



51TACD2024

Between



Appellant


and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) of the refusal of the Respondent to make a determination under section 195(2) of the Taxes Consolidation Act 1997 (“the TCA 1997”) that the Appellant is entitled to avail of relief from income tax, known commonly as ‘the artists’ exemption’, on his earnings from a book of which he is the author, entitled “”. This book hereafter is referred to in this Determination as “the work”.
2. The net issue that arises in this appeal is whether the work, which is one of historical non-fiction writing, is “*original and creative*” and of “*cultural or artistic merit*”, as is required by section 195 of the TCA 1997.
3. This appeal is determined on foot of an oral hearing at which both parties made submissions in support of their case.

Background

4. The Appellant is , currently working in .
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5. On 29 December 2020, the Appellant made an application to the Respondent for a determination granting relief from income tax on earnings paid to him by his publisher relating to the writing of the work. As these earnings constituted a pre-publication advance, the Respondent, in accordance with section 195(2)(b) of the TCA 1997, did not consider the merits of the Appellant's application until after publication. This appeal relates both to the taxation of the advance sum paid to the Appellant and to a second payment made by the publisher to the Appellant upon publication.
6. The work describes and analyses events in Weimar Germany in 1923, described by the Appellant as a being a year of permanent crisis and of political extremes. It begins with an account of the assassination of Walter Rathenau, the Weimar Republic's Foreign Minister, in June 1922 and proceeds to examine the invasion of the Ruhr Valley by France and Belgium in January 1923 and the effect of the use of violence by the occupying forces, the strategy of 'passive resistance' adopted in counteraction by the Weimar Government, the hyper-inflation of the value of the Mark that ensued and its political and societal consequences. Among these consequences were the rapid rise in popular support for the Nazi Party, Adolf Hitler and anti-democratic sentiment, which culminated in the "*Munich Putsch*" in November 1923. The Appellant explains how Hitler and the Nazi movement exploited existing anti-Semitic sentiment to further their cause and seeks to answer the question of how and why their *coup d'état* failed and the forces of democracy won out, albeit temporarily.
7. The inside cover describes the work as being a historical narrative not only of a year of great turbulence, but also how the Weimar Republic, faced with violent opposition coming from the extreme left and, most of all, right of the ideological spectrum, managed to survive.
8. It may be said at this point that the work clearly is of a very high academic standard, written in a fashion that opens a complex subject up to a wide readership. It has received significant media attention and acclaim in Ireland and internationally, especially in Germany. It was reviewed at length in the newspapers *Frankfurter Allgemeine Zeitung*, *Süddeutsche Zeitung*, *Die Welt*, *Taz* and *Die Freiheit*. It was also reviewed in non-German publications, including *The Irish Times*, *El País* and *Le Monde*. It is a common feature of these reviews that the Appellant's focus on the events of the year 1923, which he argues to be an inflection point in the fortunes of the Weimar Republic, the Nazi Party and Adolf Hitler, has the capacity to shed light on issues much discussed in contemporary democratic societies concerning the radicalisation and polarisation of politics and what may be done about these perceived trends. This is something that the Appellant himself

contends on the back of the cover of the work, where he is quoted as observing that, though the history of Weimar Germany does not repeat itself, anyone wishing to understand populism today would learn much from that which was present in 1923.

9. It is a testament to the quality of the work that it has been published under license by several federal state authorities in Germany (specifically those of Berlin, North-Rhine-Westphalia, Saxony, Rhineland-Palatinate, Bavaria, Saarland and Baden-Württemberg). This has been done so that it can be made widely available to the German public at the price of €5 or less. The Commissioner heard evidence that publication in this manner occurs only where a work is considered to be of cultural or civic significance.
10. On 7 October 2022, the Respondent issued a written decision to the Appellant in which it refused to make a determination under section 195(5) of the TCA 1997. In so doing it held that the work was not one that met the mandatory criteria of being “*original and creative*” and of “*cultural or artistic merit*”, as defined by Guidelines drawn up by the Minister for Arts, Heritage and the Gaeltacht (“the Minister”) and The Arts Council under section 195(12) of the TCA 1997.
11. The Appellant gave evidence in the course of the appeal that much of his research into the subject matter of the work was carried out using archive material available to him in Ireland, either in the libraries of academic institutions located here or online.

Legislation and Guidelines

12. The primary legislation and guidelines made pursuant to that primary legislation applicable to this appeal are set out in full in Appendices 1 and 2 to this Determination. What follows hereunder is a summary of the parts therein that are of particular relevance.
13. Section 195 of the TCA 1997 exempts from income tax certain earnings of writers, composers and artists that would otherwise be chargeable to tax under Case II of Schedule D. The exemption relates to types of works, including books, that are both “*original and creative*” and of “*cultural or artistic merit*”. Under subsection (2) of this provision it is for the Respondent to determine whether a person has “*written, composed or executed*” a work so defined.
14. Section 195(12) of the TCA 1997 prescribes that the Minister and the Arts Council shall together draw up guidelines (“the Guidelines”) so as to determine what constitutes a work that is original and creative and of cultural or artistic merit. Subsection (13)(a) of the same provision provides that the Respondent shall not determine a person to be entitled to avail of the artists’ exemption unless the work in question complies with these Guidelines.

15. Paragraph 4 of the Guidelines provides that a work shall be classed as original and creative:-

“[...] only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.”

16. Paragraph 5 of the Guidelines provides that a work shall be classed as having cultural merit:-

“[...] only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.”

17. Paragraph 6 of the Guidelines provides that a work shall be regarded as having artistic merit:-

“[...] only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.”

18. Notwithstanding paragraphs 4, 5 and 6 of the Guidelines, at paragraph 7 the Minister and the Arts Council prescribe specific criteria by which to determine whether a work of non-fiction is to be regarded as being original and creative and of cultural or artistic merit. These criteria are set out a sub-paragraph 2 therein and are as follows:-

“(a) that the work, in the opinion of the Revenue Commissioners, following consultation with the Arts Council, is a work in one or more of the following categories:

(i) arts criticism,

(ii) arts history,

(iii) arts subject work, being a work the subject matter of which is, or is any combination of, visual arts, theatre, literature, music, dance, opera, film, circus or architecture,

(iv) artists’ diaries,

(v) belles-lettres essays,

(vi) literary translation,

(vii) literary criticism,

(viii) literary history,

(ix) literary diaries,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(b) that the work, in the opinion of the Revenue Commissioners, is a work in one of the following categories:

(i) a biography,

(ii) an autobiography,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on the person or by changing the generally accepted understanding of the person,

or

(c) that the work, in the opinion of the Revenue Commissioners following consultation with the Heritage Council,

(i) is a work related to a function or functions of the Heritage Council as described in the Heritage Act 1995, and

(ii) incorporates the author's unique insight into the subject matter and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(d) that the work, in the opinion of the Revenue Commissioners, relates to archives which are more than 30 years old relating to Ireland or Irish people, is based largely on research from such archives, incorporates the author's unique insight into the subject matter, and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(e) any combination of (a), (b), (c) or (d) above."

19. Regarding point 7(2)(c) of the Guidelines, The Heritage Council was established under the Heritage Act 1995. It is an independent body that has a statutory responsibility to propose policies and priorities for the identification, protection, preservation and enhancement of the “*national heritage*”. This term is not defined. The functions of the Heritage Council are set out at section 6 therein in the following terms:-

“(1) The functions of the Council shall be to propose policies and priorities for the identification, protection, preservation and enhancement of the national heritage, including monuments, archaeological objects, heritage objects, architectural heritage, flora, fauna, wildlife habitats, landscapes, seascapes, wrecks, geology, heritage gardens and parks and inland waterways.

[...]

(3) The Council shall in particular –

(a) promote interest, education, knowledge and pride in, and facilitate the appreciation and enjoyment of the national heritage,

(b) co-operate with public authorities, educational bodies and other organisations and persons in the promotion of the functions of the Council,

(c) promote the coordination of all activities relating to the functions of the Council.”

Submissions

20. What follows hereunder in this part of the Determination is a summary of the arguments made by the Appellant and the Respondent.

Appellant

21. The Appellant submitted that the work was original and creative, being the product of his unique insight based on the analysis of archival material. It was, he said, clearly of both national and international cultural merit in that it concerned, *inter alia*, the rise of Adolf Hitler, Nazism, anti-Semitism and the causes of challenges to democratic norms and institutions. As further proof of this he pointed to its critical reception in Ireland and abroad, its translation into several languages and the licensed publication of the work by German federal state offices, so that it could be consumed widely.

The work as a biography (paragraph 7(2)(b) of the Guidelines)

22. The Appellant addressed the Guidelines specific to works of non-fiction. Firstly, in his view the work was a biography of Adolf Hitler. 1923 was the point at which this person

went from being a peripheral figure in regional political life, with limited popular support, to the head of a movement with over 50,000 members, intent on, and almost capable of, the destruction of the Weimar state. One could not understand the reasons for Hitler's ostensibly improbable rise without understanding the influence of the crisis that occurred in that year. In this respect he submitted that work was a "*contextual biography*" of a part of Hitler's life. It was a pioneering work, he said, in that it was the first biography to focus exclusively on his life in this crucial year and the events that shaped its course thereafter. Analysing other persons, events and trends was essential to providing a complete and true biography of this part of Hitler's life. For example, an analysis of Mussolini's Fascist movement and the march on Rome in 1922 was critical to understanding Hitler's planning of the Munich Putsch the following year. By the same token, providing an account of the prevalence of anti-Semitism in Germany at this time was necessary to explain Hitler's actions in 1923 and his success in gaining public support.

23. In support of the contention that the work was a contextual biography, the Appellant pointed to the fact that, with the exception of the German language edition, all versions of the work had Hitler's name in the title.

Whether the work related to a function or functions of the Heritage Council (paragraph 7(2)(c) of the Guidelines)

24. The Appellant also submitted that the work should be taken to be one relating to a function of the Heritage Council. In this respect the Appellant submitted that the "*national heritage*", which the Heritage Council is bound to preserve and promote, must include the story of the Jewish population of Ireland, some of whom were victims of the Holocaust. He made the point that a fundamental aspect of Hitler's appeal to certain people in 1923, and a major factor in his rise to power, was his outspoken and violent anti-Semitism. A work examining this was of use to the Heritage Council in explaining why Jewish monuments and sites, which form part of the Irish story, are worthy of preservation. The work was, he submitted, further relevant to the question of the treatment of other minorities in a State, of which there are now a considerable number.

Whether the work relates to archives relating to Ireland or Irish people (paragraph 7(2)(d) of the Guidelines)

25. The Appellant submitted that there could be no doubt that the work was based on archival material. He then addressed the question of whether they could be said to relate "[...] to Ireland or Irish people". He submitted, firstly, that the natural and ordinary meaning of the verb "*to relate*" is "*that there is a relationship between [...] two objects, or that one item is a subject of concern or interest to another.*" The Appellant argued that in using this term

it was clear that the Minister and the Arts Council intended that the connection of the archival material to Ireland or Irish people did not have to be close or direct. He noted that had they wished to require a close connection between archival material forming the basis of a non-fiction work and Ireland or Irish people, they might have required, for example, that it “*primarily be about Ireland or Irish people*” or, yet more restrictively, “*overwhelmingly concern them*”.

26. The Appellant submitted that archival material upon which his research was based related to Ireland or Irish people on several grounds. Documents explaining the conduct of the leader of the Nazi movement in 1923 allow for an understanding of the causes of the Second World War, a cataclysm in which an estimated 150,000 Irish men and women served on the side of the Allied Coalition and, moreover, directly affected every Irish person in one way or another. The Appellant submitted that the archives on which the work was based concerned the history of anti-Semitism in Germany and events leading in the end to the Holocaust. These were of relevance to Ireland and all Irish people, but in particular members of Ireland’s Jewish community. Numbered among the many victims of the Holocaust were Jews from Ireland and some of its survivors came to live in Ireland in its aftermath. In written argument the Appellant noted the State’s involvement in the holding of the annual Holocaust Memorial Day and the participation in recent years of the Taoiseach and the President of Ireland.
27. The Appellant submitted that events in Ireland in the period 1912 – 1923, must be viewed against the background of what was occurring elsewhere at that time in Europe and beyond. He submitted that without this context one could not establish what experiences were shared with other countries and what might be thought of as unique. By way of example, the Appellant submitted that his study of the conduct of the French military forces of the Ruhr region, in particular their tendency to use severe violence as a means of authority, would lead to a greater understanding of the reasons for the conduct of the ‘Black and Tans’ and the Auxiliaries during the War of Independence.
28. The Appellant submitted that the work also shed light on contemporary issues. Hitler achieved his rise to prominence through speaking to audiences in beerhalls, in so doing relying heavily on misinformation and propaganda. The Appellant submitted that much could be learned from this about the reasons for the prevalence of the same content in the “digital beerhalls” of the internet.
29. The Appellant argued that the work was also of relevance to persons, and their descendants, who came from Germany in the wake of the Second World War and settled in Ireland. The most notable group of such people was the German child refugees who

came to the State in 1945. The Appellant submitted that his work enabled them to understand the events that led to their arrival.

30. Lastly, the Appellant submitted that the earnings in question should fall under the artists' exemption on the grounds that it was a work coming within paragraph 7(2)(e), namely a work fulfilling a combination of the criteria set out in paragraphs 7(2)(b),(c) and (d).

31. The Appellant submitted letters supportive of his claim for relief from [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

The content of these letters, which reflect the submissions made orally and in writing by the Appellant himself, have been taken into consideration in the determination of this appeal.

Respondent

32. Brief oral submissions were made on behalf of the Respondent. It was submitted that the Appellant could only avail of the exemption on his earnings from the work if it was "*original and creative*" and of "*cultural or artistic merit*", as these terms were defined by the Minister and the Arts Council in their Guidelines. This was so because section 195(13) of the TCA 1997 prohibited the making of a determination in a claimant's favour where their work did not fall within the parameters of the criteria specified in the Guidelines.

33. Paragraph 7 of the Guidelines enumerates specific criteria relating to works of non-fiction. It was submitted that the Appellant's work satisfied none of these. It was not a work of biography within the natural and ordinary meaning of the term. Rather it was a history of events in Germany in the year 1923.

34. Nor, it was submitted, was the work one relating to the function of the Heritage Council, namely the "*promotion of interest, education, knowledge and pride in [the national heritage]*" and the facilitation of "[...] *the appreciation and enjoyment of the national heritage.*" While undefined, it was clear from the terms of the Heritage Act 1995 that the "*national heritage*" included the history, landscapes, monuments and archaeological sites of Ireland. The Respondent contended that the Appellant's book related instead to Germany.

35. In similar fashion, it was submitted that while there was no doubt that the work was one that related to archives more than 30 years old, the archives of which the Appellant made use in the writing of his work were not ones "*relating to Ireland or Irish people*".

36. It was emphasised on behalf of the Respondent that the decision to refuse to make a determination under section 195(2) of the TCA 1997 was not a comment on the quality or import of the work. It simply was a reflection of the Guidelines that the Minister and the Arts Council had deemed fit to create. In this regard it was clear that the Respondent was not contesting that the work was one rightly “*to be regarded as pioneering* [...]”, and which constituted a “*significant contribution*” to work on the subject matter.

Material Facts

37. The facts material to this appeal that were not in dispute were as follows:-

- the Appellant is the author of the work, entitled “[REDACTED]”;
- the Appellant received an advance payment from his publishers in relation to the work, in respect of which he made a claim for exemption from income tax under the artists’ exemption scheme;
- the Respondent deferred making a decision on the claim until the publication of the work;
- on 10 August 2022 the Respondent refused to allow the Appellant’s claim for the exemption from income tax of earnings made in relation to the work. It did so on the grounds that it was not a work that was “*original and creative*” and of “*cultural or artistic merit*” in so far as these terms were defined by the Minister and the Arts Council in their Guidelines relating to the artists’ exemption scheme;
- the Appellant appealed this refusal of his claim by the Respondent to the Commission on 9 March 2023.

Analysis

38. The jurisdiction of an Appeals Commissioner is set by legislation. As the Court of Appeal held in *Lee v Revenue Commissioners [2021] IECA 18*, a tax appeal cannot be determined by reference to equitable principles. In any tax appeal, including those relating to claimed entitlement to a form of relief, the sole task of the Appeals Commissioner is to interpret the meaning of the relevant legislation and determine the appeal by applying that law to the facts of the case.

39. Section 195 of the TCA 1997 allows for relief from income tax on earnings made from “*original and creative* [works]”, among which are included books or other forms of writing, which are “*generally recognised as having cultural or artistic merit*”.

40. Under subsection 12 of this provision, the Oireachtas opted to require the Minister and the Arts Council to draw up Guidelines that specify what is meant by “*original and creative*” and “*cultural or artistic merit*”. This subsection does not expressly limit the discretion of the Minister and the Arts Council in this regard. Subsection 13 of the same provision provides that the Respondent and an Appeal Commissioner shall not allow a claim for artists’ exemption unless the work in question conforms to the strictures of the Guidelines. In short, they are binding both on the Respondent and on the Commissioner.
41. The parties in this appeal were agreed that, in interpreting the meaning of section 195 of the TCA 1997 and the Guidelines, the Commissioner should, in accordance with the dictum of Supreme Court expressed at page 121 of *Inspector of Taxes v Kiernan*, [1981] 1 IR 117, give words or expressions used therein their “*colloquial or ordinary meaning*”.¹
42. In *Revenue Commissioners v Doorley*, [1933] 1 IR 750, the Supreme Court held that for a person to be subject to a tax, the relevant taxing provision must impose it on them “*clearly and unambiguously*”. However, conversely, it went on to hold in relation to a exempting provision that:-
- “[the] exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.”
43. The Commissioner notes that in *Coleman v Revenue Commissioners* [2014] IEHC 662, a case concerning a claimed entitlement to the artists’ exemption in respect of earnings made from a work of non-fiction, Donnelly J interpreted the meaning of the Guidelines, which she observed had the status of secondary legislation by virtue of section 2 of the Interpretation Act 2005, by the application of the interpretive principles outlined in *Inspector of Taxes v Kiernan* and *Revenue Commissioners v Doorley*. The Commissioner does likewise in this appeal.

¹See also O’Donnell J’s formulation of this interpretive rule at paragraph 16 of *Coleman v Revenue Commissioners* [2014] IEHC 662.

44. As already noted, the heart of the matter in this appeal is whether the Appellant's work is "*original and creative*" and of "*cultural or artistic merit*", which question must be determined by reference to the Guidelines made by the Minister and the Arts Council. The Guidelines themselves are, in the Commissioner's view, rather curious. Paragraph 4 therein prescribes that a work will be original and creative only if it is one "[...] *brought into existence by the creator's imagination*". There may be scope for debate about whether a work of historical analysis based on research of documentary material is or is not the product of its author's imagination. This question would not appear to be relevant however because paragraph 7 of the Guidelines proceeds to set down distinct and specific criteria in this context in relation to works of non-fiction.
45. Before addressing these, it is worth observing that paragraph 5 of the Guidelines prescribes that a work other than one that is non-fiction shall have "*cultural merit*" only if "*by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.*"
46. Returning to paragraph 7, at subparagraph (2)(a) therein, the Guidelines enumerate various types of non-fiction writing, all directly relating to the arts or literature, that will qualify an author for the exemption provided their work is both "*pioneering*" and "[makes] *a significant contribution to the subject matter by casting a new light on it or by changing the generally accepted understanding of it*". There is no dispute that these types of writing, which might be described as 'creative non-fiction', do not cover the Appellant's work.
47. Next, paragraph 7(2)(b) of the Guidelines provides that a work that is "*a biography*" or "*an autobiography*" qualifies its author for relief in respect of the earnings made therefrom, provided that it:-
- "[...] incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on the person or by changing the generally accepted understanding of the person"*.
48. The parties were agreed that the word "*biography*" should each be given its colloquial or ordinary meaning. The Commissioner considers this meaning in this context to be "*a written account of the life of an individual, especially a historical or public figure*".² For the sake of clarity, the Commissioner considers this definition to include a work focusing on a particular part of the life of an individual, rather than its entirety.

² Oxford English Dictionary

49. What the parties could not agree upon was whether the Appellant's work could be so defined. Having read it, the Commissioner is satisfied that it is not a biography. It is, rather, a work of history that is an account and analysis of the causes of the crisis that befell the Weimar Republic just prior to and during 1923, culminating in the *Munich Putsch*, the reactions to the crisis and the consequences of those reactions. Adolf Hitler is of course an individual of great importance in any examination of the events of this time and place. Nonetheless, his story is one of many. In the Commissioner's view, the Respondent's conclusion that the work was not a biography was correct. Despite the use of Hitler's name in the title of several language versions of the work (though not that in German) it is he who forms part of the context of what is an account and analysis of a time and place. As a result, the work cannot be termed a biography, whether contextual or otherwise, falling within the parameters of paragraph 7(2)(b) of the Guidelines.
50. This being so, it is necessary to consider whether Appellant's work relates to a function or functions of the National Heritage Council, in particular whether it "*promote[s] interest, education, knowledge and pride in, and facilitate[s] the appreciation and enjoyment of the national heritage*".
51. There is no definition given in the National Heritage Act 1995 as to what is meant by the term "*national heritage*". However, section 6(1) therein says that it includes "*monuments, archaeological objects, heritage objects, architectural heritage, flora, fauna, wildlife habitats, landscapes, seascapes, wrecks, geology, heritage gardens and parks and inland waterways*." Though this non-exhaustive list enumerates only parts of Ireland's tangible physical heritage, be they natural or man-made, it appears to the Commissioner arguable that it might also encompass Ireland's intangible cultural heritage, such as its folk lore, its literature and perhaps also its history generally.
52. However, whether or not one of the functions of the Heritage Council is the promotion, preservation, and facilitation of the appreciation of Ireland's intangible, as well as its tangible, national heritage is immaterial for the purposes of this Determination. This is because the Appellant's work concerns the 1923 crisis in Weimar Germany and its causes, including the prevalence of anti-Semitism and its exploitation in that place and at that time. It is true that it may lead an Irish reader to reflect on Ireland's own history and what constitutes its heritage, both tangible and intangible. To the Commissioner's mind, however, this does not mean that the work itself facilitates the appreciation and understanding of our national heritage. A reader of the work learns nothing from it of Ireland's own heritage, including that part relating to its Jewish community. As such, the Commissioner finds that paragraph 7(2)(c) of the Guidelines is not a basis upon which to

conclude that the work is one that permits the Appellant to avail of the relief available under section 195 of the TCA 1997.

53. Lastly, it is necessary to consider whether, in accordance with paragraph 7(2)(d) of the Guidelines, the work is one that relates to archives “*relating to Ireland or Irish people*”. The Appellant offered a broad interpretation of what this means. It was his view that a work that has an indirect relationship to Ireland or Irish people, or that provides context to historical events in Ireland while not being about those events, would qualify under this paragraph and permit its author to avail of the exemption. The Commissioner does not accept that this is the correct interpretation of this paragraph of the Guidelines, in particular when one takes into account the need to read exempting provisions in taxing legislation strictly, as was found by the Supreme Court in *Revenue Commissioners v Doorley*. Rather, it is held that paragraph 7(2)(d) should be understood as meaning that a work should relate to archives that are about Ireland or Irish people.
54. The question that then arises is whether the work should be so considered? The answer to this is clear to the Commissioner. No Irish person appears to be mentioned in it, nor, save for a reference to the sinking of the Canadian hospital ship the *Llandovery Castle* some distance off its coast, is Ireland. The Commissioner accepts the Appellant’s view, expressed in submission at the oral hearing of the appeal, that the events in this year are significant not just in their own right, but also because they mark, among other things, the beginning of the rise of a political movement that, though thwarted temporarily, soon came to power and was responsible for dismantling democracy wherever it was found, causing a global conflict in which many people, including Irish people, fought and died and murdering Jewish people on an almost unimaginable scale. None of this, however, means that the work in question relates to archives relating to either Ireland or Irish people. The Commissioner finds that, for the purposes of paragraph 7(2)(d) it does not.
55. Section 195(13) of the TCA 1997 is clear in its terms. Relief from income tax under the artists’ exemption shall not be allowed unless the work in question is one that is “*original and creative*” and of “*cultural or artistic merit*”, as defined by the Minister and the Arts Council in their Guidelines made pursuant to section 195(12) of the TCA 1997. This being the case, and the Appellant’s work having been held to fall outside the criteria specified in the Guidelines, the appeal against the Respondent’s refusal to make a determination must fail.
56. The Commissioner wishes to emphasise that the above findings are not a comment on the import of the work. It is obvious that it is a significant scholarly achievement, recognised as such in Ireland, Germany and elsewhere, which, is highly readable and of

contemporary relevance. Under the criteria for non-fiction specified in the Guidelines made by the Minister and the Arts Council, a work of historical writing qualifies and its author is entitled to the relief claimed, if it falls within the definition of a biography. It does not qualify, however, if it is in another form and does not fall within one of the other criteria for non-fiction specified in paragraph 7(2) of the Guidelines, for instance where it relates to a function of the Heritage Council or archives relating to “*Ireland or Irish people*”. It is not for the Commissioner to speculate as to why the Guidelines have been formulated in the manner that they have, only to interpret and apply them. The outcome of the appeal reflects the exercise of this limited function.

Determination

57. The Commissioner finds that the Appellant’s work, which has been held to be an analysis of the events of 1923 in Weimar Germany, is not a work that is “*original and creative*” and of “*cultural or artistic merit*”. As a consequence, the work is one in respect of which tax relief under section 195 of the TCA 1997 on income earned therefrom cannot be allowed. The Appellant’s appeal against the Respondent’s refusal to make a Determination is therefore refused.
58. This Appeal is determined pursuant to section 949AL of the TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

59. This determination complies with the notification requirements set out in section 949AJ(5) and (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

60. Any party dissatisfied with the determination has a right of appeal to the High Court 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.

A handwritten signature in black ink, appearing to read 'COHiggins', written in a cursive style.

Conor O'Higgins
Appeal Commissioner
17th January 2024

APPENDIX 1

The provisions of Section 195 of TCA 1997, as they were as of the date of the application for exemption, provided as follows:-

“(1) In this section...

“work” means an original and creative work which is within one of the following categories:

- (a) a book or other writing;*
- (b) a play;*
- (c) a musical composition;*
- (d) a painting or other like picture;*
- (e) a sculpture.*

(2)(a) This section shall apply to an individual –

(i) who is —

(I) resident in one or more Member States, or in another EEA state, and not resident elsewhere, or

(II) ordinarily resident and domiciled in one or more Member States, or in another EEA state, and not resident elsewhere, and

(ii)

(I) who is determined by the Revenue Commissioners, after consideration of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, to have written, composed or executed, as the case may be, either solely or jointly with another individual, a work or works generally recognised as having cultural or artistic merit, or

(II) who has written, composed or executed, as the case may be, either solely or jointly with another individual, a particular work which the Revenue Commissioners, after consideration of the work and of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of

persons as in their opinion may be of assistance to them, determine to be a work having cultural or artistic merit.

(b) The Revenue Commissioners shall not make a determination under this subsection unless

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(i) the individual concerned duly makes a claim to the Revenue Commissioners for the determination, being (where the determination is sought under paragraph (a)(ii)(II)) a claim made after the publication, production or sale, as the case may be, of the work in relation to which the determination is sought, and

(ii) the individual complies with any request to him or her under subsection (4).

(3)(a) An individual to whom this section applies and who duly makes a claim to the Revenue Commissioners in that behalf shall, subject to paragraphs (aa) and (b), be entitled to have the profits or gains arising to him or her from the publication, production or sale, as the case may be, of a work or works in relation to which the Revenue Commissioners have made a determination under clause (I) or (II) of subsection (2)(a)(ii), or of a work of the individual in the same category as that work, and which apart from this section would be included in an assessment made on him or her under Case II of Schedule D, disregarded for the purposes of the Income Tax Acts.

(aa) The amount of the profits or gains for a year of assessment which an individual shall be entitled to have disregarded for the purposes of the Income Tax Acts by virtue of paragraph (a) shall not exceed €40,000 for the year of assessment 2011 and each subsequent year of assessment.

(b) The exemption authorised by this section shall not apply for any year of assessment before the year of assessment in which the individual concerned makes a claim under clause (I) or (II) of subsection (2)(a)(ii) in respect of which the Revenue Commissioners make a determination referred to in clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(c) The relief provided by this section may be given by repayment or otherwise.

(4)(a) Where an individual makes a claim to which subsection (2)(a)(ii)(I) relates, the Revenue Commissioners may serve on the individual a notice or notices in writing requesting the individual to furnish to them within such period as may be specified in the notice or notices such information, books, documents or other evidence as may appear to them to be necessary for the purposes of a determination under subsection (2)(a)(ii)(I).

(b) Where an individual makes a claim to which subsection (2)(a)(ii)(II) relates, the individual shall –

(i) in the case of a book or other writing or a play or musical composition, if the Revenue Commissioners so request, furnish to them 3 copies, and

(ii) in the case of a painting or other like picture or a sculpture, if the Revenue Commissioners so request, provide, or arrange for the provision of, such facilities as the Revenue Commissioners may consider necessary for the purposes of a determination under subsection (2)(a)(ii)(II) (including any requisite permissions or consents of the person who owns or possesses the painting, picture or sculpture).

(5) The Revenue Commissioners may serve on an individual who makes a claim under subsection (3) a notice or notices in writing requiring the individual to make available within such time as may be specified in the notice all such books, accounts and documents in the individual's possession or power as may be requested, being books, accounts and documents relating to the publication, production or sale, as the case may be, of the work in respect of the profits or gains of which exemption is claimed.

(6)(a) In this subsection, "relevant period" means, as respects a claim in relation to a work or works or a particular work, the period of 6 months commencing on the date on which a claim is first made in respect of that work or those works or the particular work, as the case may be.

(b) Where –

(i) an individual –

(I) has made due claim (in this subsection referred to as a "claim") to the Revenue Commissioners for a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works or a particular work, as the case may be, that the individual has written, composed or executed, as the case may be, solely or jointly with another individual, and

(II) as respects the claim, has complied with any request made to the individual under subsection (4) or (5) in the relevant period, and

(ii) the Revenue Commissioners fail to make a determination under clause (I) or (II) of subsection (2)(a)(ii) in relation to the claim in the relevant period, the individual may [appeal to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the end of the relevant period] on the grounds that –

*(a) the work or works is or are generally recognised as having cultural or artistic merit,
or*

(b) the particular work has cultural or artistic merit, as the case may be.

(7) The Appeal Commissioners shall hear and determine an appeal made to them under subsection (6) as if it were an appeal against an assessment to income tax and, subject to subsection (8), the provisions of the Income Tax Acts relating to such appeals and to the rehearing of such an appeal and to the statement of a case for the opinion of the High Court on a point of law shall apply accordingly with any necessary modifications.

(8)(a) On the hearing of an appeal made under subsection (6), the Appeal Commissioners may

(i) after consideration of –

(I) any evidence in relation to the matter submitted to them by or on behalf of the individual concerned and by or on behalf of the Revenue Commissioners, and

(II) in relation to a work or works or a particular work, the work or works or the particular work, and

(ii) after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them,

determine that the individual concerned has written, composed or executed, as the case may be, either solely or jointly with another individual –

(A) a work or works generally recognised as having cultural or artistic merit, or

(B) a particular work which has cultural or artistic merit,

and, where the Appeal Commissioners so determine, the individual shall be entitled to relief under subsection (3)(a) as if the determination had been made by the Revenue Commissioners under clause (I) or (II) of subsection (2)(a)(ii), as the case may be.

(9) For the purposes of the hearing or rehearing of an appeal made under subsection (6), the Revenue Commissioners may nominate any of their officers to act on their behalf.

(10) For the purposes of determining the amount of the profits or gains to be disregarded under this section for the purposes of the Income Tax Acts, the Revenue Commissioners may make such apportionment of receipts and expenses as may be necessary.

(11) Notwithstanding any exemption provided by this section, the provisions of the Income Tax Acts regarding the making by the individual of a return of his or her total income shall apply as if the exemption had not been authorised.

(12) (a) An Comhairle Ealaíon and the Minister for Arts, Heritage, Gaeltacht and the Islands shall, with the consent of the Minister for Finance, draw up guidelines for determining for the purposes of this section whether a work within a category specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having, cultural or artistic merit.

(b) Without prejudice to the generality of paragraph (a), a guideline under that paragraph may

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(i) consist of a specification of types or kinds of works that are not original and creative or that have not, or are not generally recognised as having, cultural or artistic merit, including a specification of works that are published, produced or sold for a specified purpose, and

(ii) specify criteria by reference to which the questions whether works are original or creative and whether they have, or are generally recognised as having, cultural or artistic merit are to be determined.

(13)(a) Where a claim for a determination under subsection (2) is made to the Revenue Commissioners, the Revenue Commissioners shall not determine that the work concerned is original and creative or has, or is generally recognised as having, cultural or artistic merit unless it complies with the guidelines under subsection (12) for the time being in force.

(b) Paragraph (a) shall, with any necessary modifications, apply to –

(i) a determination by the Appeal Commissioners under subsection (8) on an appeal to them under subsection (6) in relation to a claim mentioned in paragraph (a), and

(ii) a rehearing by a judge of the Circuit Court of an appeal mentioned in subparagraph (i) and, to the extent necessary, to the determination by the High Court of any question of law arising on such an appeal or rehearing and specified in the statement of a case for the opinion of the High Court, by the Appeal Commissioners or, as the case may be, a judge of the Circuit Court.

(14) Where a determination has been or is made under clause (I) or (II) of subsection (2)(a)(ii) in relation to a work or works of a person, subsection (3)(a) shall not apply to any other work of that person that is in the same category as such work or works and is or was first published, produced or sold on or after the 3rd day of May, 1994, unless that other work is one that complies with the guidelines under subsection (12) for the time being in force and would qualify to be determined by the Revenue Commissioners as an original or creative work and as having, or being generally recognised as having, cultural or artistic merit.

(15) On application to the Revenue Commissioners in that behalf by any person, the Revenue Commissioners shall supply the person free of charge with a copy of any guidelines under subsection (12) for the time being in force.

(16) (a) The Revenue Commissioners may publish, or cause to be published, the name of an individual who is the subject of a determination under subsection (2).

(b) Publication under paragraph (a) may, as appropriate, include the title or category of the work of an individual.”

APPENDIX 2

“Guidelines drawn up under Section 195(2) of the Taxes Consolidation Act 1997 for the Artists Exemption Scheme by An Comhairle Ealaion and the Minister for Arts, Heritage and the Gaeltacht.

Introduction

These Guidelines have been drawn up under the provisions of Section 195 of the Taxes Consolidation Act 1997 for the purposes of determining whether a work within a category specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having, cultural or artistic merit.

General

1. Section 195(1) provides that a “work” for the purposes of the Section must be both an original and creative work in one of the following categories, namely:

- (a) a book or other writing,*
- (b) a play,*
- (c) a musical composition,*
- (d) a painting or other like picture,*
- (e) a sculpture.*

2. To secure exemption under Section 195, a work must be determined by the Revenue Commissioners to be a work which is both original and creative and a work which has, or is generally recognised as having, either cultural or artistic merit.

3. In making a determination under Section 195, the Revenue Commissioners may, as provided for in that Section, consult with such person or body of persons as may, in their opinion, be of assistance to them.

Original and Creative

4. A work shall be regarded as original and creative only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.

Cultural Merit

5. A work shall be regarded as having cultural merit only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.

Artistic Merit

6. A work shall be regarded as having artistic merit only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.

Criteria for Non-fiction Work

7. (1) *This paragraph specifies criteria, in accordance with subsection (12)(b)(ii) of Section 195, by reference to which the questions whether a work, being a nonfiction book or other nonfiction writing, is original and creative and whether it has, or is generally recognised as having, cultural or artistic merit are to be determined.*

(2) *The criteria are:*

(a) *that the work, in the opinion of the Revenue Commissioners, following consultation with the Arts Council, is a work in one or more of the following categories:*

(i) arts criticism,

(ii) arts history,

(iii) arts subject work, being a work the subject matter of which is, or is any combination of, visual arts, theatre, literature, music, dance, opera, film, circus or architecture,

(iv) artists' diaries,

(v) belles-lettres essays,

(vi) literary translation,

(vii) literary criticism,

(viii) literary history,

(ix) literary diaries,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(b) *that the work, in the opinion of the Revenue Commissioners, is a work in one of the following categories:*

(i) a biography,

(ii) an autobiography,

that incorporates the author's unique insight into the subject matter and is regarded as a pioneering work and also makes a significant contribution to the subject matter by casting new light on the person or by changing the generally accepted understanding of the person, or

(c) that the work, in the opinion of the Revenue Commissioners following consultation with the Heritage Council,

(i) is a work related to a function or functions of the Heritage Council as described in the Heritage Act 1995, and

(ii) incorporates the author's unique insight into the subject matter and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it,

or

(d) that the work, in the opinion of the Revenue Commissioners, relates to archives which are more than 30 years old relating to Ireland or Irish people, is based largely on research from such archives, incorporates the author's unique insight into the subject matter, and is regarded as a pioneering work that makes a significant contribution to the subject matter by casting new light on it or by changing the generally accepted understanding of it, or

(e) any combination of (a), (b), (c) or (d) above.

Types of Works Excluded from the Artists Exemption Scheme.

8. Notwithstanding anything else in these Guidelines, a work-

(a) shall not be an original and creative work, and

(b) shall not have, or shall not be generally recognised as having, cultural or artistic merit if, in the opinion of the Revenue Commissioners following, where appropriate, consultation with the Arts Council, it is a work of any of the types or a combination of the types, specified in subparagraphs (i) to (vi) below –

(i) a book or other writing published primarily for, or which is or will be used primarily by-

(I) students pursuing a course of study, or

(II) persons engaged in any trade, business, profession, vocation or branch of learning as an aid to trade or business-related practice, or to professional, vocational or other practise in connection with a trade, business, profession, vocation or branch of learning,

(ii) any work of journalism, published in a newspaper, journal, magazine, or other similar medium or published on the internet or on any other similar medium,

(iii) any writing, visual or musical work, or other like work, created for advertising or publicity purposes,

(iv) any arrangement, adaptation or version of musical composition, or other like work, which is not of such musical significance as to amount to an original composition,

(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes,

(vi) types or kinds of works of sculpture which primarily serve a utilitarian function.