AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

196TACD2025

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") against amended assessments to income tax raised by the Revenue Commissioners ("the Respondent") for the tax years 2008 to 2015. The total amount of tax at issue is €61,281.

2. The Appellant had claimed that he was carrying out the trade of land development since 2005 and was entitled to deduct his losses pursuant to section 381 of the Taxes Consolidation Act 1997 as amended ("TCA 1997"). The losses were disallowed by the Respondent as it did not accept that the Appellant was carrying on the trade of land development. The total amount of trading losses claimed by the Appellant was €168,120.

Background

3. The Appellant is [redacted] In 2005, he purchased a site in [redacted], for €330,000, which was funded by way of a loan from [redacted] The Appellant stated that he purchased the site with the intention of developing houses on the land for resale.

4. No houses have been built on the site, which is zoned for agricultural use and for which the Appellant has never obtained planning permission. The Appellant did not claim trading losses in his income tax returns for 2005 – 2007. He claimed losses for the first time in 2008.

5. [redacted]

6. On 20 July 2017, the Respondent issued amended assessments to income tax for the tax years 2008 to 2015. [redacted].

7. [redacted]

[redacted]

Legislation

9. Section 3(1) of the TCA defines "*trade*" as including "*every trade, manufacture, adventure or concern in the nature of trade*."

10. Section 381(1) of the TCA 1997 states *inter alia* that:

> "…*where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.*"

Evidence

[redacted] *– the Appellant*

11. The Appellant stated that [redacted]

12. In 2005, he bought a 4.5 acre site with a view to building and "flipping" a few houses. He drove around the countryside looking for an appropriate site, and the one he purchased was in a desirable part of [redacted] He believed it would be attractive to "*big spenders*" looking to relocate from [redacted] He decided to retain [redacted], to build the houses as they would offer a "turnkey" service. He anticipated achieving a half million euro profit on the first house, which would enable him to build the second, and so on. He expected total profit of around €2 million.

13. [redacted] lent him the money to purchase the site. [redacted] were to apply for planning permission. However, the relevant forms were not fully completed, and the Appellant was

advised that the application would therefore be refused. Therefore, he retained a local agent, [redacted], to submit the planning permission, but the process dragged on. He stated that [redacted] told him to wait for a ruling from a European court which had led to a moratorium on building houses. There was a further delay awaiting the completion of a local sewage plant. When that was completed, the recession hit, which affected the Appellant's [redacted] as well as his plans to develop his site.

14. The recession led to his plans to develop the site coming "*to a stop…We just thought we'll just wait and see what happens next year and here we are several years later.*" [redacted]

15. He stated that getting the loan from [redacted] "*was just a matter of a phone call*." The loan was just to purchase the site. He anticipated that [redacted] would build a house in a few months, and that therefore the completed house would be sold within the year and the loan paid off. There was a good chance of 3 to 5 houses, with a possibility of more. The loan was interest only for five years. The Appellant stated that "*it was assumed*" he would get the money to fund the building from [redacted]

16. The Appellant signed the loan document on 3 March 2005. On 28 June 2005, [redacted] came to visit and draw up plans, for which it charged the Appellant £4,700. [redacted] wanted a deposit of €100,000 but the Appellant managed to reduce that to €17,025, which was agreed in January 2006. This was to draw the plans and make the planning permission. However, things stalled around then so the Appellant retained the local agent, [redacted].

17. [redacted] told the Appellant that there were a few obstacles to achieving planning permission, including that the entrance to the site was on a sharp bend. The Appellant subsequently knocked down the corner "*but all these things took a little time to discuss*." There were also delays arising from the European court case and the development of the local sewage plant. The Appellant was subsequently of the view that [redacted] was unnecessarily delaying and making excuses "*because one could get permission to build subject to the sewage being ready*".

18. The Appellant stated that he did not buy the site to build a house from himself. He stated that the current status of the site was that "*it's still there*." The recession caused the property market to collapse and also had a detrimental effect on [redacted]. He was unable to sell [redacted] so the only choice was "*to stay put…we just waited it out*." He refinanced the [redacted] loan in 2010, which was finally paid off in around 2023.

19. The [redacted] began to pick up again around 2014. He sold [redacted] in [redacted] which resulted in him having some cash to hand, which he used to build stables on the site. The site is not listed on the market but the Appellant has received a couple of offers. He also built a roadway through the site to allow for a house or two to be built. The Appellant wanted to sell the site, because he no longer had the energy to build houses. [redacted].

20. On cross examination, the Appellant stated that he built the stables "*in dribs and drabs*". [redacted]

21. The Appellant agreed that the site was zoned for agricultural use at all times. He stated that he knocked down the corner on the site in around [redacted]. He agreed that the loan from [redacted] was purely to buy the site, but that the money to build the houses "*would come from the same source.*" He received funding to [redacted] so was confident he would have got a loan to build the houses.

22. He stated that [redacted] would have to engage local contractors to build the foundations before [redacted]. They had not contacted any local contractors because the Appellant did not engage them to build, and would not do so until planning permission was granted.

23. When asked why he did not claim trading losses in 2005 to 2007, he stated that he changed accountants who advised him that he could claim deductions on the losses from the site. He did not register for VAT because "*I figured nothing had happened yet*." When it was put to him that there was no evidence to show that the invoices from [redacted] had been paid, he stated that he could procure the bank statements to show payment. He stated that he paid [redacted] €6,000. When asked if he ever claimed losses on these payments he stated:

    "*A. No, because that would be like the 300,000 to acquire the property, you know, you'd have your total at the end and then you'd have a profit.*

    Q. No, but I mean, if you were trading and you paid out these expenses, I mean, would that not constitute a loss for you that you could have claimed?

A. Well, the way I looked at it was that it was still going on and it was separate from [redacted] *insofar as the property would be a separate trade, but then it just got lost in the wash…*

Q. I mean, I have to put it to you, if I was in business as you say you were and if I paid out roughly €27,000, the first thing I'd want to do is claim tax relief on those sums?

A. But, I think that's kind of, would it be kind of a capital allowance, that's like saying when I paid the 300,000 for the field I could have written that off just that year.

Q. That's not what we're talking about, we're just talking about these expenses. Anyway, the upshot is –

A. But they're related, they're all kind of the same expense. There's the purchase of the property and then the field, the cost associated with putting the first building on it, they'd be lumped into the same kind of overhead cost the way I see it."

24. When it was put to the Appellant that he abandoned his plans in 2007 to develop the land, he stated that "*The plans abandoned me…The environment changed.*" In response to a question from the Commissioner, the Appellant stated that he was provided with a plan by [redacted] for one house. He stated that in or around 2010 he made a last ditch effort to get planning permission, and that a different planning consultant asked [redacted] for the plans, but [redacted] stated that he did not have them anymore.

Submissions

Appellant

25. In written submissions, the Appellant submitted that the Respondent had based its argument that the Appellant was not engaged in a trade, or that any such trade had not commenced, on two old cases; *Spa Estates v Ó hArgáin* (Unreported, High Court, Kenny J, 20th June 1975) ("*Spa Estates*") and *Birmingham and District Cattle By-Products Co Ltd v IRC* (1919) 12 TC 92 ("*Birmingham and District Cattle By-Products")*. However, in *Revenue Commissioners v O'Farrell* [2018] IEHC 171 ("*O'Farrell*"), the High Court had definitively stated that land development was an adventure in the nature of trade, which began with the purchase of the land itself.

26. The Appellant bought the land with the intention of developing it at a profit. The entirety of the development was financed using bank borrowings, which were not in the form of a housing loan. The loan was for five years and was interest only, which was consistent with a loan for development rather than a housing loan. The Appellant incurred costs

arising from his retention of planning and design consultants, which he claimed as trading losses.

27. The definition of what constituted a trade was very wide, and it was clear that a one-off transaction could constitute a trade. In this case, it was clear on general principles that a trade existed, and in particular on the basis of the judgment in *O'Farrell.* Furthermore, a consideration of the six "badges of trade" identified by the Royal Commission on the Taxation of Profits and Income indicated that the Appellant was engaged in a trade.

28. In oral submissions, counsel for the Appellant stated that the *O'Farrell* judgment brought together and updated a lot of the earlier case law. In that judgment, Murphy J indicated that the law had moved on since *Spa Estates*. She stated that when one buys land as a developer, that is when the adventure in the nature of trade begins. *Spa Estates* could be distinguished from this appeal as it was concerned with a contrived scheme to avoid tax.

29. In *Birmingham and District Cattle By-Products*, the court held that the trade commenced when the company bought the materials that could be turned into product. This was consistent with the approach in *O'Farrell*. Similarly, in *Mansell v Revenue and Customs Commissioners* [2006] STC 605 ("*Mansell*"), it was found that the trade commenced when the taxpayer began operational activities and had put money at risk.

30. This was the case in the current appeal. The Appellant had purchased the land with an interest-only loan with a plan in place to develop the land. He paid planning and development consultants, which he planned to take into account and include in his costs of sale. The application for planning permission never worked out, through no fault of the Appellant. Then the economic crash happened, but the Appellant persisted with his plans and did not sell the land. He continued to improve the land. The land was not an investment property or an asset that the Appellant purchased for his personal enjoyment.

31. Counsel also submitted that some of the assessments (2008 – 2011) raised by the Respondent were out of time. There was no evidence of fraud or neglect regarding the preparation of the Appellant's returns, and therefore the Respondent was not entitled to raise those assessments after four years.

32. In reply to the Respondent, counsel stated that while the land was zoned for agricultural use, he paid approximately €80,000 per acre, which was well in excess of what the agricultural value would have been. The Respondent had not put the suggestion to the Appellant that he purchased the land for investment purposes, so it was not entitled to submit that this was what he had done. While the point about the time limit had not been

raised in the Appellant's notice of appeal, it was a statutory requirement and therefore the Commissioner was obliged to apply the law.

Respondent

33. In written submissions, the Respondent stated that it was not satisfied that the Appellant was carrying on a trade of land development during the years in question. The burden of proof rested on the Appellant to show that the amended assessments were incorrect. Even if the Appellant had commenced trade in 2005, such trade was not carried on between 2008 and 2015.

34. Whether or not a state of affairs amounted to a trade was one of fact and degree; *Cooper v C&J Clark Ltd* [1982] STC 335. There were distinguishing factors between this appeal and *O'Farrell*: the land in this appeal was never zoned for residential use; the Appellant never applied for planning permission to develop the site; there were no sewage facilities or water mains on the site; there was no written agreement in place with a bank to finance the development; the Appellant was [redacted], unlike the taxpayer in *O'Farrell*. In *Spa Estates*, the High Court held that an intending land developer which sold its lands before it commenced any development activities was not engaged in an adventure in the nature of trade.

35. In *Mansell*, it was held that there was a distinction between the setting up and the commencement of a trade. It was submitted that the Appellant never began any operational activities. A consideration of the six "badges of trade" indicated that the Appellant was not engaged in a trade. The purchase of the site by him was not sufficient to support a finding that he was trading. The alleged land development was far removed from the Appellant's normal activity [redacted] and he had no historic involvement in the construction trade.

36. [redacted]. It was important to note that the Appellant had not claimed for these expenses when they were incurred. As the Appellant never commenced trading, these expenses constituted pre-trading expenses and were not available to offset against other income.

37. The Appellant stated that he decided to put the alleged development on pause after the economic crash in 2007. Therefore, even if he had previously commenced trade, it was clear that he was not engaged in any trade following that decision, and consequently he was not entitled to the loss relief claimed.

38. Regarding the Appellant's claim that some of the assessments were out of time, no such claim was made in his notice of appeal, and therefore he was precluded from such grounds by section 949I(6) of the TCA 1997. In any event, the Appellant's returns did not contain a "*full and true disclosure*" of the relevant facts, and therefore the four year time limit was disapplied; section 955(2)(b)(i) of the TCA 1997.

39. In oral submissions, counsel reiterated the Respondent's view that there were factors in this appeal that distinguished it from some of the cases relied upon by the Appellant. The lack of any application for planning permission was indicative of the fact that there was no intention to trade. It seemed on the evidence that the Appellant would have been unable to get permission even if he had applied, so there was no commercial reality to the Appellant's claim he was trading.

40. The loan was simply to buy the site. There were no written agreements with the contractors who were allegedly engaged to build the houses. The losses were not claimed in 2005 to 2007, but were claimed afterwards clearly in order to try to save tax. No claim was made for made for the alleged payments to the consultants, which was also indicative that the Appellant was not trading. It was clear that this case was not on all fours with *O'Farrell*. The facts were more in line with those considered in *Spa Estates*.

41. It was possible for an asset that was originally trading stock to become an investment; *Stolkin v HMRC* [2024] UKFTT 160. Each case turned on its own facts but stated intentions were not sufficient – it was necessary to look at stated intentions in the round based on all the evidence.

Material Facts

42. Having read the documentation submitted, and having listened to the evidence and submissions of the parties at the hearing, the Commissioner makes the following findings of material fact that he understands to be agreed or uncontroverted:

    42.1. The Appellant [redacted]

    42.2. Prior to 2005, the Appellant had no experience in the trade of land development.

    42.3. In 2005, the Appellant purchased a 4.5 acre site in [redacted] ("the site"). The cost of the site was €330,000 (inclusive of stamp duty).

42.4. The purchase of the site was funded by way of a loan from [redacted]. The loan agreement was dated 3 March 2005 and provided that the amount of credit advanced was €330,000. The term of the loan was for 59 months, with 58 monthly repayments of interest only and a final lump sum payment. The APR was 4.706%. The purpose of the loan was stated to be "Property Related". The expiry date of the loan was 7 February 2010. The security for the loan was a mortgage on the site.

42.5. The Appellant's stated intention was to build a number of houses on the site which he intended to sell to homebuyers.

42.6. The loan did not include funding for the development of the site / the building of houses. The Appellant stated that he had discussed with [redacted] the provision of finance to fund the development of the site, but no evidence of such discussions or the promise of financing was provided to the Commission.

42.7. The site was zoned as agricultural land at all material times and remains so zoned.

42.8. The Appellant never applied for planning permission to develop the land.

42.9. The Appellant never registered for Value-Added Tax ("VAT") as a trader.

42.10. The Appellant engaged with [redacted] with a view to constructing houses on the site. The Appellant submitted invoices from [redacted] (€17,025, dated 13 January 2006) and [redacted] (£4,700, dated 28 June 2005) for work in respect of designing plans and submitting planning permission. The Appellant did not submit proof that he discharged these invoices. He did not submit any written plans or designs from [redacted].

42.11. The Appellant stated that [redacted] failed to submit a planning permission application as promised by them, and that therefore he retained a local consultant, [redacted], to submit an application. However, no application was ever submitted. The Appellant stated that he paid [redacted] €6,000; however, no invoice or proof of payment was submitted.

42.12. The Appellant stated that in 2007, following the financial and property crash, he put his development plans on hold: "*The plans abandoned me…The environment changed.*" The Appellant still owns the site. In or around [redacted] he carried out some remedial works on the site (i.e. knocking down a dangerous corner). He has subsequently built stables on the site. [redacted]

[redacted]

42.13. The Appellant did not claim any losses on his alleged trade of property development between 2005 and 2007. In 2008, following the retention by him of a new accountant, he claimed losses of €15,264. In 2009, he claimed losses for the years 2005, 2006 and 2007. In total, between 2008 and 2015, the Appellant claimed trading losses of €168,120, being interest payable on his loan(s).

42.14. The Appellant never claimed loss relief on his alleged payments to [redacted]. He stated that he intended to deduct these costs from anticipated profits on the sale of houses.

42.15. On 1 June 2010, the Appellant refinanced his loan with [redacted] The new loan had an expiry date of 20 December 2023.

42.16. In July 2017, the Respondent raised amended assessments to income tax for the years 2008 to 2015, and disapplied the trading losses claimed by the Appellant. It did not accept that he was engaged in a trade. The Appellant appealed against the amended assessments to the Commission. In his notice of appeal, the Appellant did not include a ground that the amended assessments for 2008 to 2011 were invalid on the basis that they were raised outside of the statutory four year period.

42.17. [redacted].

43. Additionally, having considered all of the documentary and oral evidence submitted and the submissions provided, the Commissioner makes the following finding of material fact on matters that were not agreed:

43.1. The Appellant did not have the intention of engaging in the trade of land development at any time during the years in question (2005 – 2015). Even if he had such an intention, the Appellant never commenced trade.

Analysis

44. The primary issue to be determined herein is whether or not the Appellant was engaging in the trade of land development. The Appellant also argued that the amended assessments for the years 2008 to 2011 were raised outside of the four year period and

therefore invalid. The Commissioner understood this to be very much a secondary argument, and it obviously only arises for consideration if it is found that the Appellant was not engaging in trade.

Whether the Appellant was engaged in trade

45. The burden of proof rests on the Appellant to show that the Respondent incorrectly concluded that he was not engaging in trade. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49 ("*Menolly Homes*"), Charleton J stated at paragraph 22 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.*"

46. In arguing that he was engaged in trade, the Appellant placed particular reliance on the High Court judgment in *O'Farrell*. The correct interpretation of *O'Farrell* was considered in detail by Dignam J in *Buckley v Revenue Commissioners* [2024] IEHC 414 ("*Buckley*"), and the Commissioner considers it apposite to quote at length from that latter judgment:

> "*54. The Revenue Commissioners v O'Farrell case is obviously of key importance. It is very heavily relied upon by the appellant. It was argued on behalf of the Revenue that the case is about more than the O'Farrell case and that it would be open to me to conclude that the Commissioner was wrong on her interpretation of O'Farrell but right in her determination because the question that is posed for this Court is broader than whether the Commissioner was correct in her interpretation of O'Farrell. This is correct insofar as it goes but nonetheless the proper interpretation of O'Farrell is of central importance to the case.*
>
> *55. The appellant essentially submits that the meaning and effect of O'Farrell is that if a tax payer purchases land with the intention of developing that land he is immediately, at the point of purchase, engaged in trade or an adventure in the nature of trade, i.e., the trade of land development. At paragraph 12 of the appellant's written submissions, it is stated " Per O'Farrell, the trade commences when the person purchases the land, not when the purchaser subsequently obtains planning permission after purchasing the land" and at paragraph 34 it is submitted that " In particular the Commissioner failing to take into account and apply the principle that a trader commences trading on purchasing the land for development, not when planning permission is obtained."*
>
> *[…]*
>
> *61. O'Farrell is not as black and white as is contended for by the appellant.*

62. I do not interpret O'Farrell as suggesting that any one factual matter can in all cases be determinative of whether a person is engaged in the trade of land development. Murphy J's statement at paragraph 43 of her judgment that "Either way, land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development" must be seen (a) in the context of the arguments that she was being asked to determine and (b) in the context of the factual background and the judgment as a whole. As noted above, in O'Farrell, the argument advanced by Revenue was entirely reliant on Spa Estates v Ó hArgáin in which Kenny J decided on the circumstances of that case that the purchase of the land did not establish that the taxpayer was engaged in trade. Therefore, the real issue to be decided by Murphy J was whether the purchase of the land for the purpose of development was sufficient to establish that the person was engaged in trade rather than determinative of the question whether in all cases where land was purchased for the purpose of development the purchaser was immediately engaged in the trade. Secondly, in O'Farrell, the facts were that when the taxpayer bought the property, he had an agreement with the bank for financing to purchase and develop the lands and he had a development plan. That Murphy J considered these to be relevant factors in the assessment of whether the taxpayer was engaged in trade is clear from paragraph 41 where Murphy J, having adopted the principles in Mansell, said: "…The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. ***Having secured finance from the bank both for the purchase of the property and for the cost of development****, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. On the Mansell principles that was an operational activity being "dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk." (Mansell, Paragraph 93) On the facts and the principles applied in Mansell, the respondent was engaged in the trade of land development* ***and began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same****. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land." (emphasis added)*

63. Taking account of such factors is also consistent with the long line of authority to the effect that in assessing whether the taxpayer is engaging in trade the Court (or the Tax Appeals Commissioner) must have regard to all of the circumstances. As noted

above, this is clear from Cooper, Ransom v Higgs, Spa Estates v Ó hArgáin, and Mara v Hummingbird [1982] ILRM 421.

64. An interpretation of O'Farrell to the effect that it is authority for the proposition that any one factor or even combination of factors is determinative in all cases is inconsistent with this long-established approach. It would also be contrary to logic. The end point of an interpretation that a person must be determined as being engaged in the trade of land development from the moment he purchased the land with the intention of developing it is that he must be determined to be engaged in trade even if has no plans to develop the land immediately or within any particular time scale. A person who was not or had never previously been engaged in the trade of land development could buy land with the intention of developing it at some undefined point in the future (which may or may not ever occur) and would have to be determined to be engaged in trade from the moment of purchase on and perhaps for a very long number of years. That is, of course, an extreme scenario but it is illustrative of the illogicality of an interpretation of O'Farrell that one factor or combination of factors can or, indeed, must be determinative. In my view, the significance of the reference by Murphy J to the taxpayer in that case coming to the project with a development plan and financing for the development costs and that he had applied for planning permission is that she was assessing all of the circumstances. This is also the relevance of Murphy J's assessment of the fact that Mr O'Farrell was renting out the house on the lands whilst going through the planning process.

65. As noted above, the Commissioner stated that O'Farrell was authority for the proposition that trade commences at the moment of purchase of the land for the purpose of development. This would appear to suggest that the Commissioner interpreted O'Farrell as meaning that the purchase of lands for the purchase of development is itself determinative. Stated in such bald terms, it seems to me that this interpretation is incorrect. However, the Commissioner then in fact adopted the approach of taking all of the circumstances into account including questions such as zoning, the fact that there was no planning permission, that no application for planning permission was made or has been made, and that there was no formal agreement for financing the development costs. It seems to me that this is what was meant by paragraph 51 of her Determination. I am satisfied that this was the correct approach on the basis of O'Farrell. She took these into account by considering the factual distinctions between this case and O'Farrell, notwithstanding that in both cases the tax-payer had bought the land with the intention of developing it. It seems to me that

the validity or relevance of the points of distinction goes to the conclusions reached rather than the general approach."

47. It seemed to the Commissioner that, notwithstanding the above *dicta* of Dignam J, counsel for the Appellant continued to assert that *O'Farrell* meant that the purchase of the site by the Appellant for the purpose of development was sufficient to determine that the Appellant was engaged in the trade of land development. However, it is clear from *Buckley* that this is not the correct interpretation of *O'Farrell,* and that it is necessary to have regard to all the circumstances when assessing whether a taxpayer is engaged in trade. Indeed, that it was notable that counsel for the Appellant did not address the implications of the judgment in *Buckley* at all, [redacted]

48. Therefore, in determining whether or not the Appellant intended to engage in the trade of land development, the Commissioner is obliged to have regard to all the relevant circumstances. He considers the following facts to be of relevance:

    - Prior to the purchase of the site in 2005, the Appellant had not engaged in land development. There was no evidence to suggest that he had ever purchased any other land other than the site for the purposes of development. Therefore, the Commissioner is satisfied that this was a one-off transaction. Although a one-off transaction is capable of being an adventure in the nature of trade, the lack of repetition indicates that the Appellant was not engaged in trade; *Marson v Morton* [1986] STC 463.

    - The Appellant did not have financing to develop the land. The loan provided to him by [redacted] was solely to purchase the site. The letter of approval stated that the purpose of the loan was "Property Related" but there was no reference to land development. The Appellant stated that it was assumed that [redacted] would provide him with a loan to finance development, but no evidence of any such intention on the part of [redacted] was provided.

    - The Appellant did not register for VAT as a trader at any stage.

    - The site was zoned as agricultural land at the time of purchase, and has remained so zoned at all material times thereafter. At no stage has the land been zoned for residential purposes.

    - The Appellant never applied for planning permission to build houses on the land. While he gave evidence of his attempts to make an application, no such

application was ever lodged with the relevant planning authorities, and therefore no building development was at any material time actually possible on the site.

- The Appellant gave evidence that he retained the services of [redacted] to design plans and submit a planning application. However, no copies of any written plans, nor copies of any completed (whether fully or partly) planning applications, were submitted to the Commissioner.

- The Appellant gave evidence that, following the failure of [redacted] to submit a planning application, he retained the services of a local planning consultant, [redacted]. However, no letter of engagement or any other written evidence of such engagement was provided.

- The Appellant did not claim any loss relief for the years 2005 to 2007. In 2008, following the retention by him of a new accountant, he claimed loss relief, and continued to do so for the following years up to and including 2015. The loss claimed was the interest on his loan to [redacted] (which was refinanced in 2010).

- The Appellant submitted invoices from [redacted] (€17,025, dated 13 January 2006) and [redacted] (£4,700, dated 28 June 2005) for work in respect of designing plans and submitting planning permission. He did not provide written evidence that these invoices were discharged by him. In any event, he never claimed these costs as trading losses.

49. It is clear from *Buckley* that none of the above matters can by itself be determinative. However, the Commissioner is satisfied that, taken together, they indicate that the Appellant never had an intention to engage in the trade of land development. In particular, the lack of financing to develop the site and the lack of planning permission clearly distinguishes the current appeal from the circumstances considered by the High Court in *O'Farrell*. Furthermore, the taxpayer in *O'Farrell* held a portfolio of investment properties, unlike the Appellant herein.

50. The Commissioner considers that, if the Appellant was genuinely engaged in trading, he would most likely have registered for VAT and claimed his trading losses as they occurred. However, no losses were claimed by him during the years 2005 – 2007, and he only began to claim losses when he retained a new accountant in 2008. The Appellant gave evidence that his new accountant advised him in 2008 that he could seek to claim the interest on his loan as a trading loss. The Commissioner considers that the most likely

explanation is that the Appellant sought to claim he was engaged in trading as a land developer on a *post facto* basis to try to justify his claims for trading losses, rather than as a true reflection of an intention to trade from 2005 on his part.

51. Furthermore, the Appellant provided invoices from [redacted], and also stated that he paid [redacted] €6,000 for planning services. No evidence of such payments having been made was provided by the Appellant, which the Commissioner would expect a trader to be able to produce. Nevertheless, the Commissioner accepts the Appellant's oral evidence that he paid these sums. However, the Commissioner finds very surprising that the Appellant did not claim these costs as trading losses. The evidence of the Appellant was that he intended to deduct them from the profit to be achieved on the sale of houses to be developed on the site (which, of course, never happened). The Commissioner considers that this constitutes further evidence that the Appellant did not genuinely consider himself to be acting as a trader in land development, but rather envisaged the site as being something more akin to a capital investment.

52. In all the circumstances, therefore, the Commissioner is satisfied that the Appellant never intended to engage in the trade of land development. Even if the Appellant did have such an intention (and the Commissioner is satisfied that he did not), the Commissioner would find that the trade never commenced. In *Mansell v Revenue and Customs Commissioners* [2006] STC (SCD) 605, it was stated that:

> "*93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities—and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade*."

53. In this appeal, while the Appellant did engage third party contractors, it was unclear how much work was ever actually carried out by them on his behalf. As stated above, no written plans for development were put before the Commissioner. No planning permission

application was made by or on behalf of the Appellant at any stage. No financing for development was secured by the Appellant. The Commissioner considers that the evidence suggests a distinct lack of urgency on the part of the Appellant to progress the development of the site. The loan approval letter was dated 3 March 2005. The invoice from [redacted] was dated 28 June 2005. The invoice from [redacted] was dated 13 January 2006. It did not seem to the Commissioner that any meaningful progress towards development of the site occurred before the Appellant's plans were paused in 2007 following the economic crash. Consequently, the Commissioner is of the view that the Appellant never commenced operational activities and therefore that, even if he had intended to trade, such trade never commenced.

54. The Appellant provided evidence of remedial works on the site and the building of a barn. The Commissioner does not consider these works sufficient to show commencement of trading. However, even if they were, the evidence was that the Appellant carried out these works after the time periods material to this appeal, and therefore the Commissioner considers that they are not relevant to his determination on whether or not the Appellant was trading.

55. The Commissioner is satisfied that the above findings are determinative of the question of whether the Appellant was engaged in trade. Nevertheless, as both parties have addressed the six "badges of trade" in their written submissions, he will briefly consider them, [redacted]

- Subject matter of the realisation: [redacted] However, the Commissioner notes that the site in question was at all times zoned for agricultural use and that planning permission for development was never granted or even applied for.

- Duration of ownership: The site has been owned by the Appellant for 20 years, which is not indicative of trading stock.

- Frequency of similar transactions: This was a one-off transaction by the Appellant. While an isolated transaction can constitute trading, a finding of trading is more likely where a taxpayer engages in a series of similar transactions.

- Supplementary work: The Appellant gave evidence that he retained planning and development consultants. However, the actual work carried out by them seems to have been fairly minimal. Furthermore, while the Appellant has subsequently

carried out some improvements to the land, the evidence was that these were done after the periods under consideration herein.

- Circumstances responsible for the realisation: The site has never been realised.
- Motive: It has already been found that the Appellant did not have the intention to trade in land development.

56. Consequently, the Commissioner is satisfied that a consideration of the badges of trade, taken together, confirms his view that the Appellant was not engaged in trading.

Whether amended assessments were out of time

57. The Appellant has contended that the amended assessments for the years 2008 to 2011 were raised outside of the four year period and therefore invalid. The Respondent argues that the Appellant is precluded from relying on this argument pursuant to section 949I(6) of the TCA 1997, and that in any event the Respondent was entitled to raise the assessments when it did.

58. Section 949I(6) of the TCA 1997 states that:

> "*A party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice*."

59. It can be seen that the prohibition on reliance on a new ground is mandatory, unless the Commissioner is satisfied that the ground could not reasonably have been stated in the notice of appeal. This ground was not specified by the Appellant in his notice of appeal, and no reason was provided by him as to why he did not do so. The Commissioner is not satisfied that the ground could not reasonably have been so stated, and therefore it follows that the Appellant is precluded from relying on this ground. In his submissions, counsel for the Appellant stated that the four year rule was a statutory requirement. However, there is nothing in section 949I(6) removing grounds based on that rule from the requirement that they be stated in the taxpayer's notice of appeal.

60. In any event, even if the Appellant was not so precluded, the Commissioner would be satisfied that the Respondent was entitled to raise the amended assessments outside of the usual four year period. Section 955(2)(b)(i) (now section 959AA(2)(a)) disapplies the four year rule where the taxpayer's return does not contain a "*true and full disclosure*" of all material facts necessary for the making of an assessment. In *O'Sullivan v Revenue Commissioners* [2024] IEHC 611, the High Court stated that:

"*91…the taxpayer's subjective belief, however well informed, as to the accuracy of his tax returns content is not a relevant consideration in ascertaining whether they can be regarded as a true and full disclosure of all material facts. It must be accurate in every respect. Subjectivity is not the yardstick*."

61. In this instance, the Appellant's claim for trading losses on his income tax returns was based on the incorrect and inaccurate basis that he had been engaged in trade. Consequently, the Commissioner finds that his returns did not contain a "*true and full disclosure*" of all material facts, and the four year time period for the amending of assessments is disapplied. While counsel for the Appellant stated that there was no evidence of fraud or neglect adduced by the Respondent, such evidence is only required where the Respondent has sought to rely on section 956 / section 959Z to make enquiries outside of the four year period, and is not a requirement where it has raised assessments under section 955 / section 959AA.

Determination

62. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the amended assessments to income tax for the tax years 2008 to 2015 inclusive should stand.

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

Notification

64. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the 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

65. 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 of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Simon Noone
Appeal Commissioner
26 June 2025