



AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

103TACD2024



Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission (“Commission”) by [REDACTED] (“Appellant”) pursuant to section 959AF of the Taxes Consolidation Act 1997 as amended (“TCA 1997”) against amended assessments to income tax for the tax years [REDACTED] [REDACTED] raised by the Revenue Commissioners (“Respondent”) in the total amount of [REDACTED]
2. The appeal proceeded by way of an oral hearing on 13 – 16 May 2024. Both parties were represented by senior and junior counsel.

Background

3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
5. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
6. On her [REDACTED] income tax return, the Appellant stated that she had income from foreign [REDACTED] totalling [REDACTED] for the year. No expression of doubt was ticked on the return, but under “Additional Notes” the following was stated:

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.”

13. Section 18 of the TCA 1997 states *inter alia* that

“(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,

(iii) any person, whether a citizen of Ireland or not, although not resident in the State, from any property whatever in the State, or from any trade, profession or employment exercised in the State, and

(iv) any person, whether a citizen of Ireland or not, although not resident in the State, from the sale of any goods, wares or merchandise manufactured or partly manufactured by such person in the State,

and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule C or Schedule E, and not specially exempted from tax,

in each case for every one euro of the annual amount of the profits or gains.

2. Profits or gains arising or accruing to any person from an office, employment or pension shall not by virtue of paragraph 1 be chargeable to tax under this Schedule unless they are chargeable to tax under Case III of this Schedule.

(2) Tax under Schedule D shall be charged under the following Cases:

[...]

Case III - Tax in respect of –

[...]

(f) income arising from possessions outside the State except, in the case of income from an office or employment (including any amount which would be chargeable to tax in respect of any sum received or benefit derived from the office or employment if the profits or gains from the office or employment were chargeable to tax under Schedule E), so much of that income as is attributable to the performance in the State of the duties of that office or employment;

Case IV - Tax in respect of any annual profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule...”

14. Section 58 of the TCA 1997 states *inter alia* that

“(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made –

(a) the source from which those profits or gains arose was not known to the inspector,

(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or

(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains.

(2) Notwithstanding anything in the Tax Acts, any profits or gains charged to tax by virtue of subsection (1)... shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as "miscellaneous income", and in respect of such profits and gains so assessed –

(i) the assessment...(II) shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should apart from this section have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity...”

Evidence

[REDACTED]

15. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20.

[Redacted text block for item 20]

21.

[Redacted text block for item 21]

22.

[Redacted text block for item 22]

23.

[Redacted text block for item 23]

24.

[Redacted text block for item 24]

25.

[Redacted text block for item 25]

[Redacted text block]

26.

[Redacted text block]

27.

[Redacted text block]

28.

[Redacted text block]

29.

[Redacted text block]

30.

[Redacted text block]

31. [Redacted text block]

32. [Redacted text block]

33. [Redacted text block]

34. [Redacted text block]

35. [Redacted text block]

36. [Redacted text block]

[Redacted text block]

37.

[Redacted text block]

38.

[Redacted text block]

39.

[Redacted text block]

40.

[Redacted text block]

41.

[Redacted text block]

[Redacted text block]

42. [Redacted text block]

43. [Redacted text block]

44. [Redacted text block]

45. [Redacted text block]

46. [Redacted text block]

47. [Redacted text block]

[Redacted]

48. [Redacted]

49. [Redacted]

50. [Redacted]

51. [Redacted]

52. [Redacted]

[REDACTED]

53. [REDACTED]

54. [REDACTED]

55. [REDACTED]

56. [REDACTED]

[REDACTED] – *Expert witness retained on behalf of the Appellant*

57. [REDACTED] (“First Expert”) was an expert in [REDACTED] retained on behalf of the Appellant. He had provided a report which he adopted as his evidence in chief. He provided details of his qualifications and experience. [REDACTED]

[REDACTED]

[REDACTED]

58. [REDACTED]

59. [REDACTED]

[REDACTED] – *Expert witness retained on behalf of the Respondent*

60. [REDACTED] (“Second Expert”) was an expert in [REDACTED] retained on behalf of the Respondent. He had prepared a report which he adopted as his evidence. He provided evidence of his qualifications and experience. [REDACTED]

61. [REDACTED]

62. [REDACTED]

63. On cross examination, the Second Expert agreed that while there were differences between his evidence and that of the First Expert, there was also a large measure of agreement between them. [REDACTED]

64. [REDACTED]

Submissions

Appellant

65. The Appellant's principal grounds were as follows:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED]

[Redacted text block]

66. [Redacted text block]

67. [Redacted text block]

68. [Redacted text block]

69. [Redacted text block]

70. The question arose whether the payments fell within Schedule D, Case III of the TCA 1997. Firstly, to fall within the Schedule, the payments must have been "income". It was clear [REDACTED] that the relevant transactions did not involve income. The next question was whether any of the payments emanated from a "foreign possession". The Appellant possessed nothing. [REDACTED]

71. In a line of authorities commencing with *Hayes v Duggan* [1929] IR 406, it was established that profits deriving from illegal trading are not taxable as income. At the time the appealed assessments were raised in this case ([REDACTED]), the Respondent had been informed by the Appellant of the nature of the income [REDACTED]

72. The *Hayes v Duggan* line of reasoning has been overtaken by statute i.e. Section 58 of the TCA 1997. Where it applies, section 58 serves to charge to tax the proceeds of an unlawful activity. Section 58 does not mention criminal law only, and therefore also covers breaches of civil law of a fundamental nature. The assessments in this case merely referred to Schedule D - "[REDACTED]". No assessment to tax had been made by virtue of section 58. Section 58(2) requires such an assessment, in any case, to be specifically charged under Schedule D, Case IV and to be described in the assessment concerned as "miscellaneous income", and that had not been done.

73. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The rule in *Clayton's Case – Devaynes v Noble* (1816) 1 MER 585 was still current.

74. In oral submissions, counsel stated that the Appellant's main argument was that the payments from [REDACTED] should have been taxed under Schedule D, Case IV but had been taxed under Schedule D, Case III. [REDACTED]

75. Section 58 was mandatory in respect of charges to tax on unlawful activity, because otherwise such activity would not be amendable to taxation. However, it was clear that the Respondent had not charged the Appellant pursuant to section 58. The Respondent had contended that the Commissioner had a discretion to amend the amended assessments, but this was incorrect. The authorities relied upon by the Respondent to support that contention did not, in fact, show that the Commissioner was at large to amend the assessments to bring them within the correct Case. Nor did the Respondent have a discretion to choose which Case to tax the payments under, as the provisions of section 58 were mandatory.

76. The Appellant adopted the following statement of the law as stated by the Respondent in its written submissions:

“If the income arises from a [REDACTED], or other foreign possession, then it is taxable under Schedule D Case III. If it is an unlawful payment, it is taxable under Schedule D Case IV.”

Counsel stated that the circumstances in this appeal were that straightforward and that binary. The payments were unlawful, but the Respondent had not taxed them as such.

77. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

78. In reply to the Respondent, counsel stated that *Hayes v Duggan* encompassed more than purely criminal activity. Section 58 is not limited to criminal sources or activities, but instead uses the broader term of “unlawful”, which mirrored the language of the Chief Justice in *Hayes v Duggan*. The Supreme Court in *Hayes v Duggan* took a different approach to the English court in *Partridge v Mallandaine* (1886) 18 QBD 276. It would be contrary to the rules of statutory interpretation to read “unlawful” as purely concerning criminal matters.

79. The Appellant was clear in her evidence that she informed the Respondent prior to the raising of the amended assessments that the income was from an unlawful source. There had been no countervailing evidence from the Respondent regarding what was said at the [REDACTED] meeting. Even if the Commissioner was not satisfied that the Respondent knew that the profit or gain had arisen from an unlawful source, it seemed inevitable that the circumstances described at section 58(1)(b) had arisen - that the profit

or gain was not known to the inspector to have arisen wholly or partly from a lawful source or activity.

80. [REDACTED]

Respondent

81. [REDACTED]

82. [REDACTED] The expression “income arising from possessions outside the State” as used in Schedule D Case III was not defined. It was well established in case law that the UK equivalent, “foreign possession” is to be construed extremely broadly, to mean everything that a person has as a source of income; *Colquhoun v Brooks* 2 TC 490.

83. Insofar as the Appellant contended that the income tax should have been charged under Case IV rather than Case III, where the Respondent made an assessment under the wrong case of Schedule D, the Appeal Commissioners or the courts had the power to substitute the correct case; *Foulsham v Pickles* [1925] AC 458 and *Bath & West Counties Property Trust v Thomas* 1978 STC 30. Where income was capable of assessment under more than one case, the Respondent had a choice as to which case to apply; *Liverpool London & Globe Insurance v Bennett* 6 TC 327.

84. [REDACTED]

85. [REDACTED]

[REDACTED]

86. Whether lawful or unlawful, [REDACTED] a foreign possession for tax purposes and therefore within Case III. [REDACTED] the mechanisms by which the Appellant received a very substantial amount of money. Therefore, bogus or not, [REDACTED] a possession. Even if not legally enforceable, [REDACTED] could nonetheless be a possession for the purposes of income tax; *McHugh v A* [1958] IR 242.

87. *Hayes v Duggan* was concerned with income derived from a wholly criminal enterprise. Section 58 of the TCA 1997 was introduced to reverse the judgment in *Hayes v Duggan*. *Partridge v Mallandaine* (1886) 18 QBD 276 was authority for the proposition that income from a source that was not legally enforceable but was not criminal was liable to taxation.

88. Even if was accepted that [REDACTED] were unlawful, it was necessary for the Appellant to show that this was known to the Respondent at the time the assessments were made. The knowledge given to the Respondent prior to the assessments being made was strictly limited. The Respondent was entitled to accept the Appellant's income tax returns at face value; *Collins v Mulvey* [1956] IR 233. [REDACTED]

[REDACTED]

89. [REDACTED]

90. [REDACTED]
[REDACTED] Income tax is tax on annual profits or gains, and what might happen to those profits or gains in subsequent years did not affect the amount of tax owed for the year in which the profits or gains were realised.

91. [REDACTED]

[REDACTED]

Material Facts

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

[REDACTED]

92.1. [REDACTED]

92.2. [REDACTED]

92.3. [REDACTED]

92.4. [REDACTED]

[REDACTED]

92.5. [REDACTED]

92.6. [REDACTED]

92.7. [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted].

92.8. [Redacted]
[Redacted]
[Redacted]
[Redacted]

92.9. [Redacted]
[Redacted]
[Redacted]
[Redacted]

92.10. [Redacted]
[Redacted]
[Redacted]

92.11. [Redacted]
[Redacted]

[Redacted]	[Redacted]
[Redacted]	[Redacted]
[Redacted]	[Redacted]
[Redacted]	[Redacted]
[Redacted]	[Redacted]

92.12. [Redacted]
[Redacted]:

[Redacted]	[Redacted]
------------	------------

[REDACTED]

92.17. [REDACTED]

92.18. [REDACTED]

92.19. [REDACTED]

[Redacted text block]

92.20. [Redacted text block]

92.21. [Redacted text block]

92.22. [Redacted text block]

[Redacted text block]

92.23. [Redacted text block]

92.24. [Redacted text block]

[Redacted text block]

expression of doubt was ticked on the return, but under "Additional Notes" the following was stated:

[REDACTED]

92.28. [REDACTED], the Appellant filed an amended income tax return for [REDACTED] in which the entirety of the payments received from [REDACTED] [REDACTED] was removed.

92.29. On the Appellant's original [REDACTED] income tax return, she included the payments received by her from [REDACTED] [REDACTED]. No expression of doubt was ticked, but the following "Additional Notes", in identical terms to those included in the [REDACTED] return, were stated:

[REDACTED]

92.30. [REDACTED] the Appellant filed an amended income tax return for [REDACTED] in which the entirety of the payments received from the [REDACTED] [REDACTED] was removed.

Communication regarding payments from [REDACTED]

92.31. On [REDACTED], the Appellant's agent wrote to the Respondent regarding the payments from [REDACTED]. In response to a query from the Respondent, "Let me have documentation in relation to [REDACTED]

[REDACTED]:

[REDACTED]

“As you are aware we have ongoing enquiries with you in relation to the taxability of income received by [the Appellant] from [REDACTED]. To date no evidence has been provided by you or [the Appellant] to confirm that the income has been repaid to [REDACTED]. [REDACTED] On the basis that no evidence has been provided to evidence the repayment of her income, [the Appellant] is considered to have received the income and is taxable in Ireland on the amount received.

[REDACTED] Accordingly in order to protect the interest of Revenue it is necessary that we arrange to amend the income tax assessment for [REDACTED]. In addition the income tax assessment for [REDACTED] will also be amended. The assessments have been amended to include [REDACTED]”

Amended assessments

92.35. Notices of amended assessment to income tax for [REDACTED] issued to the Appellant on [REDACTED]. The amended assessments included the [REDACTED], included in the Appellant’s original tax returns, but subsequently removed by her in the amended tax returns. [REDACTED]
[REDACTED]
[REDACTED]

92.36. The payments from [REDACTED] were charged to tax under Schedule D Case III as foreign possessions. The amended assessments described the payments as [REDACTED].”

92.37. On [REDACTED] the Appellant appealed against the amended assessments to the Commission. [REDACTED]
[REDACTED]
[REDACTED]

92.38. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

92.39. [REDACTED]

92.40. [REDACTED]

92.41. [REDACTED]

92.42. [REDACTED]

93. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact of matters that are in dispute:

93.1. In all the circumstances, taking into account the correspondence between the parties, the uncontroverted evidence of the Appellant that she informed the Respondent [REDACTED] [REDACTED] [REDACTED] it is found, on the balance of probabilities, that the Respondent knew by [REDACTED] that the payments to the Appellant [REDACTED] were from an unlawful source.

93.2. The Appellant had not demonstrated that she had, in fact, repaid the payments received by her from [REDACTED] [REDACTED] [REDACTED]

Analysis

94. There are a number of issues that fall to be determined in this appeal. It seems to the Commissioner that the first issue to be determined is whether the profits or gains arising to the Appellant from the payments [REDACTED] came from an unlawful source or activity. If the answer to that question is yes, then it must be determined if this was known by the Respondent when it issued the amended assessments. Depending on the answers to those questions, it will then be necessary to consider whether the amended assessments correctly charged the Appellant to tax. Finally, the question of whether the Appellant has repaid the monies received by her [REDACTED] [REDACTED] and the legal consequences of such repayment, will be considered.

95. When considering all of these questions, the starting point is that the burden of proof rests on the Appellant in respect of each of them. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49, Charleton J stated at paragraph 22 that “*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*”

Whether the profits or gains came from an unlawful source or activity

96. The Appellant claimed that [REDACTED] [REDACTED] [REDACTED] [REDACTED].

97. [REDACTED]

[REDACTED]

98. The bulk of the Appellant's oral evidence concerned [REDACTED]

99. [REDACTED]

100. [REDACTED]

101. [REDACTED]

¹¹ [REDACTED]

[Redacted text block]

102.

[Redacted text block]

103.

[Redacted text block]

104.

[Redacted text block]

■ [Redacted text block]

■ [Redacted text block]

• [Redacted text block]

■ [Redacted text block]

- [REDACTED]
- [REDACTED]

105. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

106. [REDACTED]

107. Consequently, the Commissioner determines, based on the uncontested evidence of the Appellant, and in particular [REDACTED] was wholly bogus and unlawful. [REDACTED]

² [REDACTED]

[REDACTED]

108. In any event, the Commissioner concludes that [REDACTED] [REDACTED] bogus and unlawful, and therefore he is satisfied that the source of the Appellant's profits or gains, [REDACTED] [REDACTED] was unlawful.

109. Before concluding on this aspect, the Commissioner notes that, [REDACTED] [REDACTED] no finding of criminality is made herein.

[REDACTED]

110. [REDACTED]

111. [REDACTED]

112. [REDACTED]

113. [REDACTED]

"We refer to our recent meeting concerning [the Appellant]..."

Returns of Income [REDACTED]

As you know we amended our client's tax returns via ROS by deleting the foreign income on which transborder relief was claimed. This was subject to an expression of doubt on our original return...

Transborder Relief

[REDACTED]
[REDACTED]
[REDACTED]

115.4. On [REDACTED], the Respondent wrote to the Appellant's agent regarding the Appellant and stated that it referred to *inter alia* "our meeting on [REDACTED] [REDACTED]". The letter also stated that

"At our meeting on [REDACTED] it was agreed that the circumstances surrounding the payment of [REDACTED] would be put in writing. I have no record of receiving any correspondence on this matter apart from the letter [REDACTED] [REDACTED] [REDACTED] [REDACTED]."

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

If the money has not been repaid, I require a copy of the documentation received by [the Appellant] advising her of [REDACTED] [REDACTED]

115.5. On [REDACTED], the Respondent again wrote to the Appellant's agent regarding the Appellant and stated *inter alia* that:

"As you are aware we have ongoing enquiries with you in relation to the taxability of income received by [the Appellant] from [REDACTED] [REDACTED]. To date no evidence has been provided by you or [the Appellant] to confirm that the income has been repaid [REDACTED]. [REDACTED]"

████████████████████ On the basis that no evidence has been provided to evidence the repayment of her income, [the Appellant] is considered to have received the income and is taxable in Ireland on the amount received.

You will be aware that the time limit to amend the income tax assessment for the year █████ expires on the █████. Accordingly in order to protect the interest of Revenue it is necessary that we arrange to amend the income tax assessment for █████. In addition the income tax assessment for █████ will also be amended. The assessments have been amended to include █████

116. On the basis of the above correspondence, the Commissioner is satisfied that the Appellant told the Respondent in █████, █████ that █████
████████████████████
████████████████████
████████████████████

117. The Commissioner is also satisfied that the Appellant, via her agent, notified the Respondent by █████
████████████████████ While the relevant letter from the Appellant's agent is rather unclear, as it does not have clear numbering, and the second item is stated to be "Returns of Income █████", the Commissioner is satisfied, in all the circumstances, that this was an error and should have referred to █████
████████████████████
████████████████████

118. The Respondent's knowledge of the existence of █████ is confirmed by its letter to the Appellant's agent dated █████ which explicitly refers to █████
While it does not seem that █████
████████████████████
████████████████████
████████████████████ Therefore, the Commissioner finds that the Respondent knew, as of █████
████████████████████
████████████████████

119. Additionally, the Commissioner considers that the Appellant's oral evidence was clear and consistent that she informed the Respondent, prior to the raising of the amended assessments, of the existence of █████. There was no evidence put

forward by the Respondent to contradict the Appellant in this regard. While the Commissioner considers that the evidence suggests that there was a lack of clarity on the part of the Appellant and her agent in their dealings with the Respondent regarding

[REDACTED]
[REDACTED]
[REDACTED], and therefore the Respondent was properly on notice of [REDACTED].

120. Furthermore, the Commissioner considers that [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

121. [REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

122. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

123. [REDACTED]

124. In all the circumstances, therefore, taking into account [REDACTED]

the Commissioner finds, on the balance of probabilities, that the Respondent knew by [REDACTED] that the payments to the Appellant [REDACTED] were from an unlawful source.

125. As he has found that the Appellant has not shown that the payments from [REDACTED] were unlawful, it follows that the Respondent's knowledge of unlawfulness regarding [REDACTED] does not arise. However, even if he had found that those payments were unlawful, the Commissioner would find that the Respondent did not know this as of the date of the amended assessments. [REDACTED]

Whether the Appellant was correctly charged to tax

126. The Commissioner has determined that the [REDACTED] were from an unlawful source, and that the Respondent knew about this unlawfulness when it issued the amended assessments. On the other hand, the payments from [REDACTED] were not unlawful. The consequences of these findings for the charge to tax must now be considered.

127. The amended assessments charged the Appellant to additional tax in respect of [REDACTED] [REDACTED]” under Schedule D. Schedule D Case III charges tax on, *inter alia*, “(f) *income arising from possessions outside the State...*” Schedule D Case IV charges tax on “*any additional profits or gains not within any other Case of Schedule D and not charged by virtue of any other Schedule*”. The Respondent contended that the Appellant was correctly charged under Case III as [REDACTED] constituted a foreign possession. The Appellant argued that the Respondent was obliged to charge her under Case IV, but had not complied with the mandatory requirements of section 58 of the TCA 1997.

128. In *Hayes v Duggan* [1929] IR 406, the Supreme Court held that gains from illegal enterprises were not subject to income tax. Kennedy CJ stated *inter alia* that

“In my opinion, the business profits and gains to which the income tax legislation is directed are lawful business profits and gains...I wish, however, to make it clear that this judgment is limited to the case of profits derived from a wholly unlawful business or enterprise or transaction.”

129. The judgment in *Hayes v Duggan* was followed by the High Court in *Collins v Mulvey* [1956] IR 233, in which Davitt P stated that “*In my opinion the income from the appellant's business during these years of assessment was not taxable, being the profits and gains of a business which was wholly criminal.*”

130. This remained the position in Irish law until section 19 of the Finance Act 1983 provided for the taxation of gains from illegal activities. The relevant provision is now section 58 of the TCA 1997. Section 58(1) states that

“Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made –

(a) the source from which those profits or gains arose was not known to the inspector,

(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or

(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains.”

131. In oral submissions, counsel for the Respondent sought to rely on the English judgment of *Partridge v Mallandaine* (1886) 18 QBD, wherein Denman J stated that “*I think the word "vocation" is not limited to a lawful vocation, and that even the fact of a vocation being unlawful could not be set up against the demand for income tax.*” However, this was a judgment of the English courts that predated the Supreme Court judgment in *Hayes v Duggan*, and therefore, insofar as it is inconsistent with *Hayes v Duggan*, the Commissioner is bound to follow the reasoning in the later, Irish, case.

132. The Respondent also contended that the Appellant’s [REDACTED] [REDACTED] constituted foreign possessions, and relied upon the judgment of Lord Macnaghten in *Colquhoun v Brooks* (1889) 2 TC 490, wherein he stated that “*The word "possessions" is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used.*” It additionally relied upon the Irish High Court judgment of *McHugh v A* [1958] IR 242, wherein Teevan J stated that

“In my view, therefore for present purposes, "foreign possession" means a source abroad from which is derived this income of the respondent, non-assessable but for s. 4 of the 1932 Act. The moneys must have some source and that must be looked to in considering the standard and method of assessment.

[...]

If the respondent in this case, or a person similarly situated, deriving payments of a similar nature from a concern situated in this country be taxable in virtue of the section, while without any remedy to enforce payment, or right to, or control over, is to be regarded as the possessor of the source of income I see no reason why the same assumption may not be made if the source be abroad. Mere use of the word possession in the taxation machinery cannot to my mind create any distinction.”

133. The Commissioner accepts that “foreign possession” has a very wide meaning, and that the mere non-enforceability of a right of payment does not mean that the person does not hold a foreign possession. However, in this appeal, he has found that the payments to the Appellant [REDACTED] were from a wholly unlawful source or activity, and therefore it seems to him that they fall within the confines of the judgment in *Hayes v Duggan* rather than *Colquhoun v Brooks* or *McHugh v A*.

134. It seems to the Commissioner that it is not wholly clear from the judgments in both *Hayes v Duggan* and in *Collins v Mulvey* whether the exclusion from the charge to tax applied to just criminal activity, or whether the broader scope of unlawful/illegal activity applied. All criminal activity is perforce illegal, but not all illegal activity is necessarily criminal.

However, it is noted that Kennedy CJ referred to “*the gains of unlawful and criminal enterprises*”, rather than criminal *simpliciter*, and therefore the Commissioner considers that the better view is that the court considered that the exclusion applied to all unlawful activity. In any event, section 58 has taken the broader approach of applying to “*an unlawful source or activity*”, and therefore the Commissioner considers that the section is not limited to just criminal activity, but applies to all profits or gains which come from an unlawful source or activity.

135. Section 58(1)(c) concerns profits or gains that were known to the Respondent, at the time the assessment was made, to have arisen from an unlawful source or activity. The Commissioner has already found that, at the time of the raising of the amended assessments herein, the Respondent knew that the payments to the Appellant arose from an unlawful source or activity. Consequently, he is satisfied that section 58 applied to the monies received by the Appellant from [REDACTED]

136. In its written submissions, the Respondent stated that:

“If the income arises from a [REDACTED], or other foreign possession, then it is taxable under Schedule D Case III. If it is an unlawful payment, it is taxable under Schedule D Case IV.”

It seems to the Commissioner that this is a correct statement of the law. The profits or gains in respect of [REDACTED] fall to be taxed under either Case III or Case IV; they cannot be taxed under both.

137. Section 58(2) of the TCA 1997 states *inter alia* that

“(2) Notwithstanding anything in the Tax Acts, any profits or gains charged to tax by virtue of subsection (1)... shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as “miscellaneous income”, and in respect of such profits and gains so assessed –

(i) the assessment...(II) shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should apart from this section have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity...”

138. The Commissioner considers that the above subsection mandatorily requires that profits or gains from an unlawful source be charged under Schedule D Case IV and also mandatorily requires that such profits and gains shall be described in the assessment as “miscellaneous income”. The use of the word “shall” indicates that there is no discretion

available to the Respondent, or to the Commissioner on appeal, to disregard these requirements.

139. Consequently, the Commissioner is satisfied that the payments to the Appellant [REDACTED] had to be charged under Schedule D Case IV, and had to be described as “miscellaneous income”. However, it seemed to the Commissioner that it was uncontroverted that the payments were in fact charged under Schedule D Case III as a foreign possession, and were simply described as “[REDACTED]”. Therefore, the Commissioner finds that the Respondent has not properly charged the profits or gains arising to the Appellant from the payments [REDACTED] to income tax.

140. On the other hand, as he has found that the Appellant has failed to prove that the payments from [REDACTED] were from an unlawful source, the Commissioner is satisfied that those [REDACTED] constituted foreign possessions, and therefore fell to be charged under Schedule D Case III. As this was how they were in fact charged, the Commissioner finds that the profits and gains arising to the Appellant from the payments [REDACTED] were properly charged to tax.

141. Finally, it was argued by the Respondent that the Commissioner had a discretionary power to amend the Case under which the Appellant was charged. The Commissioner does not agree that he has such a power. *Foulsham v Pickles* [1925] AC 458 concerned a specific statutory power available to the court on a case stated to amend the Case. Similarly, in *Bath and West Counties Property Trust Ltd v Thomas* [1978] STC 30, there was a specific statutory power available to the court to amend the Case. The Commissioner considers that there is no equivalent or similar statutory power open to him to amend the Case in this appeal. The Commission is a creature of statute, and does not have any inherent powers; *Lee v Revenue Commissioners* [2021] IECA 18.

142. Nor does the Commissioner agree that *Liverpool London & Globe Insurance v Bennett* 6 TC 327 is authority for the proposition that the Respondent had the discretion to utilise either Case III or Case IV; as set out above, the Commissioner is satisfied that the provisions of section 58, insofar as they are applicable, are mandatory.

143. Therefore, for the reasons set out herein, the Commissioner concludes that the Respondent correctly charged to tax the profits or gains arising from the payments [REDACTED] but incorrectly charged the profits or gains from [REDACTED] to tax.

Whether the monies received from [REDACTED] were repaid

144. In addition to the matters considered above, the Appellant also argued that she had in fact repaid the monies received by her from [REDACTED], and that therefore the assessments were not payable by her. The Commissioner understood this to be the Appellant's secondary argument, with her principal focus being on the questions already discussed herein.

145. The Commissioner is not satisfied that this argument is correct in law. He agrees with the submission of the Respondent that section 18 of the TCA 1997 refers to the "annual profits or gains", and that, as the monies were received by the Appellant in [REDACTED], what may have happened at a later stage could not change the assessments for [REDACTED]. If the Appellant repaid the monies in subsequent years, she might be entitled to credits for the repayment in her income tax assessment for those subsequent years; however, it would not alter the fact that the monies were received by her in [REDACTED]

146. Even if she might be entitled to in principle to have a subsequent repayment of the monies change the assessments under appeal, the Commissioner is also not satisfied that the Appellant has in fact shown that she repaid the monies received by her from [REDACTED]

147. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[Redacted text block]

149. [Redacted text block]

150. [Redacted text block]

151. [Redacted text block]

152. [Redacted text block]

153. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Conclusion

154. In conclusion, the Commissioner has determined (1) that the Appellant has shown that profits or gains arising from [REDACTED] came from an unlawful source or activity, but that she has not shown that the profits or gains arising from [REDACTED] were unlawful; (2) that the Appellant has shown that the Respondent knew the profits or gains arising from [REDACTED] were from an unlawful source or activity when it raised the amended assessments to income tax for [REDACTED]; (3) that the Respondent failed to correctly charge the Appellant to tax in respect of [REDACTED], but did correctly charge her to tax in respect of the payments from [REDACTED] and (4) that the Appellant has not shown that she repaid the monies received by her [REDACTED]
[REDACTED]
[REDACTED]

155. Therefore, the Commissioner determines that the amended assessments for [REDACTED] and [REDACTED] are to be reduced by removing the payments received from [REDACTED] from the assessments. It was agreed that the Appellant received the equivalent of [REDACTED]
[REDACTED]
[REDACTED] Consequently, it is determined that the assessments should be reduced by way of removal of those amounts from the line item [REDACTED]
[REDACTED]" on the respective assessments for [REDACTED] For the avoidance of doubt, the payments to the Appellant from [REDACTED] are not to be removed from the Appellant's assessed income.

Determination

156. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the amended assessments to income tax raised against the Appellant for [REDACTED] should be reduced by way of removal of [REDACTED]
[REDACTED] from the assessed income.

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

Notification

158. 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

159. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.



Simon Noone
Appeal Commissioner
24 June 2024

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.

