AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

33TACD2025

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") against assessments to employer's income tax, PRSI and USC (together "PREM") raised by the Revenue Commissioners ("the Respondent") for the years 2015 and 2016. The total amount of tax at issue is €247,313.

2. The Appellant contends that it is entitled to a deduction for expenses allegedly incurred by its delivery drivers. As well as denying that the Appellant is so entitled, the Respondent also objects, pursuant to section 949I(6) of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), to the Appellant being permitted to argue its point, as it was not included in its Notice of Appeal.

Background

3. On 15 December 2020, the Respondent raised Notices of Estimation against the Appellant for 2015 and 2016. The amount of PREM estimated for 2015 was €407,034.26, and the amount for 2016 was €358,505.29. Therefore, the total amount of PREM estimated to be owed by the Appellant was €765,539.55.

4. The assessments were raised on two grounds: (1) that the Appellant's delivery drivers were employees rather than self-employed contractors, and (2) [redacted]

5. On 12 January 2021, the Appellant appealed against the assessments to the Commission. It denied that its delivery drivers were employees. The appeals were stayed pending the outcome of the litigation in *Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza*, which concerned the employment status of Domino's Pizza delivery drivers.

6. On 20 October 2023, the Supreme Court delivered its judgment in *Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza* [2023] IESC 24 ("*Karshan*"), which determined that the Domino's Pizza delivery drivers were employees rather than self-employed contractors, and which set out a five-stage decision making framework for determining employment status for tax purposes.

7. Following the issuance of the judgment in *Karshan*, the Appellant stated that it accepted that its delivery drivers had been incorrectly classified by it as self-employed contractors. The issue concerning [redacted] was also resolved between the parties, and therefore does not fall to be considered in this determination.

8. On 16 October 2024, the Appellant delivered its Outline of Arguments to the Commission, and, for the first time in correspondence with the Commission, stated that it was seeking a deduction for expenses necessarily incurred by its delivery drivers in providing services to the Appellant. In response, the Respondent stated that the Appellant was precluded by section 949I(6) of the TCA 1997 from raising a ground of appeal that had not been included in its Notice of Appeal.

9. The appeal proceeded by way of a hearing in private on 20 November 2024. The Appellant was represented by senior counsel, and the Respondent was represented by senior and junior counsel. At the hearing, the parties confirmed that it was agreed that the adjusted amounts under appeal were €121,889 for 2015 and €125,424 for 2016.

Legislation

10. Section 114 of the TCA 1997 states that

> "*Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties,*

there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

11. Section 117(1) of the TCA 1997 states that

"*Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*"

12. 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*."

Evidence

[redacted]

13. [redacted] ("the First Witness") stated that she was [redacted] in the Appellant company since [redacted] She stated that if an employee of the Appellant used their own vehicle for work-related travel, they would submit an expense sheet to payroll, who would apply the appropriate mileage rate and the employee would receive the payment in their next pay period. She confirmed that employees were not required to claim for their expenses through their tax returns.

14. She stated that the Appellant had worked on the basis that its delivery drivers were independent contractors. The Appellant developed a contract which made it clear that its drivers were independent, and responsible for providing their own vehicle. A copy of the driver contract was submitted in evidence. She stated that it was a requirement of the contract that the drivers used a car to deliver the Appellant's product to customers.

15. The First Witness stated that in 2015 and 2016, everyone in the industry believed that delivery drivers were correctly treated as independent contractors. She stated that she was aware of a determination from 2008 by the Department of Social Welfare in respect

of Domino's Pizza that their drivers were independent contractors. As a result, the Appellant did not keep details of its drivers' vehicle registration numbers.

16. She stated that the Appellant became aware of the *Karshan* litigation in recent years. She stated that the Appellant was surprised when the Supreme Court determined that Domino's drivers were employees. She stated that the Appellant had previously had inspections by the National Employment Rights Authority ("NERA") who had never advised that it should treat its delivery drivers as employees. An email concerning a NERA inspection from [redacted] was submitted in evidence.

17. On cross examination, the First Witness stated that the Appellant did not have a specific policy for paying expenses, and that the Appellant's expense form set out what needed to be provided for an expense claim to be paid. She agreed that none of the delivery drivers submitted expense claims in 2015 and 2016, and stated that "*they wouldn't have been entitled to because they weren't employees*."

18. She stated that she understood that the payments to the drivers "*included an amount to off-set their expense of delivering that delivery to that customer.*" She stated "*it had never been separated and isolated as an expense amount*" but that what was paid to the driver included a payment for expenses. She agreed with counsel that "*All [the Appellant is] concerned about is that you deliver these goods and you're in a vehicle that's insured*."

19. In response to questioning from the Commissioner, the First Witness stated that how the delivery drivers were paid differed depending on the locality; some were paid simply by delivery, whereas others received an additional payment where the numbers of deliveries were lower. The delivery charge also differed.

[redacted]

20. [redacted] ("the Second Witness") was a tax director with [redacted] retained on behalf of the Appellant. He prepared a schedule of expenses which he stated "*were prepared when we were looking to negotiate with [the Respondent] to come to a settlement. We were looking at a logical or reasonable basis to work out a mileage claim…we were saying if they were deemed to be employees they would have been claiming expenses…So what we did was, we took the total payment for each of the years '15 and '16 and there is a separate schedule for each one…*"

21. He stated that it was agreed with the Respondent that the Appellant's delivery drivers were paid [redacted] in 2015 and [redacted] in 2016. He stated that the payment per delivery varied so he took an average of [redacted] delivery. He used this to work out the number of deliveries per driver. He took an average round trip of [redacted] per delivery,

and used the civil service mileage rates to work out the proposed mileage expenses. He used the two lower bands at a blended rate. Using his methodology, he estimated expenses of [redacted] for 2015 and [redacted] for 2016.

22. On cross examination, the Second Witness agreed that his schedule of expenses was hypothetical and was created for the purposes of negotiation. He agreed that no reimbursements had actually been paid to the drivers. He accepted that the Appellant and Respondent met in January 2020, at which the Respondent notified the Appellant that it believed the delivery drivers should have been treated as employees for tax purposes. He also accepted that he advised the Respondent in February 2020 that the Appellant was preparing a submission in reply, and did not dispute counsel's contention that no submission was in fact put forward by the Appellant. He accepted that the issues before the Commissioner "*were live for some considerable time*." He accepted that the High Court's judgment in December 2019 in the *Karshan* litigation had found that those drivers were employees.

23. The Second Witness agreed that the first reference by the Appellant to seeking a deduction for expenses was in summer 2024. He stated that at the time the Appellant submitted its appeal to the Commission, it did not have the basis for the Respondent's calculations and did not know how the liabilities had been formulated.

24. Counsel suggested that no reimbursements were ever paid to the delivery drivers, and in response the Second Witness stated that "*I suppose the rate they were paid was to cover them for their time and their cost.*" He stated that the Appellant was open to discussing its estimates of expenses with the Respondent. He agreed that the estimates were hypothetical but were based on the premise that "*the employees, if they were known to have been employees at the time, they would have made expense claims as they were required to use their own vehicles.*"

Submissions

Appellant

25. In written submissions, the Appellant stated that it accepted, on foot of the Supreme Court's judgment in *Karshan*, that its delivery drivers should be classified as employees. However, if the law had been clarified by the courts prior to 2023 and if in fact it was aware that such delivery drivers were employees, the Appellant would have been entitled to reimburse expenses incurred "*wholly, exclusively and necessarily*" by such drivers in accordance with section 114 of the TCA 1997.

26. In 2015 and 2016 the Appellant understood, like other similar taxpayers, that it was appropriate to treat the delivery drivers as independent contractors. Such belief was reinforced by the Court of Appeal decision in *Karshan* which issued in May 2022. The Appellant had no reason to seek details from such drivers in 2015 and 2016 as to the vehicle they were using to carry out their contractual obligations. Furthermore it had no legal entitlement to seek such details from the drivers. Even if it had gathered such data at the time, it would have been prohibited pursuant to GDPR from retaining it.

27. It would be entirely unfair and contrary to the spirit of the Respondent's Customer Service Charter for it to insist on strict compliance with the requirements of section 886 of the TCA 1997, concerning retention of documents, given the unique circumstances of this appeal where, as a result of the Supreme Court determination in 2023, the Appellant was now being assumed to have perfect foresight as to how to deal with such drivers in 2015 and 2016.

28. Other arguments were raised by the Appellant in written submissions that its counsel confirmed at the hearing were no longer being pursued. In response to the Respondent's objection under section 949I(6), the Appellant submitted that the law underpinning the assessment was entirely unclear from the time the Notice of Appeal was lodged in January 2021 to the Supreme Court determination in October 2023. In such circumstances it would be entirely unreasonable for the Commission to refuse to entertain the grounds advanced in the Appellant's Outline of Argument, particularly in circumstances where reliance was being placed on the Supreme Court judgement itself in support of some of these grounds. Furthermore, the Commission was obliged by section 6(2)(1) of the Finance (Tax Appeals) Act 2015 to ensure that a taxpayer ends up with a correct liability to tax and the Commission would effectively be failing to comply with its statutory obligations if it refused to entertain the Appellant's ground of appeal.

29. In the Supreme Court judgment in *Karshan*, Murray J stated at paragraph 284 that

> "*In the course of the judgment I make some comments about the potential injustice of Karshan being disproportionately penalised by one arm of the State for conducting its business in accordance with the law as it was found by another department of government. It would appear that Revenue must account for any income tax already paid by Karshan's drivers and, if necessary, abate the assessments to take account of such payments*."

30. The Appellant was unable to tender any evidence of income tax payments made by its delivery drivers. Therefore, it was submitted that the onus shifted to the Respondent to arrive at some estimate of the tax likely to have been paid by such drivers. The issue

concerning expenses incurred by such drivers was closely aligned to the argument concerning the tax payments made by such drivers.

31. In oral submissions, counsel for the Appellant confirmed that the sole ground it was relying on was the contention that it was entitled to a deduction for the expenses of its delivery drivers. The Appellant's contract with its delivery drivers obliged them to provide their own vehicle.

32. It was a fact that the delivery drivers were paid the amounts set out in the spreadsheets provided by the Appellant. It was also a fact that the drivers had to use their own vehicles. It was then a matter for the Commissioner to consider and apply those facts, and decide how to give the Appellant credit for the expenses that would have been processed through its payroll if the law had been clear at the time.

33. The Appellant was entitled to rely on its ground of appeal, even though it was not raised in the Notice of Appeal. When the Notice of Appeal issued, neither the judgment of the Court of Appeal nor that of the Supreme Court in *Karshan* had issued, and it would be unfair to limit the Appellant to what was stated in its Notice of Appeal in such circumstances. In the Supreme Court judgment, Murray J noted that two arms of the State had taken different stances on the legal position. It was a corollary of Murray J's comment, that Karshan would have been entitled to credit for any tax paid by its employees, that the Appellant should be entitled to credit for the expenses of its employees.

34. There was a tension between section 949I(6) of the TCA 1997, and section 6(2)(1) of the Finance (Tax Appeals) Act 2015. In *R v Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929, the English Court of Appeal held that a decision-making body was not entitled to ignore an obvious point of law simply because it was not included in the Notice of Appeal.

35. The Appellant had been obliged to submit its Notice of Appeal within 30 days of receiving the Notices of Assessment, in circumstances where it was not provided with the calculations for the estimates by the Respondent. The Notice of Appeal stated that the assessments were excessive, which gave it latitude to later set out why it believed this to be case.

36. The Second Witness had put forward a methodology for the credit claimed by the Appellant, which was not challenged on cross examination by the Respondent. It was accepted that the Appellant had put forward estimates, and it was open to the Commissioner to take a view on the appropriate amount of credit to be afforded if he considered the estimates to be excessive. In this regard, counsel referred to previous

determinations of the Commission, including 32TACD2021, 113TACD2021, 11TACD2023 and 159TACD2023. These showed that it was open to the Commissioner to allow the Appellant credit for unvouched expenses, in circumstances where it was not possible for it to have retained the relevant documentation regarding its drivers' expenses.

37. In response to a question from the Commissioner as to whether he had jurisdiction to grant expenses on a hypothetical basis, counsel stated that he could look to the Supreme Court's judgment in *Karshan*, where Murray J stated that that judgment had led to issues that needed to be resolved. The Appellant could not be blamed for the law having been in flux.

Respondent

38. The Respondent's Outline of Arguments, dated 19 April 2024, addressed *inter alia* the question of whether the Appellant's delivery drivers should have been treated as employees rather than independent contractors. Following the Appellant's acceptance that the drivers were employees, and its raising of the expenses ground, the Respondent provided additional written submissions. It contended that the Appellant should not be permitted to raise the new ground. Following the High Court's judgment in *Karshan*, the Appellant was on notice that its drivers were likely to be classified as employees, and therefore there was no impediment to it including a ground of appeal in relation to expenses when it submitted its Notice of Appeal.

39. Even if the new ground of appeal was to be admitted, the Appellant could not succeed on it. The Commission's function in this appeal was to decide whether the estimates raised on the Appellant should stand. The question of an offset for liabilities of other taxpayers was not one which the Commission had jurisdiction to decide; *Lee v Revenue Commissioners* [2021] IECA 18. There was nothing in the TCA 1997 which would allow credit for tax paid by one taxpayer to be offset or allowed as a deduction in respect of the tax liabilities of another taxpayer (in this case the Appellant) and, therefore, the Commission had no jurisdiction to allow such an offset.

40. In oral submissions, counsel for the Respondent stated that the Appellant was seeking a deduction for hypothetical expenses of [redacted] of the amounts paid to the drivers in 2015 and 2016. Therefore, the Appellant was contending that only [redacted] of what it paid its drivers was for the service being provided by them, with the balance being expenses.

41. The Appellant understood from January 2020 that the Respondent intended to raise assessments against it on the basis that its delivery drivers were employees. The

Appellant indicated that it wanted to provide a submission to the Respondent, but despite prompts by the Respondent no submission was provided. It was open at the time the Appellant submitted its Notice of Appeal to say that it believed credit should be allowed for expenses, but it had not done so. At the time the Appellant submitted its Notice of Appeal, the law was as stated by the High Court in *Karshan*; i.e. that Domino's delivery drivers were employees.

42. The Appellant raised the issue of expenses for the first time in May 2024. The Second Witness had stated that it had done this in the context of negotiations with the Respondent. The judgment which the Appellant sought to rely on, *R v Secretary of State for the Home Department, ex parte Robinson*, was an immigration case that considered the application of the European Convention of Human Rights, and therefore had no applicability to tax law. There was no factual basis for the Appellant to get around the provisions of section 949I(6) of the TCA 1997. This was a mandatory provision that compelled the Commissioner to refuse to allow the Appellant to raise the new ground unless he was satisfied that it could not have done so when it submitted its Notice of Appeal, and that was clearly not the position herein.

43. Without prejudice to the Respondent's objection under section 949I(6), it was clear that the hypothetical claim for a deduction for expenses could not succeed. Counsel for the Appellant had discussed the implications of section 886 of the TCA 1997, but this was not relevant to the appeal. The case was straightforward – the Appellant had never paid expenses to its drivers. There was no provision in the TCA 1997 to allow for payment of hypothetical expenses.

44. Murray J in the Supreme Court judgment in *Karshan* had stated that credit would have to be given if an employee had paid tax. But counsel for the Appellant had confirmed that it was not seeking a credit if its employees had paid tax. Sections 114 and 117 of the TCA 1997 provided that the entitlement to a deduction from tax for qualifying expenses was an entitlement of the employee, not the employer. As a matter of practice, the Respondent allowed the netting off of expenses by the employer, but only where an actual expense payment was made to the employee separately to his remuneration.

45. There was no evidence of such expense payments herein. The Appellant was seeking the Commissioner to interpret section 117 to allow it to take a benefit for a payment that was never made. All of the Commission determinations referred to by the Appellant involved circumstances where expense amounts had been paid to the employee, and therefore were not relevant to this appeal.

Material Facts

46. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

    46.1. In the *Karshan* litigation, the Commission found that Domino's Pizza delivery drivers were employees rather than independent contractors. The High Court upheld the Commission's determination on 20 December 2019 ([2019] IEHC 894). The Court of Appeal overturned the High Court judgment on 31 May 2022 ([2022] IECA 124). On 20 October 2023, the Supreme Court allowed the appeal against the Court of Appeal judgment, and concluded that the Domino's Pizza delivery drivers were employees ([2023] IESC 24).

    46.2. In 2015 and 2016, the Appellant retained the services of delivery drivers to deliver its product to customers. The delivery drivers were treated as independent contractors by the Appellant.

    46.3. The Appellant required its delivery drivers to enter into a contract. The contract provided that the delivery drivers were retained as independent contractors. It provided that each delivery driver was required to provide his own delivery vehicle, and that it was the driver's responsibility to maintain the vehicle and ensure that it was roadworthy.

    46.4. The contract provided that the Appellant would pay the delivery drivers "*according to the number of deliveries successfully undertaken.*" The contract did not make any provision for the separate payment of expenses to the drivers.

    46.5. The Appellant met with the Respondent in January 2020. At that meeting, the Respondent informed the Appellant that it intended to raise assessments against it on the basis that its delivery drivers had been incorrectly classified by it as independent contractors, and should instead have been treated as employees.

    46.6. On 15 December 2020, the Respondent raised Notices of Estimation against the Appellant for 2015 and 2016. The assessments were raised on the basis, *inter alia*, that the Appellant's delivery drivers were employees of the Appellant rather than independent contractors.

    46.7. On 12 January 2021, the Appellant appealed against the assessments to the Commission. It denied that its delivery drivers were employees. It did not include

a ground of appeal that it was entitled to a deduction for expenses paid to its delivery drivers.

46.8. In May 2024, the Appellant raised its argument that it was entitled to a deduction for expenses for the first time with the Respondent. It raised this point for this first time in correspondence with the Commission in its Outline of Arguments, submitted on 16 October 2024.

46.9. In 2015, the Appellant made total payments of [redacted] to its delivery drivers. In 2016, it made total payments of [redacted].

46.10. The adjusted assessment to PREM for 2015 was €121,889, and for 2016 was €125,424.

46.11. The Appellant had provided a methodology for expense payments it stated it would have made to its drivers if it had classified them as employees in 2015 and 2016. The Appellant had claimed a deduction of [redacted] for 2015, and a deduction of [redacted] for 2016.

46.12. No expense payments were made by the Appellant to its delivery drivers in 2015 and 2016.

Analysis

47. 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.*"

48. In addition to the above, in the recent judgment in *Hanrahan v The Revenue Commissioners* [2024] IECA 113, the Court of Appeal clarified the approach to the burden of proof where an appeal relates to the interpretation of law only. The court stated *inter alia* 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……."

49. In this appeal, the Appellant has sought credit for expense payments it states it would have made to its delivery drivers in 2015 and 2016 if the law on the employment status of its drivers had been clarified by then. In response, as well as opposing the substantive claim by the Appellant, the Respondent objects that it is precluded by section 949I(6) of the TCA 1997 from raising it after it had submitted its Notice of Appeal. The Commissioner will consider this objection first.

Whether the Appellant is precluded by section 949I(6) from raising its ground of appeal

50. The Appellant submitted its Notice of Appeal to the Commission in January 2021. Its grounds of appeal, insofar as relevant herein, were focussed on denying that its delivery drivers should be treated as employees rather than independent contractors. The Appellant accepted that it first raised its argument that it should be entitled to a deduction for expenses in correspondence with the Respondent in May 2024, and in correspondence with the Commission in October 2024. The Respondent submits that there is no reason why the Appellant could not have included this new ground in its Notice of Appeal, as it was aware of the Respondent's position regarding the employment status of its drivers since January 2020. Furthermore, at the time it submitted its Notice of Appeal, the High Court's judgment in *Karshan* had determined that Domino's Pizza's delivery drivers were employees, and the Court of Appeal had not yet overturned the High Court's judgment.

51. 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*."

52. The Commissioner considers that the Appellant must have been aware, when it submitted its Notice of Appeal, that its drivers might ultimately be determined to be its employees. Indeed, the consideration of their employment status was the original basis for the appeal. In the circumstances, it would certainly have been advisable for the Appellant to include a ground, on a 'without prejudice' basis, that, in the event that its drivers were determined to be employees, it would seek credit for expenses (hypothetically) paid to them.

53. Having said that, the Commissioner considers that it would be incorrect of him to disregard the wider context in which the appeal was brought by the Appellant. He does not doubt that in 2015 and 2016 it *bona fide* believed that its drivers were properly classified as independent contractors. In her evidence, the First Witness stated that the Appellant had been aware of a determination from an officer of the Department of Social Welfare that Domino's drivers were not employees. There was also evidence that NERA had inspected the Appellant and had not queried its treatment of its drivers as independent contractors.

54. In the Supreme Court judgment in *Karshan*, Murray J stated at paragraph 278 that

> *"While the question of whether a decision of the Social Welfare Deciding Officer of August 2008 that similarly positioned drivers were not employees generated any form of estoppel was not before this court, it strikes me at a very general level that Karshan would have a legitimate grievance if it were to be penalised by one arm of the State for conducting its business in accordance with the law as interpreted and applied by another department of government*."

The Commissioner notes that the Supreme Court judgment overturned the judgment of the Court of Appeal in *Karshan*, which itself overturn the earlier High Court judgment.

55. Therefore, the legal position regarding the employment status of drivers such as those that worked for the Appellant in 2015 and 2016 was unclear, and was not fully clarified until the Supreme Court's judgment in *Karshan* in October 2023. Given the lack of clarity, and in particular given that the Appellant had conducted "*its business in accordance with the law as interpreted and applied by another department of government*" (per Murray J), the Commissioner considers that it would be unduly restrictive and unfair to apply a strict interpretation of section 949I(6) of the TCA 1997 so as to prevent the Appellant from relying on its new ground of appeal herein.

56. In coming to this conclusion, the Commissioner has had regard to the provisions of section 6(4)(a) of the Finance (Tax Appeals) Act 2015, that mandates him to ensure that proceedings such as these are "*accessible and fair*". For the reasons set out above, and in the particular circumstances of this appeal, the Commissioner is satisfied that it would be unfair to prevent the Appellant from relying on its ground of appeal, and therefore he will proceed to consider the substantive ground.

Whether the Appellant is entitled to a deduction for expenses

57. The Appellant contends that it should be entitled to a deduction on its PREM assessments for expenses it says it would have paid to its drivers if their status as employees rather

than independent contractors had been clarified in 2015/16. In evidence, its witnesses accepted that the claim was hypothetical and that no expenses had actually been paid to the delivery drivers. However, its counsel stated that the drivers were obliged by contract to provide their own vehicles, and that therefore a portion of the amount paid to them by the Appellant should be treated as mileage expenses.

58. Section 114 of the TCA 1997 states that

> "*Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.*" (emphasis added)

59. Section 117(1) of the TCA 1997 states that

> "*Subject to this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of section 112 as a perquisite of the office or employment of that director or employee and included in the emoluments of that office or employment assessable to income tax accordingly; but nothing in this subsection shall prevent a claim for a deduction being made under section 114 in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*" (emphasis added)

60. The Commissioner considers that it is patently clear from the above provisions that deductions from taxation only apply to expenses that have actually been paid. This is clear from the highlighted portions above: "*the expenses so necessarily incurred and defrayed*"; "*any sum paid in respect of expenses*"; "*any money expended wholly, exclusively and necessarily in performing the duties of the office or employment.*" There is no reference in the above provisions to hypothetical expenses that would have been paid in different circumstances, and the Appellant did not point to any other statutory provision that would allow for deductions for hypothetical expenses.

61. The Commissioner is satisfied that the evidence before him was clear that no expense payments were made by the Appellant to its delivery drivers in 2015 and 2016. This was accepted by its witnesses. Its counsel argued that the drivers were obliged to provide their own vehicles, and that therefore part of the payment to them should be classified as

expenses. The Commissioner agrees that the contract before him states that the driver "*shall provide his own delivery vehicle*" and obliged the driver to maintain his vehicle in a roadworthy condition.

62. However, the Commissioner does not agree that this means that payments to drivers should be apportioned in the manner sought by the Appellant. The contract provided that the Appellant would pay the driver "*according to the number of deliveries successfully undertaken.*" It made no reference to expense payments at all. This is unsurprising, as the Appellant treated the drivers as independent contractors rather than employees. While counsel for the Appellant referred to previous Commission determinations where unvouched expense claimed were apportioned, these involved circumstances were it was accepted that expense payments had been made. No determination or other authority was provided to show that it was open to the Commissioner to allow a deduction for expenses where no expense payments had been made.

63. Consequently, as he is satisfied that expenses were not paid to the delivery drivers, the Commissioner determines that the appeal cannot succeed. Therefore, it is not necessary to consider whether the methodology put forward by the Second Witness on behalf of the Appellant was justified and reasonable, as it was created on a fundamentally incorrect assumption.

64. The Commissioner appreciates that the outcome of the *Karshan* litigation has caused difficulties for taxpayers such as the Appellant. However, he is satisfied that he has no jurisdiction to interpret the relevant provisions of the TCA 1997 in the manner contended for by the Appellant. In his Supreme Court judgment, Murray J stated at paragraph 284 that "*It would appear that Revenue must account for any income tax already paid by Karshan's drivers and, if necessary, abate the assessments to take account of such payments*." He did not state that credit should be granted to employers for hypothetical expense claims that would have been made if their drivers had been classified as employees rather than independent contractors.

65. In conclusion, the Commissioner determines that the adjusted assessments to PREM should stand. In so concluding, he obviously makes no findings in respect of the [redacted] issue, which formed part of the original assessments but was settled between the parties prior to the hearing herein and does not form part of this determination.

Determination

66. 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

determines that the assessments to PREM should be adjusted to €121,889 for 2015, and to €125,424 for 2016.

67. 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

68. 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

69. 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
08 January 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