 1997 based upon the similar appeal *128TACD2023* and the submissions and documentation received from both parties.

Background

13. [redacted].

14. The Appellant's principal activities are [redacted] In carrying out its trade, the Appellant licenses [redacted] to its customers, which include both affiliated entities and third party customers, in foreign jurisdictions. [redacted] The [redacted] This arrangement is governed by way of licence agreements for the specific jurisdictions concerned.

15. The jurisdictions imposing foreign RWHT in which the Appellant licenses its - [redacted] The Appellant does not have a branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions in which it licenses -

- to customers located there. In a number of those jurisdictions, customers deduct foreign RWHT at source.

16. When a royalty payment is made, foreign RWHT is applied on the gross royalties payable, regardless of whether a profit or loss is generated on that transaction. Royalty payments are generally subject to a standard rate of 20%. However, lower rates may be accessed under treaties or double taxation agreements ("DTA"). The Appellant submitted that foreign

RWHT was one of the costs of doing business for all providers [redacted] to their customers, resident in certain countries. The Appellant submitted that:

"*The prevalence of RWHT globally is generally viewed as a direct cost of carrying out international business in the Appellant's sector. It is normally not feasible to pass that cost onto customers in pricing because of global and local competition in the market. Particularly where higher rates are imposed, like any other costs of doing business, RWHT has a very significant impact on the Appellant's gross revenues and therefore the return from selling into a particular market. The commercial realities and contracts in place between the Appellant and its [redacted] customers compel the Appellant to treat such RWHT as a reduction in the gross royalty fee received. As a matter of principle, income cannot be determined until all of the costs attributable to the earning of those receipts have been ascertained. To do otherwise results in taxation on something (a receipt) that can never be received, i.e. which is in effect not income.*"

17. During the relevant period, the Appellant's royalty receipts included royalties from customers in both treaty and non-treaty jurisdictions and the foreign RWHT suffered by the Appellant amounted to €6,677,815.

18. The Appellant, in calculating its adjusted taxable trading income for the relevant period, treated the foreign RWHT it suffered as a deductible expense. As stated, the Respondent objected to this treatment. On 4 March 2024, the Respondent issued a Determination in respect of the relevant period refusing the Appellant's claim for a deduction under section 81 TCA 1997. On 28 March 2024, the Appellant duly appealed to the Commission by submitting a Notice of Appeal.

Legislation and Guidelines

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

20. 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;

21. Section 76 TCA 1997, Computation of income: application of income tax principles, *inter alia* provides that:-

(1) Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment.

22. Section 76A TCA 1997, Computation of profits or gains of a company – accounting standards, *inter alia* provides that:-

(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.

23. Section 77 TCA 1997, Miscellaneous Special rules for the computation of income, *inter alia* provides that:-

(6B) (*a) In this subsection—*

"amount of the income referable to the relevant royalties" shall be construed in accordance with paragraph 9DB(1)(b)(ii) of Schedule 24;

"relevant foreign tax" and "relevant royalties" have the same meanings, respectively, as in paragraph 9DB(1)(a) of Schedule 24.

(b) Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties, the amount of the income referable to the relevant royalties shall be treated as reduced (where such a deduction cannot be made under, and is not forbidden by, any provision of the Income Tax Acts applied by the Corporation Tax Acts) by so much of the relevant foreign tax in relation to the relevant royalties as does not exceed that amount of the income referable to the relevant royalties.

24. Section 826 TCA 1997, Agreements for relief from double taxation, *inter alia* provides that:-

(1) Where –

(a) the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to –

(i) affording relief from double taxation in respect of –

(I) income tax,

(II) corporation tax in respect of income and chargeable gains (or, in the case of arrangements made before the enactment of the Corporation Tax Act 1976, corporation profits tax),

(III) capital gains tax,

(IV) any taxes of a similar character,

imposed by the laws of the State or by the laws of that territory, and

……..

then, subject to this section and to the extent provided for in this section, the arrangements shall, notwithstanding any enactment, have the force of law as if each such order were an Act of the Oireachtas on and from the date of

(A) the insertion of Schedule 24A into this Act, or

(B) the insertion of a reference to the order into Part 1 of Schedule 24A,

whichever is the later

……

(2) Schedule 24 shall apply where arrangements which have the force of law by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the State.

……

25. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 2, General, *inter alia* provides that:-

(1) Subject to this schedule, where under the arrangements credit is to be allowed against any of the Irish taxes chargeable in respect of any income, the amount of the Irish taxes so chargeable shall be reduced by the amount of the credit.

(2) In the case of any income within the charge to corporation tax, the credit shall be applied in reducing the corporation tax chargeable in respect of that income.

26. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 4, Limit on total credit— Corporation Tax, *inter alia* provides that:-

(1) The amount of the credit to be allowed against corporation tax for foreign tax in respect of any income shall not exceed the corporation tax attributable to that income.

(2) For the purposes of this paragraph, the corporation tax attributable to any income or gain (in this subparagraph referred to as "that income" or "that gain", as the case may be) of a company shall, subject to subparagraphs (4) and (5), be the corporation tax attributable to so much (in this paragraph referred to as "the relevant income" or "the relevant gain", as the case may be) of the income or chargeable gains of the company *computed in accordance with the Tax Acts and the Capital Gains Tax Acts, as is attributable to that income or that gain, as the case may be.*

(2A)For the purposes of subparagraph (2), where credit is to be allowed against corporation tax for foreign tax in respect of any income of a company (in this subparagraph referred to as 'that income"), being income (other than income from a trade carried on by the company through a branch or agency in a territory other than the State) which is taken into account in computing the profits or gains of a trade carried on by the company in an accounting period, the relevant income shall be so much of the profits or gains of the trade for that accounting period as is determined by the formula—

$$P \times I/R$$

where—

P is the amount of the profits or gains of the trade for the accounting period before deducting any amount under paragraph 7(3)(c),

I is the amount of that income for the accounting period before deducting any disbursements or expenses of the trade, and

R is the total amount receivable by the company in the carrying on of the trade in the accounting period.

27. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 7, Effect on computation of income of allowance of credit, provides that:-

(1) Where credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income, this paragraph shall apply in relation to the computation for the purposes of income tax or corporation tax of the amount of that income.

(2) Where the income tax or corporation tax payable depends on the amount received in the State, that amount shall be treated as increased by the amount of the credit allowable against income tax or corporation tax, as the case may be.

(3) Where subparagraph (2) does not apply –

(a) no deduction shall be made for foreign tax (whether in respect of the same or any other income), and

(b) where the income includes a dividend and under the arrangements foreign tax not chargeable directly or by deduction in respect of the dividend is to be taken into account in considering whether any, and if so what, credit is to be allowed against the Irish taxes in respect of the dividend, the amount of the income shall be treated as increased by the amount of the foreign tax not so chargeable which is to be taken into account in computing the amount of the credit, but

(c) notwithstanding anything in clauses (a) and (b), where any part of the foreign tax in respect of the income (including any foreign tax which under clause (b) is to be treated as increasing the amount of the income) cannot be allowed as a credit against either income tax or corporation tax, the amount of the income shall be treated as reduced by that part of that foreign tax, but, for the purposes of corporation tax, the amount by which the income is treated as reduced by that part of the foreign tax shall not exceed the amount of income which would be the amount referred to in paragraph 4 as "the relevant income", taking account of the provisions of subparagraphs (2) and (2A) of that paragraph.

28. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 9DB, Unilateral Relief (royalty income), *inter alia* provides that:-

(1) (a) In this paragraph-

"relevant foreign tax", in relation to royalties receivable by a company, means tax—

(i) which under the laws of any foreign territory has been deducted from the amount of the royalty,

(ii) which corresponds to income tax or corporation tax,

(iii) which has not been repaid to the company,

(iv) for which credit is not allowable under arrangements, and

(v) which, apart from this paragraph, is not treated under this Schedule as reducing the amount of income.

"relevant royalties" means royalties receivable by a company-

(i) which fall to be taken into account in computing the trading income of a trade carried on by the company, and

(ii) from which relevant foreign tax is deducted.

"royalties" means payments of any kind as consideration for-

(i) the use of, or the right to use-

(I) any copyright of literary, artistic, or scientific work, including cinematograph films and software,

(II) any patent, trade mark, design or model, plan, secret formula or process,

or

(ii) information concerning industrial, commercial or scientific experience.

(b) For the purposes of this paragraph—

(i) the amount of corporation tax which apart from this paragraph would be payable by a company for an accounting period and which is attributable to an amount of relevant royalties shall be an amount equal to 12.5 per cent of the amount by which the amount of the income of the company referable to the amount of the relevant royalties exceeds the relevant foreign tax, and

(ii) the amount of any income of a company referable to an amount of relevant royalties in an accounting period shall, subject to paragraph

4(5), be taken to be such sum as bears to the total amount of the trading income of the company for the accounting period before deducting any relevant foreign tax the same proportion as the amount of relevant royalties in the accounting period bears to the total amount receivable by the company in the course of the trade in the accounting period.

(2) Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties, the amount of corporation tax which, apart from this paragraph, would be payable by the company for the accounting period shall be reduced by so much of 87.5 per cent of any relevant foreign tax borne by the company in respect of relevant royalties in that period as does not exceed the corporation tax which would be so payable and which is attributable to the amount of the relevant royalties.

……..

(4) Where, as respects any relevant royalties received in an accounting period by a company, any part of the foreign tax cannot, due to an insufficiency of income, be treated as reducing income under paragraph 7(3)(c) or under section 77(6B), then the amount which cannot be so treated shall, for the purposes of this paragraph, be unrelieved foreign tax.

(5) Where, as respects an accounting period, a company is in receipt of royalties from persons not resident in the State and such royalties are taken into account in computing the trading income of a trade carried on by the company, the company may—

(a) reduce the income (in this subparagraph referred to as "royalty income") referable to any unrelieved foreign tax and

(b) allocate such reductions in such amounts and to such of its royalty income for that accounting period as it sees fit.

(6) The aggregate amount of reductions under subparagraph (5) in an accounting period cannot exceed the aggregate of the unrelieved foreign tax in respect of all relevant royalties for that accounting period.

29. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 10, Miscellaneous, provides that:-

Credit shall not be allowed under the arrangements against the Irish taxes chargeable in respect of any income of any person if the person in question elects that credit shall not be allowed in respect of that income.

30. Section 949AN TCA 1997, Appeals raising common or related issues, provides that:

(1) Subject to subsection (2), in adjudicating on and determining an appeal (in this section referred to as a "new appeal"), the Appeal Commissioners may—

(a) have regard to a previous determination made by them in respect of an appeal that raised common or related issues, and

(b) if they consider it appropriate, in the light of such a determination, determine the new appeal without holding a hearing.

(2) Where the Appeal Commissioners wish to act in accordance with subsection (1), they shall—

(a) send a copy of the previous determination referred to in that subsection to the parties in a way that, in so far as it is possible, does not reveal the identity of any person whose affairs were dealt with on a confidential basis during the proceedings concerned (being proceedings that were not held in public),

(b) request that each of the parties submit arguments to them within 21 days after the date of the request in relation to why it would not be appropriate to have regard to the previous determination in determining the new appeal, and

(c) request that each of the parties state whether the party wishes the Appeal Commissioners to hold a hearing and, where a party so wishes, to require that the party explain why such a hearing is considered to be necessary or desirable.

(3) Notwithstanding section 949U, the Appeal Commissioners may determine the appeal without holding a hearing where -

(a) no response is received from a party within the period referred to in subsection (2)(b), or

(b) a response is received but the Appeal Commissioners are not persuaded that it would be appropriate to disregard the previous

determination referred to in subsection (1) that it is necessary to hold a hearing to determine the new appeal.

Submissions

Appellant's submissions

31. The Commissioner sets out hereunder a summary of the legal submissions filed by the Appellant in support of its appeal:

31.1. The foreign RWHT suffered by the Appellant on royalty receipts earned in other jurisdictions should be considered part of the cost of selling its products/services into such jurisdictions. The foreign RWHT is applicable to gross receipts. Therefore, it cannot be a tax on profits and as such, the foreign RWHT suffered by the Appellant was not a tax on the profits of the trade, but rather an unavoidable cost incurred wholly and exclusively in carrying out its trade in such jurisdictions. Economically, this is similar to a payment processing fee incurred by a shopkeeper when a customer makes a payment using a credit card.

31.2. It is an established principle that a tax on the profits of a trade is not an expense of that trade, but that a tax incurred in carrying out a trade would usually be deductible. In this regard, reference was made to the decision in *Harrods (Buenos Aires) v Taylor-Gooby* 41 TC 450 ("*Harrods*"), wherein the Court held that *"it was an expense necessarily incurred by it in order to carry on its trade and was wholly and exclusively laid out for the purpose of the trade of the company*". Reference was made to the decision of *Strong & Co of Romsey Limited v Woodifield (Surveyor of Taxes)* 5 TC 215 "(*Strong & Co.")*. In *Harrods*, Diplock L.J. referred to the judgment of Lord Davey in *Strong & Co.* when he stated that " '*for the purposes of the trade' … means for the purpose of enabling a person to carry on and earn profits in the trade… it is not enough that the disbursement is made out of profits of the trade*".

31.3. Section 81(2)(a) TCA 1997 provides that a disbursement or expense will not be deductible where it is not "*wholly and exclusively laid out or expended for the purposes of the trade*". The seminal case is *Strong & Co* where it was determined that the phrase "*wholly and exclusively for the purposes of the trade*" should be read as meaning "for the purposes of earning the profits" of the trade.

31.4. The decision in *Strong & Co.* is cited and endorsed by the Judgment of Budd J. in *MacAonghusa v Ringmahon* [2001] 2 IR 507 ("*MacAonghusa*"). Reference was made to the decision of *Smith v Lion Brewery Co. Ltd* [1911] AC 150 ("*Smith v*

Lion"). Reference was made to the decision in *Smith's Potato Estates v Bolland* 30 TC 267 ("*Smith's Potato Estates Limited")*.

31.5. Reference was made to the decision of the *Hong Kong Inland Board of Review* D43/91 [1991] 1 HKRC 80-154 ("the *Hong Kong decision*") and to determination *08TACD2019*. It was submitted that the Appeal Commissioner accepted that "*it would be contrary to commercial and indeed tax provisions to artificially remove the element of that cost on the basis that part of that cost represented income tax*". In the *Hong Kong decision,* the Board ultimately found that each of the foreign taxes was deductible on the basis that the taxes were applied to the taxpayer's gross receipts, rather than on net income, and the taxpayer could not have gone on earning income without payment of the applicable taxes. The Board dealt with the irrelevance of the decision in *Yates (Inspector of Taxes) v G C A International Limited* [1991] STC 157 which considered the question of deductibility of foreign taxes.

31.6. Reference was made to determination *02TACD2018*, which considered the question of whether foreign withholding taxes on royalty income in a source state bears the nature of a tax on income. The appellant had argued that the withholding tax was not a tax on income, as it was levied on gross income, rather than on profit. However, the Appeal Commissioner concluded that foreign RWHT was in the nature of tax on income, as this was the basis upon which double tax relief was available under Ireland's DTAs and therefore, was not deductible under section 81 TCA 1997. The Appeal Commissioner in *02TACD2018* agreed with the Respondent that "*it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts"*.

31.7. The determination *08TACD2019* follows the Hong Kong decision. In *08TACD2019*, it was accepted that "*it would be contrary to commercial and indeed tax provisions to artificially remove the element of that cost on the basis that part of that cost represented income tax*". The Appeal Commissioner concluded that while the parties agreed that dividend withholding tax was a tax on income, it was possible for a deduction to be permitted under section 81 TCA 1997, so long as the taxes were calculated prior to the ascertainment of profit.

31.8. In light of the jurisprudence, it must follow that the foreign RWHT suffered by the Appellant on gross royalty receipts from foreign jurisdictions, should be a deductible expense. The *Hong Kong* decision was not opened in *02TACD2018*.

31.9. The effect of section 77(6B) TCA 1997 and paragraph 7(3)(c) of Schedule 24 TCA 1997 is that where a relief or credit is not otherwise available for foreign RWHT suffered on that income, a deduction is available from that income for foreign RWHT suffered.

31.10. The combined effect of section 77(6B) TCA 1997, paragraph 7(3)(c) of Schedule 24 TCA 1997 and paragraph 9DB(5) TCA 1997 is that the full amount of foreign RWHT is available for relief by deduction. Once these deductions have been made, along with all other relevant trading deductions, one can arrive at "trading income" by reference to which capital allowances are calculated for the purposes of section 291A(6) TCA 1997.

31.11. The purpose of Schedule 24 TCA 1997 and the system of deductions for foreign tax suffered is that if a company is profitable and has suffered foreign tax, it should obtain a credit for such tax. If such a tax is not a tax on profits, but a tax on gross income, section 81 TCA 1997 should provide a deduction. Reference was made to the well-established principle that a company should not be taxed on money it never received.

31.12. The foreign RWHT suffered by the Appellant was not a tax on profits. Rather, it represents a cost of doing business in the foreign jurisdictions in which the operating entities provide services. The foreign RWHT was an expense that is revenue in nature and incurred "wholly and exclusively for the purposes of the trade" carried on by the Appellant.

31.13. Reference was made to *47TACD2024* which supports the Appellant's position. The decision clearly indicates that a tax on capital is a deductible expense and that a tax on profit is not deductible, as it is an application of a company's profits. The foreign RWHT suffered by the Appellant falls within neither of these categories, as it is levied whether the Appellant is making a profit or not. As such, foreign RWHT was an unavoidable expense incurred wholly and exclusively for the purposes of the Appellant's trade and should be a deductible expense in principle.

31.14. The Commissioner should determine that all amounts withheld should be refunded to the Appellant in order to vindicate its EU law freedoms, or in the alternative, calculated as being from a single source.

31.15. The foreign RWHT incurred by the Appellant was the same as any other costs or expense incurred by the Appellant in carrying out its trade. Therefore, the

Appellant was entitled to treat the foreign RWHT as a deductible expense. This appeal should be allowed and determined in accordance with *128TACD2023*.

Respondent's submissions

32. The Commissioner sets out a summary hereunder of the legal submissions filed in support of this appeal:

32.1. Reference was made to the principles of statutory interpretation and relevant jurisprudence of the Superior Courts, namely: *Bookfinders v The Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"), *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 ("*Dunnes Stores*"), *Heather Hill Management Company CLG and Gabriel McCormack v An Bord Pleanala, Burkeway Homes Limited and The Attorney General* [2022] IESC 43 ("*Heather Hill"*).

32.2. When section 81(2)(a) TCA 1997 is considered in the context of sections 76, 76A, 77, 826 and 826A TCA 1997, in addition to the provisions of Schedule 24 TCA 1997, it is clear that relief in respect of foreign RWHT is only available by way of relief from double taxation under section 77(6B) and/or Schedule 24 TCA 1997.

32.3. The approach adopted by the Commissioner in *128TACD2023* and other recent determinations on the same issue are incorrect and should not be followed.

32.4. Section 76(1) TCA 1997 sets out the general framework within which corporation tax liability is computed and section 76A(1) TCA 1997 establishes the basis for computation. Section 81 TCA 1997 is the general provision of the TCA in connection with deductions from income for tax purposes. Section 81(2) TCA 1997, is *"[s]ubject to the Tax Acts*", such that if another more specific provision of the Tax Acts applies, the general provision in section 81 TCA 1997 is of no application.

32.5. The foreign RWHT income is specifically dealt with in extensive and carefully calibrated provisions. Therefore, relief for foreign RWHT may be by way of credit relief (i.e. foreign tax may be offset against Irish corporation tax payable); relief by reduction (i.e. income for Irish corporation tax purposes may be reduced by the foreign tax it suffered); or a combination of both and depending on whether it is a DTA state.

32.6. Where foreign RWHT has been applied in a DTA state and the relevant treaty provides for a credit, relief by way of credit will be available in accordance with section 826 TCA 1997 and Schedule 24 TCA 1997.

32.7. In accordance with paragraph 4(1) of Schedule 24 TCA 1997, the amount of allowable credit shall not exceed "*the corporation tax attributable to that income*". This means that the credit cannot exceed the Irish corporation tax payable on may be available if the provisions for unilateral credit relief in paragraph 9DB of Schedule 24 TCA 1997 apply. The reduction provided under section 77(6B) TCA 1997 cannot reduce the Irish measure of that income below zero, i.e. a loss cannot be created.

32.8. As a matter of statutory interpretation, it is wrong in principle to adopt an approach which disregards a specific legislative regime for the provision of relief from foreign tax suffered, in favour of seeking to apply the general provision in relation to deductibility of trading expenses. This is contrary to the maxim *generalia specialibus non derogant* and the wording of section 81(2) TCA 1997 which expressly states *"[s]ubject to the Tax Acts*".

32.9. That the Appellant was in a loss-making position and therefore not in a position to avail of double taxation relief, does not alter the position. In *128TACD2023* and *47TACD2024*, the Appeal Commissioners proceeded on the basis that the taxpayers could not benefit from relief under Schedule 24 TCA 1997 (as each taxpayer was loss-making) and thus, moved to consider the availability of a deduction under section 81 TCA 1997. By adopting this approach, the Appeal Commissioners fell into error and disregarded the special provisions. The Appeal Commissioners wrongly permitted deductions pursuant to section 81 TCA 1997.

32.10. The provisions of Schedule 24 and section 77(6B) TCA 1997 suggest a clear intention on the part of the Oireachtas to limit relief for foreign taxes, such that a taxpayer cannot claim relief where it has no taxable income in Ireland.

32.11. The object of double taxation relief is to prevent the same income being taxed in two different states. It is not intended to compensate a taxpayer, at the expense of the Irish state, for the fact that the taxpayer has suffered tax in another jurisdiction. An interpretation of section 81(2)(a) TCA 1997 which permits a taxpayer to utilise unrelieved foreign tax as a trading expense and to reduce its trading income below zero, thereby creating a trading loss, would go much further than relieving double taxation.

32.12. Schedule 24 TCA 1997 cannot be treated as an optional regime and section 81(2)(a) TCA 1997 cannot be treated as a supplementary regime. In *118TACD2024*, the Commissioner wrongly placed reliance on paragraph 10 of Schedule 24 TCA 1997 by finding that paragraph 10 of Schedule 24 TCA 1997

"*provides a right of choice, whether to take the credit*", such that the Commissioner appeared to consider that where a taxpayer opts not to take a credit, a taxpayer would fall out of Schedule 24 TCA 1997 and a deduction could be available under section 81(2)(a) TCA 1997. However, paragraph 10 of Schedule 24 is limited on its own terms to credit relief "under the arrangements".

32.13. Reference was made to the decision in *IRC v Dowdall O'Mahoney & Co. Limited* [1952] 33 TC 259 ("*Dowdall O'Mahoney*"). It was not a disbursement made for the purposes of earning the profits, per the dicta of Lord Davey in *Strong & Co*. In *02TACD2018*, the Appeal Commissioner found that as foreign RWHT was in the nature of a tax on income, *Dowdall O'Mahoney* was an authority which supported the Respondent's appeal therein.

32.14. Undue reliance has been placed on the *Harrods* decision. In *02TACD2018*, the Appeal Commissioner found that foreign RWHT was not comparable to the tax at issue in *Harrods*. The *Hong Kong* decision is of no assistance to the Appellant and carries little weight in terms of it being an administrative decision from a board in Hong Kong.

32.15. The Appeal Commissioner in *02TACD2018,* determined that the element of volition discussed in *Allen (HM Inspector of Taxes) v Farquharson Brothers & Company* 17 TC 59 ("*Allen v Farquharson*") was absent in the case of the payment of foreign RWHT and that the unavoidable nature of the foreign RWHT rendered it less likely to comprise a deductible expense.

32.16. Section 81(2) TCA 1997 was amended by Finance Act 2019 by the insertion of a specific category of disallowed deduction at section 81(2)(p), being "*any taxes on income*". The amendment postdates the relevant period herein and is not relevant to the issues in this appeal. Reference was made to the decision in *Cronin (Inspector of Taxes) v Cork and County Property Co. Ltd.* [1986] IR 559 ("*Cronin*") wherein the Supreme Court held that a court cannot construe a statute in light of amendments subsequently made to it.

Material Facts

33. The facts of this appeal are identical to the facts in the similar appeal *128TACD2023*. It therefore follows that the findings of material fact made by the Commissioner in the similar appeal *128TACD2023* apply to this appeal.

34. Having regard to those material findings of fact, as well as to the circumstances of this appeal, the Commissioner makes the following findings of material fact:

34.1. In addition to the findings of material fact set out herein, the Commissioner finds that the facts, as set out in the document entitled "Agreed Statement of Facts", at paragraphs 1 to 15 inclusive of that document, and which was attached at **Appendix 1** in the similar appeal *128TACD2023,* are also material facts found herein.

34.2. The Appellant's principal activities are [redacted].

34.3. In carrying out its trade, the Appellant licenses the use of its database of [redacted] to its customers, which include both affiliated entities and third party customers in foreign jurisdictions. This arrangement is governed by way of licence, sub-licence and distribution agreements for the specific jurisdictions concerned.

34.4. The foreign jurisdictions imposing RWHT to which the Appellant licenses its imagery include (but are not limited to) [redacted].

34.5. The Appellant does not have a branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions in which it licenses its [redacted] to customers located there.

34.6. When a royalty payment is made, RWHT is applied on the gross royalties payable, regardless of whether a profit or loss is generated on that transaction.

34.7. Foreign RWHT is in the nature of a tax on income.

34.8. During the relevant period, and in light of its financial circumstances at that time, the Appellant was not in a position to avail of a credit pursuant to Schedule 24 TCA 1997, for foreign RWHT withheld on its royalty income.

34.9. Foreign RWHT was a cost for the Appellant of doing business in the foreign jurisdictions and this was confirmed by the Respondent's expert witness 1 in *128TACD2023*.

34.10. Many compulsory deductions imposed are permissible as a deductible expense pursuant to section 81 TCA 1997, such as Irish and foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges, employer's PRSI and the DST.

Analysis

The Burden of proof

35. As was confirmed by the Commissioner in *128TACD2023,* the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, at paragraph 22, Charleton J. stated that:

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".*

36. Of note however, is the recent judgment in *Hanrahan v The Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*") where the Court of Appeal considered the burden of proof when the issue is not one of ascertaining the facts, but rather the issue is one of law only. At paragraph 97 and 98 the Court held that:

> "*97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..*
>
> *98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law; Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation… "*

Statutory Interpretation

37. As was also confirmed by the Commissioner in *128TACD2023,* 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* and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders*, 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.""*

38. Furthermore, the Commissioner is mindful of the decision in *Heather Hill* and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he stated that:

> *"It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

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

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

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

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

41. Of note, the Court of Appeal in *Hanrahan* at paragraphs 79 and 80, when referring to the *dictum* of Murray J. in *Heather Hill,* in relation to the analysis of context and purpose, stated that:

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

42. 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*".

43. 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.

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

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

45. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

The Issues

46. As stated, the Appellant agreed to this appeal being determined pursuant to section 949AN TCA 1997. No submissions were received from the Appellant seeking to differentiate this appeal from *128TACD2023*, nor arguing that this appeal should not be determined pursuant to section 949AN TCA 1997. Whilst the Respondent objected to the appeal being dealt with pursuant to section 949AN TCA 1997, it was for reasons other than the facts of this appeal being in some way different to *128TACD2023.* Consequently, the Commissioner considers it appropriate to apply the findings made by the Commissioner in *128TACD2023*.

47. In this appeal, the Appellant, by seeking a deduction pursuant to the provisions of section 81 TCA 1997 was not taking a credit in accordance with Schedule 24 TCA 1997, in respect of the foreign RWHT. The Appellant was in a non-profit making or loss making scenario for the relevant period. In circumstances where the Appellant had no profits in Ireland, the result was that for the relevant period, it paid no Irish corporation tax in this jurisdiction. The Appellant submitted that in those particular circumstances, there was no credit relief available to the Appellant pursuant to Schedule 24 TCA 1997.

48. Schedule 24 TCA 1997 provides that for an accounting period, the trading income of a trade carried on by a company, including royalties, the amount of the income relating to that royalty income chargeable to tax may be reduced by the relevant foreign tax attaching to that income. However, the reduction is limited to the amount of the income for corporation tax purposes relating to the relevant royalties i.e. the Irish measure of the income.

49. In *128TACD2023,* the Commissioner stated that she intended to proceed on the basis that the Appellant was not in a position to avail of relief for foreign RWHT either under Schedule 24 or section 77(68) TCA 1997. That is also the position herein. In *128TACD2023,* the Appellant submitted that*"that's our point, if we get it under Section 81 we don't seek to get it under Schedule 24, whether by way of credit or by way of deduction.* So *we* say *it's a final cost to us. The Revenue are disallowing it under Schedule 24.* So *for the purpose of Section 81 we* say, *okay, we accept thaf'*

50. In *128TACD2023,* the Commissioner considered in what sequence she should approach her consideration of the issues and she noted the Appellant's submission that section 81 TCA 1997 must be looked at logically, in prior sequence "as *that is the way that profits are ascertained ....if we are successful in that, I* say *we don't need to go any further" .* The Commissioner decided in *128TACD2023,* that it was appropriate to consider initially the provisions of section 81 TCA 1997, in the context of the Appellant's argument that foreign RWHT was a final cost of the Appellant and no credits for foreign RWHT were available to the Appellant. As the Appellant was successful in that appeal in terms of its arguments in relation to section 81 TCA 1997, the Commissioner did not consider the application of Schedule 24 TCA 1997 to the facts of that appeal. The Commissioner considers it appropriate to proceed on a similar basis in this appeal.

51. Akin to *128TACD2023,* the Appellant claims that foreign RWHT was a cost incurred in [redacted] the jurisdictions of its customers and as such, foreign RWHT suffered on gross receipts from foreign countries, should be a deductible expense in accordance with section 81 TCA 1997. The Appellant's witness in *128TACD2023* (as opposed to its expert witness) testified that foreign RWHT was suffered on gross receipts. The Appellant submitted that foreign RWHT was applied on gross royalties payable, regardless of whether a profit or loss was generated on that transaction. Therefore , foreign RWHT was one of the costs of doing business in those jurisdictions. Consequently, foreign RWHT was suffered in many markets in which the Appellant trades. The situation in this appeal is no different.

52. It is importantto note that since the Commissioner's determination in *128TACD2023,* three further determinations have issued in respect of the imposition of foreign RWHT and the availability of a deduction pursuant to section 81(2) TCA 1997, namely *47TACD2024 , 118TACD2024* and *119TACD2024.* Each of those determinations made findings consistent with *128TACD2023,* such that the Commissioners found that there was no bar to a tax on income being treated as a deduction in accordance with the provisions of section 81 TCA 1997, if the test for deductibility was met, namely it was *" incurred wholly*

and exclusively for the purposes of the trade". The findings in those determinations were made in circumstances where Schedule 24 TCA 1997 was unavailable or the appellant did not elect to take a credit in accordance with Schedule 24 TCA 1997, not dissimilar to the circumstances in this appeal.

53. In this appeal, the Respondent again refutes that foreign RWHT suffered by the Appellant was a deductible expense in accordance with section 81(2) TCA 1997. The Respondent does not accept that foreign RWHT was an expense "wholly and exclusively incurred for the purposes of the trade" and therefore, cannot be deductible as an expense pursuant to section 81 TCA 1997. The Respondent made the point that the Appellant paid foreign RWHT in the jurisdictions in which it traded, for the reason that the Appellant was non-resident and had no permanent establishment in those jurisdictions. The general provisions in section 81 TCA 1997 were therefore not available to relieve the imposition of the foreign RWHT incurred by the Appellant, where there existed special provisions in the TCA 1997, which specifically catered for foreign RWHT incurred.

54. The Respondent argued that having regard to the principles of statutory interpretation, when section 81(2)(a) TCA 1997 TCA 1997 "*is read in the context of the other relevant provisions of the TCA 1997, namely, sections 76, 76A, 77, 826 and 826A TCA 1997, in addition to the provisions of Schedule 24 TCA 1997, it is clear that relief in respect of foreign RWHT on income was only available by way of relief from double taxation pursuant to section 77(6B) and/or Schedule 24 TCA 1997*".

Is foreign RWHT a tax on income

55. In *128TACD2023,* the Commissioner initially considered what the nature of the income was and found that foreign RWHT was a tax on income. The Commissioner noted the Respondent's argument that foreign RWHT on income was by its nature clearly a tax on income. It was not an expense for the purpose of earning the profits, and so was not deductible in accordance with section 81 TCA 1997. On the other hand, the Appellant's position was that income tax or corporation tax is ascertained on the net income of a company, such that it was the profits earned by a company, taking its gross revenue, and then deducting from it, operating expenses, to arrive at its net income. The Commissioner accepts this as being uncontroversial. The Appellant argued that as foreign RWHT was applicable to gross receipts, it cannot be a tax on profits. As such, foreign RWHT suffered by the Appellant was not a tax on the profits of the trade, but rather an unavoidable cost. The Appellant posited that "*the distinguishing feature herein, is not whether the disputed item is in itself a tax or not. The distinguishing feature is whether it is a liability or a cost that is suffered, as part and parcel of the business, before profits are ascertained".*

56. In *08TACD2019*, the Appeal Commissioner found that "*there is no general principle of law that specifically denies a deduction for taxes in accordance with the prescribed rules as set out under TCA, Section 81, where those taxes are not calculated after the ascertainment of profit*." In *128TACD2023,* the Commissioner considered *08TACD2019* and stated that whilst not bound by the decision therein, the Commissioner was satisfied that those observations were particularly relevant to the appeal in *128TACD2023* and to be a correct analysis of the law.

57. The Commissioner notes that there are many compulsory deductions imposed that are permissible as a deduction pursuant to section 81 TCA 1997, such as Irish and foreign stamp duty, Irish and foreign irrecoverable VAT, rates levied on commercial property, local authority charges, and employer's PRSI. In addition, in *128TACD2023,* the Commissioner noted that the Respondent accepted that on a case by case basis Digital Services Tax ("DST") was a deductible expense, if it was incurred wholly and exclusively for the purposes of the trade. Of importance, the Commissioner observed that DST is a tax on income which is deductible in accordance with the provisions of section 81 TCA 1997. Thus, and in line with her finding in *128TACD2023*, the Commissioner is satisfied that there is no bar to a tax on income being treated as a deduction for the purposes of section 81 TCA 1997, but that it must meet the test for deductibility, such that it was incurred wholly and exclusively for the purposes of the trade.

58. The Commissioner is satisfied that foreign RWHT is a tax on income, but that finding is not fatal to the Appellant's appeal. This finding is akin to the Commissioner's finding in *128TACD2023* and the Commissioner sees no reason to depart from her finding therein, where the facts for consideration in this appeal do not differ from the facts considered by the Commissioner in *128TACD2023*.

Section 81 TCA 1997

59. The Commissioner will initially consider the applicability of section 81 TCA 1997 to the facts of this appeal as she did in *128TACD2023*. In *128TACD2023*, the Appellant argued that foreign RWHT was a cost incurred in carrying out its business in the respective jurisdictions in which it operated and as such, foreign RWHT suffered on gross receipts from foreign countries, should be a deductible expense under section 81(2) TCA 1997. The testimony of the Appellant's witness in *128TACD2023* was that foreign RWHT was suffered on gross income. The Appellant submitted that foreign RWHT was payable regardless of whether a profit or loss was generated on that transaction thus, foreign RWHT was one of the costs of doing business.

60. The Respondent disagreed that foreign RWHT suffered by the Appellant was a deductible expense in accordance with section 81(2) TCA 1997 and argued that there was no possibility of the Appellant reclassifying foreign RWHT as a deductible expense. The Respondent does not accept that foreign RWHT is an expense "*wholly and exclusively incurred for the purpose of the trade*" and therefore, cannot be deductible in accordance with section 81(2) TCA 1997. The Respondent argued that the Appellant paid foreign RWHT in the jurisdictions in which it carried out its business, for the reason that the Appellant was a non-resident and had no permanent establishment in those jurisdictions.

61. In its submissions in this appeal, the Respondent referred the Commissioner to section 76(1) TCA 1997, which provides that:

> *"[e]xcept where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment*"

62. Moreover, the Respondent submitted that 76A(1) TCA 1997 establishes the basis for computation and provides that for the purposes of Case I or Case II of Schedule D, the profits or gains of a trade or profession of a company "*shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for these purposes".*

63. Section 81(2)(a) TCA 1997 provides that in computing the profits or gains to be charged to tax, no deduction is allowed for any expense, not being money "*wholly and exclusively laid out or expended for the purposes of the trade or profession*". The Commissioner is satisfied that it is the case that when arriving at business profits assessable to tax, a taxpayer must first look to section 81 TCA 1997 to determine what expenses are deductible. The section is drafted to restrict deductibility, but in accordance with subsection (2)(a), permits a deduction for an expense where it was "…..*money wholly and exclusively laid out or expended for the purposes of the trade or profession.*"

64. The Appellant contended that if a cost is ascertained on the gross revenue of a business and is paid prior to the calculation of its profits, then it is a deductible expense. The Commissioner notes the evidence of the Appellant's witnesses, such that foreign RWHT was ascertained on gross revenue. The Appellant argued that foreign RWHT was similar to any other costs or expenses incurred by the Appellant. The Commissioner is satisfied

that the test of deductibility is that it must be made for the purposes of earning the profits of the trade, such that if a cost was incurred on the journey to profit it is capable of being a deductible expense.

65. In *128TACD2023,* the Commissioner was directed by the parties' representatives to numerous decisions of the Superior Courts, both within this jurisdiction and elsewhere, in addition to decisions of various tribunals and decision making bodies, including the Commission, in support of the opposing positions of the parties. Similar decisions were relied upon by both parties in their respective submissions in this appeal in relation to the test for deductibility and its application to the facts of this appeal.

66. The Commissioner considers it appropriate to restate the Commissioner's findings in *128TACD2023*, as to the relevance and applicability of the case law. Therefore the Commissioner will set out hereunder, a summary of the case law relied upon by the parties and her findings thereof which have application in this appeal.

Case law

67. The Commissioner is satisfied that the **core test for deductibility** is set out in the decision in *Strong & Co*. In *Strong & Co.* the taxpayer, a brewing company which also carried on a trade as an innkeeper, sought to take a deduction for compensation paid to a customer injured by falling masonry at one of its premises. The claim was refused by the Commissioners of Inland Revenue and the company appealed. The Court of Appeal and the House of Lords upheld the Commissioner's refusal to grant a deduction. Whilst the appeal was decided against the taxpayer, the expense was found to be incurred by the taxpayer in their role as the building owner, rather than as part of the trade of innkeeping. The test articulated by Lord Davey in the House of Lords, as set out above, has established the principle that there must be a nexus between the expense and the earning of profits for deductibility. He opined that the words appear to mean "*for the purpose of enabling a person to carry on and earn profits in the trade*".

68. Furthermore, Lord Davey at page 453 of the decision states that:

> *"It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits"*.

69. This principle was upheld in the decisions in *MacAonghusa* and *Smith v Lion*. In the Irish decision of *MacAonghusa,* the Court was asked to consider whether the interest on a term loan taken out to redeem preference share capital was an expense of the company's trade. While this was not in connection with deductibility of taxes, the Supreme Court endorsed

the test in *Strong & Co.* and the case was decided in favour of the taxpayer. The Court upheld that the interest payments were integral to the trading of the company and as such deductible. The purpose of the payment was key to the decision in that it was found to be for the purpose of earning profits, rather than the financing of the trade. If it had been for the latter purpose, Geoghegan J. stated the payments could not have been deductible. Furthermore, he stated that the matter had to be approached by making a finding of fact as to the purpose of the payment and in light of that it would become "*reasonably clear whether as a matter of law the payment [is] deductible or not".*

70. The Supreme Court held, in dismissing the appeal, that the interest was a deductible expense, because it was laid out to retain the benefits of the borrowed money which enabled the respondent in that appeal to carry on its trade, thus was expenditure incurred "wholly and exclusively for the purposes of the trade". Geoghegan J. held at page 516 that:

> *"I have no doubt that, in this case, the learned Circuit Court Judge took the view that the ongoing interest payments were necessarily part and parcel of the trading of the company and were clearly deductible. In my opinion the Learned High Court Judge was correct in upholding that view"*.

71. In addition to *Strong & Co.*, the House of Lords also considered the decisions in *Dowdall O'Mahoney*, *Smith v Lion* and the decision of Lord Oaksey in *Smith's Potato Estates Limited.*

72. In *Smith v Lion,* a brewery company, as an essential part of their business, acquired and held licensed houses which were "tied" to the brewery. Under the licensing legislation in force at that time, the Licensing Act 1904, compensation fund charges were levied on licences which could be recouped from rents paid by the licensee. The levy was thus a form of withholding tax on the rents paid to the brewery. In calculating the yearly profits of the business, the brewery company claimed a deduction for the levy imposed and which they were obliged to bear. It was contended that the sum was wholly and exclusively laid out for the purpose of their business activity as the system of "tied" houses was essential to their trade. While the decision was not unanimous it was decided in the brewery company's favour. Lord Atkinson with whom Earl Halsbury agreed held at page 159 of the decision that:

> *"In the present case the Respondents cannot set up the system of trading through tied houses, unless they first acquire these premises as owners in fee or lessees, and secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation levy attaches. The impost must, therefore, necessarily be paid in order to set up the system which it is found to be vital to their*

trade prospects to set up. And if the substance of the transaction be looked at this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a particular trade or business such as that of an auctioneer, or a pawnbroker, or a publican.

It is an expenditure which must be incurred in order to earn receipts which, after the due deductions have been made, form the balance of the gains and profits assessable to the Income Tax, and may, therefore according to the decision of your Lordships' House, be properly deducted from those receipts".

73. In *Smith's Potato Estates Limited,* Lord Oaksey considered whether certain legal costs incurred in connection with an appeal were moneys wholly and exclusively laid out for the purposes of the company's trade. Moreover, he considered whether an expense is incurred to earn profit or is an application of the profit. At page 297, he stated that:

    "In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade, or is the application of the gain or profit when earned."

74. The decision in *Smith's Potato Estates* concerned legal and accountancy costs in fighting a tax appeal and the issue was whether or not they were deductible. The court found they were not deductible as they were not for the purpose of earning the profits of the trade, rather they were to determine what was the tax amount applied to those profits. The court approved the decision in *Strong & Co*. and at page 290, Lord Porter referred to the *dictum* of Lord Selborne in the decision in *Mersey Docks and Harbour Board v Lucas* 2 TC 25 at page 29, where Lord Selborne opined that:

    "*it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used*".

75. Furthermore, at page 290, Lord Porter stated that:

    "[W]hat your Lordships have to determine is whether the expense is incurred in order".

76. The test as set out in *Strong & Co.,* was applied in the decision in *Harrods*. In *Harrods*, the taxpayer company which was incorporated and resident in the United Kingdom ("UK"), carried on a retail business in Argentina and as a requirement of doing business in that jurisdiction, the company was required to pay a substitute tax which was levied at a rate of 1% on the capital of the company. It sought a tax deduction for the annual tax. The substitute tax was payable whether or not there were profits liable to Argentine income tax. Under Argentine law there were sanctions to prevent non-payment of the substitute

tax. A key point was when and how the tax was incurred. It was found that the tax was not payable on profits earned as a consequence of doing business in Argentina, but as a condition of carrying on business. Danckwerts L.J. held that:

> *"There are a number of authorities on the question of deductible expenses and the guiding principle appears to me to be that if the expense has to be incurred for the purpose of earning the company's profits, it is a deductible expense; on the other hand if the payment of the expenses or charges is made after the profits have been ascertained, then the expense is not deductible, because it is simply an application of the profits which have been earned."*

77. Further, the Commissioner considers it relevant to consider the *dictum* of Buckley J. wherein at page 461, he held that:

> *"The tax is not, in my judgment, a tax which is of the same character as Income Tax or Excess Profits Tax; it is not a tax which can only be measured and the liability to which can only be ascertained after the profits position of the Company has been finally determined in any year. Payment of that tax is not, as it seems to me, an application of the Company's profits, nor is it a payment which in its nature could be said to fall to be made out of the earned profits of the Company, for it is not a tax the liability to which depends upon the Company having earned any profits. It is a liability which the Company has exposed itself to, or undertaken, in order that it may be able to carry on its business in the Argentine. And so it is, in my judgment, a liability which the Company has undertaken for the purposes of its trade, and the payment of the tax is, in my judgment, a payment wholly and exclusively made for the purposes of the Company's trade…."*

78. Relevant also is the *dictum* of Diplock L.J, at page 468 and 469, wherein he stated that:

> *"….can a tax question really be as simple as I think this is? But the only question here is: was the money paid by the Company in settlement of its liability for Argentine substitute tax "money wholly and exclusively expended for the purposes of the trade" which it carried on in the Argentine? In order to engage lawfully in its trading activities in the Argentine at all, whether or not it made a profit by doing so, it had to pay the substitute tax. That was the purpose for which the money was expended by the Company…. why then is it not deductible?*
>
> *…….*
>
> *It is for this reason that payment by a trader of United Kingdom or foreign taxes on profits after they have been earned is not a deductible disbursement. This seems to*

me to be the ratio decidendi of the Dowdall O'Mahoney case, the Rushden Heel Co. case and the Smith's Potato Estates case. But the Argentine substitute tax is not paid out of profits. Liability to the tax does not depend upon whether profits are made or not. It is a payment which the company is compelled to make if it has a business establishment in the Argentine at all, and it must have a business establishment if it is to carry on its trade. I can see no relevant difference between this tax and rates upon its business premises."

79. The Respondent directed the Commissioner to the decision in *Allen* v *Farquharson* in support of its contention that *"[t]he element of volition considered by Finlay J. as being inherent in the nature of an expense is not present in the case of a tax on income*". Akin to her findings in *128TACD2023*, the Commissioner does not consider the absence of volition to be of any significant relevance to her consideration of the application of section 81 TCA 1997 and to the question of whether foreign RWHT was expenditure incurred "wholly and exclusively for the purposes of the trade" and thus, deductible in accordance with section 81 TCA 1997. The Commissioner has found that the test for deductibility is as set out in the decision in *Strong & Co.* and affirmed in *MacAonghusa, Smith v Lion*, and *Harrods.* The Commissioner does not consider volition to be part of the test to be applied.

80. In *128TACD2023*, the Respondent placed significant reliance on the decision in *Yates* and the previous determination *02TACD2018*. The Respondent does not reference *Yates* in its submissions in this appeal. However in circumstances where the Respondent references *02TACD2018* in its submissions, which deals with the decision in *Yates*, the Commissioner considers it useful to set out certain relevant passages in *Yates*. The question which arose in *Yates* was whether a turnover tax levied under Venezuelan law could correspond to UK income tax or corporation tax in the context of double taxation. Scott J. held that it could and did, in part. Having quoted article 54 of the Venezuelan tax code, Scott J. stated that:

> ''*The purpose behind art 54 is, in my opinion reasonably apparent from the language and context of the article. The article is dealing with profits of taxpayers 'not resident or not domiciled in Venezuela'; profits, that is to say, of foreign individuals or entities. There are obvious difficulties in obtaining full tax returns from foreign tax payers. The difficulty is dealt with in art 54 by simply providing for 10% of gross receipts to be deducted in order to produce the taxable income – the 'net profits' to use the expression employed in the article*."

81. Further, Scott J. held that:

"*But it is not said that no tax expressed as a charge on a percentage of gross receipts can, for s.498 purposes, correspond to United Kingdom income tax or corporation tax. And it is not, in my judgment, practicable to exclude a particular tax on the ground that the percentage to be deducted was not high enough to represent the likely level of expenses incurred by the foreign taxpayer in earning its gross receipts. Moreover, there were no facts before the Special Commissioner to justify a conclusion either that the 10% percent deduction was unrealistic in relation to the majority of business activities falling to be taxed under Article 54 or that the 10% deduction was unrealistic in relation to the extra expense incurred by the company, over and above its normal establishment expenses, in executing the Maraven contract*".

82. The Respondent argued that it was a logical impossibility to describe a tax withheld as a consequence of earning receipts, to be an expenditure laid out to earn those receipts. In *128TACD2023*, the Commissioner found that the decision in *Yates* was of little persuasive value for the purpose of determining the appeal, as it related to the consideration of a tax on profits, which was different to the position herein.

83. Furthermore, the Respondent sought to rely on the decisions in *Ashton* Gas *Company v AG* [1906] AC 10 ("*Ashton Gas*") *and Dowdall O'Mahoney.* Akin to her findings in *128TACD2023*, the Commissioner is satisfied that both decisions can be distinguished, in circumstances where both cases considered the deductibility of taxes after the profit was ascertained. In this appeal, the Commissioner is required to consider taxes imposed on **gross receipts,** prior to the deduction of expenses and the ascertainment of profit.

84. In *128TACD2023,* the Appellant placed significant emphasis on the *Hong Kong* decision. The decision emphasised the distinction between taxes which are a tax on profits/gains versus taxes which apply to the income itself. The Respondent dismissed the relevance of the decision on the basis that it was a decision of a Board in Hong Kong and therefore had little persuasive authority. The Commissioner was satisfied that the Hong Kong Board heard very extensive argument on all of the relevant principles.

85. In the *Hong Kong* decision*,* the taxpayer was a shipping company that owned and operated container ships which supplied between Hong Kong, Taiwan and Australia and incurred taxes on gross receipts in those jurisdictions. The company claimed that the foreign taxes were deductible from its total profits because they were outgoings or expenses incurred in the production of the profits or for the purposes of producing such profits. It was held that to the extent the overseas taxes were charged on gross receipts and not on net income they were capable of being deducted when ascertaining the total profits. As such, part of the Australian taxes were not allowed as a deduction. In reaching its decision, the Board

considered a number of UK cases concerning the meaning of "*for the purposes of the trade*" and the UK provisions analogous to section 81 TCA 1997 and it found at paragraph 6 that:

> "*in each case the foreign tax was an impost on the gross receipts relevant to the territory concerned whether or not the profits are earned… However on the clear evidence … that the taxes were in each case a tax on turnover as opposed to net income, we are of the view that the "taxable income" treatment in Taiwan and Australia is but a mechanism, a device to subject to tax the amount representing the fixed proportion of the gross receipts, and does not change the fact that the tax is imposed on the gross receipts before any deduction is made in respect of outgoings or expenses*."

86. Further, the Board held at paragraph 17 of the decision that it was satisfied that:

> *"the Taxpayer could not have gone on earning income without paying the foreign taxes and that the foreign taxes must be paid whether or not profits were earned…"*

87. In *128TACD2023*, both parties relied on previous determinations which dealt with the deductibility of a withholding tax, namely *02TACD2018* and *08TACD2019*. The Appellant relied on *08TACD2019* and the Respondent distinguished same. The Respondent relied on *02TACD2018* and the Appellant distinguished this decision on the facts, which are different to the facts herein. *02TACD2018* dealt with the deductibility of foreign RWHT suffered on licence income and *08TACD2019* with withholding tax on dividends for a company carrying on the trade of securities trading. The former found against the taxpayer and the latter found for the taxpayer. The former takes no account of the *Hong Kong* decision.

88. In *08TACD2019*, the taxpayer's appeal was successful. The dividend withholding tax for which the taxpayer was seeking a deduction was specifically excluded from relief under Schedule 24 and section 21B (4)(c) TCA 1997 and as such, the appellant therein was not otherwise entitled to a deduction or credit. Dividend withholding tax was determined to be the price of carrying out the business and non-recoverable dividend withholding tax impacted profits of the trade. It was determined that while the parties agreed that dividend withholding tax was a tax on income, it was possible for a deduction to be permitted under section 81 TCA 1997, so long as the taxes were calculated prior to the ascertainment of profit.

89. In *02TACD2018*, it was held that taxes which are applied to a taxpayer's income (as distinct from profits) are incapable of constituting a deductible expense. At paragraph 30, it was held that:

> "*Sequence is an important aspect in this analysis. Expenses deductible for the purposes of s.81(2)(a) are incurred in the course of a trade prior to the generation of income in the form of sales. For example, in the Appellant's trade, the cost of developing the software is first incurred, with sales subsequently generated in relation to that software once the software is brought to market. Tax is payable on the monies generated through sales. Usually that tax will be on profits, i.e. income after deductions, however, the fact that deductions are placed after income in the calculation of net profit is simply an accounting practice to assist in the computation of income for the purpose of, inter alia, ascertaining tax. In real time, the deductions/expenses are incurred prior to sales/turnover in that they comprise the cost of generating the product that is to be sold. Similarly, the cost of sales occurs before those sales are generated. Once the product has been made, it is brought to market and sold, turnover is generated and tax applied.*"

90. In *02TACD2018*, the Respondent's submissions were accepted as follows:

> *"... it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts So, when looked at in this light, and this is how Irish law says profits must be calculated, it is quite impossible to regard a tax on receipts as being expenditure laid out to earn those receipts. And the Revenue case is really that simple. I mean, this is a straightforward, logical impossibility*".

91. In *128TACD2023*, the Commissioner did not accept that "*It is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts*".

92. In *08TACD2019* that particular suggestion was rejected and at paragraph 99 the Appeal Commissioner found that "*there is no general principle of law that specifically denies a deduction for taxes in accordance with the prescribed rules as set out under TCA, Section 81, where those taxes are not calculated after the ascertainment of profit.*" The Commissioner considers this to be a correct analysis of the law.

93. Moreover, *02TACD2018* took no account of the *Hong Kong* decision, wherein coming to its decision, the board conducted a review of the applicable decisions referenced above, and permitted the deduction of taxes incurred on gross receipts, relying on the principles

enunciated in *Harrods* and *Strong & Co*. The Commissioner is satisfied that the *Harrods* decision supports the Appellant's appeal.

94. Furthermore, of notable distinction, was that in *02TACD2018* relief from double taxation was available and was claimed by the taxpayer in accordance with Schedule 24 TCA 1997. The decision concluded that foreign RWHT was in the nature of tax on income, as this was the basis upon which relief from double taxation was available. The inference being that withholding taxes are taxes on income rather than expenses of the trade and that the provisions for relieving such income from double taxation were fully exploited.

95. In the present appeal, the position is entirely different. The Appellant was taxed on its royalty income without a corresponding entitlement to a credit for the foreign RWHT withheld on that income. Akin to that position was *08TACD2019,* where there was no entitlement to relief from double taxation and it had not been claimed, a significant difference from *02TACD2018*.

96. Thus, the Commissioner is satisfied that the Appellant in this appeal has demonstrated that the **test of deductibility** as set out in *Strong & Co.* is satisfied. Hence, the Commissioner finds that the Appellant was entitled to treat the foreign RWHT suffered as an expense in carrying out its trade, where the Appellant was not in a position to derive any benefit from double taxation relief under Schedule 24 TCA 1997, in relation to the foreign RWHT suffered.

Schedule 24

97. The Respondent submitted that as a matter of statutory interpretation, the maxim *generalia specialibus non derogant* and the wording of section 81(2) TCA 1997, *"[s]ubject to the Tax Acts*", means that the approach was wrong to disregard a specific legislative regime for the provision of relief from foreign tax suffered, in favour of seeking to apply the general provision in relation to deductibility of trading expense. The Respondent submitted that the argument that the Appellant can avail of the general deductibility provisions in section 81 TCA 1997 *"is misconceived in circumstances where the Oireachtas has enacted an extensive and well-calibrated regime for the grant of relief from foreign tax*". The Respondent submitted that the fact that the Appellant was in a loss making position for the relevant year and that it could not avail of Schedule 24 TCA 1997 was irrelevant.

98. The Respondent submitted that in *128TACD2023* and *47TACD2024*, the Appeal Commissioners fell into error when they disregarded the fact that the special provisions in sections 826, 826A, 77(6B) and Schedule 24 TCA 1997 clearly indicate an intention on the part of the Oireachtas to provide a specific and limited relief in respect of foreign taxes

on royalty income. The Commissioner notes that the Respondent posited that these provisions "*provide important context which inform the interpretation of section 81(2) and militate against permitting a taxpayer to circumvent the limitations on double taxation relief by relying on the general provision*". The Respondent submitted that "*the Appeal Commissioners were incorrect to proceed on the basis that the appellant's could not benefit from relief under Schedule 24 and therefore, moved to consider the availability of a deduction under section 81 TCA 1997*".

99. The Commissioner notes that the Appellant has sought to argue a number of points in relation to Schedule 24 TCA 1997 in its submissions in this appeal under the heading "The interaction between section 291A TCA and Schedule 24 TCA". In particular, the Commissioner notes the following submission:

> *"43. The interaction of section 291A(6) and section 77(6B) TCA, paragraph 7(3)(c) of Schedule 24 TCA and paragraph 9DB(5) from a computational perspective therefore has the following effect:*
>
> *43.1 One computes a trading profit for the company for the year. This includes all matters (including relief under section 77(6B) TCA paragraph 7(3)(c) of Schedule 24 TCA and paragraph 9DB(5)) other than allowances and interest under s. 291A(6)(a).*
>
> *43.2 This trading profit figure, which must be calculated using all other trading deductions including those under section 77(6B) TCA, paragraph 7(3)(c) of Schedule 24 TCA and paragraph 9DB(5) as applicable, equals the maximum amount of allowances and interest permitted under section 291A(6)(b)*
>
> *43.3 A deduction in respect of RWHT is included in the computation at 43.1 above. The trading income or profit figure is arrived at after deduction of RWHT and that trading income or profit figure equals the permissible deduction in respect of capital allowances and interest under s. 291A(6)(b). The net effect is that the Appellant is entitled to a deduction for RWHT suffered because the RWHT is deducted before the amount of permissible capital allowances and interest is determined.*
>
> *44. Arising from the foregoing, even if it is not accepted that a deduction is available under section 81, a deduction should be available pursuant to the interaction of section 291A(6) and section 77(6B) TCA, paragraph 7(3)(c) of Schedule 24 TCA and paragraph 9DB(5).*

45. The purpose of Schedule 24 and the system of deductions for foreign tax suffered is that if a company is profitable, and has suffered foreign tax, it should obtain a credit for such tax. If such a tax is not a tax on profits but a tax on gross income, section 81 should provide a deduction. If the tax suffered is some form of other tax, be it a tax on profits or otherwise (e.g., a tax such as the substitute tax the subject of the Harrods case), a deduction should be available by virtue of section 77(6B) TCA, paragraph 7(3)(c) of Schedule 24 TCA and paragraph 9DB(5). In short, the well-established principle is that a company should not be taxed on money it never receives."

100. Furthermore, the Commissioner notes the Appellant's additional argument in this appeal under the heading "Fundamental Freedoms of the European Union" that "*the Commission determine that all amounts withheld should be refunded to the Appellant in order to vindicate its EU law freedoms, or in the alternative, calculated as being from a single source*".

101. As the Commissioner has found that the Appellant is entitled to a deduction in accordance with section 81 TCA 1997, the Commissioner does not intend to address the additional points and/or arguments made by the Appellant and the application of Schedule 24 TCA 1997. This is in circumstances where the Appellant stated that if the Commissioner concludes that it was entitled to a deduction in accordance with section 81(2) TCA 1997, it does not also seek a deduction in accordance with the provisions of Schedule 24 TCA 1997. This is consistent with the Commissioner's approach in *128TACD2023,* where she proceeded on the basis that having found in favour of the Appellant in relation to the deductibility of foreign RWHT in accordance with section 81 TCA 1997, there was no requirement to contemplate the rules relating to relief from double taxation in accordance with Part 35 TCA 1997 and Schedule 24 TCA 1997 and to determine the availability of such relief. Hence, the Commissioner sees no reason to depart from that methodology where the facts herein are identical to those in *128TACD2023* and she has found that the Appellant was entitled to treat the foreign RWHT suffered for the relevant period as a deductible expense in accordance with section 81(2) TCA 1997. The Commissioner is satisfied that it is appropriate that this Determination "mirror" the determination in *128TACD2023,* for all the reasons set out in the preceding paragraphs.

Conclusion

102. As stated, the Commissioner is satisfied that the facts of this appeal are not dissimilar to those in *47TACD2024*, *118TACD2024* and *119TACD2024* where importantly, a credit

under Schedule 24 TCA 1997 was unavailable to the appellants or was not elected for by the appellants, and thus no credit was to be allowed. The Commissioners concluded that foreign RWHT was a tax on income, but the fact that it was a tax on income did not preclude it from being considered a deductible expense, in accordance with section 81 TCA 1997. The Commissioners determined that the test for deductibility was that as set out in *Strong & Co*. and consideration was given to the full suite of jurisprudence relating to the test for deductibility, including whether a tax applied to gross income was capable of being a deductible expense.

103. Thus, the Commissioner is of the view herein that there appears no reason why she should not follow her decision in *128TACD2023,* to conclude that the Appellant was entitled to treat the foreign RWHT suffered, as "an expense incurred wholly and exclusively for the purpose of its trade", where the Appellant was not in a position to derive any benefit from double taxation relief under Schedule 24 TCA 1997 in relation to the foreign RWHT it suffered. It is clear to the Commissioner that in such circumstances, the Appellant was not precluded from treating that tax as an expense incurred in carrying on its business in those jurisdictions, if the test of deductibility as set out in *Strong & Co.* was satisfied, which the Commissioner considers was met for the reasons set out hereunder.

104. The Commissioner is satisfied that it was not possible for the Appellant to trade in those jurisdictions imposing the foreign RWHT without incurring the imposition of the foreign RWHT. The Commissioner considers that the factual situation is akin to that in *Harrods*. In addition, as is evident from the decision in *Harrods* and the *Hong Kong decision*, there was a distinction to be made between taxes calculated before and after profits have been ascertained. As such, the foreign RWHT was incurred by the Appellant irrespective of whether the Appellant generated any profits. The foreign RWHT was applied to the gross income of the Appellant. Therefore, the Commissioner is satisfied that the foreign RWHT suffered can be treated as a cost incurred for the purpose of earning the Appellant's profits. The Respondent argued that the Appellant chose to conduct business in such jurisdictions, without a permanent establishment. The Commissioner rejects that argument entirely. The Commissioner observes that if the Respondent's argument was accepted, the Appellant would be effectively suffering a tax on income that it never received, which cannot be correct.

105. Therefore, the Commissioner is satisfied that the following factors entitled the Appellant to treat the foreign RWHT suffered, as a final cost of doing business in those jurisdictions:

(i) The Appellant was not entitled to avail of relief for double taxation under Schedule 24 TCA 1997;

(ii) The tax was calculated prior to the ascertainment of profit and the tax was applied to gross royalty income;

(iii) The tax was calculated irrespective of whether the Appellant made a profit or a loss;

(iv) There was a nexus between the expense and the earning of profits for deductibility. The Appellant suffered the foreign RWHT for the purposes of enabling it to carry on and earn profits in the trade (as per Lord Davey in *Strong & Co*.);

(v) The sequencing or the timing of when the liability was incurred was irrelevant, as was the absence of volition to the test for deductibility under section 81 TCA 1997.

The Finance Act 2019

106. The Commissioner notes the amendment to section 81 TCA 1997, effected by the Finance Act 2019 and which commenced on 1 January 2020. The Commissioner observes that the Finance Act 2019 introduced a new subsection (p) to section 81(2) TCA 1997 which provides that: "*no sum shall be deducted in respect of…any taxes on income*".

107. The Respondent drew the Commissioner's attention to the decision in *Cronin*. In that case, the Supreme Court held that a Court cannot construe a statute in the light of amendments that may thereafter have been made to it. Griffin J. in his judgment in the Supreme Court at page 572, stated that:

> "*An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be.*"

108. The Commissioner is satisfied that it was appropriate and correct to accept the Respondent's submission in this regard. Having regard to the jurisprudence, the Commissioner is satisfied that an amending provision cannot be used to interpret pre-existing statutory provisions. Therefore, the Commissioner undertook no consideration of the amended provisions herein.

Determination

109. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded on balance in showing that the Respondent was incorrect to issue the Notice of Determination dated 4 March 2024, pursuant to section 864 TCA 1997, in respect of relevant period, being the period ended 31 December 2019.

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

Notification

111. 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

112. 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
27 March 2025

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.