AN COIMISIÚN UM ACHOMHAIRC CHÁNACH

TAX APPEALS COMMISSION

94TACD2026

Between

[redacted]

Appellant

and

Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This Determination concerns the Appellant's appeals under section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") to the Tax Appeals Commission ("the Commission") of Notices of Assessment and Amended Assessment to income tax, made by the Respondent for the years 2007 – 2016 inclusive ("the years in issue").

2. Regarding the years 2007, 2008, 2014, 2015 and 2016, the Appellant's appeals are of Notices of Amended Assessment made by the Respondent. Under these amended assessments, the Appellant was found to have balances payable of €50,974, €40,389, €3,872, €12,565 and €13,426 respectively.

3. Regarding the years 2009 – 2013 inclusive, the appeals are of Notices of Assessment to income tax, made by the Respondent in the absence of returns filed by the Appellant. Under these assessments, the Appellant was found to have tax due in the amounts of €56,449, €56,648, €63,508, €66,776 and €59,898 respectively.

4. In relation to each Notice of Assessment and Amended Assessment under appeal, the Appellant contended that tax assessed by the Respondent as owing should be abated either in part or entirely. The Appellant did so on the grounds that the income he received from the company [redacted] Limited ("A Limited") in the period 16 April 2007 – 31 March 2011, and then from the related company [redacted] Limited ("B Limited") in the period 1 April 2011 – 31 March 2016, constituted emoluments from employment. The Respondent had instead treated the income from these companies as being income from the Appellant's self-employment.

5. As part of the appeal hearing, the Commissioner heard preliminary applications advanced by the Respondent regarding the validity and acceptance of each of the Appellant's appeals. In respect of the appeals of the Notices of Amended Assessment for the years 2007, 2008 and 2014, the Respondent contended that they should be found by the Commissioner to be invalid and incapable of acceptance, on the grounds that the Appellant was, contrary to sections 957(3) and 959AK(1) of the TCA 1997, seeking to appeal matters other than additions to, deletions from, or alterations in the amended assessments.

6. In respect of the appeals of the Notices of Assessment and Amended Assessment for the years 2009 – 2013, 2015 and 2016, the Respondent contended that they should be found invalid and incapable of acceptance, on the grounds that the Appellant had failed to pay the full amount of tax, including interest, due on foot of his own income tax returns, as

was required by section 959AH(1) of the TCA 1997. In relation to the years 2009 – 2013, these were returns filed after the making of the assessments by the Respondent.

7. In the course of the hearing of the Appellant's appeals of the Notices of Assessment and Amended Assessment to income tax, the Commissioner heard evidence from witnesses called by both parties and had the benefit of legal submissions made by their respective representatives at hearing. The evidence given and submissions made have been taken into consideration by the Commissioner in determining the issues arising.

8. The Commissioner notes that the Appellant also appealed Notices of Estimation of VAT due for the years 2007 – 2015. These appeals were due to be heard alongside those concerning the Notices of Assessment and Amended Assessment to income tax for the years 2007 – 2016. However, before the commencement of the appeal hearing the Appellant withdrew his appeals of the Notices of Estimation. As such, they became final and conclusive in accordance with section 949G of the TCA 1997.

9. In line with a request made by the Appellant, the hearing of the appeals proceeded in private, in accordance with section 949Y(3) of the TCA 1997. Therefore, this Determination will be redacted prior to its publication in accordance with section 949AO of the TCA 1997.

Background

10. During the years in issue the Appellant worked as a software developer and IT professional.

11. From 16 April 2007 – 31 March 2011, the Appellant carried out software development and IT work for A Limited.

12. From 1 April 2011 – 31 March 2016, the Appellant carried out software development and IT work for B Limited.

13. It was a fact agreed by the parties that over the years in issue the Appellant sent monthly invoices to A Limited and B Limited, charging them for work done in his capacity as a software developer and IT professional. It was also an agreed fact that the Appellant was paid by A Limited and B Limited based on a daily rate for a 7.5 hour working day, and that he charged VAT in respect of work done. This VAT was not remitted to the Respondent and was retained by the Appellant.

14. Invoice documentation included by the Respondent in its appeal booklets indicated that over the period April 2007 – April 2016, the Appellant invoiced and was paid for work done in every month. It is not necessary to list in this Determination each payment made

for each month. It suffices to say that, while the sums paid to the Appellant could vary somewhat from month to month, in the main he was paid an amount representing 20 – 22 days at the relevant rate.[1]

15. The Appellant filed an on-time Form 11 income tax return with the Respondent for the year 2007. In this return, the Appellant disclosed gross self-employed income from "*software development"* of €52,853 and, after the claiming of deductions and expenses, assessable profit therefrom of €32,132. The parties to the appeal were in agreement that the Appellant's assessable profit from this activity for the year 2007 was, after accounting for the deductions and expenses claimed, in fact €142,485.

16. The Appellant filed an on-time Form 11 income tax return with the Respondent for the year 2008. In this return, the Appellant disclosed gross self-employed income from "*software development"* of €46,803 and, after the claiming of deductions and expenses, assessable profit therefrom of €24,238. The parties to the appeal were in agreement that the Appellant's assessable profit from this activity for the year 2008 was, after accounting for the deductions and expenses claimed, in fact €115,912.

17. The Appellant did not file on-time income tax returns for the years 2009 – 2013. As is set out hereunder in this Determination, the timing of the late returns filed by the Appellant for the years 2010 – 2013, though not 2009, was a matter of disagreement between the parties. By the Appellant's account, returns for 2010 – 2013 were filed on his behalf in mid-2016. By the Respondent's, they were not filed until January 2018. The Commissioner has made findings on this question in this Determination.

18. On 11 November 2015, the Appellant filed a Form 11 income tax return in respect of the year 2014, in which he returned gross income in the amount of €120,899 from the self-employed activity of "*IT Consultancy",* and assessable profit therefrom of €113,996. It was an agreed fact that the Appellant's income in this respect related to work done for B Limited. In this regard, the Appellant claimed in his Form 11 return expenses and deductions of €1,500 ("*consultancy, professional fees"*), €1,040 (*"motor, travel and subsistence"*) and €4,363 ("*other expenses"*), giving rise to the assessable figure of €113,996. The Appellant also claimed capital allowances for the year 2014 for machinery and plant of €1,375.

[1] According to the information provided to the Commissioner, the lowest amount paid to the Appellant was for the equivalent of 15 days of work done for A Limited and B Limited in the years 2007 – 2016, while the highest amount was for 29 days.

19. In the Form 11 return for the year 2014, the Appellant also disclosed employment income in the amount of €34,099. It was an agreed fact that this income was not related to work done for B Limited.

20. On 11 December 2015, the Respondent commenced an investigation covering the years 2010 – 2014 into the Appellant's tax affairs.

21. In correspondence dated 6 May 2016, the Appellant's tax agent wrote to the Respondent indicating that the Appellant wished to make an "*un-prompted qualifying disclosure"* for the years 2007 – 2009.

22. In separate correspondence bearing the same date, the Appellant's tax agent also provided the following information regarding the Appellant's tax affairs for the years 2010 – 2014. In this correspondence, he stated:

    "*Dear* [Officer of the Respondent]

    In relation to the above our client has instructed us to provide you with the following disclosure in respect of the Revenue Investigation.

    Please see enclosed the following

    - *Completed Form 11s for 2010 to 2014;*
        - *Summary from ROS Offline*
    - *Completed and account listing* [sic] *for all financial Institutions*
        - *Attached Bank Statements for relevant periods*

    The disclosure below, is in two parts, firstly Income tax, and then VAT. [The Appellant] *approached our firm in 2015, with a view to regularizing his tax position, however in the intervening period the letter Notification of Revenue Investigation issued. His intention was to file the most recent tax year beginning with 2014, then with a view to address the balance of the years*.

    […]"

23. Later in the correspondence dated 6 May 2016, the Appellant's tax agent stated under the heading "*Income tax"* that:

    "*With regard to returns and liabilities, I have excluded the income from* [A Limited and B Limited] *in the computations. The basis being to establish* [the Appellant's] *employment status. However, this income is noted, and included for your examination as follows.*

- *Year 2010 - €119,310*

- *Year 2011 - €122,705*

- *Years 2012 - €117,620*

- *Year 2013 – €98,519*

- *Year 2014 - €114,000*

Each year has been broken down between liability, interest, penalty, and surcharge in the table below, and I have also provided summary computation prepared on ROS Offline".

24. Further on in the same correspondence dated 6 May 2016, the Appellant's tax agent calculated the Appellant's tax liability for the years 2010 – 2014 to be as follows:

"*Tax - €8,429*

Interest - €1,456

Penalty - €1,533

€11,426"

25. Near the end of the correspondence dated 6 May 2016 regarding the years 2010 – 2014, the Appellant's tax agent calculated the Appellant to have a VAT liability which, along with penalties and interest, came to €204,407. The Appellant's tax agent then stated, "*I believe that payment for this has already been delivered to you, 11th March 2016."*

26. It is not clear whether the correspondence of the Appellant's tax agent relating to the Appellant's tax affairs for the years 2010 – 2014 was in fact sent to the Respondent on 6 May 2016. There is no question in any event that it was sent by the Appellant's tax agent as an attachment to an email on 1 June 2016. Also attached to this email correspondence of 1 June 2016 were "*Form 11 return summaries"* for the years 2010 – 2014 ("the return summaries") and, *inter alia*, lists of lodgements made to the Appellant's account for the years 2010 – 2013, as well as documents for the same years entitled "[The Appellant's] *income and expenditure account."* The parties agreed that the return summaries were printouts from the "ROS Offline" tool. They constituted documents summarising information entered by the Appellant's tax agent into a Form 11 return downloaded onto their computer or other similar device.

27. Receipt of the email correspondence of 1 June was acknowledged that same day by the officer of the Respondent to whom it was addressed, when she replied:

"*Hi* […],

Just to let you know those submissions came through so I'll have a look at them but it will take some time."

28. Further acknowledging correspondence was sent by the relevant officer of the Respondent on 30 June 2016. Therein she stated to the Appellant's tax agent that she acknowledged "[…] *receipt of your submissions dated 6/5/16 on behalf of* [the Appellant], *which were received by email on 1/6/16."* She also confirmed receipt of the Appellant's payment of €204,407.

29. It is necessary to observe at this stage of the Determination that the Respondent did not accept at hearing that the return summaries provided to it in either May or June 2016 constituted Form 11 returns for the purpose of the Appellant fulfilling his filing obligations under section 959I of the TCA 1997. The Respondent also did not accept that full Form 11 returns were submitted to it in either May or June 2016.

30. Regarding the 2010 return summary sent by the Appellant's tax agent to the Respondent, this stated that the Appellant had the following income:

"*IT Consultant – Self – 0*

Taxed Interest – Self – €8

Emoluments – Self - €1,460."

31. Under the heading "*Total Liability",* the 2010 return summary stated that the Appellant had made an overpayment of tax for that year of €80.

32. However, the "*income and expenditure"* document for 2010 composed by the Appellant's tax agent stated, *inter alia*, that the Appellant received income in that year from A Limited in the amount of €119,310. The document listing lodgements to the Appellant's bank account disclosed payments from A Limited in the amount of €144,356.10.

33. The 2011 return summary stated that the Appellant had the following income:

"*IT Consultant – Self - €1,194*

Taxed Interest – Self - €5

Emoluments – Self - €4,784"

34. Under the heading "*Total Liability",* the 2011 return summary stated that the Appellant had made an overpayment of tax for that year of €528.60.

35. The "*income and expenditure"* document for 2011 composed by the Appellant's tax agent stated, *inter alia*, that the Appellant had income from A Limited and B Limited in the amount of €122,705. The document listing lodgements to the Appellant's bank account disclosed payments coming from A Limited and B Limited in the amount of €148,473.05

36. The 2012 return summary stated that the Appellant had the following income:

"*IT Consultant – Self - €1,175*

Private Grinds – Self - €2,000

Taxed Interest – Self - €38,547

Emoluments – Self - €14,256"

37. Under the heading "*Total Liability",* the 2012 return summary stated that the Appellant had tax payable of €2,024.05 for that year.

38. The "*income and expenditure"* document for 2012 composed by the Appellant's tax agent stated, *inter alia*, that the Appellant had income from B Limited in the amount of €117,620. The document listing lodgements to the Appellant's bank account disclosed payments coming from B Limited in the amount of €144,517.40.

39. The 2013 return summary stated that the Appellant had the following income:

"*IT Consultant – Self - €0*

Private Grinds – Self - €4,000

Taxed Interest – Self - €43,364

Emoluments – Self - €30,761"

40. Under the heading "*Total Liability",* the 2013 return summary specified that the Appellant had tax payable of €3,085.11 for that year.

41. The "*income and expenditure"* document for 2013 composed by the Appellant's tax agent stated, *inter alia*, that the Appellant had income from B Limited in the amount of €98,519. The document listing lodgements to the Appellant's bank account disclosed payments coming from B Limited in the amount of €121,178.

42. On 10 November 2016, the Appellant filed an income tax return in respect of the year 2015. In this return, the Appellant included "*Irish rental income"* in the amount of €12,542 and employment income in the amount of €27,534. A self-assessment was included as part of the return in which the Appellant assessed himself as having an income tax liability

in the amount of €5,057.16. A Notice of Self-Assessment then issued on 11 November 2016, which reflected the information included by the Appellant in his Form 11 return.

43. However, aside from the information set out in the Form 11 return, the Appellant's tax agent also provided the following expression of doubt made under section 959P of the TCA 1997:

> "[The Appellant] *is engaged in a Revenue investigation covering a number of periods. In 2015 he received payments totalling €159,338, including VAT. However the net amount we are uncertain how to treat. It is the belief that* [the Appellant] *is an employee of* [A Limited/B Limited]. *We have engaged with* [the investigating officer of the Respondent] *and this case is ongoing.* [The Appellant] *has additional PAYE income and rental income, details of which have been included in his Form 11.*
>
> [The Appellant] *is potentially an employee of* [A Limited/B Limited]*, and the uncertainty rests with how to treat the payments for income tax purposes, i.e. is he an employee or a contractor. Monies are on account for 2015, and the source of the payments have ceased in March 2016."*

44. On 15 November 2017, the Appellant filed a Form 11 income tax return for the year 2016. In respect of this year, the Appellant returned profit from rental income, taxable under Schedule D, in the amount of €16,063 and *"Irish taxed interest",* also taxable under Schedule D, in the amount of €30,100. The Appellant then returned income from employment, taxable under Schedule E, in the amount of €95,499. A self-assessment was included as part of the return in which the Appellant assessed himself as having an income tax liability in the amount of €8,314.55.

45. However, as with the return for 2015, the Appellant included an expression of doubt along with the return in which he referred to further income, received from B Limited, which was in the amount of €40,251.75, including VAT. The doubt expressed again related to the proper treatment of this income (i.e. whether it was chargeable to tax under Schedule D or E).

46. On 1 December 2017, the Respondent issued Notices of Amended Assessment to the Appellant in respect of the years 2007, 2008, 2014 and 2015. Under the amended assessments, the Respondent assessed the Appellant to have the following taxable income from software development/IT consultancy and balances of tax payable:

Year	Income from Software development/ IT Consultancy	Balance of tax payable
2007	€142,485	€50,974
2008	€115,912	€40,389
2014	€113,996	€3,872
2015	€122,640	€12,565

47. On 4 December 2017, the Respondent issued Notices of Assessment made in the absence of a return to the Appellant in respect of the years 2009 – 2013. Under these assessments, the Respondent assessed the Appellant to have the following amounts of tax, plus surcharges, due:

Year	Tax Due
2009	€56,449
2010	€56,648
2011	€63,508
2012	€66,776
2013	€59,898

48. Also on 4 December 2017, the officer conducting the Respondent's investigation sent correspondence to the Appellant's tax agent providing information relating to the assessments made in respect of the years 2009 – 2013, as well as relating to the

amended assessments made three days earlier in respect of the years 2007, 2008, 2014 and 2015. In this correspondence, the officer stated:

> "[…]
>
> *Having reviewed your submission dated 6 May 2016 and the various papers etc I am proceeding as follows:*
>
> ***2007 – 2009***
>
> *In your correspondence dated 6 May 2016, you advised of your instructions to prepare a qualifying disclosure for the above years. On 30 June 2016 you were advised that although* [the Appellant] *was now unable to make a qualifying disclosure he could make a non-qualifying disclosure. No further correspondence has been received in this regard from either you or* [the Appellant].
>
> ***2007***
>
> *I wish to advise that I am not satisfied with* [the Appellant's] *2007 income tax return. I have made an amended assessment increasing his declared trading profit of €32,132 to €142,485 and a Notice of Amended Assessment is issuing dated 1st December 2017.*
>
> ***2008***
>
> *I wish to advise that I am not satisfied with* [the Appellant's] *2008 income tax return which was received 13 November 2009. I have made an amended assessment increasing his declared trading profit of €24,238 to €115,912 and a Notice of Amended Assessment is issuing dated 1 December 2017.*
>
> ***2009***
>
> *I wish to advise that* [the Appellant] *has failed to submit a Tax Return for 2009. Please find attached a copy of the Notice of Assessment issuing today.*
>
> ***2010 - 2014***
>
> *In relation to your correspondence dated 6 May 2016 in which you made a submission and included notification that income had been omitted from* [the Appellant's] *2014 tax return. The position is as follows:*
>
> ***2010 – 2013***

Tax returns have not been delivered. In such circumstances please find attached copies of the notices issuing today. If [the Appellant] *wishes to submit appeals paper tax returns will be required.*

2014

[The Appellant's] *tax return was previously filed on 11 November 2015.*

In relation to the following income, which you have advised in your correspondence dated 6 May 2016 was omitted from the original return:

Private grinds	*€4,000*
Taxed Interest	*€41,805*

I wish to advise a Notice of Amended Assessment is issuing dated 1st December 2017.

2015

[The Appellant's] *tax return for 2015 was received 10 November 2016. In the Expression of Doubt section an entry was made advising that he had received payments, including VAT, totalling €159,338, the background was outlined and this income was not included on the return. In my view this source of income is correctly chargeable, as returned previously by* [the Appellant], *as trading income. A Notice of Amended Assessment is issuing dated 1st December 2017.*

The trading income assessed is €122,640 calculated as follows:

Sales as above, including VAT,	*€159,338*
VAT at 23%	*€29,795*
Sales excluding VAT	*€129,543*
Expenses (estimated as per 2014)	*€6,903*
	€122,640

I have also included bank interest of €49,064, which was not included in the return.

Other information

I wish to advise the information available to me indicates the following:

2010

Emoluments [redacted]	*Pay*	*€575*	*Tax deducted*	*€235.75*

Taxed interest [redacted] *€13,750*

2011

Taxed Interest [redacted] *€29,166*

2012

Taxed interest [redacted] *€41,630*

2013

Taxed interest [redacted] *€47,906*"

49. On 28 December 2017, the Appellant, through his tax agent, appealed the Respondent's assessments made in respect of the years 2007 – 2015 by means of correspondence sent to the Commission. The Appellant's grounds of appeal were as follows:

"[…] *we are appealing the tax treatment of* [the Appellant].

Income Tax Assessments have been raised by [the Respondent] *for tax years 2007 – 2015 on the basis that* [the Appellant] *is a self-employed contractor, however the details of the case indicate that* [the Appellant] *is an employee.*

[The Appellant] *was placed under investigation on 11 December 2015, covering tax years 2010 to 2014. An initial disclosure and payment, was made, by this office, responding to the letter in May 2016.*

During the preparation of the disclosure, and client discussions a question arose in relation to the working status of [the Appellant]. *Essentially was he an employee or self-employed contractor.*

Case background as per submission

In mid-2007 [the Appellant] *was engaged by* [A Limited]*, an IT solutions company, based in* [redacted]*. In August 2011, he was transferred to* [B Limited]*, a sister company, where he worked up to March 2016.*

While working at [A Limited]*, he invoiced, for his services, and at a later stage he provided similar services to* [B Limited]*, and similarly invoiced.*

[The Appellant] *performed all duties directed of him, and was a team lead during his time in each company.*

He was held out as an employee, to varying customers of each of the above companies, managing teams, providing direction to company staff. [A Limited/B

Limited] *would separately invoice their customers, while remunerating* [the Appellant] *separately*.

[…]*"*

50. The Appellant then stated in his grounds of appeal that, having regard to the Respondent's own guidance material on worker status, the Appellant was, based on the circumstances in which he worked for A Limited and B Limited, properly to be regarded as an employee of those companies over the years 2007 – 2015. The Appellant elaborated on these alleged circumstances in detail in his Notice of Appeal. This information was replicated in the Appellant's oral evidence, which is set out below.

51. At the close of the Appellant's appeal correspondence of 28 December 2017, the Appellant's tax agent stated, "*We were of the understanding that returns had been submitted to* [the officer of the Respondent] *and will follow with this when he returns in January."* The Appellant's tax agent then indicated that he had made payment in respect of the Appellant's income tax liabilities that day.

52. On 3 January 2018, the Appellant's tax agent filed paper Form 11 income tax returns with the Respondent for the years 2009 – 2013. The content of the paper Form 11 returns filed by the Appellant's tax agent was as follows.

53. In the paper Form 11 return for 2009, the Appellant specified gross income from "*Irish employments"* in the amount of €150,971. This constituted the total of payments received from A Limited in that year. The Appellant also returned income from deposit interest in the amount of €14,010, which previously had been subjected to deposit income retention tax ("DIRT"). The Appellant calculated his tax liability for 2009, not including interest, to be in the amount of €54,876.

54. In the paper Form 11 return for 2010, the Appellant specified gross income from "*employments subject to PAYE"* in the amount of €146,401. This constituted the total of payments received from A Limited in that year. The Appellant also returned income from deposit interest in the amount of €13,751, which previously had been subjected to DIRT. The Appellant calculated his tax liability for 2010, not including interest, to be in the amount of €53,447.

55. In the paper Form 11 return for 2011, the Appellant specified gross income from employments subject to PAYE in the amount of €153,257. This constituted the total of payments received from A Limited and B Limited in that year. The Appellant also returned income from deposit interest in the amount of €29,166, which previously had been subjected to DIRT, and self-employed income from "*property showing"* in the amount of

€3,260. The Appellant calculated his tax liability for 2011, not including interest, to be in the amount of €64,861.

56. In the paper Form 11 return for 2012, the Appellant specified gross income from employments subject to PAYE in the amount of €158,773. This constituted the total of payments received from B Limited in that year. The Appellant also returned income from deposit interest in the amount of €41,630, which previously had been subjected to DIRT, and self-employed income from "*property*" (€3,290) and "*grinds*" (€2,000). The Appellant calculated his tax liability for 2012, not including interest, to be in the amount of €69,388.

57. In the paper Form 11 return for 2013, the Appellant specified gross income from employments subject to PAYE in the amount of €151,939. This constituted the total of payments received from B Limited in that year. The Appellant also returned income from deposit interest in the amount of €47,906, which previously had been subjected to DIRT, and self-employed income from "*grinds*" in the amount of €4,000. The Appellant calculated his tax liability for 2013, not including interest, to be in the amount of €61,774.

58. On 5 February 2018, the Respondent sent the following correspondence to the Commission, in which it objected under section 949L of the TCA 1997 to the acceptance of the Appellant's appeals of the assessments made in respect of the years 2011 - 2013.[2] In particular, the Respondent stated:

> "[We] *refer to the Notices of Appeal against the income tax assessments 2009 to 2013.*
>
> *The assessments were made on the 4 December 2017 in default of the delivery of the returns.*
>
> [We] *drew* [the Appellant's] *attention to the requirements of section 957(2) and 959AH TCA 1997 on the 12th January and I was advised that the position would be clarified.*
>
> *I am now objecting to the making of the appeals for the years of assessment 2011, 2012 and 2013 as the requirements of Section 957(2) and of 959AH TCA 1997 have not been complied with.*"

59. On 15 February 2018, the Respondent also objected to the acceptance of the Appellant's appeals in respect of the years 2007, 2008, 2014 and 2015. In this objection correspondence, the Respondent stated:

[2] At hearing the Respondent expanded its objection on these grounds to include the appeals of the assessments for the years 2009 and 2010.

"[We] *wish to advise on the basis of the provisions of section 957 and 959AG TCA 1997 that* [we] *wish to object that the Grounds for Appeal for 2007, 2008 and 2014 include:*

> *'The Appellant was an employee for the years in question and thus the classification of the income assessed as Schedule D income is incurred'.*

And additionally for 2014 [we] *are objecting on the basis of Section 959AH TCA 1997 as there is interest due.*

The background to [the] *objection is that the tax returns 2007 and 2008 returned trading profits described as arising from Software Development and for 2014 described as IT Consultancy. The making of the amended assessment arose for:*

- 2007 and 2008 from not being satisfied with the actual amount of trading income returned

- 2014 from the notification dated 6 May 2016 that Bank Interest and Private Grinds income were 'not present in the 2014 Income Tax return.'

In relation to the 2015 appeal, [we are] *objecting on the basis of Section 959AH TCA 1997 as there is tax together with interest due. This arises as the income at issue was not included in the return under Schedule D or E. In respect of which the Expression of Doubt '…we are uncertain how to treat' was entered*."

60. On 6 December 2018, the Respondent made an amended assessment in respect of the Appellant for the year 2016. Thereunder, it assessed the Appellant as having profits from "*IT Consultancy",* chargeable to tax under Schedule D, in the amount of €25,822.

61. On 4 January 2019, the Appellant appealed the amended assessment made in respect of the year 2016 to the Commission. The grounds of appeal were expressed in the following terms:

"(1) [the Appellant] *was engaged under a contract of service and is not liable to tax under Schedule D Case I in respect of this income.*

(2) The liability rests with the employee under PAYE regulations. If a Schedule assessment is raised a tax credit must be given for PAYE which should have been deducted by the employer.

[The Appellant] *is not a director and was not a director so company liability cannot be attributed to him.*

(3) The amount is excessive under either Schedule."

62. The Commissioner notes that in correspondence sent by the Commission dated 3 September 2018, it indicated that the Appellant's appeals in relation to the years 2009 – 2015 had been admitted. However, thereafter, the former Commissioner of the Commission then dealing with the Appellant's appeals themself raised with the parties the matter of whether mandatory requirements governing validity had been met. This prompted the Respondent to express objection to the acceptance of the Appellant's appeals relating to all of the years 2009 – 2015, having regard to either the requirements of sections 957/959AK or section 959AH of the TCA 1997. Section 949N of the TCA 1997 provides that a Commissioner shall, where they become aware that an appeal is invalid having previously formed the view that it is valid, refuse acceptance of that appeal. In the light of this provision, the Commissioner heard in the appeal hearing evidence and submissions relating to the question of acceptance of the appeals for the years 2009 - 2015 and has made findings based on that evidence and those submissions.

63. The Commissioner also notes that the Respondent did not initially raise an objection under section 949L to the acceptance of the Appellant's appeal of the amended assessment for 2016. However, in its Outline of Arguments, delivered in advance of the appeal hearing, it also raised the question of the validity of the Appellant's appeal in respect of this year. In this regard, the Respondent objected to acceptance on the basis that the Appellant had failed to adhere to the mandatory requirements imposed under section 959AH of the TCA 1997, and stated in particular:

> "*The trading income from* [the Appellant's] *work with* [B Limited] *was not returned in the Appellant's income tax return for the year 2016. In the Expression of Doubt section, there is an entry advising that payments had been received, totalling €40,251.75 including VAT, which had not been included in the return as 'uncertainty rests with how to treat the payments for income tax purposes, i.e. is he an employer or contractor…' If these monies, which appear accepted to be income by the Appellant, had been included as such in the Tax Return under whatever category, the liability shown in the Appellant's self-assessment would have been greater than that actually shown."*

64. The Commissioner has in this Determination likewise considered the Respondent's objection to acceptance made in relation to the appeal of the amended assessment for the year 2016.

Legislation

65. Section 955 of the TCA 1997, which concerns assessments made in respect of the years preceding 2013, makes provision for the amendment of assessments by an inspector of the Respondent.

66. Section 957 of the TCA 1997, which likewise concerns assessments made in respect of the years preceding 2013, is entitled "*Appeals".* Subsection (3) therein provides:

"*Subject to subsections (1) and (2), where an assessment is amended under section 955 (not being an amendment made by reason of the determination of an appeal), the chargeable person may appeal against the assessment as so amended in all respects as if it were an assessment made on the date of the amendment and the notice of the assessment as so amended were a notice of the assessment, except that the chargeable person shall have no further right of appeal, in relation to matters other than additions to, deletions from, or alterations in the assessment, made by reason of the amendment, than the chargeable person would have had if the assessment had not been amended."* [Emphasis added]

67. Section 959AK(1) of the TCA 1997, which concerns appeals against amended assessments made in respect of the years 2013 onwards, provides, in like manner to section 957(3), that a person shall have no further right of appeal to the Commission, "[…] *in relation to matters other than additions to, deletions from, or alterations in the assessment, made by reason of the amendment, than the person would have had if the assessment had not been amended*."

68. Section 959I, which is the first section in Chapter 3 of Part 41 A of the TCA 1997, provides:

"(1) Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form.

(2) The prescribed form referred to in subsection (1) may include such matters in relation to gift tax and inheritance tax as may be required by that form."

69. Section 951 of the TCA 1997, applicable to chargeable periods prior to 2013, provided in effectively identical terms to section 959I that a "*chargeable person*" deliver their return "*in the prescribed form*" on or before the specified return date.

70. Section of 959A of the TCA 1997, defines a "*chargeable person"* in the following terms:

"[…] *as respects a chargeable period, a person who is chargeable to tax for that period, whether on that person's own account or on account of some other person but, as respects income tax, does not include a person to whom subsection (1) of section 959B relates*"

71. Section 959B of the TCA 1997, as worded prior to its amendment by section 86 of the Finance Act 2014, provides:

"*For the purposes of the meaning assigned to "chargeable person" in section 959A, it does not include a person –*

whose only source or sources of income for a tax year is or are sources the income from which consists of emoluments to which Chapter 4 of Part 42 applies, but for this purpose a person who, in addition to such source or sources of income, has another source or other sources of income shall be deemed for the tax year to be a person whose only source or sources of income for the tax year is or are sources the income from which consists of emoluments to which Chapter 4 of Part 42 applies if the income from that other source or those other sources is taken into account in determining the amount of his or her tax credits and standard rate cut-off point for the tax year applicable to those emoluments, and, for the purposes of deciding whether such income should be so taken into account, the Revenue Commissioners may have regard to the amount for that, or any previous, tax year of the income of the person from that other source or those other sources before deductions, losses, allowances and other reliefs

[…]"

72. Section 950(1) of the TCA 1997, applicable to chargeable periods prior to 2013, defined a "*chargeable person"* as:

"[…] *as respects a chargeable period, a person who is chargeable to tax for that period, whether on that person's own account or on account of some other person but, as respects income tax, does not include a person—*

whose only source or sources of income for the chargeable period is or are sources the income from which consists of emoluments to which Chapter 4 of Part 42 applies, but for this purpose a person who, in addition to such source or sources of income, has another source or other sources of income shall be deemed for the chargeable period to be a person whose only source or sources of income for the chargeable period is or are sources the income from which consists of emoluments to which Chapter 4 of Part 42 applies if the income from that other source or those other *sources is taken into account in determining the amount of his or her tax credits and standard rate cut-off point for the chargeable period applicable to those emoluments, and, for the purposes of deciding whether such income should be so taken into account, the Revenue Commissioners may have regard to the amount for that, or any previous, chargeable period of the income of the person from that other source or those other sources before deductions, losses, allowances and other reliefs*

[…]"

73. Section 959AH of the TCA 1997 is entitled "*chargeable persons"* and provides:

"(1) Where a Revenue officer makes a Revenue assessment, no appeal lies against the assessment until such time as—

(a) where the assessment was made in default of the delivery of a return, the chargeable person delivers the return, and

(b) in all cases, the chargeable person pays or has paid an amount of tax on foot of the assessment which is not less than the tax which—

(i) is payable by reference to any self assessment included in the chargeable person's return, or

(ii) where no self assessment is included, would be payable on foot of a self assessment if the assessment were made in all respects by reference to the statements and particulars contained in the return delivered by the chargeable person.

(3) References in subsection (1) to an amount of tax shall be construed as including any amount of interest which would be due and payable under section 1080 on that tax at the date of payment of the tax, together with any costs incurred or other amounts which may be charged or levied in pursuing the collection of the tax contained in the assessment or the assessment as amended, as the case may be."

74. Section 917F of the TCA 1997 is entitled "*Electronic transmission of returns"* and provides, *inter alia*:

"*(1) Notwithstanding any other provision of the Acts, the obligation of any person to make a return to which this Chapter applies shall be treated as fulfilled by that person if information is transmitted electronically in compliance with that obligation, but only if—*

(a) the transmission is made by an approved person or an authorised person,

(b) the transmission is an approved transmission,

(c) the transmission bears the electronic identifier of that person, and

(d) the receipt of the transmission is acknowledged in accordance with section 917J.

(2) In subsection (1), the reference to the information which is required to be included in the return includes any requirement on a person to—

(a) make any statement,

(b) include any information, accounts, statements, reports, or further particulars, or

(c) make or attach any claim.

(3) Where the obligation of any person to make a return to which this Chapter applies is treated as fulfilled in accordance with subsection (1) then, any provision of the Acts which—

(a) requires that the return include or be accompanied by any description of declaration whatever by the person making the return, apart from a declaration of an amount,

(b) requires that the return be signed or accompanied by a certificate,

(c) requires that the return be in writing,

(d) authorises the return to be signed by a person acting under the authority of the person obliged to make the return,

(e) authorises the Revenue Commissioners to prescribe the form of a return or which requires a return to be in or on any prescribed form, or

(f) for the purposes of any claim for exemption or for any allowance, deduction or repayment of tax under the Acts which is required to be made with the return, authorises the Revenue Commissioners to prescribe the form of a claim,

shall not apply.

(4) Where the obligation of any person to make a return to which this Chapter applies is treated as fulfilled in accordance with subsection (1) then, the time at which any requirement under the Acts to make a return is fulfilled shall be the day on which the

receipt of the information referred to in that subsection is acknowledged in accordance with section 917J.

(5) Where an approved transmission is made by –

> *(a) an approved person on behalf of another person, or*
>
> *(b) an authorised person on behalf of another person (not being the person who authorised that person),*

a hard copy of the information shall be made and authenticated in accordance with section 917K.

> […]"

75. Section 917J of the TCA 1997 is entitled "*Acknowledgement of electronic transmissions"* and provides:

"*For the purposes of this Chapter, where an electronic transmission of information which is required to be included in a return to which this Chapter applies is received by the Revenue Commissioners, the Revenue Commissioners shall send an electronic acknowledgement of receipt of that transmission to the person from whom it was received."*

76. Section 12 of the TCA 1997 provides:

"*Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below—*

Schedule C – Section 17;

Schedule D – Section 18;

Schedule E – Section 19;

Schedule F – Section 20.

and in accordance with the provisions of the Income Tax Acts applicable to those Schedules."

77. Section 18 TCA 1997 is entitled "*Schedule D".* Section 18 provides:

"(1) "The Schedule referred to as Schedule D is as follows:

SCHEDULE D

1. Tax under this Schedule shall be charged in respect of —

(a) the annual profits or gains arising or accruing to —

(i) any person residing in the State from any kind of property whatever, whether situate in the State or elsewhere

(ii) any person residing in the State from any trade, profession, or employment, whether carried on in the State or elsewhere,

[…]"

78. Section 19 of the TCA 1997, relating to income falling under Schedule E provides:

"(1) The Schedule referred to as Schedule E is as follows:

[…]

2. Tax under this Schedule shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable out of the public revenue of the State, other than annuities charged under Schedule C, for every one euro of the annual amount thereof."

Evidence

79. It was agreed by the parties that the appeal would be run in two parts. The first part concerned the Respondent's objections to the acceptance of the appeals made in respect of the years 2007 – 2016. The second part concerned the substantive appeals of the assessments.

The objection to the Appellant's appeals

The Respondent

80. [redacted], an auditor and caseworker employed by the Respondent, was called to give evidence. Hereafter [redacted] is referred to as "the Respondent's witness".

81. The Respondent's witness began by stating that she was the person assigned by the Respondent to handle the Appellant's file, following the retirement of the previous caseworker in charge.

82. Counsel for the Respondent brought the Respondent's witness to the Appellant's income tax return filed for the year 2007. Therein, in the section headed "*Self-employed income"* the Appellant entered gross income from "*software development"* in the amount of €52,853 and, after deductions for expenses, assessable profit of €32,132. In the subsequent section of the income tax return headed "*PAYE/BIK/Pensions",* the Appellant

entered the figure of €11,965 as being his income from "*Irish Employments subject to PAYE".*

83. Both the Appellant's income for 2007 returned as being from profit from self-employment and emoluments from his employment were included in the Notice of Assessment for 2007 that issued on 27 February 2009. The profit of €32,132 was assessed as taxable under Schedule D of the TCA 1997 and described, as in the Appellant's own return, as being from "*software development".* The PAYE income included in the return of €11,965 was also set out in the Notice of Assessment and assessed as taxable under Schedule E of the TCA 1997.

84. Counsel for the Respondent then brought the Respondent's witness to the Notice of Amended Assessment for 2007 under appeal, made in respect of the Appellant on 1 December 2017. Therein, the Respondent assessed the Appellant as having profit from "*software development"* in the amount of €142,485, rather than the taxable income of €32,132 previously returned by the Appellant. The PAYE income in the amount of €11,965 remained unaltered.

85. Next, counsel for the Respondent brought the Respondent's witness to the Appellant's income tax return filed for the year 2008. Therein, in the section headed "*Self-employed income"* the Appellant entered gross income from "*software development"* in the amount of €46,803 and, after deductions for expenses, assessable profit of €24,238. The Appellant did not return any employment income subject to PAYE for this year.

86. Counsel for the Respondent brought the Respondent's witness to the Notice of Assessment issued to the Appellant for 2008. The only income included therein was, in line with the contents of the Appellant's income tax return, that attributable to software development in the amount of €24,238. This income was charged under Schedule D.

87. Counsel for the Respondent then opened the Notice of Amended Assessment for 2008 under appeal, made on 1 December 2017, so that it could be commented on by the Respondent's witness. The Respondent's witness observed that the only amendment made by the Respondent thereunder was to increase the Appellant's assessable profit attributable to software development from €24,238 to €115,912. It remained charged under Schedule D of the TCA 1997.

88. Counsel for the Respondent opened the Appellant's income tax return for the year 2014 to the Respondent's witness. Asked to comment on the content of the return, the Respondent's witness observed that the Appellant disclosed taxable self-employed income, relating to "*IT consultancy*", in the amount of €113,996 and income from

employment subject to PAYE in the amount of €34,099. Under the Appellant's self-assessment included in the income tax return, he had tax due in the amount of €58,982.87.

89. Counsel for the Respondent then asked the Respondent's witness to comment on the Notice of Amended Assessment for 2014 under appeal, made on 1 December 2017. The Respondent's witness observed that thereunder, the Respondent assessed the Appellant as having taxable income under Schedule D in the overall amount of €159,801 (an increase on such income disclosed in the income tax return). However, drawing attention to Panel 1 in the amended assessment for 2014, the Respondent's witness further observed that the additional Schedule D income related to "*Grinds-Self*" (€4,000) and *"Taxed Interest – Self"* (€41,805). She stated that, in the amended assessment for 2014, the Respondent had made no alteration to the Appellant's self-declared income attributable to IT-Consultancy, returned as being from self-employment. This remained, as per the Appellant's own return, at €113,996.

90. Counsel for the Respondent also asked the Respondent's witness about matters relevant to the acceptance of the appeals of the assessments for the years 2009 – 2013.

91. Referring to a table that she had prepared outlining the Appellant's liabilities as of the submission of his appeals for these years and the payments made by him in respect thereof, the Respondent's witness explained that the Appellant had made payments for 2009 and 2010 of €56,449 and €56,648 respectively. These amounts were somewhat greater than the amount of tax that the Appellant had himself calculated as being due for these years in his paper returns (sums of €54,867 and €53,447 respectively). However, the Respondent's witness stated that the payments made were not sufficient to cover the interest then due pursuant to section 1080 of the TCA 1997.

92. In respect of the year 2011, the Respondent's witness gave evidence that the Appellant had made a payment to the Respondent in the amount of €11,054. This was against the Appellant's own computation of his liability in his paper return of €64,861. The Respondent's witness also stated that pursuant to the assessment for 2011 under appeal, the Appellant had been assessed to have a tax liability, including a 10% surcharge, of €63,508.

93. In respect of the years 2012 and 2013, the Respondent's witness gave evidence that the Appellant had made no payment to the Respondent in respect of tax liabilities for these years, self-assessed in the Appellant's own paper returns, in the respective amounts of €69,338 and €61,774. The Respondent's witness also stated that pursuant to the

assessments for 2012 and 2013 under appeal, the Appellant had been assessed by the Respondent to have tax liabilities in the respective amounts of €66,776 and €59,898.

94. In respect of the years 2015 and 2016, the Respondent's witness gave evidence that the Appellant had, in his Form 11 returns for these years, self-assessed his tax liabilities to be in the respective amounts of €5,057 and €8,315. She also gave evidence, however, that in an expression of doubt furnished along with the returns for these years, the Appellant's tax agent had referred to the Appellant having received payments, including VAT, of €159,338 and €40,251.75 from B Limited, but that the tax agent was "*uncertain how to treat this income*" (i.e. whether it was income chargeable under Schedule D or Schedule E of the TCA 1997). The Respondent's witness gave evidence that, by the Respondent's calculations, were one to have included the income referred to in the expression of doubt in the Appellant's returns for these years, his tax liabilities would have been €71,548 for 2015 and €21,742 for 2016. The Respondent's witness then gave evidence that the payments made by the Appellant for these years were, respectively, €58,983 and €8,315. The Appellant made the payment of €58,983 in respect of the year 2015 notwithstanding that his self-assessment in his return specified his tax liabilities as being only €5,057.

95. The Respondent's witness gave evidence in relation to the return summaries for the years 2010 – 2013, which it was agreed the Appellant's tax agent furnished to the Respondent alongside the correspondence dated 6 May 2016.

96. Regarding the return summaries, the Respondent's witness stated that they constituted:

> "[…] *a summary of a ROS offline, which is a facility that you can basically complete a return offline without the need for internet access, which then subsequently has to be uploaded through ROS in order to be submitted. So* [a return summary] *is not actually a return, it's a tool for facilitation in terms of computation of liability* […] *it's not a return of income."*

97. The Respondent's witness gave evidence that the return summaries, being summarising documents, outlined the Appellant's taxable income from different sources in the years 2010 – 2013. The information therein represented "*final computations"* of the Appellant's liabilities based on information that had been entered into the ROS Offline tool. The return summaries did not set out information that the Respondent required be included in Form 11 returns, such as the Appellant's gross sources of income and a breakdown of his expenses and deductions claimed, giving rise to his taxable income in the years 2010 – 2013. Nor did the return summaries have the standard declaration included in all Form

11 returns regarding the truth and accuracy of the information being provided therein by the Appellant.

98. Counsel for the Respondent then asked the Respondent's witness about the contents of a document on which appeared screenshot type images of records concerning the Appellant relating to the years 2007 – 2016. The Respondent's witness explained in her evidence that:

> "*This is a printout of our Revenue system. We operate a system called ITP which shows us the sort of return filing history or the current status of an individual's filing affairs.*
>
> […]
>
> *So you see the first table there, it provides a summary from 2007 up to 2021. And then the years have been broken down underneath and that's a more detailed analysis of what exactly occurred in relation to each year*."

99. The Respondent's witness gave evidence that the records to which she had referred relating to the years 2007, 2008, 2014, 2015 and 2016 contained references to the receipt of returns furnished by the Appellant. By contrast, the records relating to the years 2009 – 2013 contained no references to returns having been received. Asked why the records for these years did not record receipt of the paper returns filed on the Appellant's behalf in January 2018, the Respondent's witness said that these would not have been recorded on the system in circumstances where, prior to their filing, the Appellant had brought appeals of the assessments made in respect of the years 2009 – 2013. She said that the bringing of the appeals meant that the returns then submitted could not, under the Respondent's own procedures, be "processed" and entered on the ITP system.

100. The Respondent's witness was also asked whether, to her knowledge, it was possible on the ROS system for a taxpayer/agent to file late returns online (i.e. returns more than four years late). The Respondent's witness said that it was her understanding that one could not do this and that it was necessary in such circumstances to obtain paper Form 11 returns, fill these out and send them to the Respondent by post. The Respondent's witness thus doubted that the Appellant could have filed Form 11 returns for the years 2009 – 2011 using the ROS system.

101. The Respondent's witness was cross-examined by the Appellant's representative at hearing.

102. The Appellant's representative asked the Respondent's witness why it was that she had concluded that no Form 11 returns for the years 2009 – 2013 had been filed by the Appellant prior to January 2018. In answer to this, the Respondent's witness said:

"*The reason I am so clear is that the* […] *summary documents appear to be offline returns which were completed using Revenue's offline system. This is a preparation facility which allows individuals to complete the returns offline without internet access, if they don't have it. They are then saved to their computer, and can be…in order to complete the submission process, they must be uploaded through ROS and then they would be transmitted over to Revenue and submitted at that stage. We have no record of them being submitted to Revenue*."

103. The Appellant's representative put it to the Respondent's witness that, on its face, the correspondence dated 6 May 2016, sent by the Appellant's tax agent to an officer of the Respondent then involved in the investigation into the Appellant's affairs, stated that Form 11 Returns were enclosed. How, asked the Appellant's representative, could she be sure that the Form 11 returns had not, as stated, been enclosed and thus furnished to the Respondent in physical form? To this, the Respondent's witness replied:

"*I can't say that* [Form 11 Returns] *were or weren't* [enclosed]. *But I have reviewed the file, and whatever was on it, and taken possession of that file. So all I can say is that I have the documentation that is in from of me*.

[…]

I have what's in my file, which matches the summaries that have been provided by the Appellant."

104. The Appellant's representative put it to the Respondent's witness in cross-examination that it was inevitable that, as return summaries had been generated and then sent to the Respondent in hard-copy form, the Appellant's tax agent must therefore have entered information onto a Form 11 return on ROS Offline. The Respondent's witness agreed with this proposition. The Appellant's representative then put the following proposition to the Respondent's witness:

"Would you agree that if [the Appellant's tax agent] *printed off the Form 11 from the ROS offline signed it and attached it to this document to* [the officer of the Respondent], *that they had completed a proper Form 11*?"

105. To this the Respondent's witness replied:

"*I don't think there is a facility where you can print the Form 11, as is on the ROS, and have it in a comparable format with the paper return."*

106. It was then put to the Respondent's witness that this was incorrect and that it was possible to use ROS Offline to produce a printed version of a Form 11 return, which could then be signed by an authorised agent and supplied to the Respondent.

107. Regarding the reliance of the Respondent's witness on record keeping, the Appellant's representative asked:

"*How do you know* [the investigating officer of the Respondent] *didn't get* [Form 11 returns] *and* […] *fail to put them on record?*

108. The Respondent's witness stated that the height of what she could attest to was that there was no record of Form 11 returns for the years 2009 – 2013 having been received in 2016.

The Appellant

109. The Appellant called [redacted] to give evidence. Hereafter in this Determination, [redacted] is referred to as "the Appellant's witness".

110. The Appellant's witness is a chartered tax advisor and colleague of the Appellant's representative. He gave evidence regarding the operation of the ROS system and ROS Offline tool from the perspective of a tax agent.

111. The Appellant's representative began by asking the Appellant's witness whether he was familiar with using the ROS Offline tool. He said that he was.

112. The Appellant's witness, with the aid of a computer, then proceeded in his evidence to demonstrate that it was possible, using ROS Offline, to download a Form 11 return for the year 2008, enter information on to it, and then upload and file it electronically using the ROS online system. Upon filing, ROS generated a "*Form 11 Return Summary – For Year of Assessment 2008".* Under this was the sentence "*This Return Summary is approved by Revenue for the purposes of Section 917K TCA 1997 as amended and no other purpose".*

113. Asked to describe the information contained in the document filed online, the Appellant's witness stated:

"There [is] *a declaration* […] *it also shows figures for income, sales receipts, turnover from Government agencies, gross profits, gross trading profits, salary, subcontractors, it's very comprehensive*."

114. It was put to the Appellant's witness in cross-examination that although the Form 11 Summary for 2008 generated upon electronic filing contained detailed information including gross income, deductions/expenses and a declaration, the return summaries, provided to the Respondent by way of enclosure with the correspondence dated 6 May 2016, contained none of this information. The Appellant's witness accepted this proposition. He agreed with the suggestion of counsel for the Respondent that returns for the years 2010 – 2013 had not been filed electronically online using ROS. In re-examination however, the Appellant's witness wondered whether the returns could have been filed with the Respondent in their physical, rather than electronic, form.

The substantive appeal

115. The Appellant gave evidence in the appeal hearing. He began by stating in examination-in-chief that over the years 2007 – 2016, he worked as a *"team lead"* or "*team leader*" for A Limited and B Limited. This, he said, involved "*managing a team of software developers, on a day-to-day basis, coaching them, mentoring them, and also hiring developers as well for the team and other teams."* The Appellant also said that he reported to a "*director of software engineering".*

116. He described the business of A Limited and B Limited in the following terms:

> "[…] [redacted] […] [redacted]. [redacted] [redacted] [redacted]."

117. Returning to the nature of his own role, the Appellant agreed with the proposition put to him by his representative that he had supervisory authority over members of his team who were, he believed, all employees of A Limited and B Limited. The Appellant said that, in the fulfilment of his supervisory duties, he would report to a person named [redacted], whom he referred to as his "*line manager",* on the question of the performance of team members.

118. The Appellant was asked in examination-in-chief about several documents, originally included by the Respondent in its book of hearing documents. On their faces, these documents constituted written agreements governing the relationship between the Appellant and one or other of A Limited or B Limited. For the purpose of clarity, they are referred to hereafter in this Determination as "the written agreements". Each of the written agreements covered a period falling within the years in issue.

119. The earliest of the written agreements ("the first written agreement") covered the period 16 April – 13 July 2007 and was stated to be between A Limited and the Appellant, who was defined as the "*contractor*".

120. Asked about the first written agreement by his representative, the Appellant said that he did not recall signing it, though he accepted that his signature, dated 2 April 2007, appeared on the first page. He also indicated that he recalled having previously met the other signatory, [redacted], who was recorded as being A Limited's Chief Operating Officer.

121. The Appellant was also asked by his representative about another written agreement between himself and A Limited ("the second written agreement"), which covered the period 31 March 2010 – 31 March 2011.This was signed only by a representative of A Limited. The Appellant's representative asked the Appellant whether he recalled having signed this document. The Appellant said that he could not recall ever having done so.

122. The Appellant was asked by his representative about a further written agreement ("the third written agreement"), this time between himself and B Limited, which covered the period 1 April 2011 – 31 December 2011. This was signed by the Appellant, with the signature dated 6 December 2011. Asked whether he remembered ever signing the third written agreement, the Appellant stated that he did not.

123. The Appellant then stated in his oral evidence that in about 2015, B Limited's Head of HR, a person named [redacted], had come to him seeking copies of all of the written agreements that he had entered into over the preceding years with A Limited and B Limited. He then said:

> "*I explained to her I don't have any contracts, because there were very few. And that was* […] *I think around October/November 2015* [when] *I had that meeting. We had two meetings on it, and I told her I don't have any, because I didn't receive any. Just the ones that were signed were the only ones I received*."

124. The Appellant's representative then took the Appellant to a letter, sent to him by [redacted], which was dated 24 March 2015 and was entitled "*Extension of Contractor Agreement".* At the bottom of the letter was the signature of the Appellant under the statement "*I accept this contract extension and agree to abide by all the terms and conditions of my employment".* Asked whether he recalled signing this document, the Appellant said that he did. He said that this extension document was actually provided to him in the wake of his aforementioned meeting with [redacted] and another meeting with the Chief Operating Officer of B Limited, [redacted].

125. The Appellant's representative also opened a second signed extension letter, dated 21 December 2015, which further extended his period working with B Limited to 31 March 2016. In relation to this extension, the Appellant said:

> "*Obviously after meeting* [redacted]*, she fed information back to* [redacted]*, the COO. He met me in person. So he said that we have concerns. Concerns about you and us, specifically. You've been here, you're senior. It leaves us fairly open because you're essentially an employee, really, in real terms. So we're going to extend you by three months to* […] *I suppose hand over to different people, and within the three month period you've an option to come back in as a full-time employee or you can leave the organisation. They're your two options. Because it leaves us very open, the way we've been operating with you over the past number of years*."

126. The Appellant's representative asked the Appellant if he knew why, after such a lengthy relationship with A Limited and then B Limited, concerns had been expressed to him only in 2015/2016 about his work status. The Appellant said that he understood that B Limited had either been, or was about to be, the subject of a Revenue audit and that this was the cause for its concern.

127. The Appellant then returned to the circumstances of his engagement with A Limited and B Limited. He said that he was paid at the end of each month, with the amount due to him calculated by reference to a daily rate and the number of days worked over the month in question.[3]

128. The Appellant gave evidence in examination-in-chief that he would, on rare occasions, be out of work because he was ill or because he had to attend an event such as a funeral. The Appellant then said "*So when I was out, so I got paid for that day. So, end of the month, I got paid for the day I was out."* He said that he rarely was away from his work for more than a day or two. In relation to his work, he said:

> "*So when I was out of office, it would pretty much go on hold. It would mean I'd have to come in, it might be on a weekend, to catch up. But it would go on hold, because it was difficult for somebody to pick it up in a short period of time*."

129. The Appellant gave evidence that he carried out the work for A Limited and B Limited personally and did not get another person or "*substitute"* to do work for him, including on instances when he was away.

[3] Transcript of hearing, day 2, page 58-59;

130. Referring to his role and responsibilities, the Appellant referred to himself as a "*team leader",* and stated:

> *"First and foremost* [the role] *was assigning tasks. So work, day-to-day work, you know. Mentoring the team, coaching the team technically, giving them technical oversight. Dealing with, you know, team issues, so, conflicts, non-performers, okay. And working with HR and that type of stuff, getting into processes. Where we had maybe a pipeline coming of work, so I'd know the capacity of the team and if we needed new people. I'd work with HR to get a requirement to get out to the market and get somebody new, I'd hire that person, meet that person and hire them. I'd interview them. Meeting with clients* […]"

131. Furthermore, the Appellant gave evidence that while he had a supervisory function, he would ultimately have a "*reporting function"* to his "*line manager".* The Appellant asserted that all of the people working on the same team as him were A Limited/B Limited employees.

132. The Appellant was asked by his representative whether projects for clients on which he worked ever "*failed".* In relation to this, he said:

> "*So in the early days, yeah, we had a lot of projects that failed and I think…lost quite a lot of money*."

133. Asked whether he was ever personally out of pocket on foot of such failures, the Appellant said that he was not.

134. Conversely, the Appellant was asked whether certain projects of A Limited or B Limited were "*very successful and made loads of money for* [those companies]". To this he replied:

> "*Yeah, there were also many of those as well. But similarly, I had a role to play but I had no financial gain from that.*"

135. The Appellant's representative asked whether A Limited or B Limited ever inquired whether he had public liability or professional indemnity insurance. The Appellant said that this was neither asked nor required of him.

136. The Appellant said that he was regularly asked to work 'off site', in particular in London and in Jersey. In relation to Jersey, he said that he worked for a client of B Limited for about a year. He said that his transport to and from these locations was paid for by B Limited, as was his accommodation when abroad. In relation to subsistence expenses

other than accommodation, such as meals, the Appellant said that he would pay himself and keep a receipt for reimbursement later on foot of the submission of an expense form.

137. In this regard, the Appellant's representative asked the Appellant to comment on an invoice from the [redacted] Hotel in [redacted], addressed to the Appellant and in the amount of £121.50, relating to charges for food and drink incurred in his stay there over the period 24 July 2015 – 28 July 2015. The Appellant said that he had stayed in this hotel, had paid the sum charged for food and drink, and had later provided the invoice to B Limited, following which it had reimbursed him for the expense incurred.

138. The Appellant's representative also brought the Appellant to a page on which was printed a table containing entries for *"Parking"* (€43.95)*, "Subsistence"* (€203.05) and "*Taxis"* (€54.62). Also on the same page, but separate from the table, were the words "*Employee Signature"*, beside which was the name of the Appellant in print and, under that, the date of 4 December 2015. Under the date were the words "*Manager Signature",* however no name was printed next to this. The Appellant stated in evidence that this constituted a copy of a B Limited expenses claim form and that the expenses claimed had been reimbursed to him after its submission. He further stated that, in making the claim, nobody from B Limited objected to him doing so on the basis that he was not in their view an employee of that company, but rather an independent contractor.

139. The Commissioner notes that four B Limited expenses claim forms, covering the periods July – December 2015, were included in the hearing documents. These forms indicate that B Limited paid the Appellant the following amounts for travel and subsistence for work then done in Jersey: July 2015 - €1,647.64; August/September 2015 - €1,290.30; November 2015 - €301.62; and December 2015 - €301.65.

140. The Appellant was asked in examination-in-chief where he worked from when in [redacted]. In this regard he said that he worked from the headquarters of A Limited/B Limited. Until about 2013 these were in [redacted], after which they were in a building on [redacted]. The Appellant said that the offices at [redacted] had car parking spaces that he was permitted to use. The [redacted] offices had no such parking facilities. He also explained that he gained entry to the offices of A Limited or B Limited by means of a *"staff card".*

141. The Appellant said that when in the offices of A Limited or B Limited he had a dedicated desk from which to work, as well as a laptop. He said that he appeared as a contact in the "*internal* […] *telephone book"* and was given access to a subscription to "*Pluralsight",* this being an online training platform used by software developers. The Appellant also

said he attended in-person training courses for software developers, paid for by A Limited/B Limited.

142. The Appellant gave evidence that the offices of A Limited/B Limited had a canteen and that free breakfast was provided to workers, including himself. Lunch was, he said, also provided free once a week. He recalled that at certain times of year he may have received One4All vouchers as a bonus. He said that he participated in workplace social events.

143. Counsel for the Respondent cross-examined the Appellant. In so doing, she referred the Appellant to copies of the first, second and third written agreements already referred to, as well as to two additional written agreements.

144. Counsel for the Respondent began by asking the Appellant about the terms of the first written agreement, which covered the period 16 April 2007 – 13 July 2007. The Appellant accepted that it bore his signature, dated 2 April 2007, and it appeared to bear the signature of the Chief Operating Officer of A Limited, [redacted], a person with whom he was familiar.

145. Counsel for the Respondent then put it to the Appellant that under the terms of the first written agreement, he, the contractor, was required to provide his services to A Limited, which was, in turn, to provide his services to one of its own clients, Bank [redacted] ("Bank A"). In this regard, the Appellant agreed with counsel for the Respondent when she suggested to him that "[…] *you were doing work for* [A Limited] *who was doing work for a third party client".*

146. Counsel for the Respondent put it to the Appellant that he was required under the first written agreement to invoice A Limited for work done and that, in the period April – July 2007, he did so through a company called [redacted] Limited, which was registered for VAT. Counsel for the Respondent also put it to the Appellant that, though the invoices provided to A Limited in 2007 were in the name of [redacted] Limited, payment inclusive of VAT and without the deduction of any tax was made directly into his own personal bank account. The Appellant agreed that this was so.

147. Counsel for the Respondent put it to the Appellant that, under clause 3.1.5 of the first written agreement, he was to be provided by A Limited with a "*suitable place of work"* either in the offices of A Limited or of its client. The Appellant stated that this term reflected the reality of his engagement and that the places from which he mostly worked while engaged by A Limited were its offices in either [redacted] or [redacted].

148. Counsel for the Respondent put it to the Appellant that he was, pursuant to clause 5.1 of the first written agreement, to be paid by reference to a daily rate for a 7.5 hour, 9.00 am

– 5.30pm day (€435 per day in this instance). The Appellant agreed that this was correct and also agreed that payment by reference to a daily rate occurred at all times over the period of his working relationship with A Limited and, later on, B Limited.

149. Counsel for the Respondent observed that Schedule 1 of the first written agreement provided that "*This work includes any additional hours worked or overtime required and is all inclusive. If less than 7.5 hours is worked because of reasons relating to the contractor, an hourly rate is charged."* In relation to this clause, the Appellant stated that, on the contrary, he regularly worked over the 7.5 hours specified and was paid for those extra hours. He said that, for example, if he did four hours in the evening, he would, when it came to monthly invoicing, include this in his overall calculation as a half day worth of work. The Appellant said that throughout his working relationship with A Limited and B Limited he worked long hours. This, he said, was reflected in the sums that he charged by invoice, which were thereafter paid to him. The Appellant stated in his evidence that on certain occasions, such as over Christmas, he would be paid double the daily rate in question.

150. Counsel for the Respondent pointed out to the Appellant that clause 5.2 of the first written agreement concerned the filling out of timesheets for the purpose of invoicing. Under this clause, these timesheets were to be supplied to him by A Limited and on them he was to record his hours worked. The Appellant confirmed that this was what happened at all times when carrying out work for A Limited and B Limited.

151. Counsel for the Respondent also brought the Appellant's attention to clause 10.1, headed "*Termination"*, which provided that:

> *"This agreement may be terminated at any time by either party upon the provision of 28 days' notice in writing to the other party, unless otherwise stated in the relevant Schedule."*

152. Counsel for the Respondent referred the Appellant to clause 11 of the first written agreement, entitled "*Restrictions". *This provided that:

> "*Neither the Client, nor any subsidiary or associated company of the Client, nor any client of the Client shall during this Agreement be permitted to utilize the Services of the contractor other than through* [A Limited].
>
> *Neither the Client, nor any subsidiary associated company of the Client, nor any client of the Client shall during this Agreement be permitted to retain or re-engage the services of the contractor directly on a contract or permanent basis within 6 months of the completion of the contract*."

153. The Appellant stated in his evidence that when engaged by A Limited/B Limited to carry out software development work for one of their clients, he could not carry out work for that client on his own account. He accepted that this was a standard term in the IT/software development industry.

154. Counsel for the Respondent drew the Appellant's attention to an invoice contained in one of its hearing booklets, which had been sent by the Appellant in the name of [redacted] Limited to A Limited charging it €7,368.90, inclusive of VAT at 21%, for 14 days worked in April 2007. The Appellant accepted in his evidence that he had sent this invoice to A Limited.

155. Counsel for the Respondent then took the Appellant to the second written agreement, which covered the period 31 March 2010 – 31 March 2011 and was entitled "*Contract for the Provision of Contractor Services*". Under the second written agreement, the Appellant's role was described as being that of "*IT contractor*".

156. The copy of the second written agreement put before the Commissioner was not signed by the Appellant, though it was signed by the Chief Operating Officer of A Limited. When it was put to the Appellant that the copy before him might constitute A Limited's copy and that he might have had his own, the Appellant indicated that he thought this to be unlikely.

157. Turning to the terms of the second written agreement, counsel observed that clause 3.1.9 provided:

> "[A Limited] *and the Contractor hereby confirm to the other that nothing in this agreement shall create or shall or should be construed as creating a contract of employment or service or an employment relationship between the Contractor (which term shall include, for the avoidance of doubt its servants or agents) and* [A Limited] *and the Contractor acknowledges that neither it nor any of its [employees, directors] servants or agents have any entitlement to any pension, holiday entitlement, or sick pay by virtue of this agreement. The Contractor agrees that it is responsible for all payments to its [employees, directors] servants and agents for the purposes of this agreement and agrees to indemnify and hold harmless* [A Limited] *against any claims or demands that may be made by the relevant authorities in respect of such matters arising from or in connection with the Services provided in this agreement.*"

158. In respect of this, counsel for the Respondent asked the Appellant whether he ever received any holiday pay, sick pay or pension contributions from A Limited. The Appellant said that he received no holiday pay or pension contributions, however he said there were occasions on which he was out sick yet was paid nonetheless.

159. Counsel for the Respondent further put it to the Appellant that, as with the first written agreement, under the second written agreement the Appellant was to be paid a daily rate, set at €485, and was to issue invoices to A Limited. The Appellant agreed that this was correct.

160. Counsel for the Respondent referred the Appellant to clause 6 of the second written agreement, which was headed "*Intellectual Property Rights".* The Appellant accepted that under this clause he did not hold any property rights in respect of work done for a client of A Limited or for A Limited. He agreed with the proposition of counsel for the Respondent that this term was "*common* […] *in the IT industry."*

161. Counsel for the Respondent further observed that, as with the first written agreement, the second written agreement contained a requirement that A Limited maintain "*public liability, employer's liability and professional indemnity insurance."* There was no express term requiring that the Appellant have cover. The Appellant agreed with this observation.

162. The Appellant also agreed with the observation that the second written agreement, similarly to the first, contained a clause whereby either party could terminate without reason with 4 weeks' notice. A Limited, moreover, was entitled to terminate with no notice and without liability where, *inter alia*, there was a material breach of terms by the Appellant which went un-remediated after 28 days, unprofessional conduct on the part of the Appellant and bankruptcy.

163. Counsel for the Respondent observed that under the second written agreement, the Appellant's working address was that of Bank A, rather than the address of A Limited. She also observed that, in line with the evidence of the Appellant given in examination-in-chief, the Appellant's role was defined in Schedule 2 of the contract as involving:

> "[…] *participation in the full project life cycle. You will be involved in the analysis, design, development, testing and documentation of software projects. This role may also include the responsibility for managing a small team of developers either on a project or on a particular customer site, to deliver high quality software within an agreed timeframe that meets defined requirements*."

164. Counsel for the Respondent put it to the Appellant that by the time of the second written agreement he had moved from invoicing A Limited in the name and using the VAT number of [redacted] Limited, to invoicing in his own name and using his PPS number. The Appellant accepted that this was correct. He further accepted that he did this despite never having registered for VAT.

165. Referring to an invoice in the Respondent's book of documents, counsel for the Respondent observed that, for the month of November 2010, the Appellant had invoiced A Limited for 20 days' work. The amount charged under this invoice, including VAT, came to €11,737. The Appellant agreed that this was so. The subsequent invoice in the Respondent's book of documents was for December 2010. In this invoice, the Appellant charged the Appellant the same amount for the same number of days worked.

166. Counsel for the Respondent then turned in cross-examination to the third written agreement, again entitled "*Contract for the provision of contractor services*", this time between the Appellant and B Limited, which covered the period 1 April 2011 – 30 December 2011. The client on this occasion was [redacted] Bank ("Bank B"), and the Appellant's working address was given as that entity's offices in [redacted]. The Appellant's role was described as being that of "*Technical Lead/IT Consultant*".

167. Counsel for the Respondent made the point in cross-examination that the terms of the third written agreement varied in only a small number of respects from those of the second written agreement. As before, B Limited was obliged to provide the Appellant with a suitable place of work, and he had no pension, holiday or sick pay entitlements. However, at clause 3.2.3 of the third written agreement, the Appellant was required to "*maintain adequate professional indemnity and public liability insurance*". The Appellant said that, notwithstanding this term, he never had any such insurance in place.

168. Counsel for the Respondent then drew the Appellant's attention to clause 4.1 of the third written agreement. This provided that:

> "*It is acknowledged by* [B Limited] *that* [the Appellant] *will be free to undertake activities and offer the same or other services at the same time or otherwise to other parties, to the extent that such activities and the provision of such services do not interfere with or conflict with* [the Appellant's] *obligations under this agreement or otherwise or would not or could not result in a breach of any provision of this agreement.* [The Appellant] *however agrees not to offer services during the term of this agreement to any other party which is a competitor of* [B Limited] *and/or* [B Limited's client]."

169. Asked by counsel for the Respondent whether he in fact did other work during the period covered by the third written agreement, the Appellant said that he was employed part-time as a lecturer in [redacted]. He also did not dispute that he had other minor income from property interests.

170. Counsel raised clause 5.3 of the third written agreement with the Appellant. This provided that the Appellant was:

"[…] *directly responsible for all expenses (travel expenses, hotel etc) incurred unless otherwise agreed. In particular circumstances, where legitimate business expenses may be covered by* [B Limited] *this will only be honoured where prior written authorization has been received from the Director."*

171. Counsel for the Respondent contrasted this term with the Appellant's evidence in examination-in-chief regarding B Limited's propensity to pay for his expenses when abroad.

172. Counsel for the Respondent brought the Appellant to another written agreement, this time unsigned, between himself and B Limited ("the fourth written agreement"). This covered the period 3 January 2012 – 31 January 2013 and in effect contained the same terms as the written agreement that preceded it. Although the Appellant's place of work was described once again as being at the offices of Bank B, the Appellant stated that this was not the case for the majority of the period covered by the fourth written agreement. Instead, he spent most of the time working at the offices of the [redacted]

173. Counsel for the Respondent then opened a further written agreement ("the fifth written agreement"), this time signed by the Appellant, that he had entered into with B Limited. The fifth written agreement covered the period 19 August 2013 to 18 November 2013. On this occasion the Appellant's working address was given in the Schedule thereto as being at B Limited's offices. The terms of the fifth agreement in effect mirrored those of the preceding two written agreements, save that the nature of his business was given as "*.Net Developer*" and his rate of pay had fallen from €470 to €400 per day.

174. In cross-examination, counsel for the Respondent also opened an invoice sent by the Appellant to B Limited in respect of work done over October 2013. In this invoice, the Appellant charged for 22 days of work, the sum due for which was €10,824 including VAT. The Appellant accepted that he had issued this invoice.

175. Counsel for the Respondent put it to the Appellant that the sums paid to him by B Limited (and before that A Limited) did not constitute an "*agreed salary*". The Appellant accepted this.[4]

176. Noting that he charged VAT at all times, counsel for the Respondent put it to the Appellant in cross-examination that he was aware that he was providing a service to A Limited and then B Limited over the years at issue. In response to this, the Appellant said that he was

[4] Transcript of hearing, day 2, page 121.

asked by these companies to charge VAT on his invoices. Pressed on the question of whether he was providing a service, he said:

> "*Well, I was, working there as a member of staff* […] *performing duties that all the other staff were doing* […] *but I was asked to put VAT on the invoice. I was told to put it on."*

177. Asked why he acquiesced to this request or direction, the Appellant said:

> "*Well, at the time I did. I suppose I just, you know, it was a busy time, so just* […] *did it and, look, it drifted, it went on, and that's what happened."*

178. Counsel for the Respondent put it to the Appellant that there was clearly a "*meeting of minds"* between himself and A Limited and B Limited that he was an independent contractor and not an employee. In reply, the Appellant stated "*Well, that's what the contract says, yeah."*

179. In his evidence-in-chief, the Appellant had stated that if he ever took time off doing work for A Limited and B Limited, any unfinished work would be waiting for him on his return. Counsel for the Respondent suggested to him that, given the technical nature of software development work, this was not uncommon in the IT industry. The Appellant agreed with this. He said that he had an "*end to end"* understanding of the platform operated by A Limited and B Limited that made him difficult to replace.

180. Regarding the question of the documented expenses referred to by the Appellant earlier in his evidence, counsel for the Respondent put it to him that they were "*simply the reimbursement of payments that you made so that you weren't out of pocket."* The Appellant agreed with this proposition.

181. Regarding the evidence of the Appellant that A Limited and B Limited funded his training and paid for development tool resources, counsel for the Respondent put it to the Appellant that in the particular context of the software development and IT business, it was essential to have all workers, whether employees or independent contractors "*on the same page".* The Appellant agreed with this, though he stressed that it was not ever the case in his experience that independent contractors would have their subscriptions to development tools and resources paid for by the business making use of their services.

182. Counsel for the Respondent then raised the fact with the Appellant that he had, as late as November 2015 when he filed his income tax return for the year 2014, treated his income from A Limited and B Limited as arising from self-employment. She asked him, in particular, whether he stood over the assertion that this had been a mistake and not a reflection of his actual relationship with these companies. In answer to this, the Appellant

said that it was in early 2015 that the issue of his work status had first been raised by members of the senior management of B Limited, who he said considered that they were exposed in a legal sense given the nature of their relationship. He also however said that in mid-2015 his tax agent had advised him that he may have been, based on an objective factual analysis, an employee of A Limited and B Limited, and not an independent contractor engaged by them to provide a service.

183. The Appellant agreed with counsel for the Respondent's proposition that in 2007 and 2008, he had never considered that he was an employee. Nonetheless, he later stated:

> "*So, I saw myself as a senior member of staff. That's what I saw myself as in the company. That's what I was referred to as. A senior member of staff. So the word "contractor" was never used."*

184. In relation to the question of why he had made no income tax returns at all for the years 2009 – 2013, the Appellant stated under cross-examination "*It was back in the heyday* […] *and I'm not trying to make excuses for it".* Later, he said "*So it just kept drifting and I let it get out of control."*

Submissions

The preliminary issue – objections to acceptance

Respondent

185. Counsel for the Respondent submitted that under section 949J of the TCA 1997 there were two conditions that must be met in order for an appeal to be valid. The first was that an appeal must relate to an "*appealable matter",* as defined by section 949A of the TCA 1997. The second was that *"any conditions that are required (by the provisions of the Acts relevant to the appeal concerned) to be satisfied, before an appeal may be made, are satisfied before it is made."*

186. Counsel for the Respondent submitted that in relation to the years 2007, 2008 and 2014, there was no "*appealable matter".* This was so because in his returns filed for these years, the Appellant had declared his income from *"software development"* and "*IT consultancy"* to be self-employed income, taxable under Schedule D. In appealing the amended assessments made in respect of these years, the Appellant was, therefore, challenging his own designation of this income as arising from self-employed activity. This, counsel submitted, was contrary to section 957(2) of the TCA 1997 and section 959AK of the TCA 1997 (the latter of which applies to appeals of assessments made in respect of the years 2013 onwards).

187. In relation to the years 2009 – 2013, counsel for the Respondent submitted that the appeals of the assessments in question had been brought in circumstances where the Appellant had not yet made a return. After the bringing of the appeals, the Appellant had filed paper returns for these years, in accordance with a request of the Respondent that he do so.

188. Counsel for the Respondent submitted that it was clear from the evidence that while the Appellant had paid amounts to the Respondent in respect of his self-assessed income tax liabilities for the years 2009 – 2013, the payments he had made did not cover interest due. The appeals of the assessments in question were therefore invalid. This was so because subsection (1) of section 959AH of the TCA 1997 provides that "*no appeal lies against* [an] *assessment until such time as* […] *the chargeable person pays or has paid an amount of tax on foot of* [that] *assessment which is not less than the tax which* […] *is payable by reference to any self assessment included in the chargeable person's return".* Crucially, subsection (3) clarifies that *"tax"* in the context of subsection (1) of section 959AH of the TCA 1997 must be construed as "*including any amount of interest due and payable at the date of payment* […]".

189. Counsel for the Respondent also submitted that the Appellant's appeals in respect of the years 2015 and 2016 were not valid for much the same reason. The Appellant had not included his income received from B Limited in either the part of the return relating to income from employment or the part relating to income from self-employed activity. He had, however, included the income earned from this source, €159,338 including VAT for 2015 and €40,251.75 including VAT for 2016, in the expressions of doubt furnished with his returns. In respect of neither year had the full amount of tax due on foot of this income been paid, nor had any interest arising.

Appellant

190. The Appellant's representative stated at the outset of her legal submissions on the question of acceptance, that it was an agreed fact that the "*further income"* under Schedule D included in the Respondent's amended assessments for 2007 and 2008 was, as with the Schedule D income included by the Appellant in his own return for those years, attributable to his "*Software Development"* work from A Limited[5]. The Appellant's representative submitted however that the Appellant had in returning assessable profit of €32,132 for 2007 and €24,238 for 2008 from software development for A Limited "*erroneously"* described it as "*self-employed income"*. The Appellant's representative then

[5] Transcript of hearing, day 1, pages 135 – 136.

submitted in relation to the further income included under Schedule D, Case I in the Respondent's amended assessments for 2007 and 2008:

> "[…] *what has happened here is that the additional amount is an additional amount of income, but I say that income is, and always was, Schedule E PAYE type income, and that it is not open in the first place to the Respondent to arbitrarily allocate it to Schedule D Case I. It is not a Case I source of income, it is PAYE income, because my case is that* [the Appellant] *was in fact an employee, and that was the source of the income, and that's the point to be argued in the substantive case."*

191. The Appellant's representative then made submission on the Respondent's reliance on the requirements of section 959AH of the TCA 1997 as a basis for refusing the appeals brought by the Appellant.[6] In this regard, the Appellant's representative submitted that if the Commissioner were to find that the Appellant's income from A Limited and B Limited was remuneration from employment, chargeable to tax under Schedule E, then he would not meet the definition of a "*chargeable person"* under the TCA 1997 and, thus, section 959AH, being a provision relating only to such persons, would be inapplicable to the Appellant. Failure to adhere to the requirements set out therein would not therefore constitute a basis for the Commissioner to refuse to accept appeals brought by the Appellant. The net effect of the Appellant's submission was that it was necessary for the Commissioner to hear and decide on the substantive issue relating to whether the Appellant's income earned from A Limited and B Limited was income from self-employment or income from employment, before making any finding in relation to the question of acceptance in this context.

192. In support of this submission, the Appellant's representative relied on the judgment in *JSS and Others v Tax Appeals Commission* [2020] IECA 73 ("*JSS*"). There, the Court of Appeal held that an Appeal Commissioner had erred in failing to address and make findings in relation to an argument made before the Commission by several appellants. The argument in question was that the conditions for appeal set out under section 959AH of the TCA 1997 were inapplicable as a consequence of the appellants not being chargeable persons within the meaning of section 959A of the same legislation.

193. The Appellant's representative then made submissions specific to the appeals of the assessments for the years 2010 – 2013. She submitted that in respect of these appeals, there was dispute as to whether returns had in fact been filed in advance of the

[6] In making submissions on the application of section 959AH of the TCA 1997, the Appellant's representative referred to the appeals of all the years in issue. However, it is clear from the submissions made by the Respondent's counsel, that the Respondent was grounding its section 959AH objection to the appeals of the assessments for the years 2009 – 2013, 2015 and 2016 only.

Respondent issuing the assessments in question. In this regard, the Appellant's representative stated:

> "[…] *our position* [is] *that a return was filed according to* […] *the letter which we have in our possession of* [the Appellant's tax agent] *of 6 May* [2016] *in which he says 'I enclose the Form 11s for each of these years."*

194. The Appellant's representative stated that her interpretation of this correspondence was that the Appellant's tax agent was sending to the Respondent both summaries of the Appellant's Form 11 returns, and the Form 11 returns themselves.

195. The Appellant's representative then submitted that, in any event, the Appellant's provision of the return summaries constituted the "*electronic transmission"* of a return, within the meaning of section 917F of the TCA 1997. This was so because the return was transmitted by email by an "*authorised person",* namely the Appellant's tax agent, on 1 June 2016. This transmission was, the Appellant's representative submitted, then acknowledged by an officer of the Respondent, when the officer stated in her email of the same date:

> "*Hi* […]*,*
>
> *Just to let you know those submissions came through so I'll have a look at them but it will take some time."*

196. The Appellant's representative submitted that this statement constituted an acknowledgment within the meaning of section 917J of the TCA 1997.

197. Summarising her position regarding how, and thus when, returns for 2010 – 2013 were submitted, the Appellant's representative stated:

> "*And I would say that based on 917F, that returns were in fact submitted, because the summary returns which we have already identified and which* [are] *there,* [have] *now gone from being summary returns in* [the Appellant's tax agent's] *possession, to a summary now in the possession of* [the Respondent]*, and acknowledged as such, and that would convert it into a return submitted to* [the Respondent]."

198. The Appellant's representative then made submissions on the implications of a finding that the Appellant had filed returns in June 2016, rather than in early 2018. According to the information submitted in June 2016, the Appellant's overall tax liability for the years

2010 – 2014 was €11,426.[7] Thus, the Appellant's representative submitted in relation to the years 2010 – 2013 that:

> "*If I am correct and those returns went in, the tax and interest in relation to those returns was paid, and it was paid with the original voluntary disclosure and should have been brought to account against those years. For some reason it is brought to account, but it is brought to account against 2007 and I have no idea why."*

199. Regarding the paper returns submitted by the Appellant's tax agent in 2018, the Appellant's representative contended that these were submitted in circumstances where the officer of the Respondent who had made the assessments in question had told the Appellant's tax agent in correspondence of 4 December 2017 that he would not have the right to appeal to the Commission unless they were filed. The Appellant's representative therefore submitted that "*there wasn't much choice"* other than to file paper returns in 2018.

The substantive issue

Appellant

200. The Appellant's representative submitted that the evidence in the appeal pointed to the Appellant having been engaged by A Limited and B Limited over the years in issue on a contract of service. He was, in other words, an employee and not an independent contractor.

201. The Appellant's representative grounded her submissions in this regard on the judgment of the Supreme Court in *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza*[2023] IESC 24 ("*Karshan*"), in which Murray J held that the question of whether or not someone is an employee:

> "[…] *should be resolved by reference to the following five questions:*
>
> *(i) Does the contract involve the exchange of wage or other remuneration for work?*
>
> *(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?*
>
> *(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?*

[7] See page 8 of the correspondence of the Appellant's tax agent dated 6 May 2016.

(iv) If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing."

202. With regard to the first question, the Appellant's representative stated that the evidence before the Commissioner was that the Appellant received a "*consistent pattern"* of payments from A Limited and later B Limited directly into his bank account. The consistency was not only in the timing of the payments, but also in the amounts paid. Taking the first three months of 2011, the Appellant's representative observed that the Appellant received payments from A Limited on 7 January, 4 February and 4 March of that year, each in the identical amounts of €11,737. The Appellant's representative submitted that this looked "*very like a pay day on the first Friday of the month",* which was in her view indicative of an employment relationship.

203. The Appellant's representative also submitted that the evidence of the Appellant was that he received payments in respect of overtime, on certain occasions at a rate exceeding that usual applicable. She submitted that this too was indicative of the Appellant being paid a salary as an employee.

204. The Appellant's representative then submitted that the evidence was that the Appellant received payment in respect of expenses that he incurred. He was, she submitted, in his time working away from the office paid subsistence, air fares and hotel bills. In the view of the Appellant's representative, none of this was consistent with the Appellant being an independent contractor.

205. The Appellant's representative submitted that the evidence of the Appellant was that he could not substitute in a person to provide a service to A Limited and B Limited in his stead. Again, this was an indicator that he was an employee of those companies.

206. The Appellant's representative cited the oral evidence of the Appellant that he was a "*team leader"* integrated into A Limited's/B Limited's business, as a further factor that

should be considered indicative of him being an employee and not an independent contractor.

207. The Appellant's representative also submitted that the Appellant's oral evidence was that he was "*under the control of management*" of A Limited and B Limited. Again, she said that this was a clear indicator of the Appellant being an employee engaged on a contract of service.

208. The Appellant's representative submitted that certain terms of the written agreements included by Respondent in its book of documents should be given little weight. However, in so far as there was weight to be given to these documents, the Commissioner should take account of:

> "[the] *level of control which the company retains for itself, perfectly understandably, given its engagement with so many financial institutions, and it is not going to allow anyone in, contractor, limited company, until it has seen their CV or carried out an interview, and that is in the definitions of contractor*."

209. Addressing the Appellant's day-to-day experience with A Limited and B Limited, the Appellant's representative submitted that he was clearly embedded in their organisations. She pointed to his evidence that he had a desk and that he was on the office communications system.

210. The Appellant's representative submitted that the evidence pointed to the Appellant not being in business on his own account as regards his relationship with A Limited and B Limited. He did not profit more greatly if a project was a success, nor suffer a loss if a project failed.

211. In relation to the Appellant's charging of VAT, the Appellant's representative submitted that this was irrelevant to the question of whether he was an employee or an independent contractor providing his services. In this respect, she stated in submission:

> "*If a person* […] *is a trader or provides a service, whether they're providing goods or services, and they are over a certain turnover limit, VAT draws from that. That must be charged. However, the reverse is not true. You can't say if somebody charges VAT, therefore you reverse the operation, and it leads straight back to the trader providing services or providing goods*."

212. In relation to this submission, the Appellant's representative noted that under section 69 of the VATCA 2010 an unregistered person who charged VAT was *"deemed"* an *"accountable person"* obligated to return the tax they had charged. They were not,

however, to be taken to be a person carrying out a trade, the income from which was chargeable to tax under Schedule D, simply because they were charging VAT.

213. The Appellant's representative made similar submissions regarding the Appellant's lack of pension rights and holiday entitlements according to the written agreements. In this respect, she stated:

> "*Now, again, exactly the same point. The absence of PRSI record, the absence of holiday rights* […] *the absence of employment rights in the contract is again looking at the situation the wrong way up the one-way street, because it is employment law that confers the right to holiday pay, it is employment law that confers the right to employer's contributions from PRSI, it is employment law that confers the right to pensions under the PRSI system*."

214. The Appellant's representative made submissions regarding why the amended assessments for the years 2007 and 2008 should be considered to have been made outside the four-year time-limit prescribed under section 955 of the TCA 1997 for the raising of assessments by the Respondent. In this respect, the Appellant's representative submitted that, in circumstances where the true nature of the Appellant's income from A Limited in these years was as emoluments from employment, the tax on which was in the first instance the responsibility of the employer to remit, there was "*full and true*" disclosure on the Appellant's part in his Form 11 income tax returns for 2007 and 2008.

215. Furthermore, the Appellant's representative submitted that were the Commissioner to find that the Appellant's income from A Limited in 2007 and 2008, and B Limited in 2014, 2015 and 2016, constituted emoluments earned from employment, then the Commissioner would have no choice but to reduce the sums assessed in these amended assessments to nil. This was so, she submitted, on the grounds that the Commissioner was not, in the exercise of his function, empowered to change the Schedule under which income included in these amended assessments had been charged. What the Commissioner was obligated to do was to examine whether the Appellant had, as found by the Respondent, the relevant income from self-employment in the years 2007, 2008, 2014, 2015 and 2016 and determine his appeals accordingly.

216. The Appellant's representative made a different point regarding the assessments under appeal for the years 2009 – 2013. In this respect, she submitted that "*equity require*[d]" that if the Commissioner held the Appellant to be an employee of A Limited and B Limited over these years, the tax liability arising from his remuneration should be met by those companies, rather than the Appellant. As she put it:

"*So the question has to be asked: where does the tax lie? Who owns the tax in relation to that income? Is the tax chargeable on the individual or is the tax chargeable on the company? And in my view, in the first place, the tax is chargeable on the company. And I would go further and say it most certainly should be charged on the company, because we have, in front of us, a series of attempted contracts* […] *I won't call them contracts at this point* […] *we have attempted contracts and I would find it difficult to escape a conclusion that these contracts were designed to contract out of employment law*."

217. The Appellant's representative submitted that this was:

"[…] *wrong in terms of dealing with the* [Appellant], *because, as we touched on there, but I would say in reverse, the* [Appellant] *loses employment rights, they lose holiday pay, they lose sick leave cover, and they lose their contributory pensions contributions. As I said, it is extremely serious to do this*."

218. In support of this proposition, the Appellant's representative cited section 986A of the TCA 1997, introduced under section 77 of the Finance Act 2017, whereby an employer that fails to deduct and remit tax on emoluments paid must do so on a 're-grossed' emoluments figure. The Appellant's representative accepted, however, that section 986A of the TCA 1997 came into force on 1 January 2018 and was therefore not of direct relevance to the assessments under appeal for the years 2009 – 2013.

219. The Appellant's representative submitted that the Appellant was, using the Respondent's own guideline documentation on the matter, properly to be regarded as an employee and not an independent contractor.

Respondent

220. Counsel for the Respondent agreed with the Appellant's representative that the five-stage test enumerated by the Supreme Court in *Karshan,* and quoted at paragraph 201 of this Determination, represented the correct approach when seeking to establish whether a person was an employee engaged under a contract of service.

221. As regards the first stage of the *Karshan* test, counsel for the Respondent submitted that there was, clearly, no dispute that the Appellant was remunerated for his work done for A Limited and B Limited. She accepted also, on the basis of the terms of the written agreements, that the Appellant had agreed to provide his own services, rather than those of a third party, thus satisfying the second stage of the *Karshan* test.

222. In briefly addressing the third stage, counsel for the Respondent said that the evidence of the Appellant was that he had "*certain freedoms".* She further submitted that while he

had said that he "*reported upwards"* the Commissioner should bear in mind the skilled nature of his work in software development.

223. Counsel for the Respondent observed however that, from paragraph 236 of *Karshan,* Murray J, referring to the earlier judgments in *Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance* [1968] 2 QB 497 *("Ready Mixed Concrete")*, *Market Investigations Ltd. v Minister of Social Security* [1969] 2 QB 173 *("Market Investigations*"), *Henry Denny & Sons (Ireland) Ltd. trading as Kerry Foods v The Minister for Social Welfare,* [1998] 1 IR 34 *("Henry Denny"),* and *Castleisland Cattle Breeding Society Limited v Minister for Social and Family Affairs,* [2004] 4 IR 150 *("Castleisland")*, had stated that:

"*In this regard, I think the right approach is to view the first three questions I have just identified as a filter in the form of preliminary questions which, if any one is answered negatively means that there can be no contract of employment, but if all are answered affirmatively, allow the interrogation of all of the facts and circumstances to ascertain the true nature of the relationship. This is what Keane J. in Henry Denny described as the consideration of 'all the circumstances of [the] employment'. It is clear that the court in Henry Denny was concerned that the question of whether the worker was carrying on business on their own account was, at least generally, central to this.*

To that end, the third stage of the RMC test should be reframed as follows:

> *'Are the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer'.*

This formulation seeks to make four matters clear, having regard to the case law in this jurisdiction since RMC. First, while RMC looked to 'the provisions of the contract', the decision in Castleisland establishes that the contract itself must be interpreted (as, today, with all contracts) in the light of the factual matrix in which it was concluded. There is nothing new in that regard in Irish law, but insofar as the RMC test does not make this clear, it should be expressly stated.

Second, both Henry Denny and Castleisland demand that in conducting that inquiry, the court must take into account the actual dealings between the parties. Keane J. thus referred in the first of these cases to the relevance of ' the manner in which the work *was done', Murphy J. to ' the facts or realities of the situation on the ground' and (in Castleisland) Geoghegan J. stressed that the Appeals Officer whose decision was in issue in that case, was bound to examine ' what the real arrangement on a day to day basis between the parties was'*."

224. Counsel for the Respondent submitted that the fact that the Appellant charged and was paid VAT by A Limited and B Limited was a significant circumstance pointing toward his being, pursuant to his agreement with these companies, an independent contractor rather than their employee. Counsel for the Respondent pointed to the evidence of the Appellant, given under cross-examination, that he considered himself, in so charging them, to be providing a service to A Limited and B Limited.

225. Counsel for the Respondent emphasised that the Appellant was not a "*passive participant"* in his relationship with A Limited and B Limited and the unfortunate victim of an effort by those companies to seek to 'contract out' of their obligations arising under employment law. The evidence suggested that he was, rather, a person who had himself decided that it was more advantageous to be a person, invoicing A Limited/B Limited at the end of each month with fees calculated by reference to a daily rate, who was the self-employed provider of a service. This was reflected in the information that he provided to the Respondent in his returns for the years 2007, 2008 and 2014. Having made no returns at all and paid no tax in respect of the years 2009 – 2013, it was only once he suspected that the Respondent would look into his affairs that he arrived at the conclusion that he was, after all, an employee of A Limited and B Limited, rather than an independent contractor.

226. Counsel for the Respondent submitted that the written agreements included in its book of documents suggested a "*meeting of minds"* that the Appellant was providing a service. This being so, she quoted the following excerpt from paragraph 241 of *Karshan*:

"*The issue of whether the court can disregard provisions of a detailed written contract of employment that define the legal rights and obligations of the parties (as distinct from purporting to describe the legal consequences of those rights and obligations) where those provisions are inconsistent with the manner in which the parties have conducted themselves, raises more complex questions. As I have noted earlier in this judgment, the United Kingdom Supreme Court has decided in Autoclenz that it can and, in an appropriate case, should do this. This court has never adopted this position, and neither Henry Denny nor Castleisland should be understood as having so decided. In neither of those cases was it expressly decided that the substantive terms of the parties' written agreement (as distinct from the conclusions of law they sought* *to include in their contract) could be over-ridden simply because they were contradicted by the parties' conduct* […]"

227. Counsel for the Respondent also quoted the following passage from *Murphy v Grand Circle Travel* [2014] IEHC 337, being a judgment which concerned the question of whether or not the plaintiff in that case was an employee, capable of claiming for unfair dismissal:

"*It is well settled from the Irish and English case-law cited that controversies of this nature can rarely be resolved by an aggregation of documentation all pointing utterly unequivocally to one conclusion or the other. In this regard, Mr. Connaughton properly acknowledges that some occasional documentary references to "employment" may be found, and he also accepts that, for what he argues is nonetheless an independent contractor relationship, the measure of residual control exercised by his client over the Plaintiff is comparatively high. But he nonetheless points to a preponderance of other documentation which he contends is to the contrary effect, in addition to a formal document executed by the Plaintiff, which is expressly designated as an "Independent Contractor's Agreement" and contains terms that clearly accord with that description of the engagement*."

228. Counsel then quoted from the following passage in the same judgment, in which Moriarty J, addressing evidence given by the plaintiff that she signed documentation referring to herself as an independent contractor without understanding that it was at variance with her being an employee, held:

"*I do not readily see a lady who has sturdily asserted her rights before the Defendant and the legal system meekly assenting to the signed endorsement of a document expressly purporting to commit her to a regime fundamentally at variance with her perception of her engagement already then over several months. It seems to me that she must have been aware of the nature of the engagement to which she was signifying her commitment.*"

229. Counsel for the Respondent relied on this passage in support of the proposition that the Commissioner should beware of straying from the terms of the written agreements, which she submitted indicated that the Appellant and A Limited and B Limited were all of the understanding that he was an independent contractor, rather than an employee.

230. Counsel for the Respondent referred to *Castleisland.* This judgment of the Supreme Court related to a company's appeal of a decision of a social welfare appeals officer. The appeals officer had held that a veterinary inspector who had previously been employed

by the company, had been made redundant, and had then been re-engaged ostensibly as an independent contractor, was in an employment relationship with the company even after his re-engagement. The High Court held that this finding had not been one open to the appeals officer to make and allowed the company's appeal. The Supreme Court then agreed with the judgment of the High Court.

231. In submission, counsel for the Respondent observed that, in finding that on the available evidence it had not been open to the appeals officer to conclude that the veterinary inspector was an employee, the Supreme Court had, among other matters, focused on the fact that the veterinary inspector had, after redundancy, self-assessed himself to be self-employed and "*claimed allowances as a self-employed person".* The Appellant, in like fashion, had in the years 2007, 2008 and 2014 self-assessed as being self-employed as regards his relationship with A Limited and B Limited. This was a fact that, in counsel for the Respondent's submission, ought to weigh against any finding that the Appellant was an employee of these companies.

232. Counsel for the Respondent then brought the Commissioner to *Jensal Software Limited v Revenue and Customs Commissioners* [2018] UKFTT 271 (TC) ("*Jensal Software Limited*"), a decision of the First-Tier Tribunal (Tax Chamber) of the United Kingdom. There, a worker who, through his company and an intermediary agency, provided project management and IT services to the Department of Work and Pensions under a series of fixed-term contracts lasting in total a period of just under a year, was held not to be engaged as an employee in circumstances where the fixed-term contracts described the relationship as being one of an independent contractor. Counsel for the Respondent made the point that in *Jensal Software Limited,* although the worker in question operated as part of a team and submitted work proposals and plans related to his field of expertise to full-time employees of the Department of Work and Pensions for their "*consideration and agreement",* this fell short of "*supervision"* and the level of control necessary to give rise to an employment relationship.

233. Counsel for the Respondent made the submission that the Appellant's actions had to be taken into account by the Commissioner when considering what the nature of his working relationship with A Limited and B Limited was. In this respect, counsel for the Respondent reiterated that the charging of VAT, from which it followed that the Appellant considered himself to be providing a service, was a relevant factor that should lead the Commissioner to consider that the terms of the written agreements indicating that he was an independent contractor, and not an employee, represented the reality of his relationship.

234. Counsel for the Respondent further submitted that it appeared from the evidence that the only forum in which the Appellant had sought to assert his rights as an employee was before the Commission. He had not, for example, taken any action regarding employment or social welfare rights denied to him as a consequence of his ostensible status under the written agreements as an independent contractor. For example, he had never made a claim in respect of pension entitlements. This, counsel for the Respondent submitted, was part of the relevant background that the Commissioner should take into consideration in determining the Appellant's appeals.

235. Counsel for the Respondent addressed the submissions made by the Appellant's representative regarding the amended assessments for the years 2007 and 2008 having been made out of time. Counsel submitted that the key question was whether the inspector who made these assessments had, under section 956(1)(c) of the TCA 1997, "*reasonable grounds for believing that the* [Appellant's] *return* [was] *insufficient due to its having been completed in a fraudulent or negligent manner."* Counsel submitted that in excluding altogether from his returns for these years substantial income received from A Limited, it was abundantly clear that the inspector had reasonable grounds to believe in the existence of, at a minimum, negligence. As such, the four-year time-limit prescribed by section 955 of the TCA 1997 was not applicable.

236. Near the close of the legal submissions of counsel for the Respondent, the Commissioner asked whether a finding that the Appellant was an employee of A Limited and/or B Limited for some or all of the years in issue would necessitate a reduction in the relevant sums assessed to nil. The Commissioner was, in particular, seeking submission regarding the scope of his jurisdiction. In response to these inquiries, counsel for the Respondent said that where she and the Appellant's representative appeared to converge in their legal argument was that, if the Appellant was held to be an employee, the assessments under appeal would have to be reduced to nil. She did not accept that the Commissioner was empowered to alter the assessments under appeal so as to charge for tax due on income chargeable under Schedule E of the TCA 1997.

Material Facts

237. The facts material to the determination of this appeal are as follows:

- the Appellant was at the times relevant to this appeal a software developer/IT professional;
- the Appellant carried out work as a software developer/IT professional for A Limited from 16 April 2007 to the end of March 2011;

- the Appellant carried out work as a software developer/IT professional for B Limited from April 2011 to April 2016;
- the business of A Limited and B Limited was the development and provision to financial institutions of software products to assist them in meeting their reporting and accounting obligations;
- the Appellant signed written agreements with A Limited and B Limited relating to the terms of his engagement in respect of the periods 16 April 2007 – 13 July 2007, 1 April 2011 – 30 December 2011 and 19 August 2013 – 18 November 2013;
- on 24 March 2015, the Appellant signed a document entitled *"Extension of contractor agreement"*, which extended his engagement with B Limited to 31 December 2015;
- on 22 December 2015, the Appellant signed a document entitled *"Extension of contractor agreement"*, which extended his engagement with B Limited to 31 March 2016;
- the terms of the written agreements for the periods 16 April 2007 – 13 July 2007, 1 April 2011 – 30 December 2011 and 19 August 2013 – 18 December 2013 included provisions governing the performance of services, the standard of services, termination, the manner of payment, restrictions, the ownership of intellectual property, confidentiality, insurance, indemnity and the rate of pay;
- over the course of his engagement by A Limited and B Limited the Appellant was paid by reference to a daily rate for a 7.5 hour working day;
- for each month from April 2007 – April 2016, the Appellant invoiced either A Limited or B Limited for work done, in so doing charging them VAT;
- in each invoice the Appellant would specify the number of days worked in the relevant month and charge accordingly. Any hours worked in excess of the 7.5 hour day would be rolled up by the Appellant and included in his invoice as a day or days' worth or work;
- in general the Appellant would charge A Limited and B Limited for between 20 – 22 days of work per month, though the number of days worked per month could be fewer or greater;

- the Appellant reported on his work to a senior employee of A Limited and B Limited;
- the Appellant carried out software development work for A Limited and B Limited personally and did not use a substitute or substitutes;
- the Appellant filed a Form 11 income tax return with the Respondent for the year 2007. In this return, the Appellant disclosed gross self-employed income from "*software development*" of €52,853 and, after the claiming of deductions and expenses, assessable profit therefrom of €32,132;
- the Appellant's assessable profit in 2007 from the trade of software development was in fact €142,485;
- the Appellant filed a Form 11 income tax return with the Respondent for the year 2008. In this return, the Appellant disclosed gross self-employed income from "*software development*" of €46,803 and, after the claiming of deductions and expenses, assessable profit therefrom of €24,238;
- the Appellant's assessable profit in 2008 from the trade of software development was in fact €115,912;
- the Appellant did not file on-time income tax returns in respect of the years 2009, 2010, 2011, 2012 and 2013;
- the Appellant received payments from A Limited and/or B Limited, inclusive of VAT charged, in the amounts of €150,971 in 2009, €146,401 in 2010, €153,257 in 2011, €158,773 in 2012 and €151,939 in 2013;
- in November 2015, the Appellant filed a Form 11 income tax return in respect of the year 2014 in which he returned assessable profit from the trade of "*IT-Consultancy*" in the amount of €113,996 (the Appellant's gross income from IT Consultancy was €120,899 before deductions and expenses claimed);
- in 2015, Appellant received payments from B Limited, inclusive of VAT charged, in the amount of €159,338;
- in 2016, the Appellant received payments from B Limited, inclusive of VAT charged, in the amount of €40,251.75;
- the Appellant filed income tax returns for 2015 and 2016 but did not include his income received from B Limited in these returns. Rather, the Appellant referred to this income in an expression of doubt furnished along with his returns;

- in his income tax return for 2015, the Appellant included a self-assessment in which he calculated his tax liabilities for that year to be in the amount of €5,057;
- in his income tax return for 2016, the Appellant included a self-assessment in which he calculated his tax liabilities for that year to be in the amount of €8,315;
- the Respondent opened an inquiry into the tax affairs of the Appellant in December 2015;
- in May or June 2016, the Appellant made a voluntary disclosure in relation to the years 2007 – 2014 by means of correspondence dated 6 May 2016;
- along with the correspondence dated 6 May 2016, the Appellant submitted to the Respondent, *inter alia*, return summaries for the years 2010 – 2014 generated on ROS offline, lists of lodgements made to his account for those years, and documents for those years entitled "[The Appellant's] *income and expenditure account";*
- on 1 December 2017, the Respondent made amended assessments in respect of the Appellant for the years 2007, 2008, 2014 and 2015;
- for the years 2007 and 2008, the Respondent amended the original assessments, which were based on the content of the Appellant's own Form 11 returns, by increasing his assessable profits from the trade of software development, taxed under Schedule D, to the respective amounts of €142,485 and €115,912;
- for the year 2014, the Respondent amended the Appellant's self-assessment by adding Schedule D income relating to relating to "*grinds"* and "*taxed interest"*. The Respondent made no amendment to income returned by the Appellant relating to the trade of "*IT consultancy",* self-assessed as being in the amount of €113,996;
- on 4 December 2017, the Respondent made assessments in the absence of returns in respect of the Appellant for the years 2009 – 2013;
- the Appellant filed paper Form 11 income tax returns for the years 2009 – 2013 in January 2018. In these paper returns, the Appellant calculated his income tax liabilities, excluding interest due, to be in the following amounts:
    - 2009 - €54,876;
    - 2010 - €53,447;
    - 2011 - €64,861;

- 2012 - €69,388;
- 2013 - €61,774;

- also in January 2018, the Appellant made payment in respect of his liabilities to income tax;
- as of January 2018 the payments made by the Appellant for the years 2009 – 2013 were in the following amounts:
  - 2009 - €56,449;
  - 2010 - €56,648;
  - 2011 - €11,054;
  - 2012 – nil;
  - 2013 – nil;
- the payments made by the Appellant in respect of his tax liabilities for 2009 – 2013 did not cover interest due as of January 2018;
- on 6 December 2018 the Respondent made an amended assessment in respect of the Appellant for the year 2016;
- the Appellant made payment in respect of his liabilities for the years 2015 and 2016 in the respective of amounts of €58,983 and €8,315.

Analysis

The Preliminary Issues – objections to acceptance

The appeals for 2007, 2008 and 2014.

238. The Respondent objected to the acceptance of the appeals of the amended assessments for these years on the grounds that, under sections 957(3) and 959AK of the TCA 1997, the Appellant was not entitled to appeal "[…] *in relation to matters other than additions to, deletions from, or alterations in the assessment, made by reason of the amendment, than the person would have had if the assessment had not been amended*."

239. The Commissioner finds that the Respondent's objections based on the invalidity of the Appellant's appeals in respect of the amended assessments for these years are well founded and the Commissioner refuses acceptance for the reasons set out hereunder.

240. In relation to the years 2007 and 2008, the Appellant filed Form 11 income tax returns disclosing gross receipts of self-employed income from the trade of *"software development"* in the respective amounts of €52,853 and €46,803. After expenses and deductions claimed, the Appellant's declared profit from this trade was in the amount of €32,132 and €24,238 for each year.

241. It was an agreed fact in this appeal that for the years 2007 and 2008 all of the Appellant's income declared as being from the self-employed trade of software development was received from A Limited.

242. On foot of the Appellant's Form 11 income tax returns for 2007 and 2008, Notices of Assessment issued on 26 November 2008 and 20 November 2009 respectively, with the Appellant's income from software development, set out in Panel 1, being charged under Schedule D, in accordance with the Appellant's own return and section 18 of the TCA 1997.

243. On 1 December 2017, the Respondent issued the amended assessments in respect of the years 2007 and 2008. The sole amendment made by the Respondent, from the original assessments for these years was to increase the Appellant's profit from the trade of software development, set out in Panel 1, from €32,132 to €142,485 for 2007 and from €24,238 to €115,912 for 2008. Again, it is an agreed fact that the increased sums represent the income received by the Appellant from A Limited in 2007 and 2008 after accounting for deductions and expenses claimed by him in his own income tax returns. As with the Notices of Assessment for the years 2007 and 2008, the Notices of Amended Assessment for the years 2007 and 2008, charged the Appellant's income under Schedule D.

244. In relation to the year 2014, the Appellant filed a Form 11 income tax return in which he returned profits from the self-employed trade of *"IT Consultancy"* in the amount of €113,996. The parties were agreed that this related solely to payments received from B Limited.

245. In the amended assessment for 2014, the Respondent made additions to the Appellant's self-assessment by adding Schedule D income from "*grinds"* in the amount of €4,000, as well as income from deposit interest (subject to DIRT at source) in the amount of €41,805. The Respondent did not, it must be emphasised, make any amendment in respect of the Appellant's self-declared income from the trade of IT Consultancy. This remained, as returned, in the amount of €113,996, charged to tax under Schedule D.

246. The Appellant's grounds of appeal in respect of the amended assessments for the years 2007, 2008 and 2014 are limited to the claim that his income from software development and IT consultancy did not constitute Schedule D income from self-employment, but rather were emoluments from employment, chargeable to tax under Schedule E of the TCA 1997.

247. In challenging the amended assessments made by the Respondent for 2007, 2008 and 2014 only on the grounds that his income from software development and IT consultancy is correctly chargeable to tax under Schedule E, the Appellant is in breach of the limitation on the right to appeal an amended assessment to the Commission, imposed by sections 957(3) of the TCA 1997 (this being the provision applicable to the years 2007 and 2008) and 959AK(1) of the same legislation (this being the provision applicable to the year of assessment 2014). This limitation on the right of appeal is that an Appellant may appeal in relation only to "*matters*" in an amended assessment constituting "*additions to, deletions from or alterations in the assessment* […]".

248. In relation to the amended assessment for the year 2014, no change whatsoever was made in relation to the Appellant's "*IT Consultancy*" income, which, in line with the information included in his own Form 11 income tax return, was income in the amount of €113,996, derived from self-employment and therefore chargeable under Schedule D of the TCA 1997. The changes made by the Respondent pursuant to the amended assessment for 2014 were, instead, limited to the addition in Panel 1 of undeclared Schedule D income relating to "*Grinds*" and "*taxed interest*". These are additions with which the Appellant takes no issue.

249. In relation to the amended assessments for the years 2007 and 2008, while the Respondent increased the amount of income included in Panel 1 attributable to "*software development*" to €142,485 for 2007 and €115,912 for 2008, it made no alteration in respect of the Schedule under which this income, agreed by the parties to be income from a single source, namely A Limited, was charged. This is significant, as the only issue raised by the Appellant in his grounds of appeal was not the amount of income from this activity assessed, which was in fact altered, but rather that the Respondent did not treat the income as being, contrary to the information set out in the Appellant's own Form 11 returns, emoluments, chargeable to income tax under Schedule E of the TCA 1997. In so doing, the Appellant is, as in the case of the appeal of the amended assessment for 2014, seeking to appeal a matter in the amended assessments for 2007 and 2008 that does not constitute an "*alteration*" or "*addition*". The Schedule under which the Respondent assessed the income from the activity of software development was unchanged from the

original assessments reflecting the Appellant's own return and, accordingly, the Appellant's grounds are in breach of the limitation of the right of appeal imposed under section 957(3) of the TCA 1997.

250. Section 949J of the TCA 1997 provides that an appeal shall be a *"valid appeal"* if it is made in relation to "*an appealable matter."* Section 949A of the TCA 1997 defines an appealable matter as "*any matter in respect of which an appeal is authorised by the Acts."*

251. As the Appellant's appeals of the amended assessments for 2007, 2008 and 2014 do not concern appealable matters they cannot therefore be deemed valid. Section 949N of the TCA 1997 provides that when an Appeal Commissioner is satisfied that an appeal is not valid, they "*shall refuse to accept the appeal".* Thus, the Commissioner is required by legislation to refuse acceptance of the Appellant's appeals of the amended assessments for 2007, 2008 and 2014. This decision is final and conclusive.

The appeals for 2009 – 2013

252. The basis for the Respondent's objections in respect of the appeals of the assessments for the years 2009 – 2013 was that the Appellant had not, in accordance with the conditions for appeal prescribed by section 959AH(1) of the TCA 1997, paid the income tax, including interest, due on foot of the information contained in his own returns.

253. It is first necessary to observe in this context that, at hearing, the parties agreed with one another that the conditions for appeal prescribed under section 959AH(1) of the TCA 1997 govern only appeals made to the Commission by "*chargeable persons".* As a consequence, and having regard to the judgment of the Court of Appeal in *JSS ,* they both were of the view that, in deciding on the objections raised in respect of these years, it would fall to the Commissioner to hear evidence on the nature of the Appellant's working relationship with A Limited and B Limited in the years 2009 – 2013. This was so, it was submitted, because if the Commissioner found the relationship between the Appellant and A Limited and B Limited to be in any of these years one involving a contract of service, rather than a contract for services, the Appellant was not then a chargeable person, obligated to make a return and pay self-assessed tax prior to being deemed to have a valid appeal.

254. With respect to the years 2011 – 2013, the Commissioner questions whether the Appellant falls within the definition of a chargeable person even if one disregards his income then received from A Limited and B Limited. This is so on account of the small amounts of self-employed income that the Appellant declared in January 2018 in his own paper returns for these years, referable to "*property", "property showing"* and "*grinds".*

However, having regard to the joint position adopted by both parties at hearing that the Appellant's status as a chargeable person, one therefore required to adhere to the requirements of section 959AH, hinged on whether his income from A Limited and B Limited in all of the years 2009 – 2013 was from self-employment or employment, the Commissioner does likewise in this Determination.

255. It must be observed however that the Appellant's representative grounded her opposition to the Respondent's objections made in respect of the appeals of the assessments for the years 2010 – 2013 not only on the proposition that the Appellant was not a chargeable person required to pay the tax self-assessed as due under the paper Form 11 returns submitted on the Appellant's behalf in January 2018. She also contended that the Commissioner should find that Form 11 returns for those years had been submitted on the Appellant's behalf to the Respondent in May or June 2016 and that the tax, including interest, calculated as due thereunder, being far less than the tax later self-assessed in the paper Form 11 returns filed in January 2018, had been paid by the Appellant when he transferred the sum of €204,407 to the Respondent in March 2016.[8]

256. On this question, the Commissioner finds there is inadequate evidence on which the Commissioner can make a finding that income tax returns for the years 2010 - 2013 were filed by the Appellant prior to the submission of the paper returns in January 2018. It was an agreed fact in this appeal that the Appellant delivered to the Respondent printed copies of return summaries, which had been generated by the Appellant's tax agent on the ROS Offline tool. These return summaries, however, did not contain all the information that a taxpayer must include in the Form 11 return prescribed by the Respondent. Comparing them with the paper returns submitted in respect of the years 2010 – 2013 in January 2018 makes this clear. The return summaries did not, for example, have distinct sections for income from self-employed trades, professions or vocations, Irish rental income and Irish employments. All that was specified in the return summaries was the taxable amounts attributable to various sources of income. Moreover, information such as sales/turnover figures in respect of the Appellant's self-employed income was absent, a section for deductions and expenses claimed was not included, and there was no section relating to capital gains made. At the end of the document, there was no declaration for the Appellant to sign whereby he attests to the accuracy of the information he is providing.

257. The consequence of this is that in providing the return summaries to the Respondent in June 2016 by means of email attachment, the Appellant was not delivering a "*return in*

[8] It should be recalled that the sum of €204,407 had been paid to the Respondent on 11 March 2016 (see paragraph 24 of this Determination). The Appellant had, in the correspondence dated 6 May 2016, calculated the Appellant's VAT liability, including interest, as being in this precise amount.

the prescribed form" as he was required to under sections 951/959I of the TCA 1997. Moreover, the Commissioner does not consider that the delivery of the return summaries by email had the effect of making them electronically transmitted returns within the meaning of section 917F of the TCA 1997. No matter the means of transmission, what was required for compliance with section 959AH of the TCA 1997 was, *inter alia*, the provision of information in the manner and form prescribed by the Respondent. This was not then done.

258. The Commissioner notes that in her submissions, the Appellant's representative also argued that the Commissioner should infer from the content of the correspondence of the Appellant's tax agent dated 6 May 2016, that the Appellant had provided the Respondent not just with return summaries generated on ROS Offline, but also with hard-copy Form 11 returns in the prescribed form. The available evidence does not support the drawing of such an inference, and the Commissioner does not do so. In the correspondence dated 6 May 2016, which was the letter by which the Appellant sought to make an unprompted qualifying disclosure, the Appellant's tax agent referred on the first page to his enclosure of "*Completed Form 11s for the years 2010 to 2014".* Directly underneath this, however, he stated "*Summary from ROS offline".* It is therefore not apparent from this correspondence that what the tax agent then enclosed were Form 11 returns for 2010 – 2014 in the prescribed form, along with return summaries, or return summaries alone.

259. The evidence that the Commissioner did have, however, was that there was no indication on the Respondent's computerised record keeping system of its receipt in 2016 of Form 11 tax returns for the years 2009 – 2013. The Commissioner did not hear evidence from the Appellant's tax agent, who was not called by the Appellant as a witness. It should be noted however that, having been informed by the Respondent that he was required to file Form 11 returns for 2009 – 2013 prior to having a valid appeal, the Appellant's tax agent did not insist that returns had been filed about a year and a half previously. Instead, he filed paper Form 11 returns on 3 January 2018.

260. The foregoing leads the Commissioner to conclude that the first Form 11 income tax returns filed on behalf of the Appellant in respect of the years 2009 – 2013 were those filed on 3 January 2018 in paper form.

261. In these income tax returns for 2009 – 2013, the Appellant calculated his own tax liabilities as being €54,876 for 2009, €53,447 for 2010, €64,861 for 2011, €69,338 for 2012 and €61,774 for 2013. These figures, it must be emphasised, did not include any interest due, which by then was in each case substantial. The evidence given by the Respondent's witness, which was not called into question in cross-examination, was that the Appellant

had in respect of his tax liabilities paid in January 2018 €56,449 for 2009, €56,648 for 2010, €11,054 for 2011 and nothing for 2012 and 2013. It is clear from this that the sums paid by the Appellant in respect of his liabilities for each of these years could not have and did not cover the amounts of interest due by the time of payment in January 2018. The Commissioner so finds as a matter of fact.

262. Section 949J of the TCA 1997 provides that an appeal will only be valid if "[…] *any conditions that are required (by the provisions of the Acts relevant to the appeal concerned) to be satisfied, before an appeal may be made, are satisfied before it is made*." The effect of section 959AH(1) of the TCA 1997 is to prescribe a condition that an appellant must pay either tax due on foot of the content of their returns, plus interest, or, where self-assessment is included in the return, the tax specified in that self-assessment, again plus interest. This is a condition that is mandatory and is one that the Appellant has not met in respect of his appeals for the years 2009 – 2013. Therefore, should the Commissioner, in addressing the question of the nature of the working relationship between the Appellant and A Limited and B Limited, find that he was an independent contractor in receipt of substantial self-employed income, and thus a chargeable person, his appeals must be deemed invalid.

The appeals for 2015 and 2016

263. As already noted, section 959AH(1) of the TCA 1997 requires that, where a self-assessment is included in a chargeable person's return, the obligation on that person should they wish to appeal to the Commission is to pay the tax "*which is payable by reference to any self assessment included in the chargeable person's return."* Although the Appellant included reference to additional income in his expressions of doubt, the Appellant's self-assessment in his returns stated the tax payable to be in the respective amounts for 2015 and 2016 of €5,057.16 and €8,315. In circumstances where the Appellant has, as a matter of fact, paid the tax specified in the self-assessment sections included in his own returns for these years, and without question any interest due thereon, the Commissioner decides that these appeals must be deemed valid and capable of acceptance.

The substantive issue

264. Thus, the Commissioner turns to the question of whether the sums assessed in the assessments for 2009 – 2013, and the amended assessments for 2015 and 2016, were in error on the grounds that the Appellant's income was from employment as a software developer/IT consultant, rather than from self-employment.

The burden of proof

265. It is the Appellant who bears the burden of proof in his appeals. In *Menolly Homes Limited v The Appeal Commissioners and the Revenue Commissioners* [2010] IEHC 49 ("*Menolly Homes*"), Charleton J, citing the earlier judgment of Gilligan J in *TJ v The Criminal Assets Bureau* [2008] IEHC 168 ("*TJ*"), held 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."*

266. Both Charleton J in *Menolly Homes* and Gilligan J in *TJ* emphasised that a tax appeal is not a *lis inter partes*, but rather an inquiry carried out so as to establish the correct liability of a taxpayer. In finding that the burden of proof rested with the taxpayer in this inquiry, they held that it is the taxpayer who should have at their disposal the information necessary to establish their correct charge to tax.

267. This statement of the law regarding where lies the burden of proof has been reaffirmed by the Courts in subsequent judgments (see for example *McNamara v The Revenue Commissioners* [2023] IEHC 15). In *Quigley v Revenue Commissioners and the Tax Appeal Commission* [2023] IEHC 244, Phelan J held at paragraph 101 that:

> "*Consistently therefore with the dicta of Charleton J. in Menolly, the Court of Appeal has endorsed the established position that in taking an appeal, the taxpayer undertakes the burden of appeal, within the relevant statutory formula, as to the relief which he might be granted if successful. It is for the tax payer to establish an entitlement to the relief and thereby upset the assessment raised by the Revenue. Murray J. restates this proposition throughout his judgment in Lee reiterating with regard to the jurisdiction of the Tax Appeals Commission to determine issues arising (at para. 39):*
>
>> *'…they are always issues that come back to the question of whether there is a charge to tax properly applied in accordance with the relevant statutory provisions and, if so, its amount. That liability, and those questions, all arise from the assessment to tax which defines the appellant body's jurisdiction.'*"

268. Thus, it is the Appellant in this case who is required to bring forward evidence proving that the assessments and amended assessments of the Respondent were in error on the grounds that his income paid to him by A Limited and B Limited was from his employment as their servant, rather than from self-employment as an independent contractor.

The Karshan Test and its application to the facts proved

269. In *Karshan,* Murray J, giving judgment on behalf of the Supreme Court, carried out a detailed analysis of the law relevant to the question of whether a worker is or is not an employee. In so doing, he took into consideration notable judgments from this jurisdiction and from England and Wales, including *Henry Denny*, *Castleisland, Ready Mixed Concrete* and *Market Investigations.* Having done this, he held:

> "*The method prescribed by MacKenna J. in RMC as developed in Market Investigations and as applied by this court in Henry Denny continues to provide a reliable structure for the identification of a contract of employment. The parties in this case did not suggest that the approach adopted in those cases should no longer govern the issue. Developments in the law since that case, as well as the desirability of avoiding confusion in the future as to the need for 'mutuality of obligation', suggest that it can be usefully clarified. Thus, the question of whether in any given case a worker is an employee should be resolved by reference to the following five questions:*
>
> *(i) Does the contract involve the exchange of wage or other remuneration for work*?
>
> *(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?*
>
> *(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?*
>
> *(iv) If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.*
>
> *(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing*."

270. The Commissioner notes that in the Supreme Court's judgment, Murray J emphasised that the first three stages of the above test amounted to a "*filter".* In other words, if the answer to any of the questions posed was in the negative, then a working relationship could not, by definition, be considered one constituting employment.

271. There was no dispute in this appeal that the Appellant's work with A Limited and B Limited was carried out "*in exchange for remuneration*". As such, the first stage of the test enumerated in *Karshan* is satisfied.

272. Likewise, there was no dispute in this appeal that the Appellant, in carrying out work for A Limited and B Limited, provided his services personally. The Commissioner therefore is satisfied that the second stage of the test enumerated in *Karshan* is satisfied.

273. In relation to the third stage of the test, Murray J made clear at paragraphs 232 – 234 of the Supreme Court's judgment that the level of control necessary in this context was the "*minimum level* […] *before a relationship is found capable of constituting an employment contract".*

274. The Commissioner finds that there existed a framework under which A Limited and B Limited could exercise control over the Appellant, which was sufficient to meet the minimum level *capable* of grounding a contract of employment. The Commissioner makes this finding on the basis that it is apparent that A Limited and B Limited specified the location from which the Appellant was to carry out his work (i.e. from their offices or the offices of a client). The Commissioner also does so having regard to the available evidence that A Limited and B Limited retained some level of control over the manner in which the Appellant carried out his work. Thus, under clause 3.1.1 of the written agreements the Appellant was to "*observe and comply with all resolutions, regulations and directions from time to time made or given by* [A Limited/B Limited]". Moreover, under clause 3.1.3 it was provided that:

> "[The Appellant] *shall adhere to and comply with (a) all rules and regulations provided by* [A Limited/B Limited] *and/or of* [A Limited's/B Limited's] *Client with regard to the manner in which the Services are performed and (b) all applicable laws and regulatory provisions."*

275. In view of these terms governing the Appellant's relationship with A Limited and B Limited, the Commissioner finds that the third stage of the test set out in *Karshan* is satisfied.

276. This leads to the fourth stage of the *Karshan* test concerning whether, having regard to the "*admissible factual matrix"* and the *"working arrangements between the parties as disclosed by the evidence",* the agreements between the Appellant and A Limited and B Limited were consistent with a contract of employment, in particular having regard to the question of whether the Appellant was "*working for themselves or for* [A Limited/B Limited]."

277. In this appeal, the Appellant's representative, in contending that the Appellant was an employee, placed emphasis on certain matters of fact referred to by the Appellant in his oral evidence that were either not in dispute or were corroborated by documentary material put before the Commissioner in the appeals process. Thus, the Appellant's representative pointed to the continuous engagement of the Appellant by A Limited and B Limited from 2007 – 2016, as well as the general consistency in the amounts paid to him monthly and, consequently, the amount of time worked. The Appellant's representative likewise highlighted that the Appellant did not over the years in issue carry out software development work for any other person or entity. She pointed also to records concerning subsistence expenses related to work done by the Appellant in Jersey, which were covered by B Limited. The Commissioner notes that the full documentary material proffered in the appeals process in this context disclosed travel and subsistence expenses incurred by the Appellant in the months July – December 2015 and has taken this information into consideration in making his determination.

278. In her oral submissions, counsel for the Respondent emphasised that the working arrangements of the Appellant involved invoicing A Limited and B Limited for services rendered and charging VAT in respect thereof. This was, she submitted, indicative of the Appellant being an independent contractor and not an employee. She further submitted that the Appellant's own evidence was that he did not receive holiday pay or pension entitlements.

279. Part of the documentary material proffered to the Commissioner in this appeal included, as noted already, the written agreements. These were initially produced by the Respondent in the appeals process. The Appellant denied having any recollection of receiving and signing the written agreements, though he accepted that his signature was to be found on three of them (namely the first, third and fifth written agreements).

280. It is appropriate to summarise the terms of these written agreements. At the outset, the Appellant was described as a "*contractor*" of A Limited/B Limited, which was defined as meaning:

> "*either the individual or the limited companies through which the Contractor work and with whom* [A Limited/B Limited] *has contracted to carry out the Services, and shall include any individuals or limited companies who have been introduced to* [A Limited/B Limited] *either by way of the provision of a CV or by way of an interview.*"

281. The "*services*" he was to provide involved:

"[…] *participation in the full project lifecycle. This role will involve the analysis, design, development, testing and documentation of software projects. This role may also include the responsibility for managing a small team of developers."*[9]

282. Under clause 3 of the written agreements, the Appellant agreed to provide these services for a set period and undertook to do so to a high standard and in a timely manner. The Appellant was to be provided with a suitable place to work in A Limited/B Limited's offices, or in the offices of a client. As noted already in the context of the third stage of the Karshan test, under clauses 3.1.1 and 3.1.3, the Appellant was required to adhere to rules and regulations set by A Limited/B Limited and/or a client regarding the manner in which services were to be performed.

283. Under clause 3.1.9, the Appellant and A Limited/B Limited agreed that the Appellant was not entitled to sick pay, holiday pay or to receive a pension.

284. Under clause 3.1.10, A Limited and B Limited had the right, in the event of the Appellant's services not being in accordance with the other terms of the written agreement, to rescind, to withhold payment, to seek repayment and/or to require that corrective work be carried out without charge to them.

285. The third, fourth and fifth written agreements stipulated, under clause 3.2.3, that the Appellant was responsible for maintaining his own professional indemnity and public liability insurance. This was not a term included under the first and second written agreements. As noted already, the Appellant denied in his oral evidence ever having such indemnity and insurance. Clause 3.2.3 of the third, fourth and fifth written agreements also provided, *inter alia*, that the Appellant was responsible for "*devising appropriate working strategies, and determining the method and manner of the performance of services."* This was not a term written into the first and second written agreements.

286. Clause 4 of the written agreements permitted the Appellant to offer "*the same services at the same time or otherwise to other parties, to the extent that such activities and provision of services do not interfere with or conflict with* [the Appellant's] *obligations under* [the written agreements]". There was also an exclusion on carrying out work for competitors of A Limited and B Limited.

287. Under clause 5 of the written agreements, A Limited and B Limited undertook to pay a daily rate for work performed, which ranged from €400 - €485 per day under the various

[9] The Commissioner notes that the second written agreement also included after the word "*developers"* the phrase "[…] *either on a project or on a particular customer site, to deliver high quality software within an agreed timeframe that meets defined requirements."* This phrase was not present in the first, third, fourth and fifth written agreements.

written agreements. A Limited and B Limited were to supply the Appellant with timesheets, and the Appellant was then to supply an invoice on the basis of the content of the relevant timesheet.

288. Also under clause 5 of the written agreements, the Appellant was stated to be responsible for travel expenses, with the caveat that "*in certain circumstances" "legitimate business expenses"* might be covered with prior approval by A Limited/B Limited.

289. Under clause 6 of the written agreements, the Appellant agreed that rights to intellectual property resulting from the provision of his services would belong to A Limited/B Limited.

290. Under clause 7 of the written agreements, the Appellant undertook not to disclose to third parties any information relating to A Limited/B Limited and their clients.

291. Under clause 8 of the written agreements, A Limited/B Limited were required to have in force public liability, employer's and professional indemnity insurance.

292. Under clause 9 of the written agreements, A Limited and B Limited and the Appellant limited their liability to one another for any loss of profits or special, indirect or consequential damage.

293. Under clause 10 of the written agreements, the Appellant agreed to indemnify A Limited and B Limited in respect of, among other things, instances of negligence in the performance of his work.

294. Under clause 11.1 and 11.4 of the written agreements, either party could terminate the contract upon the provision of 4 weeks' notice.

295. Under clause 11.2, A Limited/B Limited were also entitled to terminate without notice in prescribed circumstances, including in the event of an un-remediated breach of a "*material term"* and unacceptable performance or conduct.

296. The written agreements are on their face ambiguous in their meaning. They contain terms suggestive of the Appellant being an independent contractor and others suggestive of an employer/employee relationship. In respect of the former, the Appellant was, for example, liable to A Limited and B Limited under the written agreements if the standard of work done by him was deemed by them to be inadequate. Liability could involve the repayment of fees or the carrying out of corrective work without charge. The Appellant undertook to indemnify A Limited and B Limited against any claims brought by their clients arising from negligence on his part. The Appellant and A Limited and B Limited agreed that the Appellant would not receive sick pay, holiday pay or accrue pension entitlements. The Appellant was to invoice A Limited and B Limited for work done. The Commissioner notes

also that the Appellant was entitled to carry out other work in the field of software development "*at the same time*" as his engagement by A Limited and B Limited, although this came with the proviso that he was not permitted to do so for a competitor of A Limited/B Limited or for one of their clients

297. Conversely, under the written agreements, A Limited and B Limited provided the Appellant with a place from which to work, he was paid by refence to a 7.5 hour day specified as being 9 am – 5:30 pm (though he could under the agreement work fewer hours if he so chose on the grounds that he was entitled to carry out other work at the same time). A Limited and B Limited were stated to be required to have employer's liability insurance and the agreements stated that he might be required to manage a small team of other software developers. These terms are suggestive of employment.

298. It is thus a significant factor in this appeal that the Appellant's own contemporaneous conduct over the years in issue was consistent with him being the independent provider of services to A Limited and B Limited, rather than their employee. This conduct involved the Appellant invoicing on a monthly basis and charging VAT in respect of his services. It would have been obvious to the Appellant, who was a skilled professional person, that the charging of VAT was fundamentally at odds with his relationship with A Limited and B Limited being one of employee/employer. Furthermore, as the invoice documentation provided to the Commissioner makes clear, even after the commencement of the Respondent's investigation into his tax affairs in December 2015, the Appellant continued to charge VAT in respect of his services rendered to B Limited until they ceased in April 2016. The Appellant did so, moreover, in circumstances where, by his own oral evidence, he and his tax agent had had a discussion "[in] *2015 sometime*" regarding whether he might in fact be an employee of B Limited.[10]

299. Likewise, the Appellant was, as late as November 2015, treating his income from A Limited and B Limited in his tax returns as being from self-employment.[11] He was also claiming deductions and expenses in respect of his trade, which meant that his gross "*IT Consultancy*" income received from B Limited was €120,899 whereas his assessable profit was €113,996, as well as capital allowances. That he then claimed such deductions and expenses renders implausible his suggestion in evidence that returning himself as self-employed at this stage was a mistake.

300. This brings the Commissioner back to the burden of proof and to its importance in this appeal. In *Karshan,* the Supreme Court re-emphasised what it had held previously in

[10] Transcript of hearing, day 2, page 130.
[11] See the Appellant's tax return for 2014.

Henry Denny and *Castleisland*. In assessing whether a person was in business on their own account, and hence their status as employee or independent contractor, it was critical to establish the "*real arrangement on a day-to-day basis"* between that person and the party engaging them. In this appeal, the Appellant gave oral evidence that his day-to-day working arrangement with A Limited and B Limited was indistinguishable from that of other persons working in the same field for these companies, whom he said were their employees. He also said that he carried out specific management functions for A Limited and B Limited, such as engaging with senior management on the hiring of personnel and performance review of its employees, that could be seen as the preserve a person engaged in their service and not one in business on their own account.

301. It was a striking feature of the appeal that the Appellant did not call as a witness before the Commission anybody with whom he worked in A Limited and B Limited over the years in issue. This was so in circumstances where he claimed in his evidence that he would have been viewed not just as being their fellow employee of A Limited and B Limited, but a *"key cog"* in the operations of these companies. It was also so in circumstances where the case was made by the Appellant at the stage of legal submission that the written agreements proffered in the appeals process were, in so far as they portrayed him as an independent contractor, sham contracts, designed by A Limited and B Limited so as to contract out of their own tax obligations to the exchequer and their obligations to the Appellant under employment law

302. It cannot in the Commissioner's view be overlooked that the Appellant's assertion that he was an employee of A Limited and B Limited stands in direct contradiction of his own contemporaneous conduct throughout the years in issue. The consequence of this is that there is in the Commissioner's view good reason to doubt the credibility of the Appellant as a witness in his own cause. The Commissioner is not, therefore, in a position to accept the Appellant's evidence on matters for which he has provided no independent corroboration.

303. In the view of the Commissioner, the net effect of the foregoing is that the factors that point toward the Appellant's status as an employee are the substantial length of time engaged by A Limited and B Limited, the overall consistency of payments made to him in terms of timing and amounts, the absence of indemnity insurance on his part and perhaps the reimbursement of travel and subsistence expenses relating to work done in Jersey in the second half of 2015. The Commissioner notes that the Appellant's representative focused in her submissions on the fact that the Appellant was paid 'overtime'. The Appellant's own evidence however was that any time worked in a given day each month

over the 7.5 hours specified for the daily rate was "*rolled up"* by him into an additional day or days in his invoice. The Commissioner does not consider that the Appellant so doing points to employment over self-employment.

304. The Commissioner finds that the above factors pointing to employment are not sufficient for the Appellant to prove that the assessments made by the Respondent in respect of the years 2009 – 2013, 2015 and 2016 were in error. This is so because they are outweighed by the Appellant's invoicing throughout the years in issue and his charging of VAT to A Limited and B Limited. The Commissioner finds that these are substantive features of his working arrangements that fall to be taken into consideration as part of the fourth stage of the Karshan test. They are not just relevant to the question of the Appellant's credibility as a witness. Moreover, it is also relevant the Appellant did not receive holiday pay and pension entitlements, and his assertion that on occasion he received pay while sick was not supported by any evidence. In the context of this case where, in marked contrast to the facts in *Karshan* and many of the other cases cited , there was no evidence other than that the Appellant agreed freely with A Limited and B Limited to such terms on the basis that they were to his overall advantage, they are of significance and stand against his relationship with A Limited and B Limited being taken as one of employment. Finally, the terms of the written agreements relating to the right of the Appellant to do alternative software development work at the same time as his work for A Limited and B Limited is also relevant. In the view of the Commissioner is serves to preclude him inferring from the length of time spent by the Appellant working for A Limited and B Limited, and his working pattern over these years in terms of the amount of time worked per month, that he was doing so as their servant, and not a person in business on their own account, carrying out work that he considered to be the most economically advantageous open to him. For these reasons, the Commissioner finds that the Appellant has failed to meet the burden resting with him in accordance with the law as expressed in *Menolly Homes.*

305. The effect of this finding of the Commissioner is that, for the years 2009 – 2013, the Appellant was a chargeable person, required to file Form 11 income tax returns. Thus, the Appellant was pursuant to section 959AH(1) of the TCA 1997 required to pay the amount of tax and interest due on foot of his returns. As the Appellant has not done so, his appeals in respect of these years must be found to be invalid and refused under section 949N of the TCA 1997. This decision is final and conclusive.

306. The appeals of the Notices of Amended Assessment for the years 2015 and 2016 have already been accepted. As the Commissioner has found that the Appellant's income for

these years arose from self-employment as an independent contractor, and the sole ground of appeal advanced by him was that his income had wrongly been charged to tax under Schedule D rather than Schedule E, the Appellant has failed to prove that the Notices of Amended Assessment for 2015 and 2016 are in error.

Determination and decision

307. The Commissioner decides and determines as follow:

- The appeals of the Notices of Amended Assessment for the years 2007 and 2008 are found to be invalid on the grounds that the Appellant has sought to appeal in relation to matters other than additions to, deletions from or alterations in these assessments. Acceptance of the appeals therefore is refused under section 949N of the TCA 1997. This decision is final and conclusive;
- The appeals of the Notices of Assessment for the years 2009 – 2013 are found to be invalid on the grounds that the Appellant has failed to adhere to the requirement under section 959AH of the TCA 1997 to pay tax and interest due on foot of the Appellant's own self-assessment. Acceptance of the appeals therefore is refused under section 949N of the TCA 1997. This decision is final and conclusive;
- The appeal of the Notice of Amended Assessment for the year 2014 is found to be invalid on the grounds that the Appellant has sought to appeal in relation to matters other than additions to, deletions from or alterations in the assessment. This appeal is therefore refused under section 949N of the TCA 1997. This decision is final and conclusive;
- The Notices of Amended Assessment for 2015 and 2016, under which the Appellant was assessed to have balances due of €12,565 and €13,426 respectively, are found to be correct and shall stand.

308. The Appellant's appeals of the Notices of Amended Assessment for the years 2015 and 2016 have been determined in accordance with Part 40A of the TCA 1997 and in particular section 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

309. 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

310. Any party dissatisfied with the determination under section 949AK of the TCA 1997 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.

Conor O'Higgins
Appeal Commissioner
23 June 2026

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.