AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

162TACD2025

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("TCA 1997") brought on behalf of [redacted] ("the Appellant") in respect of a Notice of Determination ("the Determination") issued by the Revenue Commissioners ("the "Respondent") in accordance with section 864(1) TCA 1997 [redacted] and a related amended assessment ("the amended assessment") dated [redacted], in respect of the corporation tax period ending [redacted] ("FY19")("the relevant period").

2. The Determination issued by the Respondent denied the Appellant a corporation tax deduction in respect of foreign royalty withholding tax ("RWHT") incurred on charges for the use of intellectual property ("IP") by [redacted] ("the group") local operating companies, located in certain jurisdictions ("the operating entities").

3. On 15 August 2024, the Appellant duly appealed to the Commission, the Determination and amended assessment of the Respondent.

4. On 4 December 2024, the Commissioner decided that it was appropriate that this appeal be determined without a hearing in accordance with section 949AN TCA 1997, on the basis that it raises common and related issues to determination *118TACD2024*.

5. On 31 January 2025, the parties submitted their respective Outline of Arguments.

Section 949AN TCA 1997

6. On 27 June 2024, the Commissioner issued a determination in favour of the Appellant, namely *118TACD2024.* The determination concerned appeals against Notices of Determination and related Notices of Amended Assessments which refused the same deduction for foreign RWHT, in respect of the accounting periods ending 31 August 2016 to 31 August 2018 inclusive. This appeal relates to the period ending 31 January 2019.

7. Consequent to the Commissioner's determination in *118TACD2024,* on 6 August 2024, 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 7 November 2024 and sent it to the parties. The Case Stated was transmitted to the High Court by a Notice of Transmission, dated 18 November 2024. The Case Stated is currently awaiting a hearing before the High Court.

8. Subject to certain conditions being fulfilled, section 949AN 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.

9. 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.

10. On 12 November 2024, the Commissioner wrote to the parties to this appeal to inform them that:

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

    10.2. 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 requires the Commissioner to hold a hearing, and where the party so requires, to explain why such a hearing is considered necessary; and

    10.3. the Commissioner was enclosing the similar appeal, *118TACD2024* for consideration;

11. The submissions of the parties reflected that it was the Appellant's position that this appeal should be determined consistently with *118TACD2024,* on the basis that "*the Appellant expects the TAC's determination in respect of the New Appeal will directly mirror TAC's determination in respect of the Current Appeal, save for any necessary updates to reflect dates and quantum. The Appellant therefore believes a hearing and all related submissions (e.g. Outline of Arguments etc) should not be necessary and all papers to state the New Appeal to the High Court should similarly mirror those in the Current Appeal, thereby requiring minimal input from solicitors for both parties*".

12. However, the Respondent submitted that the Commissioner should stay the appeal in accordance with section 949W TCA 1997, pending the decision of the High Court in the

Case Stated, as "*a stay incurs no costs whatsoever, either now or in future, and is the most logic and cost-effective alternative to the proposed section 949AN assessment*."

13. On 4 July 2024, having considered the submissions from both parties on the application of section 949AN TCA 1997 to this appeal, the Commissioner wrote to the parties to inform the parties 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 *118TACD2024* and that it was not necessary, having regard to the common or related issues herein, to hold a hearing to determine this appeal.

14. 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 for the Appellant, before the Commission. The Commissioner was satisfied that there were no compelling reasons why this appeal should be the subject of a stay, in accordance with section 949W TCA 1997. The Commissioner had refused the Respondent's initial application for a stay on this appeal on 17 May 2024, prior to her consideration of section 949AN TCA 1997.

15. 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 *118TACD2024* and the submissions and documentation received from both parties.

Background

16. The Appellant is a trading company incorporated and tax resident in Ireland.

17. The Appellant is a member of the group of companies. T[redacted]. The group conducts its client facing business through its local operating entities, each of which functions within its own designated territory [redacted] The group relies on a centralised repository of IP to service its customers.

18. The Appellant controls the IP assets used by the various operating entities [redacted]

19. The Appellant's principal activities consist of [redacted]

20. [redacted],

[redacted].

21. During the relevant period, the Appellant granted access to the IP to each of the operating entities under Intellectual Property Licensing Agreements ("the IPLAs"), [redacted]. In return, the operating entities paid a royalty to the Appellant.

22. It is these royalty payments which are reduced by the foreign RWHT, the subject matter of this appeal. The foreign RWHT was incurred by the Appellant by way of deduction from the royalty payments made by the operating entitles, during the relevant periods. The rate of foreign RWHT depended on the particular country from which they were paid.

23. The foreign RWHT was deducted from the payments at source on the gross amount due under the IPLA. The applicable foreign RWHT was deducted and remitted in the jurisdictions of the operating entities from payments due to the Appellant. The Appellant submitted that during the relevant period, there was no blanket rule against deductions for foreign taxes on income and there was no general provision or principle of tax law that precluded the deductibility of taxes, where that taxation was not based on underlying profits. The Appellant contended that "*foreign RWHT is not a tax on profits and represents a cost of doing business in the foreign countries in which the Operating Entities provide services. The WHT is an expense that is revenue in nature and incurred wholly and exclusively for the purposes of the trade carried on by the Appellant*".

24. The Appellant filed its corporation tax returns for the relevant period and made a claim for a trading deduction under section 81 TCA 1997. The Appellant included an expression of doubt in its corporation tax returns, in respect of its claim to a deduction under section 81 TCA 1997 for foreign RWHT for the relevant period.

25. The Respondent does not agree that the Appellant was entitled to claim a trading deduction under section 81 TCA 1997 in respect of the foreign RWHT. Consequently, the Respondent issued its Determination and amended assessment, the subject of this appeal. The Respondent argued that Schedule 24 TCA 1997 was engaged herein and that foreign RWHT was not deductible in accordance with the provisions of section 81 TCA 1997.

Legislation and Guidelines

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

27. 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;

28. 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.

29. 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.

30. 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.

31. 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

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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.

………………………

32. 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.

33. 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 x 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.

34. 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.

35. 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.*

36. 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.

37. 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.*

Evidence and Submissions

Appellant's submissions

38. The Commissioner sets out hereunder a summary of the legal submissions made within the documents submitted in support of this appeal:

38.1. The foreign RWHT is deducted at source on the gross amount due under the IPLA and the applicable foreign RWHT is deducted and remitted in the jurisdictions of the operating entities from payments due to the Appellant.

38.2. During the relevant period there was no blanket rule against deductions for foreign taxes on income. There was no general provision or principle of tax law that precluded the deductibility of taxes where that taxation was not based on underlying profits. The foreign RWHT was not based on the Appellant's underlying profits.

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

38.4. 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 purpose of the trade*". The seminal case is *Strong* & Co*. v Woodifield* [1906] AC 448 ("*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.

38.5. The relevant case law does not establish any prohibition on the deductibility of taxes (taxes on income or otherwise). Rather, the case law such as *Ashton Gas Company v AG* [1906] AC 10 ("*Ashton Gas*") and *Inland Revenue Commissioners v. Dowdall O'Mahoney & Co. Ltd* [1952] AC 401. ("*Dowdall O'Mahoney*") establish that taking the principle in *Strong & Co.*, expenses which are viewed as an application of profits are not deductible.

38.6. Given the facts of the Appellant's business the cost of the foreign RWHT was incurred in line with the judicial pronouncements on the meaning of wholly and exclusively for the purposes of the trade.

38.7. Schedule 24 TCA 1997 provides for a system of credits for foreign taxes on certain types of income. There is no absolute rule against a deduction for foreign taxes on income, it is the opposite. Schedule 24 TCA 1997, paragraph 7, provides restrictions on the ability to take deductions in respect of foreign tax in circumstances where a taxpayer is accessing credit relief under Schedule 24 TCA 1997. If there is, as the Respondent claims, a blanket prohibition on the ability to take a deduction in respect of foreign taxes, there would be no need for such restriction where credit is claimed in paragraph 7 of Schedule 24 TCA 1997.

38.8. Paragraph 7(3)(a) of Schedule 24 TCA 1997 provides that where credit relief is claimed "*no deduction shall be made for foreign tax".* The Respondent's own Guidance Notes state that: "*Where a credit for the foreign tax is allowable against any of the Irish taxes, no deduction for the foreign tax is to be made".*

38.9. It is notable that the legislators considered it necessary to explicitly preclude the possibility of taking a deduction in respect of the relevant foreign tax on income where credit relief is "allowable". This clearly points to the starting position being a possibility of deduction in respect of foreign tax on income, absent this provision.

38.10. Paragraph 7(3)(c) of Schedule 24 TCA 1997 provides that notwithstanding paragraph 7(3)(a) of Schedule 24 TCA 1997, a deduction may be taken (up to the level of the 'Irish measure' of the income) in respect of any part of the foreign tax for which credit relief is not available: "*notwithstanding … clauses (a) and (b), where any part of the foreign tax in respect of the income … cannot be allowed as a credit … the amount of the income shall be … reduced by that part of that foreign tax…*".

38.11. Whilst Paragraph 7(3)(c) of Schedule 24 TCA 1997 does provide for the possibility of a limited right of reduction in respect of foreign tax where credit is claimed, it must be viewed through the lens of Paragraph 7(3)(a) which, as a starting point, denies a deduction for foreign tax where credit relief is availed of.

38.12. Paragraph 7(3)(c) is granting relief from the earlier provisions of Paragraph 7(3)(a) (which deny a deduction where credit is claimed). Paragraph 7(3)(a) would not be necessary if the Respondent’s starting premise was correct. This position is clearly supported elsewhere within the Respondent’s Guidance Note. The Appellant agrees with the Respondent’s Guidance Note that where credit is not claimed in respect of foreign tax, it should “generally be allowable as a deduction”.

38.13. Paragraph 10 of Schedule 24 TCA 1997 is titled ‘Miscellaneous’ and provides that a taxpayer may elect out of the credit relief provisions of Schedule 24 TCA 1997. It states that: *“Credit shall not be allowed … if the person in question elects that credit shall not be allowed in respect of that income*”.

38.14. The Respondent’s Guidance Note on paragraph 10 of Schedule 24 TCA 1997 is instructive as it speaks to the general position that applies when a taxpayer has elected out of the credit relief under Schedule 24 TCA 1997 whereby, in explaining the consequences of electing out of relief under Schedule 24 TCA 1997, the Respondent states that: “*A person may elect not to accept credit for the foreign tax ... In that event, the direct foreign tax borne on the foreign income would generally be allowable as a deduction in arriving at the foreign income chargeable to Irish tax*”.

38.15. It is self-evident that these provisions would not have been necessary if there was, an overriding general prohibition against taking a deduction under section 81 TCA 1997, for foreign taxes on income.

38.16. The Respondent has released guidance outlining the position in relation to the tax deductibility of Digital Services Tax ("DST"). DST is described therein as "*charges typically levied on revenues associated with the provision of digital services and advertising*". The Respondent’s Guidance Note states that where the identified DST is suffered for the purposes of the trade "*[The Respondent] is prepared to accept that they are deductible expenses in computing income of that trade*"

38.17. The foreign RWHT suffered by the Appellant in the relevant period was not creditable for Irish tax purposes. It follows that the general position should apply to the foreign RWHT and, as credit is not claimed in respect of the foreign RWHT, it should be allowable as a deduction in accordance with section 81 TCA 1997. The words “*would generally be allowable as a deduction*” are clear in this regard.

38.18. The High Court has affirmed that profit is not the ‘amount earned’. It is not turnover, gross income or the receipts of a business. As a matter of Irish law, therefore, a cost deducted from ‘receipts’ cannot be viewed as a cost “made out of the profits” and so does not fall foul of Lord Davey’s principle in *Strong* & *Co.*

This distinction between receipts and profits was emphasised in the judgment in *Sun Insurance Office v Clark* [1912] AC 443 which demonstrated that receipts are merely the starting point in any calculation of profits. This cardinal principle was subsequently endorsed as a rule of law of general application in the House of Lords decision of *Willingale v International Commercial Bank Ltd.* [1978] AC 834. Any argument by the Respondent that the foreign RWHT is in the nature of a tax on income or profits is incorrect and there is no legal basis for simply arguing that taxing gross receipts is the same thing as taxing profit.

38.19. Thus, these cases establish the fundamental principle that profits must be appropriately calculated and ascertained before the application of income tax or corporation tax. This is the defining feature of the income tax/corporation tax system in Ireland, and it is this feature that adheres with the logical principle regarding non-deductibility of income tax/corporation tax emerging in cases such as *Strong & Co*.

38.20. The payments subject to foreign RWHT do not represent profits. ‘Profits’ is the surplus of receipts over related expenditure. In this regard, a principle has emerged from the case law's interpretation of "*for the purposes of the trade*" that denies a deduction for taxes suffered on ‘profits’. It is a fact that the foreign RWHT was suffered before the Appellant’s actual business profits were ascertained and understood in any way and it is not a tenable argument that the foreign RWHT is a tax on profit.

38.21. *Ashton Gas* is authority for the general position and logical starting point that the profit of a taxpayer must first be ascertained before an income tax can be exacted from those profits. The Appellant’s profit is not ascertained at the point of suffering the foreign RWHT. Therefore, the foreign RWHT cannot be seen as a portion of the Appellant’s profits exacted by the relevant tax authority.

38.22. The foreign RWHT is not the Appellant’s obligation, but rather an obligation imposed on the operating entities, which obligation results in the operating entities paying the Appellant less. The Appellant thus suffers the economic cost, but the legal reality is a number of steps removed from corporation tax/income tax (or indeed any tax) of the Appellant. Rather, it is a cost incurred by the Appellant.

38.23. *Strong & Co*. has been upheld by several subsequent House of Lords decisions. This principle was followed in *Smith's Potato Estates Limited v Bolland (Inspector for Taxes)* 30 TC 267 (“*Smith's Potato Estates Limited”)*.

38.24. In *MacAonghusa v Ringmahon Company* [2001] 2 IR 507 ("*MacAonghusa")*, the Supreme Court considered the *Strong & Co.* decision to be good authority and applied the principles laid out therein in allowing the interest expense incurred by the taxpayer.

38.25. The decision of *Harrods (Buenos Aires), Ltd v Taylor-Gooby (HM Inspector of Taxes)* 41 TC 450 ("*Harrods*") is often cited as the seminal case on the distinction between deductible and non-deductible foreign taxes. The Court of Appeal found in favour of the taxpayer in holding that the substitute tax was a deductible trading expense. The Court (upholding Buckley J. in the Chancery Division) held that there was a distinction between a tax applied to profits earned and a tax incurred for the purposes of earning the profits.

38.26. The decision in *Yates (Inspector of Taxes) v GCA International Limited* [1991] STC 157 ("*Yates"*) is distinguishable from the issue being considered in this appeal. The UK High Court held that the particular Venezuelan tax could be viewed as corresponding to UK corporation tax for the purposes of unilateral relief provisions. The decision was examining an entirely different legislative context and does not offer any guidance in relation to the interpretation of the specific provisions under consideration in this appeal. The Court did not assess the question as to whether the tax should be considered as incurred for the purposes of the trade, the question in this appeal.

38.27. In *Inland Revenue Board of Review Decisions (Hong Kong) Case No. D43.91* ("*Hong Kong*"), 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 *Yates* decision to the question of deductibility of foreign taxes.

38.28. In the Commission's Determination *02TACD2018* ("the 2018 Determination"), the facts underpinning the 2018 Determination can clearly be distinguished from this appeal as the royalty income had been part relieved by the use of Schedule 24 TCA 1997. The interpretation of the law relating to the deductibility of foreign taxes as an expense was not appropriately considered as a consequence. The 2018 Determination relies on the incorrect assertion that a tax applied to gross receipts cannot be a deductible trading expense. That proposition was dispelled in the *Hong Kong* decision on the basis of the *Harrods* decision. The 2018 Determination accepted the arguments of counsel for the Respondent, that where a tax arises on income, the tax cannot be said to have been incurred for the purposes of earning that income, but the argument is entirely flawed once the relevant case law and statutory framework is properly taken into account.

38.29. In the Commission's Determination *08TACD2019* ("the 2019 Determination"), it was held that notwithstanding the foreign withholding tax may be a 'tax on income', such tax could still constitute a deductible trading expense on the basis that it was not applied to underlying net profits which have been ascertained after the deduction of relevant expenditure. The 2019 Determination expressly disagreed with the Respondent regarding the relevance and interpretation of the *Yates* decision.

38.30. The 2019 Determination stated that the *Yates* decision was irrelevant to the determination of the appeal. The 2019 Determination is correct in this regard and the correct focus is to consider whether the withholding tax was suffered on gross amounts prior to the ascertainment of profit for the purposes of the Appellant's trade.

38.31. The 2019 Determination was correct to hold that the *Dowdall O'Mahoney* and *Ashton Gas* decisions are to be distinguished from the facts in the 2019 Determination, as those cases dealt with taxes applied to profits. Unlike the Appellant in the 2018 Determination, but similar to the Appellant in the 2019 Determination, the Appellant herein is not claiming credit relief pursuant to Schedule 24 TCA 1997, in relation to the foreign RWHT.

38.32. Reference was made to *128TACD2023* ("the 2023 Determination") and *47TACD2024* ("the 2024 Determination") (collectively "the recent TAC Determinations"). On the basis that the legal issues and factual circumstances of the recent TAC Determinations were similar to the legal issues and factual circumstances herein, the findings of the Commissioners in the recent TAC Determinations should apply equally to the current appeal.

38.33. In the alternative, reliance is also placed on section 81(2)(e) TCA 1997, such that the foreign RWHT suffered by the Appellant was an allowable deduction as expended wholly and exclusively for the purposes of the trade and properly considered either as an expense or as a loss, but in either event, as an allowable deduction.

Respondent's submissions

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

39.1. Where foreign RWHT has been applied in a Double Taxation Agreement ("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. 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 that particular stream of income. This is known as the Irish measure.

39.2. The term "income" for the purpose of the Taxes Acts (as for accountancy purposes) is always a reference to net income. While there is no statutory definition of income in the TCA, section 76(1) TCA 1997 provides that, 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*".

39.3. Section 4 TCA 1997, entitled Interpretation of the Corporation Tax Acts, defines "profits" as meaning income and chargeable gains and section 76A(1) TCA 1997 provides that 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*".

39.4. In addition, a further measure of relief will be available by means of reduction of income under paragraph 7(3)(c) of Schedule 24 TCA 1997. This means that where the foreign effective tax rate is higher than the Irish effective tax rate (such that not all of the foreign RWHT may be credited against Irish corporation tax) a measure of double tax relief will be available for the non creditable foreign tax by way of reduction of the income

39.5. Paragraph 7(3)(c) of Schedule 24 TCA 1997 must be read in light of paragraph 4(2A) of Schedule 24 TCA 1997 in relation to income streams covered by paragraph 4(2A) (i.e. royalties and interest taxed as trading income). The term "income" in paragraph 7(3)(c) of Schedule 24 TCA 1997 is a reference to net income. The net income is calculated by reference to the formula for obtaining the

Irish measure of the foreign income (which rateably apportions the tax adjusted trading profit of a company to the relevant foreign income).

39.6. It is this net income figure which can be “reduced” by way of relief under paragraph 7(3)(c). The effect of this is that if the taxpayer does not have net income after deductions relating to the foreign income stream, no further reduction can be obtained. The income cannot be “reduced” below zero.

39.7. If the taxpayer could reduce the income below zero, and create or augment a loss, the taxpayer would effectively be compensated for foreign tax rather than receiving double taxation relief.

39.8. Where the foreign RWHT has been applied in a non DTA jurisdiction, then credit relief 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.

39.9. Foreign RWHT is not deductible as an expense under section 81 TCA 1997 as it is a tax on income. Any assertion to the contrary would be inconsistent with the entire scheme that exists, both in Irish tax law and international double taxation treaties, for relieving double taxation. The very basis on which double taxation relief is available to the Appellant under Ireland’s DTAs and/or under Schedule 24 TCA 1997 is that foreign RWHT is a tax on income.

39.10. Foreign RWHT is a tax on income from the trade and is not an expense laid out wholly and exclusively for the purposes of earning profits of the trade. The 2018 Determination supports this conclusion.

39.11. The 2018 Determination determined that it is important to consider the sequence of events at issue such that “[*e]xpenses deductible for the purposes of [section 81(2)(a) TCA 1997] are incurred in the course of a trade prior to the generation of income in the form of sales”* and the fact that foreign RWHT is imposed on a gross income figure in the source state *“does not transform the tax into an expense or a tax deductible expense*”

39.12. The features of the Argentinian tax considered in the *Harrods* decision are far removed from the case of foreign RWHT. The tax in *Harrods* was imposed on capital not income, there is no suggestion that the same kind of sanction would arise from non-payment of foreign RWHT. Foreign RWHT cannot logically be seen as a pre-condition of doing business, as was the case with the tax in the *Harrods* decision.

39.13. The *Hong Kong* decision is of no assistance to the Appellant and carries little weight in terms of it being an administrative decision from 30 years ago, by a board in Hong Kong.

39.14. The 2018 Determination found that as foreign RWHT on royalty income was in the nature of a tax on income, *Dowdall O'Mahoney* was an authority which supported the Respondent's case therein.

39.15. The 2018 Determination determined that the element of volition discussed in the *Allen (HM Inspector of Taxes) v Farquharson Brothers & Company* 17 TC 59 ("*Allen v Farquharson*") decision is absent in the case of the payment of foreign RWHT. It was determined that the unavoidable nature of the foreign RWHT rendered it less likely to comprise a deductible expense.

39.16. Any reliance on the 2019 Determination is misplaced, as the facts are considerably different to the facts at issue in this appeal. The key differentiating facts were that the Appellant's business was that of a market maker in the trading of stocks and equity options, Dividend Withholding Tax ("DWT") was an "unavoidable consequence" of its trading activities, unlike foreign RWHT which arises from a licensing right and is earned, dividend income is not earned, as the entitlement to the dividend simply arises from being the holder of record on the payment date of the stock.

39.17. The fundamental issue in terms of the 2019 Determination, was that it simply does not address the issues that arise in relation to Part 35 and Schedule 24 TCA 1997, which sets out the specific provisions for relief from double taxation. It does not address the Respondent's arguments in that regard, the same arguments that are made in this appeal in relation to the specific provisions for relief for double taxation.

39.18. There are very significant differences between the 2018 Determination and the 2019 Determination. The 2018 Determination provides the most relevant guidance for this appeal. While not binding, there is no good reason to depart from the reasoning of the 2018 Determination on the facts of this appeal.

39.19. 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*". This amendment postdates the tax years at issue in these appeals and is not relevant to the issues which the Appeal Commissioner must determine. 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.

39.20. Reference was made to the principles of statutory interpretation and in particular to the decision in *Hanrahan v the Revenue Commissioners* [2024] IECA 113 (“*Hanrahan*”). Not only should the plain and ordinary meaning of the words be considered, but also the context and the overall purpose of the statute. When looking at a particular section within the Act, consideration must be given to the other provisions within the TCA which might be more specific or relevant.

39.21. The 2023 Determination and the 2024 Determination move straight to the consideration of section 81 TCA 1997, without consideration first being given to the specific provisions for relief for double taxation namely, Schedule 24 TCA 1997. This was an error in the Determinations and the Commissioner had no right to consider the applicability of section 81 TCA 1997, as it is not relevant in light of Schedule 24 TCA 1997.

39.22. The Commissioner erred in her decision in *118TACD2024* by wrongly placing reliance on paragraph 10 of Schedule 24 TCA 1997 and by finding that it “*provides a right of choice whether to take a credit*”. Paragraph 10 is limited on its own terms to credit relief “*under the arrangements*”, which term “*arrangements*” is defined in paragraph 1(1) as “*arrangements for the time being in force by virtue of section 826(1)”.* Furthermore, paragraph 10 of Schedule 24 TCA 1997 does not state that the effect of an election is that a taxpayer may make a claim pursuant to section 81 TCA 1997.

39.23. Section 826A TCA 1997 makes provision for foreign taxes in respect of which no credit is given under the DTA arrangements. This was not considered in *118TACD2024*. The Commissioner erred in failing to acknowledge that paragraph 9DB(4) to (6) of Schedule 24 TCA 1997 specifically provides for relief in a scenario in which a taxpayer has suffered from foreign taxes on royalty income which cannot be treated as reducing income by operation of paragraph 7(3)(c) of Schedule 24 or section 77(6B) TCA 1997 “*due to an insufficiency of income*”.

39.24. The Commissioner erred in *118TACD2024* in relying on paragraph 10 of Schedule 10 in supporting her view that a taxpayer could claim a deduction in accordance with section 81 TCA 1997 where relief was not available under Schedule 24 and/or section 77(6B) TCA 1997.

Material Facts

40. The facts of this appeal are identical to the facts in the similar appeal *118TACD2024*. It therefore follows that the findings of material fact made by the Commissioner in the similar appeal *118TACD2024,* apply to this appeal.

41. 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:-

41.1. In addition to the findings of material fact hereunder, the Commissioner finds that the facts as set out in the document entitled "Agreed Statement of Facts" and which was attached at **Appendix 1** to the similar appeal *118TACD2024* are also material facts found.

41.2. The Appellant's principal activities consist of [redacted]

41.3. The Appellant is a member of the group of companies.

41.4. The group is [redacted]

41.5. [redacted].

41.6. The group relies on a centralised repository of IP [redacted]

41.7. The Appellant controls the IP used by the various operating entities and is responsible for global intellectual asset development and management within the group.

41.8. The Appellant controls and funds the development of the IP.

41.9. Each of the group's operating entities requires access to the Appellant's IP [redacted]

41.10. During the relevant period, the Appellant granted access to the IP to each of the operating entities under the IPLAs enabling the operating entities to provide [redacted] within the jurisdictions under the group name. In return, the operating entities paid a royalty to the Appellant.

41.11. During the relevant period, the foreign RWHT incurred by the Appellant was by way of deduction from the payments from the operating entitles.

41.12. During the relevant period, the rate of foreign RWHT depended on the particular country from which the Appellant was paid.

41.13. During the relevant period, the Appellant did not have a branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions in which it licensed its IP to the operating entities located there.

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

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

41.16. 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.

41.17. During the relevant period, it was open to the Appellant to elect not to take a credit pursuant to Schedule 24 TCA 1997.

41.18. Foreign RWHT was a cost for the Appellant of doing business in the foreign jurisdictions and this was confirmed in *118TACD2024*, by the Respondent's expert witness 1.

41.19. Many compulsory deductions imposed are permissible as deductible expenses 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.

41.20. The foreign RWHT was an amount that was suffered by the Appellant on its gross income and was never received by the Appellant.

41.21. The full amount, including the amount that was never received by the Appellant was invoiced to the operating entity and that invoice amount was the amount that was reflected in the Appellant's financial statements for the relevant period, including the amount that was never received.

41.22. It is of no consequence in this appeal whether the Appellant's financial statements showed foreign RWHT "above the line" or "below the line", as the financial statements provide guidance on how to account for tax transactions only, but they do not dictate tax matters.

Analysis

The burden of proof

42. As was confirmed by the Commissioner in *118TACD2024*, 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".*

43. Of note is the recent judgment in *Hanrahan*, where the Court of Appeal considered the burden of proof when the issue is not one of ascertaining the facts and 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

44. As was also confirmed by the Commissioner in *118TACD2024,* In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the judgment of

McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

> "*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
> >
> > *(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
> >
> > *(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*
> >
> > *(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*
> >
> > *(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*
> >
> > *(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the*

context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible.""*

45. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

46. Furthermore, the Commissioner is cognisant of the decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J., wherein he stated that when interpreting a statute it must be borne in mind that:

> *"108…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".

116 … 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…"

47. The *dictum* of Murray J. in *Heather Hill* was considered and approved by the Court of Appeal in the recent 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.*"

48. 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."*

49. 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*". 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

50. 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 states that:

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

51. 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.

52. The Commissioner will now proceed to consider the issues and the respective statutory provisions articulated in this appeal, namely Schedule 24 and section 81 TCA 1997.

The Issues

53. As stated, the Appellant has 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 *118TACD2024* (save for differing relevant periods and amounts) 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 other reasons than the facts of this appeal being in some way different to *118TACD2024.* Consequently, the Commissioner considers it appropriate to apply the findings made by the Commissioner in *118TACD2024*.

54. The Appellant's appeal relates to a Determination and amended assessment issued by the Respondent denying the Appellant a deduction in accordance with section 81(2)(a) TCA 1997, for foreign RWHT suffered on royalty payments for the use of IP by the local operating companies, located in certain jurisdictions.

55. In seeking a deduction pursuant to section 81 TCA 1997, the Appellant was not taking a credit in accordance with Schedule 24, in respect of the foreign RWHT. The Appellant submitted that it was simply seeking to pay Irish tax (in addition to the foreign RWHT) only on the amounts actually received by the Appellant. As in *118TACD2024*, it is relevant to state that 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 it paid no Irish corporation tax in this jurisdiction for the relevant period. The Appellant submitted that in those particular circumstances, there was no credit available to the Appellant under Schedule 24 TCA 1997.

56. 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.

57. Furthermore, the Appellant argued that even if the Appellant was in a position to avail of a credit in accordance with Schedule 24 TCA 1997, it was not mandated to do so, in accordance with paragraph 10 of Schedule 24 TCA 1997, which provides that an entity may elect to take a credit. The Appellant stated that the availability of a credit does not preclude an entity from considering the foreign RWHT as a deduction under the general provisions of section 81 TCA 1997.

58. The Respondent's position is that section 81 TCA 1997 was unavailable to the Appellant for the purpose of relieving foreign RWHT incurred and that Schedule 24 TCA 1997 was the appropriate mechanism to deal with foreign RWHT incurred, despite the Appellant having paid no corporation tax in this jurisdiction to enable it to claim a credit in accordance with Schedule 24 TCA 1997. The Respondent posited that it was therefore the position that the foreign RWHT was unrelieved tax paid.

59. The Respondent submitted in its Outline of Arguments that having regard to the principles of statutory interpretation and the applicable statutory provisions, the Appellant's claim to a deduction pursuant to section 81(2)(a) TCA 1997 is misplaced. The Respondent argued that *"[a]s 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 by Irish taxpayers in favour of seeking to apply the general provision in relation to deductibility of trading expenses. Such an approach is contrary to both the established maxim generalia specialibus non derogant and also to the wording of section 81(2) which is expressly made "[s]ubject to the Tax Acts"….The conflict between the specific legislative scheme enacted by the Oireachtas and the interpretation of section 81(2)(a) advanced by the Appellant cannot be resolved by treating Schedule 24 as an optional regime or treating section 81(2)(a) as a supplementary regime. The wording of the relevant provisions simply does not support this approach*"

60. Furthermore, the Respondent argued that the correct approach to consideration of the foreign RWHT incurred by the Appellant, was to consider the exact provisions which cater for foreign RWHT i.e. Schedule 24 TCA 1997, which in the Appellant's circumstances provided no credit, as no corporation tax was paid in this jurisdiction. It was not the case that in circumstances where a credit was not to be allowed in accordance with Schedule 24 TCA 1997, that the Appellant was entitled to treat foreign RWHT as a deductible expense in accordance with the general provisions of section 81 TCA 1997. The general provisions in section 81 TCA 1997 were not available to relieve the imposition of the foreign RWHT incurred by the Appellant, when there existed special provisions in the TCA, which specifically catered for foreign RWHT incurred.

Is foreign RWHT a tax on income

61. In *118TACD2024*, the Commissioner initially considered what the nature of the income was. The Commissioner observed that it was the Respondent's position that the foreign RWHT deducted in the source State (whether that source State is a DTA country or a non-DTA country) were taxes on income and the fact that foreign RWHT may be applied to the gross income, should not be taken as an indication that foreign RWHT was not in the nature of a tax on income or profits, as the very basis on which double taxation relief was available under Ireland's DTAs and under Schedule 24 TCA 1997, for foreign RWHT incurred, was that foreign RWHT are taxes on income. The Respondent argued that the tax on income would have been avoided, if the Appellant had carried on its business through a permanent establishment in each of the jurisdictions and that this was reflected in the DTA [redacted]

62. The Respondent submitted that if the Appellant had profits in Ireland, on the very same royalty income it would have applied for a credit in accordance with Schedule 24 TCA 1997, which was an acknowledgment that foreign RWHT was a tax on income, because it cannot claim a credit under Schedule 24 TCA 1997, unless the Appellant comes within the DTA, being a tax on income. The fact that the Appellant had no profits was of no consequence, such that the Appellant simply did not obtain credit relief, but it was not open to the Appellant to pick and choose, such that if it had profits it would concede that foreign RWHT was a tax on income, but in circumstances where it had no profits, it claimed foreign RWHT was an expense to which section 81 TCA 1997 applied.

63. In *118TACD2024*, the Respondent argued that Part 35, section 77(6B), section 826, and schedule 24 TCA 1997 and the whole global system that exists in terms of the alleviation of double taxation would be rendered nugatory, if the Appellant's assertions are accepted. Moreover, the Respondent submitted that it did not matter if the foreign RWHT was applied

to the gross income or not, it was of no consequence as this was a tax on income, relievable in accordance with Schedule 24 TCA 1997.

64. The Respondent argued that the *Yates* decision deals with the real core issue herein, namely that these were taxes on income and the entitlement to relief derived from Schedule 24 TCA 1997, because they were recognised as taxes on income pursuant to the DTAs. The Respondent submitted that even if they were calculated in a crude manner, the *Yates* decision makes it clear that they come within the ambit of a tax on income. To suggest that foreign RWHT was an expense incurred and that it was incurred "*wholly and exclusively for the purpose of the trade*" was a red herring. Section 81 TCA 1997 was simply not applicable herein.

65. By contrast, the Appellant's position was that income tax or corporation tax is ascertained on the net income of a company, such that it is the profits earned by a company, taking its gross revenue and then deducting its operating expenses to arrive at its net income or profit. The Commissioner accepts this as uncontroversial. The Appellant argued that as foreign RWHT was applicable to gross receipts, it could not be a tax on profit. The Appellant stated that if it was a tax on income, then income means gross receipts as the tax was applied on the "journey to profit" as the foreign RWHT was applied without consideration of the Appellant's position. Foreign RWHT incurred by the Appellant was not a tax on the profits (net income) of the trade, but rather an unavoidable cost of its business and earning its profits of the trade.

66. The Commissioner was directed by the Appellant to the Respondent's eBrief dated 5 August 2022, the tax deductibility of Digital Services Taxes ("DST"). The Appellant submitted that "[*t]he eBrief is a very recent confirmation by Revenue that taxes (DSTs) levied on gross receipts are deductible. We respectfully submit that the principles emerging from the case law (that have been correctly applied in the eBrief to DSTs), draw no distinction whatsoever between a DST levied on gross income and the WHT (also levied on gross income).*"

67. The Commissioner observes that the Respondent is prepared to accept that the DST is a deductible expense if it has been incurred wholly and exclusively for the purposes of the trade. Of importance, this is a tax on income which is deductible in accordance with the provisions of section 81 TCA 1997. Thus, 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, certainly the Respondent in its approach to the DST seems to confirm that a tax on income is capable of being treated as a deductible expense, but that it first must meet the test for deductibility, such that it was incurred wholly and exclusively for the purposes of

the trade. This was the Commissioner's finding in *118TACD2024,* and she has been presented with no reason to depart from that finding, that foreign RWHT is a tax on income.

Schedule 24 TCA 1997

68. The Appellant's appeal is on the basis that it claimed an entitlement to a deduction pursuant to section 81 TCA 1997, in respect of foreign RWHT suffered for the relevant period. However, it was argued by the Respondent that section 81 TCA 1997 was not applicable to the foreign RWHT suffered, as it was a tax on income and there exists an entire scheme in the TCA, namely Schedule 24 TCA 1997, to deal with the imposition of foreign RWHT.

69. In accordance with her determination in *118TACD2024*, the Commissioner will proceed to consider first, the Respondent's argument for the application of Schedule 24 TCA 1997. As stated, the Commissioner is satisfied that her findings as to the applicability of Schedule 24 TCA 1997 in this appeal, should not differ from the similar appeal in *118TACD2024,* in circumstances where this appeal "mirrors" the previous similar appeal, but for different relevant periods and amounts.

70. Schedule 24 TCA 1997 provides for a system of credits for foreign taxes on certain types of income and Schedule 24 TCA 1997 sets out the "mechanics" for determining the amount of the credit that can be given against corporation tax in respect of foreign RWHT incurred. The operation of this relief is complex. The relief available for foreign RWHT suffered on royalty income 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. The treatment varies depending on whether or not the foreign RWHT has been applied in a country with which Ireland has a DTA. Relief by way of credit will be available in accordance with section 826 and Schedule 24 TCA 1997.

71. 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 is described as "*the Irish measure of income*", such that where the trading income of a trade carried on by a company includes 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.

72. Section 77(6B) TCA 1997 provides for foreign withholding tax that has arisen in a non-DTA state. Again, the reduction provided in accordance with section 77(6B) TCA 1997 cannot reduce the Irish measure of that income below zero, i.e. a loss cannot be created.

73. As the Appellant was in a loss-making situation for the relevant period, the Appellant was not in a position to avail of any relief by way of a credit or reduction for foreign RWHT suffered, as there was no Irish measure of income. Thus, the relief cannot reduce the Irish measure of the foreign income below zero and therefore the foreign RWHT suffered was simply unrelieved tax.

74. It was argued by the Appellant that both Schedule 24 and section 77(6B) TCA 1997 provide the potential for a credit for foreign RWHT incurred by a company. However, there was nothing in the TCA 1997 generally or Schedule 24 TCA 1997 specifically, that mandated the Appellant to avail of that credit, if no credit existed. In addition, the very existence of Schedule 24 TCA 1997 and the system of credits, did not interfere with the general system of deductibility that had existed in the TCA for years. The Appellant submitted that the DTAs do not impose taxes and the DTAs do not set out that domestic provisions no longer apply, but rather DTAs sit beside domestic provisions and may provide relief, by way of a credit system. That is different to the deduction system that existed already in the Tax Acts.

75. The Appellant submitted that the words in paragraph 7(1) of Schedule 24 TCA 1997 *"[w]here credit for foreign tax is to be allowed*" are pertinent and it was paragraph 7 that set out what was to occur if credit was to be allowed or taken at paragraph 7(3). The Appellant submitted that if credit was to be allowed there would be a blanket ban on a deduction as paragraph 7(3)(a) states that "*no deduction shall be made for foreign tax*". The Appellant argued that this is very clearly setting out that if a taxpayer is within the credit system and a credit is to be allowed, then no deduction shall be allowed as the taxpayer is now within the credit system.

76. Moreover, the Appellant argued that the Respondent was wrong in its interpretation of paragraph 7(3)(c) of Schedule 24 TCA 1997, such that if election is made not to take the credit, in accordance with paragraph 10 of Schedule 24 TCA 1997, paragraph 7(3)(c) applies, because section 7(1) clearly states that paragraph 7 will only operate where credit is to be allowed and "*this paragraph shall apply in relation to the computation for the purposes of income tax or corporation tax of the amount of that income*". The Commissioner notes the wording in paragraph 7(3)(c) wherein it states *inter alia* that *"…..where <u>any part</u> of the foreign tax in respect of the income…..cannot be allowed as a credit…"* [Emphasis added]

77. The Commissioner notes that the Respondent argued that the maxim *generalia specialibus non derogant* applied herein. The maxim provides that a general provision does not derogate from a special one. The Respondent submitted that in terms of statutory interpretation, it is clear that in the context of the TCA, special provisions cannot be displaced or ignored. The Respondent directed the Commissioner to the opening words in section 81(2) TCA 1997 wherein it states "*Subject to the Tax Acts*" and it was submitted that it could not be clearer. The Respondent argued that it was not optional, but mandatory, that regard was had to a special provision which catered specifically for the situation, rather than a general provision which catered for the general, and herein being a general right of deduction.

78. The Respondent submitted that in *118TACD2024,* the Commissioner wrongly placed reliance on paragraph 10 of Schedule 24 TCA 1997, where she found that paragraph 10 of Schedule 24 TCA 1997 provides a choice whether to take the credit, and where a taxpayer opts not to take a credit the taxpayer would fall outside Schedule 24 TCA 1997 and that a deduction in accordance with section 81 TCA 1997 may be available. The Respondent submitted that the term "arrangements" is defined in paragraph 1(1) as "*arrangements for the time being in force by virtue of section 826(1)".* The Respondent contended that paragraph 10 of Schedule 24 of the TCA 1997 does not state that the effect of an election is that a taxpayer may claim a deduction under section 81(2) TCA 1997 and "*[n]o reference is made to section 81 at all. Rather, it provides an election has the result that "[c]redit shall not be allowed under the arrangements"".* The Respondent further submitted that "*the TCA 1997 makes specific provision for relief for foreign taxes in respect of which no credit is given under DTA arrangements. Section 826A of the TCA 1997 expressly provides that "where relief is not afforded by virtue of section 826, relief … from tax shall be given in respect of tax paid under the laws of a territory other than the State in accordance with Schedule 24". The effect of this provision was not considered in Determination 118TACD2024*".

79. The Respondent submitted that the Commissioner further erred in *118TACD2024*, that paragraph 10 supported her view that the Appellant could claim a deduction in accordance with section 81 TCA 1997 where relief was not available pursuant to Schedule 24 and/or section 77(6B) TCA 1997. The Commissioner failed to acknowledge that paragraph 9DB(4) to (6) of Schedule 24 TCA 1997 "*specifically provides for relief in a scenario in which a taxpayer has suffered from foreign taxes on royalty income which cannot be treated as reducing income by operation of paragraph 7(3)(c) of Schedule 24 or section 77(6B) of the TCA 1997 "due to an insufficiency of income"."* The Respondent posited that whilst this relief was of no benefit to the Appellant herein, it supports the view that a general

deduction under section 81 TCA 1997 was not available. The Respondent maintained its argument herein that the general provision is overridden and rendered inapplicable by the specific provisions for relief for foreign taxes.

80. Akin to her decision in *118TACD2024*, the Commissioner notes the use of the word “reduction” in paragraph 7(3)(c) wherein it states that “…*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…”* The Commissioner notes that the word “reduced” is used therein, which is different to the word deduction (i.e. reduction is different to deduction). The Commissioner has considered paragraph 10 in light of paragraph 7(3)(c) and considers there to be no nexus between the two. The Commissioner accepts the Appellant’s argument that as a matter of statutory interpretation, either paragraph 7 applies or it does not, and in circumstances where paragraph 10 is invoked, paragraph 7(3)(c) is therefore not engaged. The Commissioner is satisfied that the words of the statute are clear and their meaning self-evident such that paragraph 7(1) provides that if credit is to be taken then paragraph 7(3) applies. It does not refer to paragraph 10.

81. The Appellant argued that legislation is applied to a set of facts, but the facts are such herein that the legislation does not apply, the credit is not to be allowed as it is in a loss-making situation. Therefore, the Appellant never came within the system of credits, and it was clear that the blanket ban on a deduction under the general provisions was if the credit is to be allowed in accordance with paragraph 7(1) of Schedule 24 TCA 1997. The Appellant submitted that the 2023 Determination and the 2024 Determination were correct in finding that where Schedule 24 TCA 1997 does not apply, there was no bar to the consideration of section 81 TCA 1997. Furthermore, even if a credit was available, the Appellant argued that paragraph 10 of Schedule 24 TCA 1997 permits a taxpayer to elect to take a credit.

82. Taking paragraph 10 firstly, in accordance with her finding in *118TACD2024*, the Commissioner is satisfied that the wording in paragraph 10 of Schedule 24 TCA 1997 very clearly and plainly states that “*credit shall not be allowed under the arrangements…if the person in question <u>elects</u> that credit shall not be allowed in respect of income*”. [Emphasis added]. The word elect is a word used in common parlance and a word that an ordinary member of the public would understand. The Commissioner has consulted the Oxford English Dictionary as to the meaning of the word “elect” which states that it is a verb meaning “to pick out, choose (usually, for a particular purpose or function)”.

83. As was the position in *118TACD2024*, the Commissioner has no doubt that paragraph 10 of Schedule 24 TCA 1997 provides a right of choice, whether to take the credit. The Commissioner therefore considers that the Respondent's argument, that the Appellant must take the credit, was incorrect and also the argument that the Appellant was precluded from considering section 81 TCA 1997 was incorrect. The Commissioner notes the Respondent's argument that the Commissioner was incorrect in her finding in the 2023 Determination and in *118TCAD2024*, namely that she should not have considered section 81 TCA 1997 in light of the special system of credits established in accordance with section 826 and Schedule 24 TCA 1997. However, the Commissioner is satisfied that the 2023 Determination deals with a situation where a credit was unavailable and thus, the Commissioner concluded that there was nothing in law that precluded her from her consideration of the availability of a deduction in accordance with the provisions section 81 TCA 1997, in those circumstances.

84. In relation to the right of the Appellant to consider a deduction, again the Commissioner is satisfied that during the relevant period, there was no absolute rule against a deduction for foreign RWHT on income, in light of the specific provisions in Schedule 24 and section 77(6B) TCA 1997. Rather, the Commissioner considers it to be the opposite.

85. Having regard to the plain and ordinary meaning of the words in Schedule 24 TCA 1997, in context, and having regard also to the purpose of the provisions of the TCA as a whole, the Commissioner is satisfied that paragraph 7 of Schedule 24 TCA 1997 provides that where a credit is to be taken, a deduction is specifically denied. Thus, the corollary is that if no credit is to be taken and which right is expressly provided for in paragraph 10 in terms of election, paragraph 7(3)(a) is not applicable to preclude a deduction.

86. Furthermore, and as stated, where a credit is to be allowed, paragraph 7(3)(a) of Schedule 24 TCA 1997 confirms that no deduction is available. Paragraph 7(3)(a) of Schedule 24 TCA 1997 expressly refers to the right of deduction and limits it if credit is to be taken. Thus, a taxpayer is either "in" Schedule 24 or "out". If "in" Schedule 24 TCA 1997, no deductibility is available and if "out" the possibility remains, subject to the tests to be applied in accordance with the general rules and established jurisprudence. The Commissioner is satisfied that this finding would concur with the 2018 Determination, whereby the taxpayer elected to take the credit, but was seeking a deduction (as opposed to a reduction) for the unrelieved portion of the foreign RWHT. It was correctly denied and whilst not expressly stated in the 2018 Determination that paragraph 7(3)(a) of Schedule 24 TCA 1997 was applicable to deny a deduction in those circumstances, the

Commissioner herein is satisfied that the correct interpretation of the law is that paragraph 7 would apply to deny a deduction, where credit was allowed.

87. However, the Commissioner is satisfied that the factual matrix herein is not dissimilar to the 2019, 2023 and 2024 Determinations, whereby the availability of a credit was hindered either by the nature of the tax incurred or the taxpayer's financial circumstances, there being no profits for the purposes of corporation tax. As there was no blanket rule that denied the potential of a deduction in accordance with the section 81 TCA 1997, and the credit for foreign tax not being allowed against the Irish taxes chargeable in respect of any income (Paragraph 7(1)) in those appeals, the appellants could avail of the general provisions of section 81(2) TCA 1997.

88. The Commissioner is satisfied that if there was an absolute prohibition on the ability to take a deduction in respect of foreign taxes, as is claimed by the Respondent, there would be no need for such a restriction, as set out at paragraph 7(3)(a) of Schedule 24 TCA 1997, where credit for foreign tax is to be allowed in accordance with paragraph 7(1). Thus, the legislators expressly precluded the possibility of taking a deduction in respect of the relevant foreign tax on income, where credit relief was to be allowed. Moreover, the words "*where credit for foreign tax is to be allowed*" would seem to suggest a lack of mandatory application. Hence, the Commissioner is satisfied that paragraph 7 of Schedule 24 TCA 1997 should be interpreted as providing a restriction on the ability to take a deduction in respect of foreign tax only in circumstances where "*credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income*" and where credit relief is claimed "*no deduction shall be made for foreign tax"*.

89. Furthermore, in its Outline of Arguments the Appellant directed the Commissioner to the Respondent's Guidance Notes. The Commissioner agrees with the Appellant's submissions in respect of the Respondent's Guidance Notes being supportive of the interpretation set out in the preceding paragraph. The Commissioner notes that the Respondent's Guidance Notes in relation to paragraph 7 state that *"[w]here credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income, the following applies… where a credit for the foreign tax is allowable against any of the Irish taxes, no deduction for the foreign tax is to be made in computing the amount of the foreign income for the purposes of income tax*".

90. Moreover, the Guidance Notes deal with paragraph 10 of Schedule 24 TCA 1997. The Guidance Notes state that *"A person may elect not to accept credit for the foreign tax ... In that event, the "direct" foreign tax borne on the foreign income would <u>generally</u> be allowable as a deduction in arriving at the foreign income chargeable to Irish tax"*

[Emphasis added] In that regard, the Appellant submits that "*The Revenue Schedule 24 Guidance on Paragraph 10 is very instructive because it speaks to the general position that applies when a taxpayer has elected out of the credit relief under Schedule 24".*

91. The Commissioner is satisfied that the Respondent's own Guidance Notes clearly point to a general position that where credit relief is not taken for foreign tax, that foreign tax would generally be allowable as a deduction. The Commissioner is satisfied that these provisions would not have been necessary if there were, as the Respondent argues, an overriding general prohibition against taking a deduction for foreign taxes on income in accordance with the provisions of section 81 TCA 1997.

92. Accordingly, it was the position that foreign RWHT suffered by the Appellant in the relevant period was not creditable for Irish tax purposes in accordance with Schedule 24 TCA 1997. Akin to her findings in *118TACD2024*, the Commissioner is satisfied that it follows that the general position was capable of being applied to the foreign RWHT and, as a credit in accordance with Schedule 24 TCA 1997 was not claimed in respect of the foreign RWHT, it was capable of being considered under the ordinary computational rules, as a deduction, subject to the usual test of deductibility. The Commissioner considers that the words "would generally be allowable as a deduction" are clear in this regard.

93. The Commissioner will now proceed to consider 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 credit for foreign RWHT was available to the Appellant, in accordance with Schedule 24 TCA 1997. In *118TACD2024,* 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.

94. The Commissioner considers it appropriate to restate the Commissioner's findings in *118TACD2024*, 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 thereon which have application in this appeal.

Section 81 TCA 1997

95. 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

TCA 1997. The Commissioner notes the testimony of the Appellant's witness in *118TACD2024*, 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. Therefore, foreign RWHT was one of the costs of doing business.

96. The Respondent disagrees that foreign RWHT suffered by the Appellant was a deductible expense under section 81 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 was an expense "*wholly and exclusively incurred for the purpose of the trade*" and therefore, cannot be deductible as an expense in accordance with section 81 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 non-resident and had no permanent establishment in those jurisdictions.

97. 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.*" The Commissioner is satisfied that the **test of deductibility** is that it must be made for the purpose earning the profits of the trade. The Appellant submitted that if a cost is incurred on the "journey to profit" it is capable of being a deductible expense. The Appellant contended that if a cost is ascertained on the **gross revenue** of a business and is paid subsequent to the calculation of profits, then it is a deductible expense.

98. The Appellant stated that foreign RWHT was similar to any other costs or expenses incurred by the Appellant. In *118TACD2024*, the Respondent argued that the consequence of what the Appellant is endeavouring to achieve by appealing the determinations issued by the Respondent is firstly, to impose on the Irish State an obligation to fund the Appellant's liability to foreign taxes by permitting it to deduct those foreign taxes.

Case law

99. In accordance with her decision in *118TACD2024*, 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*".

100. 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"*.

101. This principle was upheld in the decisions in *MacAonghusa* and *Smith (Surveyor of Taxes) v Lion Brewery Company, Limited* [1911] AC 150. 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".*

102. The Commissioner observes that 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 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".

103. 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.*

104. 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."

105. 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*".

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

"[W]hat your Lordships have to determine is whether the expense is incurred in order to earn gain, or is the application or distribution of that gain when earned.

107. 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, which they were obliged to bear. It was contended that the sum was wholly

and exclusively laid out for the purposes 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 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”*.

108. The Appellant submitted that these cases deal with the concept that what is taxed are profits and not receipts (i.e. the gross income) and the case law establishes that that tax can be a deductible expense if it was incurred on the journey to profit or if it was a cost of doing business or it was a liability that the company was exposed to. The Appellant contended that the *Harrods* decision was a clear example of this principle.

109. The Respondent argues that foreign RWHT was not a requirement of earning the receipts/income. There was no requirement, restriction, entry fee or charge for trading in the various jurisdictions in which the Appellant choose to trade globally. It was a tax which accrued once the receipts/income had been generated.

110. The test as set out in *Strong & Co.,* was also 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."

111. 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…."

112. Moreover, Danckwerts L.J. opined at page 468 of the judgment that:

"*In my opinion, the present case fails within the principle of Smith v Lion Brewery. The "substitute tax" was something which the Company was compelled to pay if it was to carry on business in Argentina, and if it could not carry on business in Argentina it could not earn profits. Consequently it was an expense which was necessarily incurred by it in order to carry on its trade and was wholly and exclusively laid out or expended for the purpose of the trade of the Company."*

113. 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;..".

114. The Respondent submitted that the *Harrods* decision has little relevance to the Appellant's appeal. The Respondent distinguished the decision in *Harrods* based on the factual circumstances, but specifically on the grounds that the company had a permanent establishment, and the Argentinian tax was not charged on the basis of profits/income/receipts but was charged entirely on the basis of certain capital of the company that was employed in the trade. Secondly, non-payment of tax could result in the company being precluded from trading. The Respondent submitted that the company was not permitted to have any form of business unless it paid this 1% of its capital, which is wholly distinguishable from the situation herein, as had the Appellant opened a branch in each of the jurisdictions it could have avoided the imposition of foreign RWHT. The company in *Harrods* had a branch.

115. The Commissioner does not agree that the decision is to be distinguished as argued by the Respondent. The tax in *Harrods* was charged not on the basis of profit or income of the company and therefore, amounted to a liability the company had undertaken in order to trade in the Argentine. The Commissioner is satisfied that the tax in *Harrods* was unrelated to the income or profits of the company and furthermore, failure to pay the liabilities precluded the company from trading in the Argentine.

116. The Appellant argued that it had no choice but to pay the foreign RWHT on the royalty payments, but that if it was in some way possible not to pay the foreign RWHT tax, it would cause significant reputational damage to the Appellant's business, being an entity not in compliance with its tax obligations. In addition, the Appellant argued that the absence of sanction is entirely irrelevant, as it does not bear at all on the question of

whether the deductions incurred were wholly and exclusively for the purposes of the trade. Akin to her decision in *118TACD2024*, the Commissioner accepts that argument.

117. The Respondent directed the Commissioner to the decision in *Allen v Farquharson* in support of its contention that "*the unavoidable nature of the withholding tax renders it less likely to comprise a deductible expense due to the absence of the element of volition*". 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 Respondent's trade and thus, deductible in accordance with section 81 TCA 1997. As set out above, the Commissioner has already 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.

118. The Respondent placed reliance on the decision in *Yates* and the 2018 Determination. 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*."

119. 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".

120. The Respondent submitted that the above dictum strongly supports the argument advanced on behalf of the Respondent and is a correct analysis of the nature of the foreign RWHT. 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.

121. The Appellant does not agree with the Respondent's interpretation of *Yates,* as the issue considered in that case was whether the Venezuelan tax had the same function as UK income or corporation taxes. It was held by Scott J. that although the Venezuelan tax was computed on the basis that only 10% of the gross income was deductible, it was intended to be a **tax on profits** rather than on turnover. The Court held that the Venezuelan tax corresponded to income or corporation tax and was therefore creditable. In this regard, the Commissioner agrees with the Appellant and finds that the decision in *Yates* is of little persuasive value for the purposes of determining this appeal as it was considering a tax on profits which is different to the current position herein.

122. Moreover, there are cases in contradistinction, such as the *Dowdall O'Mahoney* decision where the House of Lords held, in a unanimous decision, that a UK branch of an Irish company was not entitled to deduct as an expense for UK income tax purposes, the proportion of income tax suffered in Ireland which corresponded to the profits of the UK branch. This decision provided that income tax applied to the 'profits' of a trade was not deductible as the tax was applied to the profits after they had been made and was not incurred "for the purposes of earning the profits". The court held that the tax did not satisfy the test of being on the journey to profit as it was a tax on profit and therefore not allowable. The Appellant argued that if the tax was imposed on the journey to profit it was deductible and that the foreign RWHT incurred herein was on the journey to earning the profits. The Appellant submitted that the foreign RWHT suffered by the Appellant was clearly something which was incurred to earn the gain and it was not the application or distribution of the profit when earned, because it had not yet got to the calculation of profit.

123. In *Ashton Gas*, the appellant company was subject to prescribed legislative rules concerning the quantum of dividends payable to its members out of the 'profits' of the company. The company paid a dividend to members without first making the necessary deduction for income tax payable by the company. The question under consideration for the courts was what amount represented 'profit' for the purposes of the prescribed

dividend quantum. The House of Lords held that income tax (being a tax on profits) could not be deducted from profits. This was because the tax was itself chargeable on the profits and thus, the House of Lords held that the ‘profits’ ought to be calculated as being inclusive and not exclusive of the amount of income tax payable for the year.

124. The judgment of Earl Halsbury observed the distinction between an expense and a tax applied to a profit and at page 12 of the decision he held that:

> “*Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax. But if you confound what is the necessary expenditure to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax - you have no right to deduct the income tax before you ascertain what the profit is.”*

125. The Appellant submitted that *Ashton Gas* was clear authority for the principle that tax applied to the ascertained profit of a trade is not deductible in ascertaining the profit itself. Such a tax should properly be considered as constituting “part of” the profits of the relevant taxpayer. The Appellant’s profit is not ascertained at the point of suffering the foreign RWHT. Therefore, the foreign RWHT cannot be seen as a portion of the Appellant’s profits exacted by the relevant tax authority.

126. The Commissioner is satisfied that both decisions, namely *Dowdall O’Mahoney* and *Ashton Gas* can be distinguished, in circumstances where both cases considered the deductibility of taxes after the profit was ascertained. In this appeal, a consideration is required of taxes imposed on **gross receipts** prior to the deduction of expenses and the ascertainment of profit.

127. The Commissioner also considered the *Hong Kong* decision. The decision emphasises the distinction between taxes which are a tax on profits/gains versus taxes which apply to the income itself. In *118TACD2024*, the Respondent dismissed the relevance of the decision on the basis that it is a decision of a Board in Hong Kong, over 30 years ago and therefore has little persuasive authority. The Commissioner is satisfied that the Hong Kong Board heard very extensive argument on all of the relevant principles herein and affirms the principles enunciated in much of the case law referred to.

128. The *Hong Kong* decision dealt with the Hong Kong equivalent of Section 81 TCA 1997 deductions, and the Commissioner considers that it is therefore a case which is on point, as opposed to *Yates* which is not on point. Whilst the legislation in the *Hong Kong* decision was not identical to section 81 TCA 1997, the effect of it is the same as Section 81 TCA 1997. The Commissioner agrees with the Appellant's submission that it is far more relevant than a case on unilateral relief namely *Yates*. The Appellants submitted also that the *Hong Kong* decision is correct in its assessment of *Yates* such that it is irrelevant, as are the determinations in 2019, 2023 and 2024 in this jurisdiction.

129. Turning to the *Hong Kong* decision*,* the taxpayer was a shipping company which 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 was 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*."

130. 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…"*

131. The Appellant contended that *Hong Kong* decision was important, as it shows that in the case of jurisdictions where they deem a profit, the Board said it was a mechanism to get a rate, which was still imposed on the gross receipts, and, therefore, it was an impost on the gross and it was an expense on the journey to ascertain profit. This was relevant in the context of the evidence in *118TACD2024* of the Appellant's expert

witness 1, in relation to the position in [redacted] The Appellant submitted that there are now four decisions dealing specifically with foreign withholding tax namely, the *Hong Kong* decision, the 2018 Determination, the 2023 Determination and the 2024 Determination.

132. Both parties relied on decisions of Appeal Commissioners, which dealt with the deductibility of withholding tax, namely the decisions in the 2018 Determination, the 2019 Determination, the 2023 Determination and the 2024 Determination. The Appellant relied on the 2019 Determination and the Respondent distinguished same. The Respondent relied on the 2018 Determination and the Appellant distinguished this decision on the facts, which are different to the facts herein. The *Hong Kong decision* was cited in three of the four decisions, namely the 2019, 2023 and 2024 Determinations. The 2018 Determination dealt with the deductibility of foreign RWHT suffered on licence income and the 2019 Determination with withholding tax on dividends for a company carrying on the trade of securities trading. The 2018 Determination found against the taxpayer and the 2019 Determination found for the taxpayer. The 2018 Determination takes no account of the *Hong Kong* decision. The 2023 Determination and the 2024 Determinations found in favour of the appellants. The Respondent submitted that the 2023 and 2024 Determinations are wrong in law, which the Commissioner will address in more detail hereunder.

133. In the 2018 Determination, it was held that taxes which are applied to a taxpayer's income (as distinct from profits) were 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.*"

134. Furthermore, the submission of the Respondent was 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*".

135. The Appellant argued that this analysis was wrong. As stated above, the Commissioner is satisfied herein, that foreign RWHT is in the nature of a tax on income, having regard to the manner in which it is imposed. Nonetheless, there is no case law which states that taxes which are imposed on income are by their nature, non-deductible. Accordingly, the Commissioner does not accept, as held in the 2018 Determination, 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*". The Commissioner has some reservations in terms of why the former Appeal Commissioner came to that conclusion, in the absence of case law to support the reasoning outlined. It is trite to state that the decision of the former Appeal Commissioner is not binding on the Commissioner herein.

136. The Commissioner notes that the 2019 Determination rejected that precise proposition in the 2018 Determination, holding at paragraph 99 of the decision 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. As aforementioned, there are many compulsory deductions imposed by the State that are permissible as a deduction pursuant to section 81 TCA 1997.

137. Likewise, it is notable that the 2018 Determination takes no account of the *Hong Kong* decision which in coming to its decision, 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*. Moreover, the 2018 Determination distinguishes the *Harrods* decision and relies on the decision in *Yates* to dismiss the Appellant's appeal. The Commissioner is satisfied that the *Harrods* decision is significant for the Appellant and that the *Yates* decision is of little or no persuasive authority, in circumstances where *Yates* concerned a tax on profits and has no relevance to the facts herein.

138. Of critical importance in the 2018 Determination, was the fact that relief from double taxation was available and was claimed by the taxpayer under Schedule 24 TCA 1997. The 2018 Determination 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. The Commissioner has set out above the provisions of Schedule 24 TCA 1997 that do not permit a deduction where credit is taken in accordance with paragraph 7 of Schedule 24 TCA 1997. Whilst not expressly stated in the 2018 Determination, paragraph 7 of Schedule 24 applied therein to deny a deduction.

139. In the present appeal, the position is entirely different, such that the Appellant was taxed on its royalty income without a corresponding entitlement to a credit for the foreign RWHT withheld on that income. In the 2019 Determination, there was no entitlement to relief from double taxation and it had not been claimed, a significant difference from the earlier 2018 Determination.

140. The 2019 Determination upheld the taxpayer's appeal. The DWT for which the taxpayer was seeking a deduction was specifically excluded from being availed of as a credit for withholding tax suffered. The DWT was determined to be the price of carrying out the business and non-recoverable DWT impacted the profits of the trade. It was determined that while that DWT 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.

141. It is the case that both the legal issues arising and the factual circumstances herein are similar to the 2023 Determination and the 2024 Determination. Notably, both involve a dispute in respect of deductions pursuant to section 81 TCA 1997 for foreign RWHT suffered on gross royalty payments from foreign jurisdictions pursuant to licensing agreements; both involve a loss making company, such that the relevant deductions pursuant to section 81 TCA 1997 served to augment such losses, where a credit in accordance with Schedule 24 was not to be allowed; and the appellant did not have a branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions.

142. The 2023 Determination upheld the appellant's appeal. The appeal concerned similar factual matrix. The appellant's business involved [redacted] as a means of generating profits and the Appellant suffered foreign RWHT on its gross royalty income from the sales. Importantly a credit under Schedule 24 TCA 1997 was unavailable to

the appellant, due to its particular financial circumstances, and thus no credit was to be allowed. The Commissioner 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 Commissioner determined that the test was that as set out in *Strong & Co*. and the Commissioner considered the full suite of jurisprudence relating to the test for deductibility, including whether a tax applied to gross income is capable of being a deductible expense. The Commissioner concluded that foreign RWHT must be incurred by the appellant in order to earn its profits from the trade; it was part and parcel of the business activities of the appellant and it was a foreseeable condition of earning the income and gains. Moreover, the Commissioner determined that foreign RWHT was incurred irrespective of whether the appellant made a profit and therefore, it was an unavoidable component in determining profit before tax.

143. The 2024 Determination also concerned a similar factual matrix as the Appellant's position herein. The 2024 Determination came to the same conclusions and decision as the 2023 Determination.

144. in relation to the 2023 Determination and the 2024 Determination, the Appellant submitted in its supplementary submissions that *"[o]n the basis that the legal issues and factual circumstance of the Recent TAC Determinations are similar to the legal issues and factual circumstances of the current appeal, the Appellant submits that the findings of Commissioner Millrine and Commissioner O'Driscoll in the Recent TAC Determinations (with which we agree for all the reasons set out above) should apply equally to the current appeal."*

145. Thus, the Commissioner is satisfied that there are no reasons why she should not follow her decisions in the 2023 Determination and in *118TACD2018*, in circumstances where the Commissioner has found herein that: there is no bar to a tax on income being treated as a deduction for the purposes of section 81 TCA 1997; the absence of "volition" is not of any significant relevance to the application of section 81 TCA 1997; the decision in *Yates* is of little persuasive value for the purposes of determining the legal considerations under this appeal in circumstances where *Yates* concerned a tax on profits and has no relevance to the facts herein*;* the decisions in *Ashton Gas* and *Dowdall O'Mahoney* can be distinguished where the relevant taxes herein are imposed on gross receipts prior to the deduction of expenses and the ascertainment of profit; the 2019 Determination was correct in holding that there is no general principle of law that specifically denies a deduction for taxes in accordance with section 81 TCA 1997, where

those taxes are not calculated after the ascertainment of profit; the issue of "sequencing" or the stage of a transaction at which the tax was applied is irrelevant; and a tax which is incurred irrespective of whether a company makes a profit represents a cost of doing business.

146. As is illustrated in the above referenced case law, the determinant or test is whether the tax in question was a tax on profits (which would not be deductible) or a tax incurred in earning profits (which would be). Herein, foreign RWHT was suffered irrespective of whether the Appellant earned any profits and withholding tax was calculated on the gross income and not the profits.

147. In line with her decision in *118TACD2024*, the Commissioner is satisfied that foreign RWHT must be incurred by the Appellant in order to earn or profit from the trade; it was part and parcel of the business activity and was a foreseeable condition of earning income and gains. Foreign RWHT was incurred irrespective of whether the Appellant made a profit. Therefore, incurring foreign RWHT was not merely foreseeable, it was an unavoidable component in determining profit before tax. The Appellant could not conduct its trade, namely the development, the management, the protection and the exploitation of intellectual property without incurring the foreign RWHT. The Appellant was in a position whereby credit was not to be allowed under Schedule 24 TCA 1997 in relation to the foreign RWHT suffered and thus, as set out in detail under the heading Schedule 24 TCA 1997, there was no absolute prohibition on the general deductibility of the tax on income in those circumstances.

148. It is clear to the Commissioner that in such circumstances, the Appellant was not precluded from treating that foreign RWHT 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.

149. The Commissioner considers the principles enunciated in the *Harrods* decision to be significant to the Appellant's appeal as not dissimilar to the Appellant herein, the "substitute tax" was something which the company was compelled to pay if it was to carry on business in Argentina, and if it could not carry on its business in Argentina it could not earn profits. Of importance, the withholding tax was incurred irrespective of whether the company in *Harrods* earned any profits. Therefore, such taxes represented a cost of doing business. The Commissioner considers this is analogous to the Appellant's position. Moreover, the Respondent's own expert witness 1 testified in *118TACD2024* that it was a cost of doing business in those jurisdictions.

150. The Commissioner is satisfied that it was not possible for the Appellant to trade in the jurisdictions without incurring the imposition of the foreign RWHT. The Commissioner considers that the factual situation was akin to that in *Harrods*. In addition, as is evident from the decision in *Harrods* and the *Hong Kong* decision, there is a distinction to be made between taxes calculated before and after profits have been ascertained. As such, foreign RWHT was incurred by the Appellant irrespective of whether the Appellant generated any profits. 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.

151. The Commissioner was directed by the Appellant to the decision in *Quigley (Inspector of Taxes) v Harris* [2008] IEHC 403 and submitted that the decision provides guidance as to the approach to be taken herein and that consideration should be given to the characteristics of the foreign RWHT. The Appellant submitted that the characteristics of the foreign RWHT in every instance here are that it is payable on the gross, it is payable whether or not the Appellant was in a profit or loss situation, and it was payable without any regard to the expenses of the Appellant. Therefore, taking those characteristics into consideration, the question arises; in this jurisdiction would that be a tax on receipts/income or a tax on profit? If it was a tax on receipts/income, it would be a deductible expense. If it was a tax on profit, it would not be a deductible expense under the test in *Strong & Co*. The Commissioner agrees with the submission of the Appellant.

152. Thus, the Commissioner sees no reason to depart from her decision in *118TACD2024,* in circumstances where the facts in this appeal are identical to the facts in *118TACD2024* (save for certain dates and amounts) 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.

Conclusion

153. As stated and akin to her decision in *118TACD2024,* the Commissioner is satisfied that there was a separate regime under Schedule 24 TCA 1997 which permitted a credit if the Appellant satisfied the relevant requirements. However, if no credit was to be allowed then a deduction was not prohibited. If a credit was to be taken a deduction was expressly denied under paragraph 7(3)(a) of Schedule 24 TCA 1997. As the Appellant was in the position that no credit was to be allowed, the Commissioner is satisfied that there was no prohibition on deduction and therefore, the Appellant was entitled to proceed to consider the deductibility of the foreign RWHT suffered under the general computational rules and on the straightforward application of the well-established

principles that ordinarily apply. There was no need for the Appellant to engage Schedule 24 TCA 1997 herein.

154. The Commissioner determines that the Appellant has shown on balance that in circumstances where a credit was not to be taken in accordance with Schedule 24 TCA 1997, there was no absolute prohibition on the deductibility, in accordance with section 81 TCA 1997.

155. Moreover, the Commissioner determines that the Appellant has shown on balance that it meets the test for deductibility as outlined by Lord Davey in the decision in *Strong & Co.* and affirmed in the decision in *Harrods*. The principles were also upheld in the Irish decision *MacAonghusa*.

156. In the context of the facts of this appeal and having had regard to the similar appeal in *118TACD2024*, the Commissioner is satisfied that, the following factors entitle the Appellant to treat foreign RWHT suffered, as a final cost of doing business in those jurisdictions:

(i) The Appellant's circumstances were such that it could not avail of credit for foreign tax, in accordance with Schedule 24 TCA 1997;

(ii) In circumstances where the credit was not to be allowed in accordance with paragraph 7(1) of Schedule 24 TCA 1997, no right of general deduction is precluded, in accordance with paragraph 7(3)(a) of Schedule 24 TCA 1997;

(iii) Even if the Appellant was in a position to avail of a credit, in accordance with Schedule 24 TCA 1997, paragraph 10 of Schedule 24 TCA 1997 provides a right to elect that credit shall not be allowed;

(iv) The foreign RWHT was calculated prior to the ascertainment of profit, that is the tax is applied to gross royalties;

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

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

(vii) 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

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

158. 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.*"

159. The Commissioner is satisfied that it is appropriate and correct to accept the Respondent's submission in this regard. The Commissioner is satisfied having regard to the jurisprudence 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

160. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded in showing on balance that the Respondent was incorrect to issue the Determination dated [redacted], pursuant to section 864 TCA 1997 and the amended assessment dated [redacted], in respect of the relevant period, namely the corporation tax period ending [redacted]

161. 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

162. 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

163. 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
3 April 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.