AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

118TACD2024

Between

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

Table of Contents

Introduction

1. These are appeals to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (" TCA 1997") brought on behalf of [redacted] ("the Appellant") in respect of three Notices of Determination issued by the Revenue Commissioners ("the "Respondent") in accordance with section 864(1) TCA 1997, on [redacted], [redacted] ("the Determinations") and related amended assessments ("the amended assessments"), in respect of the corporation tax periods ending [redacted] ("FY16"), [redacted] ("FY17") and [redacted] ("FY18"), respectively ("the relevant period").

2. The Determinations issued by the Respondent to deny the Appellant a corporation tax deduction in respect of a foreign royalty withholding tax ("RWHT") cost incurred on charges for the use of intellectual property ("IP") by [redacted] ("the group") local operating companies, located in certain jurisdictions ("the operating entities").

3. A hearing of the appeals took place over three days, commencing on 20 May 2024. The Appellant and Respondent were represented by senior counsel. In addition to legal submissions, the Commissioner heard evidence, including expert evidence, from the following witnesses:

   3.1. [redacted] – the Appellant's witness 1;

   3.2. [redacted] – the Appellant's witness 2;

   3.3. [redacted] – the Appellant's expert witness 1;

   3.4. [redacted] – the Appellant's expert witness 2;

   3.5. [redacted] – the Respondent's expert witness 1.

Background

4. The Appellant is a trading company incorporated and tax resident in Ireland.

5. The Appellant is a member of the group of companies. [redacted]. The group conducts its client facing business through its local operating entities, each of which functions within its own designated territory [redacted]. The group relies on a centralised repository of IP to service its customers.

6. The Appellant controls the IP assets used by the various operating entities [redacted].

7. The Appellant's principal activities consist of [redacted]

8. Each of the operating entities require access to the Appellant's IP assets to [redacted]

9. During the relevant period, the Appellant granted access to the IP to each of the operating entities under Intellectual Property Licensing Agreements ("the IPLAs"), [redacted] In return, the operating entities paid a royalty to the Appellant.

10. It is these royalty payments which are reduced by the foreign RWHT, the subject matter of this appeal. The foreign RWHT was incurred by the Appellant by way of deduction from the royalty payments made by the operating entitles, during the relevant periods. The rate of foreign RWHT depended on the particular country from which they were paid.

11. The Appellant filed its corporation tax returns for the relevant period and made a claim for a trading deduction under section 81 TCA 1997. The Appellant included an expression of doubt for each of the relevant period in its corporation tax returns, in respect of its claim to a deduction under section 81 TCA 1997 for foreign RWHT for the relevant period.

12. The Respondent does not agree that the Appellant was entitled to claim a trading deduction under section 81 TCA 1997 in respect of the foreign RWHT and consequently, issued its Notices of Determination, the subject of these appeals. The Respondent argued that Schedule 24 TCA 1997 is engaged herein and that foreign RWHT is not deductible in accordance with the provisions of section 81 TCA 1997.

13. On [redacted], [redacted] and [redacted], the Appellant duly appealed to the Commission, the Notices of Determination issued by the Respondent as aforementioned. It is these appeals that are dealt with by the Commissioner in this Determination.

14. At the outset, the Commissioner considers it relevant and appropriate to set out the manner in which the Commissioner will deal with the issues in dispute. The Commissioner intends firstly to set out the background to this appeal and the applicable legislative provisions. The Commissioner will then set out a summary of the evidence of the witnesses including the expert witnesses and the legal submissions made by senior counsel for both parties to the appeals. The Commissioner then considers it proper to set out the Commissioner's material findings of fact. Thereafter, the Commissioner will proceed into the analysis of the issues, before reaching her Determination. For ease of reference, the Commissioner has broken down her considerations in the analysis section into a series of subheadings namely, the issues, the expert witnesses, is foreign RWHT a tax on income, statutory interpretation, Schedule 24 TCA 1997 and section 81 TCA 1997. Finally, the Commissioner sets out her Conclusion and Determination.

Legislation and Guidelines

15. The legislation relevant to this appeal is as follows:-

16. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides that:-

(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts

(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of—

(a) *any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;*

…….

(e) any loss not connected with or arising out of the trade or profession;

17. Section 76 TCA 1997, Computation of income: application of income tax principles, *inter alia* provides that:-

(1) Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment.

18. Section 76A TCA 1997, Computation of profits or gains of a company – accounting standards, *inter alia* provides that:-

(1) For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes.

19. Section 77 TCA 1997, Miscellaneous Special Rules for the Computation of income, *inter alia* provides that:-

(6B) (*a) In this subsection—*

"amount of the income referable to the relevant royalties" shall be construed in accordance with paragraph 9DB(1)(b)(ii) of Schedule 24;

"relevant foreign tax" and "relevant royalties" have the same meanings, respectively, as in paragraph 9DB(1)(a) of Schedule 24.

(b)Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties, the amount of the income referable to the relevant royalties shall be treated as reduced (where such a deduction cannot be made under, and is not forbidden by, any provision of the Income Tax Acts applied by the Corporation Tax Acts) by so much of the relevant foreign tax in relation to the relevant royalties as does not exceed that amount of the income referable to the relevant royalties.

20. Section 826 TCA 1997, Agreements for relief from double taxation, *inter alia* provides that:-

(1) Where –

(a) the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to –

(i) affording relief from double taxation in respect of –

(I) income tax,

(II) corporation tax in respect of income and chargeable gains (or, in the case of arrangements made before the enactment of the Corporation Tax Act 1976, corporation profits tax),

(III) capital gains tax,

(IV) any taxes of a similar character,

imposed by the laws of the State or by the laws of that territory, and

……..

then, subject to this section and to the extent provided for in this section, the arrangements shall, notwithstanding any enactment, have the force of law as if each such order were an Act of the Oireachtas on and from the date of

(A) the insertion of Schedule 24A into this Act, or

(B) the insertion of a reference to the order into Part 1 of Schedule 24A,

whichever is the later

……

(2) Schedule 24 shall apply where arrangements which have the force of law by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the State.

……

21. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 2, General, *inter alia* provides that:-

(1) Subject to this schedule, where under the arrangements credit is to be allowed against any of the Irish taxes chargeable in respect of any income, the amount of the Irish taxes so chargeable shall be reduced by the amount of the credit.

(2) In the case of any income within the charge to corporation tax, the credit shall be applied in reducing the corporation tax chargeable in respect of that income.

22. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 4, Limit on total credit— Corporation Tax, *inter alia* provides that:-

(1) The amount of the credit to be allowed against corporation tax for foreign tax in respect of any income shall not exceed the corporation tax attributable to that income.

(2) For the purposes of this paragraph, the corporation tax attributable to any income or gain (in this subparagraph referred to as "that income" or "that gain", as the case may be) of a company shall, subject to subparagraphs (4) and (5), be the corporation tax attributable to so much (in this paragraph referred to as "the relevant income" or "the relevant gain", as the case may be) of the income or chargeable gains of the company *computed in accordance with the Tax Acts and the Capital Gains Tax Acts, as is attributable to that income or that gain, as the case may be.*

(2A)For the purposes of subparagraph (2), where credit is to be allowed against corporation tax for foreign tax in respect of any income of a company (in this subparagraph referred to as 'that income'), being income (other than income from a trade carried on by the company through a branch or agency in a territory other than the State) which is taken into account in computing the profits or gains of a trade carried on by the company in an accounting period, the relevant income shall be so much of the profits or gains of the trade for that accounting period as is determined by the formula—

$$P \times I/R$$

where—

P is the amount of the profits or gains of the trade for the accounting period before deducting any amount under paragraph 7(3)(c),

I is the amount of that income for the accounting period before deducting any disbursements or expenses of the trade, and

R is the total amount receivable by the company in the carrying on of the trade in the accounting period.

23. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 7, Effect on computation of income of allowance of credit, provides that:-

(1) *Where credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income, this paragraph shall apply in relation to the computation for the purposes of income tax or corporation tax of the amount of that income.*

(2) Where the income tax or corporation tax payable depends on the amount received in the State, that amount shall be treated as increased by the amount of the credit allowable against income tax or corporation tax, as the case may be.

(1) Where subparagraph (2) does not apply –

(a) no deduction shall be made for foreign tax (whether in respect of the same or any other income), and

(b) where the income includes a dividend and under the arrangements foreign tax not chargeable directly or by deduction in respect of the dividend is to be taken into account in considering whether any, and if so what, credit is to be allowed against the Irish taxes in respect of the dividend, the amount of the income shall be treated as increased by the amount of the foreign tax not so chargeable which is to be taken into account in computing the amount of the credit, but

(c) notwithstanding anything in clauses (a) and (b), where any part of the foreign tax in respect of the income (including any foreign tax which under clause (b) is to be treated as increasing the amount of the income) cannot be allowed as a credit against either income tax or corporation tax, the amount of the income shall be treated as reduced by that part of that foreign tax, but, for the purposes of corporation tax, the amount by which the income is treated as reduced by that part of the foreign tax shall not exceed the amount of income which would be the amount referred to in paragraph 4 as "the relevant income", taking account of the provisions of subparagraphs (2) and (2A) of that paragraph.

24. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 9DB, Unilateral Relief (royalty income), *inter alia* provides that:-

(1) (a) In this paragraph-

"relevant foreign tax", in relation to royalties receivable by a company, means tax—

(i) which under the laws of any foreign territory has been deducted from the amount of the royalty,

(ii) which corresponds to income tax or corporation tax,

(iii) which has not been repaid to the company,

(iv) for which credit is not allowable under arrangements, and

(v) which, apart from this paragraph, is not treated under this Schedule as reducing the amount of income.

"relevant royalties" means royalties receivable by a company-

(i) which fall to be taken into account in computing the trading income of a trade carried on by the company, and

(ii) from which relevant foreign tax is deducted.

"royalties" means payments of any kind as consideration for-

(i) the use of, or the right to use-

(I) any copyright of literary, artistic, or scientific work, including cinematograph films and software,

(II) any patent, trade mark, design or model, plan, secret formula or process,

or

(ii) information concerning industrial, commercial or scientific experience.

(b) For the purposes of this paragraph—

(i) the amount of corporation tax which apart from this paragraph would be payable by a company for an accounting period and which is attributable to an amount of relevant royalties shall be an amount equal to 12.5 per cent of the amount by which the amount of the income of the company referable to the amount of the relevant royalties exceeds the relevant foreign tax, and

(ii) the amount of any income of a company referable to an amount of relevant royalties in an accounting period shall, subject to paragraph 4(5), be taken to be such sum as bears to the total amount of the trading income of the company for the accounting period before deducting any relevant foreign tax the same proportion as the amount of relevant royalties in the accounting period bears to the total amount receivable by the company in the course of the trade in the accounting period.

(2) Where, as respects an accounting period of a company, the trading income of a trade carried on by the company includes an amount of relevant royalties, the amount of corporation tax which, apart from this paragraph, would be payable by the company for the accounting period shall be reduced by so much of 87.5 per cent of any relevant foreign tax borne by the company in respect of relevant royalties in that period as does not exceed the corporation tax which would be so payable and which is attributable to the amount of the relevant royalties.

……..

(2) Where, as respects any relevant royalties received in an accounting period by a company, any part of the foreign tax cannot, due to an insufficiency of income, be treated as reducing income under paragraph 7(3)(c) or under section 77(6B), then the amount which cannot be so treated shall, for the purposes of this paragraph, be unrelieved foreign tax.

(3) Where, as respects an accounting period, a company is in receipt of royalties from persons not resident in the State and such royalties are taken into account in computing the trading income of a trade carried on by the company, the company may—

(a) reduce the income (in this subparagraph referred to as "royalty income") referable to any unrelieved foreign tax and

(b) allocate such reductions in such amounts and to such of its royalty income for that accounting period as it sees fit.

(6) The aggregate amount of reductions under subparagraph (5) in an accounting period cannot exceed the aggregate of the unrelieved foreign tax in respect of all relevant royalties for that accounting period.

25. Schedule 24 TCA 1997, Relief from Income Tax and Corporation Tax by Means of Credit in Respect of Foreign Tax, paragraph 10, Miscellaneous, provides that:-

Credit shall not be allowed under the arrangements against the Irish taxes chargeable in respect of any income of any person if the person in question elects that credit shall not be allowed in respect of that income.

Evidence and Submissions

Appellant's evidence

26. The Appellant's witness 1 gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder, a summary of the evidence given by the witness:-

26.1. The witness testified that he is the [redacted] within the Appellant [redacted].

26.2. The witness testified in relation to the group structure and the Appellant's business activities. The witness confirmed that he is a board member of the Appellant. The witness gave evidence in relation to the IP. The witness stated that the Appellant holds the IP and manages that portfolio centrally, [redacted].

26.3. The witness testified that the IPLAs are a standard agreement with the operating entities and the knowledge and data is owned by the Appellant. [redacted] The witness confirmed that the foreign RWHT is paid on royalty income from the operating entities for the use of the IP that each of the operating entities have.

26.4. The witness was cross examined on his evidence by senior counsel for the Respondent. The witness was directed to the Directors' Report and Financial Statements for the year ending [redacted]. [redacted]. The witness was questioned in relation to the amortisation in the accounts. It was put to the witness that it was one of the largest expenses in the accounts.

27. The Appellant's witness 2 gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the witness:-

27.1. The witness confirmed that he is currently a Senior Finance Manager in the Appellant. [redacted] during the relevant years he would have been responsible for preparing the financial statements of the Appellant. The witness testified that he is an ACCA qualified accountant and has a degree in accounting and finance.

27.2. The witness confirmed that the foreign RWHT is paid on the gross licence fee. The witness testified that in order to confirm that understanding across the

[1] Booklet of Appeal Documents, page 6

operating entitles, he reached out to the tax directors within the group by email[2] to confirm his understanding. The witness stated that each of the tax directors for each of the corresponding regions within the group, namely North America, Europe Middle East and Asia ("EMEA") and [redacted] confirmed that the foreign RWHT is applied to the gross amount invoiced.

27.3. Reference was made to an invoice from [redacted][3], a withholding tax certificate[4] and the [redacted] extract from the Appellant's internal system[5] which showed the [redacted] amount that was invoiced. The witness testified that the invoice showed that a withholding tax rate of 10% has been applied to the gross amount, the withholding tax certificate was from the [redacted] tax authorities confirming the withholding tax amount that was paid by the [redacted] entity to the [redacted] tax authorities. The witness stated that it operated in the same manner for all jurisdictions, but that the rate of the foreign RWHT may be different. Nevertheless, he stated it is always applied to the gross amount and that it is a standardised system.

27.4. Reference was made to the invoice that was issued to the [redacted] entity[6] for August 2017. The witness stated that it was always his understanding that the foreign RWHT was applied on the gross amount invoiced by [redacted]

27.5. The witness made reference to the Appellant's financial statements. The witness stated that the Appellant's financial statements showed that the foreign RWHT expense is recorded within the tax expense line item. [redacted]

[2] Supplementary Booklet of Documents, Tab 50, 51 and 52
[3] Core Booklet of Documents, Tab 15
[4] Core Booklet of Documents, Tab 16
[5] Core Booklet of Documents, Tab 17
[6] Core Booklet of Documents, Tab 6

27.6. The witness stated that it is a principles based accounting system and the whole purpose is to present fairly the financials of a company, at a point in time. The witness said that whether the withholding tax expense was recorded in the tax expense line item or in the operating expense, the same result would be achieved and there was no impact, it was still a valid business expense for the company and was shown in the profit and loss.

27.7. The witness was cross examined on his evidence by senior counsel for the Respondent. The witness confirmed that there was an expression of doubt[7] in respect of the deduction under section 81 TCA 1997, in relation to the foreign RWHT for the relevant period. It was put to the witness that the manner in which the foreign RWHT was treated as an expense within the corporation tax return, had the effect of increasing the Appellant's losses. The witness agreed. The witness agreed that there was no dispute that there was a significant amount of foreign RWHT incurred in respect of the royalty income. It was put to the witness that according to the DTAs, if the Appellant had a branch in each jurisdiction, it could have avoided incurring foreign RWHT. The witness stated that the Appellant would not have a centralised IP model if those were its circumstances. The witness was asked if that was something that he had considered or if the Appellant had considered that. The witness stated that it would be a question for the Appellant's leadership.

27.8. [redacted]. The witness also confirmed that the foreign RWHT is the amount that is suffered and never received, that the full amount is invoiced including the part that is never received and that the invoice amount is that amount in the financial statements, including the amount that is never received, which financial statements give rise to a profit or loss depending on the circumstances of the other deductions. The witness said that he was not an expert on DTAs.

28. The Appellant's expert witness 1 gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the expert witness:

28.1. The witness stated that he prepared an expert report for the purposes of the appeal.[8] The witness confirmed that he is a Principal at [redacted]

[7] Booklet of Appeal Documents, Tabs 10, 11 and 12
[8] Booklet of Expert Witness Reports, Tab 3

[redacted] been practising law in [redacted] since 1988. The witness said that he joined [redacted] in 1991 and was appointed partner in 1997.

28.2. The witness stated that the regime in [redacted] is such that in accordance with [redacted] income tax law, non-residents are subject to income tax on their [redacted] source income. Activities carried out in the [redacted] which are included under the definition of [redacted] source income, and payments to be made from [redacted] to non-residents in consideration for [redacted] source income, are subject to an income tax withholding at the rate of [redacted] and in the case of underlying transactions, [redacted] so technically in that particular case the effective income tax withholding rate is [redacted] Reference was made to paragraph 2.4.2 of the witness's report.

28.3. The witness said that the tax rate is the [redacted] which is the one corresponding to payments made under the IPLA. The witness said that this means that the effective tax rate [redacted] and it is withheld in [redacted] regardless of whether the non-resident has a profit or loss as a consequence of the payments made from [redacted]. The witness confirmed that the effective tax rate of [redacted] is on the gross amount of the invoice and there is no possibility to amend the rate. The withholding tax is applied on the presumed income, regardless of whether the foreign entity may have a profit or loss.

28.4. The witness testified that if these payments were made to an [redacted] tax resident, then the [redacted] tax resident would be subject to income tax on the net taxable income and in that case, the expenses to be deducted are the real expenses recorded and incurred by the [redacted] taxpayer. That is the difference between payments made to an [redacted] tax resident and payments made to a non-resident outside of [redacted]. It is a wholly different situation that the income would be computed on taxable profits for an [redacted] tax resident.

28.5. The witness said it is a catch all provision, which establishes that [redacted] of the payment would be considered as presumed income, and therefore the [redacted] income tax applies on that presumed income which is at the end of the day an effective withholding tax of [redacted]. The witness said that it operates on the gross amounts to be paid from [redacted] and that is the way it is understood by practitioners and indeed by the Supreme Court in [redacted]

28.6. The witness was cross examined on his evidence by senior counsel for the Respondent. The witness agreed that if a branch was established or a permanent

establishment was set up within [redacted] the application of the withholding tax would not come into play. It was put to the witness that the [redacted] The witness stated agreed, in a theoretical way.

29. The Appellant's expert witness 2 gave evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the expert witness:-

29.1. The witness confirmed that he prepared an expert report for the purposes of the appeal.[9] The witness also confirmed that he is a Partner [redacted]. The witness stated that he has been a Partner for six years and has advised clients on accounting advisory transactions. The witness stated that he has been asked to consider two aspects: firstly, to determine the rules used in Financial Reporting Standards ("FRS") 101 and to consider whether a withholding tax on royalties is an income tax and secondly, to consider the level of judgment involved in making that assessment. The witness stated that the Appellant's financial statements were prepared in accordance with FRS 101.

29.2. The witness testified that there are three broad accounting frameworks in Ireland that can be used namely, FRS 101, FRS 102 and the IFRS. The witness stated that FRS 101 is an IFRS measurement and recognition principle based standard, thus it has the same recognition and principle rules as IFRS, but with significantly fewer disclosures. The witness stated that FRS 102 is a completely different framework, separate to IFRS and separate to FRS 101, and is an alternative framework that can be adopted by companies in Ireland.

29.3. The witness stated that the IFRS is a principles based standard, so it does not claim to cover all aspects of accounting possibilities, hence why there is a conceptual framework, which outlines the core principles and fundamentals of IFRS. The witness testified that the aim is to achieve truth and fairness in the representation of financial statements. The witness said that sometimes is achieved by the pure application of the accounting standards. However, there are times when a standard is silent on the particular treatment or accounting aspect,

[9] Booklet of Expert Witness Reports, Tab 1

then the conceptual framework is looked at for guidance, which is based on the core principles of IFRS.

29.4. The witness testified that it is a principle based standard and one of the core components of the standard is the exercise of judgment in preparing financial statements. The witness said that given the complexity of the business environment, it is not possible that a set of accounting standards could accommodate all possible transactions, so there is a significant level of judgment usually involved in a number of key transactions and how to account for those in the context of the broad principles of the accounting standard.

29.5. The witness testified that generally financial statements are prepared for the benefit of the shareholders, existing shareholders or potential shareholders, but they can also be used by creditors, lenders and other users. The witness said that they are general purpose financial statements, so they are industry agnostic and tax agnostic. The witness gave evidence that they purely apply the rules of accounting and do not deem to accommodate for any specific tax rules. There are tax aspects to the standards in the accounting rules, but they do not accommodate industry or tax specific matters. The witness confirmed that financial statements under FRS 101 are not designed to reflect determinations of tax law.

29.6. The witness stated that the financial standards provide guidance on how to account for tax transactions, but they do not dictate tax matters. The witness gave evidence that withholding tax is a tricky area and it is one that is probably one of the most judgmental areas in the tax standard. The witness testified that for a withholding tax, if it is clear that the withholding tax is calculated based on a gross number, generally that would not be considered an income tax because it does not meet the definition of net under the concepts, but generally the judgment would be whether it is based on a net or a gross percentage.

29.7. The witness made reference to his report and stated that the IFRS Interpretation Committee of the International Accounting Standards Board was asked to comment on the appropriate classification of certain withholding taxes back in 2006 and 2009. The witness stated that the Committee reiterated the importance that for something to be an income tax and to be treated in the income tax line, there needs to be a net concept or a net component and the Committee was very clear that with taxes in general, not just withholding taxes, that are calculated based on a gross measure, are not an income tax and should be treated as an

operating expense above the line. The witness stated that he has seen withholding taxes both in the income tax line and presentation as an operating expense.

29.8. The witness made reference to paragraph 28 of his report and stated that in the context of foreign RWHT, in many cases that is a rate applied to a gross revenue number in a territory. The witness stated that therefore, it can be relatively easy to conclude that it may not be an income tax under the accounting rules, simply because it does not meet, or initially appear to meet the concept of a net component. But it is a much more nuanced judgment than that. The witness stated that there are a number of factors that a practitioner would consider to determine the appropriate accounting treatment, one being that in many jurisdictions, while you are applying a rate to a headline gross number, that rate, depending on the jurisdiction, may be reduced by deemed profit percentages. The witness testified that none of the factors are determinative by themselves and a full assessment of the nature and components of the withholding tax regimes in the country should be carried out to understand the true and most appropriate accounting treatment.

29.9. The witness made reference to the expert report of the Respondent's expert witness 1. The witness stated that FRS102 is not relevant here and it a completely different accounting framework. In relation to the reference to FRS16 by the Respondent's expert witness 1, the witness stated that it has been out of circulation for ten years and is completely irrelevant for the circumstances herein. The witness stated that he would not be competent to comment on FRS 16 at this stage, because it is so old and he cannot comment on the accuracy or otherwise of what FRS 16 said, because FRS 101 is the ruling framework herein. The witness said that the standard was developed in 2000 before any comment from the Interpretations Committee in 2006 and 2009 and at a time when the global tax landscape was significantly less complex than it is now. The witness testified that it is not a relevant standard for current accounting.

29.10. The witness testified that International Accounting Standard ("IAS") 12 is clear that withholding taxes on distributions received are income taxes, but that is where it stops, as IAS 12 does not comment on withholding taxes outside of distributions and that is where the judgment is. The witness stated that a distribution is in a profit, it is the residual after payment of expenses, so any

withholding tax that would be payable on a distribution would meet the net concept under IFRS.

29.11. In relation to FRS 102, the witness said that in FRS 102 the paragraph entitled "Withholding tax on dividends", is very specific with rules 29.18 and 29.19 and specific to the withholding tax on dividends and distributions, but it does not extend to be all encompassing for foreign RWHT.

29.12. The witness stated that he was not privy to the judgments the directors made in determining whether to record in the tax line or above the tax line, but that he has seen it done both ways. The witness stated that in any event the result is the same, it is just a matter of geography in the profit and loss account.

29.13. The witness was cross examined on his evidence by senior counsel for the Respondent. In relation to IAS 12, the witness stated that it is easy to determine that distributions are based on a net profit measure, but beyond that it is not easy to comment whether other withholding taxes are based on a gross or net concept, and that is why IAS 12 does not go any further and limits it to withholding taxes on distributions. The witness said that in trying to assess the appropriate accounting treatment for a withholding tax, if it is not clear that it is based on a net profit number, then further considerations are required in terms of judgement making, for example; is the amount applied to a gross number? Is there an implied profit reduction for that gross number? The witness stated that there are indicators for income tax and indicators against income tax and those need to be assessed to conclude on the appropriate determination. The witness stated that none are determinative, but they assist directors to make an informed judgment around the appropriate treatment. It was put to the witness that the Respondent's expert witness 1 considers FRS 102 to have some application herein. The witness stated that the Interpretations Committee guidance that has been quoted from 2006 and 2009, still remains the most appropriate, relevant and up to date commentary from the Interpretations Committee, as it applies to the accounting for withholding tax for FRS 101 reporters. FRS 16 is no longer an accepted framework to be adopted by accounting practitioners and its use is precluded by Irish law. The witness testified that the principles that are enunciated in FRS 16 have been overridden by FRS 101 principles.

Appellant's submissions

30. The Commissioner sets out hereunder a summary of the legal submissions made both at the hearing of the appeal and within the documents submitted in support of this appeal:

30.1. The foreign RWHT is deducted at source on the gross amount due under the IPLA and the applicable foreign RWHT is deducted and remitted in the jurisdictions of the operating entities from payments due to the Appellant.

30.2. During the relevant period there was no blanket rule against deductions for foreign taxes on income. There was no general provision or principle of tax law that precluded the deductibility of taxes where that taxation was not based on underlying profits. The foreign RWHT was not based on the Appellant's underlying profits.

30.3. The foreign RWHT is not a tax on profits and it represents a cost of doing business in the foreign countries, in which the operating entities provide services. The foreign RWHT is an expense that is revenue in nature and incurred wholly and exclusively for the purposes of the trade carried on by the Appellant.

30.4. Section 81(2)(a) TCA 1997 provides that a disbursement or expense will not be deductible where it is not "*wholly and exclusively laid out or expended for the purpose of the trade*". The seminal case is *Strong* & Co*. v Woodifield* [1906] AC 448 ("*Strong & Co.")* where it was determined that the phrase "*wholly and exclusively for the purposes of the trade*" should be read as meaning "for the purposes of earning the profits" of the trade.

30.5. The relevant case law does not establish any prohibition on the deductibility of taxes (taxes on income or otherwise). Rather, the case law such as *Ashton Gas Company v AG [*1906] AC 10 ("*Ashton Gas")* and *Inland Revenue Commissioners v. Dowdall O' Mahoney & Co. Ltd* [1952] AC 401. ("*Dowdall O'Mahoney*") establish that, taking the principle in *Strong & Co.*, expenses which are viewed as an application of profits are not deductible.

30.6. Given the facts of the Appellant's business the cost of the foreign RWHT was incurred in line with the judicial pronouncements on the meaning of wholly and exclusively for the purposes of the trade.

30.7. Schedule 24 TCA 1997 provides for a system of credits for foreign taxes on certain types of income. There is no absolute rule against a deduction for foreign taxes on income, it is the opposite. Schedule 24 TCA 1997, paragraph 7, provides

restrictions on the ability to take deductions in respect of foreign tax in circumstances where a taxpayer is accessing credit relief under Schedule 24 TCA 1997. If there is, as the Respondent claims, a blanket prohibition on the ability to take a deduction in respect of foreign taxes, there would be no need for such restriction where credit is claimed in paragraph 7 of Schedule 24 TCA 1997.

30.8. Paragraph 7(3)(a) of Schedule 24 TCA 1997 provides that where credit relief is claimed "*no deduction shall be made for foreign tax".* The Respondent's own Guidance Notes[10] state that: "*Where a credit for the foreign tax is allowable against any of the Irish taxes, no deduction for the foreign tax is to be made".*

30.9. It notable that the legislators considered it necessary to explicitly preclude the possibility of taking a deduction in respect of the relevant foreign tax on income where credit relief is "allowable". This clearly points to the starting position being a possibility of deduction in respect of foreign tax on income, absent this provision.

30.10. Paragraph 7(3)(c) of Schedule 24 TCA 1997 provides that notwithstanding paragraph 7(3)(a) of Schedule 24 TCA 1997, a deduction may be taken (up to the level of the 'Irish measure' of the income) in respect of any part of the foreign tax for which credit relief is not available: "*notwithstanding … clauses (a) and (b), where any part of the foreign tax in respect of the income … cannot be allowed as a credit … the amount of the income shall be … reduced by that part of that foreign tax…*". Whilst Paragraph 7(3)(c) of Schedule 24 TCA 1997 does provide for the possibility of a limited right of reduction in respect of foreign tax where credit is claimed, it must be viewed through the lens of Paragraph 7(3)(a) which, as a starting point, denies a deduction for foreign tax where credit relief is availed of.

30.11. Paragraph 7(3)(c) is granting relief from the earlier provisions of Paragraph 7(3)(a) (which deny a deduction where credit is claimed). Paragraph 7(3)(a) would not be necessary if the Respondent's starting premise was correct. This position is clearly supported elsewhere within the Respondent's Guidance Note. The Appellant agrees with the Respondent's Guidance Note that where credit is not claimed in respect of foreign tax, it should "generally be allowable as a deduction".

30.12. Paragraph 10 of Schedule 24 TCA 1997 is titled 'Miscellaneous' and provides that a taxpayer may elect out of the credit relief provisions of Schedule 24 TCA 1997.

[10] Booklet of Legislation and Guidance Material, page 219

It states that: *"Credit shall not be allowed … if the person in question elects that credit shall not be allowed in respect of that income*".

30.13. The Respondents' Guidance Note on paragraph 10 of Schedule 24 TCA 1997 is instructive as it speaks to the general position that applies when a taxpayer has elected out of the credit relief under Schedule 24 TCA 1997 whereby, in explaining the consequences of electing out of relief under Schedule 24 TCA 1997, the Respondent states that: "*A person may elect not to accept credit for the foreign tax ... In that event, the direct foreign tax borne on the foreign income would generally be allowable as a deduction in arriving at the foreign income chargeable to Irish tax*".

30.14. It is self-evident that these provisions would not have been necessary if there was, an overriding general prohibition against taking a deduction under section 81 TCA 1997, for foreign taxes on income.

30.15. The Respondent has released guidance[11] outlining the position in relation to the tax deductibility of Digital Services Tax ("DST"). DST is described therein as "*charges typically levied on revenues associated with the provision of digital services and advertising*". The Respondent's Guidance Note states that where the identified DST is suffered for the purposes of the trade "*Revenue is prepared to accept that they are deductible expenses in computing income of that trade*"

30.16. The foreign RWHT suffered by the Appellant in the relevant period was not creditable for Irish tax purposes. It follows that the general position should apply to the foreign RWHT and, as credit is not claimed in respect of the foreign RWHT, it should be allowable as a deduction in accordance with section 81 TCA 1997. The words "*would generally be allowable as a deduction*" are clear in this regard.

30.17. The High Court has affirmed that profit is not the 'amount earned'. It is not turnover, gross income or the receipts of a business. As a matter of Irish law, therefore, a cost deducted from 'receipts' cannot be viewed as a cost "made out of the profits" and so does not fall foul of Lord Davey's principle in *Strong* & *Co.* This distinction between receipts and profits was emphasised in the Judgement in *Sun Insurance Office v Clark* [1912] AC 443 which demonstrated that receipts are merely the starting point in any calculation of profits. This cardinal principle was subsequently endorsed as a rule of law of general application in the House of Lords decision of *Willingale v International Commercial Bank Ltd.* [1978] AC

[11] Book of Legislation and Guidance Material, page 408

834. Any argument by the Respondent that the foreign RWHT is in the nature of a tax on income or profits is incorrect and there is no legal basis for simply arguing that taxing gross receipts is the same thing as taxing profit.

30.18. Thus these cases establish the fundamental principle that profits must be appropriately calculated and ascertained before the application of income tax or corporation tax. This is the defining feature of the income tax/corporation tax system in Ireland and it is this feature that adheres with the logical principle regarding non-deductibility of income tax/corporation tax emerging in cases such as *Strong & Co*.

30.19. The payments subject to foreign RWHT do not represent profits. 'Profits' is the surplus of receipts over related expenditure. In this regard, a principle has emerged from the case law's interpretation of "*for the purposes of the trade*" that denies a deduction for taxes suffered on 'profits'. It is a fact that the foreign RWHT was suffered before the Appellant's actual business profits were ascertained and understood in any way and it is not a tenable argument that the foreign RWHT is a tax on profit.

30.20. *Ashton Gas* is authority for the general position and logical starting point that the profit of a taxpayer must first be ascertained before an income tax can be exacted from those profits. The Appellant's profit is not ascertained at the point of suffering the foreign RWHT. Therefore, the foreign RWHT cannot be seen as a portion of the Appellant's profits exacted by the relevant tax authority.

30.21. The foreign RWHT is not the Appellant's obligation, but rather an obligation imposed on the operating entities, which obligation results in the operating entities paying the Appellant less. The Appellant thus suffers the economic cost, but the legal reality is a number of steps removed from corporation tax/income tax (or indeed any tax) of the Appellant. Rather, it is a cost incurred by the Appellant.

30.22. *Strong & Co*. has been upheld by several subsequent House of Lords decisions. This principle was followed in *Smith's Potato Estates Limited v Bolland (Inspector for Taxes)* [1948] 30 TC 267 ("*Smith's Potato Estates Limited")*.

30.23. In *MacAonghusa v Ringmahon Company* [2001] 2 IR 507 ("*MacAonghusa")*, the Supreme Court considered the *Strong & Co.* decision to be good authority and applied the principles laid out therein in allowing the interest expense incurred by the taxpayer.

30.24. The decision of *Harrods (Buenos Aires), Ltd v Taylor-Gooby (HM Inspector of Taxes)* [1963] 41 T.C. 450 ("*Harrods*") is often cited as the seminal case on the distinction between deductible and non-deductible foreign taxes. The Court of Appeal found in favour of the taxpayer in holding that the substitute tax was a deductible trading expense. The Court (upholding Buckley J in the Chancery Division) held that there was a distinction between a tax applied to profits earned and a tax incurred for the purposes of earning the profits.

30.25. The decision in *Yates (Inspector of Taxes) v GCA International Limited* [1991] STC 157 ("*Yates"*) is distinguishable from the issue being considered in this appeal. The UK High Court held that the particular Venezuelan tax could be viewed as corresponding to UK corporation tax for the purposes of unilateral relief provisions. The decision was examining an entirely different legislative context and does not offer any guidance in relation to the interpretation of the specific provisions under consideration in this appeal. The Court did not assess the question as to whether the tax should be considered as incurred for the purposes of the trade, the question in this appeal.

30.26. In *Inland Revenue Board of Review Decisions (Hong Kong) Case No. D43.91* ("*Hong Kong*"), the Board ultimately found that each of the foreign taxes was deductible on the basis that the taxes were applied to the taxpayer's gross receipts, rather than on net income, and the taxpayer could not have gone on earning income without payment of the applicable taxes. The Board dealt with the irrelevance of the *Yates* decision to the question of deductibility of foreign taxes.

30.27. In the Commission's Determination 02TACD2018 ("the 2018 Determination"), the facts underpinning the 2018 Determination can clearly be distinguished from this appeal as the royalty income had been part relieved by the use of Schedule 24 TCA 1997. The interpretation of the law relating to the deductibility of foreign taxes as an expense was not appropriately considered as a consequence. The 2018 Determination relies on the incorrect assertion that a tax applied to gross receipts cannot be a deductible trading expense. That proposition was dispelled in the *Hong Kong* decision on the basis of the *Harrods* decision. The 2018 Determination accepted the arguments of counsel for the Respondent, that where a tax arises on income, the tax cannot be said to have been incurred for the purposes of earning that income, but the argument is entirely flawed once the relevant case law and statutory framework is properly taken into account.

30.28. In the Commission's Determination 08TACD2019 ("the 2019 Determination"), it was held that notwithstanding the foreign withholding tax may be a 'tax on income', such tax could still constitute a deductible trading expense on the basis that it was not applied to underlying net profits which have been ascertained after the deduction of relevant expenditure. The 2019 Determination expressly disagreed with the Respondent regarding the relevance and interpretation of the *Yates* decision.

30.29. The 2019 Determination stated that the *Yates* decision was irrelevant to the determination of the appeal. The 2019 Determination is correct in this regard and the correct focus is to consider whether the withholding tax was suffered on gross amounts prior to the ascertainment of profit for the purposes of the Appellant's trade.

30.30. The 2019 Determination was correct to hold that the *Dowdall O'Mahoney* and *Ashton Gas* decisions are to be distinguished from the facts in the 2019 Determination, as those cases dealt with taxes applied to profits. Unlike the Appellant in the 2018 Determination, but similar to the Appellant in the 2019 Determination, the Appellant herein is not claiming credit relief pursuant to Schedule 24 TCA 1997, in relation to the foreign RWHT.

30.31. Reference was made to Commissioner Millrine's Determination in 128TACD2023 ("the 2023 Determination") and Commissioner O'Driscoll's Determination in 47TACD2024 ("the 2024 Determination") ("the recent TAC Determinations"). On the basis that the legal issues and factual circumstances of the recent TAC Determinations were similar to the legal issues and factual circumstances herein, the findings of Commissioner Millrine and Commissioner O'Driscoll in the recent TAC Determinations should apply equally to the current appeal.

30.32. In the alternative, reliance is also placed on section 81(2)(e) TCA 1997 and that the foreign RWHT suffered by the Appellant was an allowable deduction as expended wholly and exclusively for the purposes of the trade and properly considered either as an expense or as a loss, but in either event, as an allowable deduction.

Respondent's evidence

31. The Respondent's expert witness 1 gave expert evidence at the hearing of the Appeal. The Commissioner sets out hereunder a summary of the evidence given by the expert witness:-

31.1. The witness confirmed that he has been a Chartered Accountant since [redacted] The witness stated that he has lectured in [redacted], on the topic of accounting standards.

31.2. The witness testified that he agreed with the tax treatment being a tax charge, because it is based on a notional profit figure, in that the income has been earned abroad. The witness stated that the countries that deduct withholding tax, do so for administration purposes, as the only way that those countries can get their hands on the tax, is to take it off the turnover. The witness said that to his mind, it is basically a form of income tax, which is hopefully recoverable through DTAs, but if it is not, then it is unfortunately irrecoverable. The witness gave evidence that it is basically a tax on a notional profit, not actual profit.

31.3. The witness testified that there is no difference, in terms of the basic concepts and principles between FRS 102 and the full conceptual framework and both refer to the fact that there is a need to recognise income and expenses and that income and expenses are the leftovers. The witness stated that there is no difference in the definition of an asset, liability, income or expense in the standards, and in fact it is actually compulsory to use that particular section of FRS 102 for local companies, but not for international companies, whereby it is merely used as guidance. The witness testified that they are essentially the same.

31.4. The witness said that his references to FRS16 were to bring in the history of where FRS 101 emanated. The witness stated when that looking at the substance of any transaction all the material available should be considered, whether it be historical or regulations in another jurisdiction. The witness testified that there was an income that was earned in those foreign jurisdictions and those foreign jurisdictions cannot get access to the profits that are earned, because they do not have a physical presence in that country. Therefore, those jurisdictions “want to get a piece of the action in terms of taxation”, so they use the gross income as the basis of getting to that tax, as there is no other way it can be done. The witness said that he would agree with the comment that it is a proxy for what the entity would have paid had it a physical presence in that jurisdiction. The witness stated

that it is in substance a tax on profits and that is why the accounting standards treat it as a tax charged below the line.

31.5. The witness was cross examined by senior counsel for the Appellant. It was put to the witness that the dispute between the parties that he referenced in his report was not actually the issue in dispute, as the dispute in this case is whether or not the foreign RWHT is a deduction for tax purposes. The witness confirmed his agreement that the accounting standard which applies to the Appellant is FRS 101. The witness agreed that FRS 102 does not apply to the Appellant and the witness agreed that the objective of general purpose financial reporting is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders and other creditors. The witness agreed that there is a difference between receipts and profit, such that receipts are a gross number and profit is what you get once expenses are deducted. The witness stated that profit is the same as income in a situation where expenses are zero and the witness stated that expenses in the various jurisdictions are zero, because they there is no physical presence in those jurisdictions. It was put to the witness that the jurisdiction that gets to tax profit is the country of residence. It was put to the witness that the paragraph "withholding tax on dividends" in FRS 102 does not apply to the Appellant and the witness agreed that it only referred to dividends and not royalties. The witness agreed that FRS 101 and FRS 102 are two different standards. The witness agreed that financial statements do not purport to give a tax determination and do not purport to deal with tax deductibility in accordance with the tax acts. The witness confirmed his view that the various jurisdictions are concerned about getting a tax on the income being earned in the respective jurisdictions. The witness stated that turnover and gross receipts are the same. The witness was asked if he agreed that if a company cannot in some way recoup the withholding tax by way of a deduction, then that would be an irrecoverable cost. The witness stated that it is a cost of doing business in that jurisdiction, but that there was a decision to go to that jurisdiction. The witness stated that the entity could have set up a branch in each jurisdiction and it would have been paying local taxes on the profits earned.

Respondent's submissions

32. The Commissioner sets out a summary hereunder of the submissions made both at the hearing of the appeal and in the documents submitted in support of this appeal:

32.1. Where foreign RWHT has been applied in a DTA state and the relevant treaty provides for a credit, relief by way of credit will be available in accordance with section 826 TCA 1997 and Schedule 24 TCA 1997. In accordance with paragraph 4(1) of Schedule 24 TCA 1997, the amount of allowable credit shall not exceed "*the corporation tax attributable to that income*". This means that the credit cannot exceed the Irish corporation tax payable on that particular stream of income. This is known as the Irish measure.

32.2. The term "income" for the purpose of the Taxes Acts (as for accountancy purposes) is always a reference to net income. While there is no statutory definition of income in the TCA, section 76(1) TCA 1997 provides that, except where otherwise provided by the Tax Acts, "*the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles*".

32.3. Section 4 TCA 1997, entitled Interpretation of the Corporation Tax Acts, defines "profits" as meaning income and chargeable gains and section 76A(1) TCA 1997 provides that the "*profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes*".

32.4. In addition, a further measure of relief will be available by means of reduction of income under paragraph 7(3)(c) of Schedule 24 TCA 1997. This means that where the foreign effective tax rate is higher than the Irish effective tax rate (such that not all of the foreign RWHT may be credited against Irish corporation tax) a measure of double tax relief will be available for the non creditable foreign tax by way of reduction of the income

32.5. The Respondent's consistent interpretation of paragraph 7(3)(c) of Schedule 24 TCA 1997 must be read in light of paragraph 4(2A) of Schedule 24 TCA 1997 in relation to income streams covered by paragraph 4(2A) (i.e. royalties and interest taxed as trading income). The term "income" in paragraph 7(3)(c) of Schedule 24 TCA 1997 is a reference to net income. The net income is calculated by reference to the formula for obtaining the Irish measure of the foreign income (which rateably apportions the tax adjusted trading profit of a company to the relevant foreign income).

32.6. It is this net income figure which can be "reduced" by way of relief under paragraph 7(3)(c). The effect of this is that if the taxpayer does not have net income after

deductions relating to the foreign income stream, no further reduction can be obtained. The income cannot be "reduced" below zero.

32.7. If the taxpayer could reduce the income below zero, and create or augment a loss, the taxpayer would effectively be compensated for foreign tax rather than receiving double taxation relief

32.8. Where the foreign RWHT has been applied in a non DTA jurisdiction, then credit relief may be available if the provisions for unilateral credit relief in paragraph 9DB of Schedule 24 TCA 1997 apply. The reduction provided under section 77(6B) TCA 1997 cannot reduce the Irish measure of that income below zero, i.e. a loss cannot be created.

32.9. Foreign RWHT is not deductible as an expense under section 81 TCA 1997 as it is a tax on income. Any assertion to the contrary would be inconsistent with the entire scheme that exists, both in Irish tax law and international double taxation treaties, for relieving double taxation. The very basis on which double taxation relief is available to the Appellant under Ireland's DTAs and/or under Schedule 24 TCA 1997 is that foreign RWHT is a tax on income.

32.10. Foreign RWHT is a tax on income from the trade and is not an expense laid out wholly and exclusively for the purposes of earning profits of the trade. The 2018 Determination supports this conclusion.

32.11. The 2018 Determination determined that it is important to consider the sequence of events at issue such that "[*e]xpenses deductible for the purposes of [section 81(2)(a) TCA 1997] are incurred in the course of a trade prior to the generation of income in the form of sales"* and the fact that foreign RWHT is imposed on a gross income figure in the source state *"does not transform the tax into an expense or a tax deductible expense*"

32.12. The features of the Argentinian tax considered in the *Harrods* decision are far removed from the case of foreign RWHT. The tax in *Harrods* was imposed on capital not income, there is no suggestion that the same kind of sanction would arise from non-payment of foreign RWHT. Foreign RWHT cannot logically be seen as a pre-condition of doing business, as was the case with the tax in the *Harrods* decision.

32.13. The *Hong Kong* decision is of no assistance to the Appellant and carries little weight in terms of it being an administrative decision from 30 years ago, by a board in Hong Kong.

32.14. The 2018 Determination found that as foreign RWHT on royalty income was in the nature of a tax on income, *Dowdall O'Mahoney* was an authority which supported Revenue's case therein.

32.15. The 2018 Determination determined that the element of volition discussed in the *Allen (HM Inspector of Taxes) v Farquharson Brothers & Company* 17 TC 59 ("*Allen v Farquharson*") decision is absent in the case of the payment of foreign RWHT. It was determined that the unavoidable nature of the foreign RWHT rendered it less likely to comprise a deductible expense.

32.16. Any reliance on the 2019 Determination is misplaced, as the facts are considerably different to the facts at issue in this appeal. The key differentiating facts were that the Appellant's business was that of a market maker in the trading of stocks and equity options, DWT was an "unavoidable consequence" of its trading activities, unlike foreign RWHT which arises from a licensing right and is earned, dividend income is not earned, as the entitlement to the dividend simply arises from being the holder of record on the payment date of the stock.

32.17. The fundamental issue in terms of the 2019 Determination, was that it simply does not address the issues that arise in relation to Part 35 and Schedule 24 TCA 1997, which sets out the specific provisions for relief from double taxation. It does not address the Respondent's arguments in that regard, the same arguments that are made in this appeal in relation to the specific provisions for relief for double taxation.

32.18. There are very significant differences between the 2018 Determination and the 2019 Determination. The 2018 Determination provides the most relevant guidance for this appeal. While not binding, there is no good reason to depart from the reasoning of the 2018 Determination on the facts of this appeal.

32.19. Section 81(2) TCA 1997 was amended by Finance Act 2019 by the insertion of a specific category of disallowed deduction at section 81(2)(p), being "*any taxes on income*". This amendment postdates the tax years at issue in these appeals and is not relevant to the issues which the Appeal Commissioner must determine. Reference was made to the decision in *Cronin (Inspector of Taxes) v Cork and County Property Co. Ltd.* [1986] I.R. 559 ("*Cronin*") wherein the Supreme Court held that a court cannot construe a statute in light of amendments subsequently made to it.

32.20. Reference was made to the principles of statutory interpretation and in particular to the decision in *Hanrahan v the Revenue Commissioners* [2024] IECA 113 ("*Hanrahan*"). Not only should the plain and ordinary meaning of the words be considered, but also the context and the overall purpose of the statute. When looking at a particular section within the Act, consideration must be given to the other provisions within the TCA which might be more specific or relevant.

32.21. The 2023 Determination and the 2024 Determination move straight to the consideration of section 81 TCA 1997, without consideration first being given to the specific provisions for relief for double taxation namely, Schedule 24 TCA 1997. This was an error in the Determinations and the Commissioner had no right to consider the applicability of section 81 TCA 1997, as it is not relevant in light of Schedule 24 TCA 1997.

Material Facts

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

33.1. In addition to the findings of material fact, the Commissioner finds that the facts as set out in the document entitled "Agreed Statement of Facts" and which is attached herein at **Appendix 1** to this Determination are also material facts found.

33.2. The Appellant's principal activities consist of [redacted].

33.3. The Appellant is a member of the group of companies.

33.4. The group is a [redacted].

33.5. [redacted]

33.6. The group relies on a centralised repository of IP [redacted].

33.7. The Appellant controls the IP used by the various operating entities and is responsible for global intellectual asset development and management within the group.

33.8. The Appellant controls and funds the development of the IP.

33.9. Each of the group's operating entities requires access to the Appellant's IP [redacted].

33.10. During the relevant period, the Appellant granted access to the IP to each of the operating entities under the IPLAs enabling the operating entities to provide [redacted] within the jurisdictions under the group name. In return, the operating entities paid a royalty to the Appellant.

33.11. During the relevant period, the foreign RWHT incurred by the Appellant was by way of deduction from the payments from the operating entitles.

33.12. During the relevant period, the rate of foreign RWHT depended on the particular country from which the Appellant was paid.

33.13. During the relevant period, the Appellant did not have a branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions in which it licensed its IP to the operating entities located there.

33.14. When a royalty payment was made, RWHT was applied on the gross royalties payable, regardless of whether a profit or loss was generated on that transaction.

33.15. Foreign RWHT is in the nature of a tax on income.

33.16. During the relevant period, and in light of its financial circumstances at that time, the Appellant was not in a position to avail of a credit pursuant to Schedule 24 TCA 1997, for foreign RWHT withheld on its royalty income.

33.17. During the relevant period, it was open to the Appellant to elect not to take a credit pursuant to Schedule 24 TCA 1997.

33.18. Foreign RWHT was a cost for the Appellant of doing business in the foreign jurisdictions and this was confirmed by the Respondent's expert witness 1.

33.19. Many compulsory deductions imposed are permissible as a deductible expense pursuant to section 81 TCA 1997, such as Irish and foreign stamp duty, Irish and

foreign irrecoverable VAT, rates levied on commercial property, local authority charges, employer's PRSI and the DST.

33.20. The foreign RWHT was an amount that was suffered by the Appellant on its gross income and was never received by the Appellant.

33.21. The full amount, including the amount that was never received by the Appellant was invoiced to the operating entity and that invoice amount was the amount that was reflected in the Appellant's financial statements for the relevant period, including the amount that was never received.

33.22. It is of no consequence in this appeal whether the Appellant's financial statements showed foreign RWHT "above the line" or "below the line", as the financial statements provide guidance on how to account for tax transactions only, but they do not dictate tax matters.

Analysis

34. The appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* [2010] IEHC 49, at paragraph 22, Charleton J. stated 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".

35. It appears the statements regarding the evidential burden made by Charleton J. in *Menolly Homes* are premised on the information relating to the matter or matters which must be proved in a tax appeal, being within the particular knowledge of the Appellant. The passage at paragraph 22 as set out above by the Commissioner is much quoted before the Commission and means that in this appeal all factual issues arising should stand to be proved by the Appellant.

36. Of note however, is the recent Judgment in *Hanrahan*, where the Court of Appeal considered the burden of proof when the issue is not one of ascertaining the facts and the issue is one of law only. At paragraph 97 and 98 the Court held that:

"*97. Where the onus of proof lies can be highly relevant in those cases in which evidential matters are at stake……..*

98. In the present case however, the issue is not one of ascertaining the facts; the facts themselves are as found in the case stated. The issue here is one of law;.....Ultimately when an Appeal Commissioner is asked to apply the law to the agreed facts, the Appeal Commissioner's correct application of the law requires an objective assessment of what the law is and cannot be swayed by a consideration of who bears the burden. If the interpretation of the law is at issue, the Appeal Commissioner must apply any judicial precedent interpreting that provision and in the absence of precedent, apply the appropriate canons of construction, when seeking to achieve the correct interpretation……."

(i) The Issues

37. The Appellant's appeal relates to three Notices of Determination issued by the Respondent denying the Appellant a deduction in accordance with section 81(2)(a) TCA 1997, for foreign RWHT suffered on royalty payments for the use of IP by the local operating companies, located in certain jurisdictions.

38. As such, it should be understood that in seeking a deduction in accordance with section 81 TCA 1997, the Appellant was not taking a credit in accordance with Schedule 24, in respect of the foreign RWHT. The Appellant submits that it was simply seeking to pay Irish tax (in addition to the foreign RWHT) only on the amounts actually received by the Appellant.

39. At the outset the Commissioner considers it relevant to state that the Appellant was in a non-profit making or loss making scenario for the relevant period. In circumstances where the Appellant had no profits in Ireland, the result was that it payed no Irish corporation tax in this jurisdiction for the relevant years. The Appellant submitted that in those particular circumstances, there was no credit available to the Appellant under Schedule 24 TCA 1997. Schedule 24 TCA 1997 provides that for an accounting period, the trading income of a trade carried on by a company, including royalties, the amount of the income relating to that royalty income chargeable to tax may be reduced by the relevant foreign tax attaching to that income. However, the reduction is limited to the amount of the income for corporation tax purposes relating to the relevant royalties i.e. the Irish measure of the income.

40. Furthermore, the Appellant argued that even if the Appellant was in a position to avail of a credit in accordance with Schedule 24 TCA 1997, it was not mandated to do so, in

accordance with paragraph 10 of Schedule 24 TCA 1997, which provides that an entity may elect to take a credit. The Appellant stated that the availability of a credit does not preclude an entity from considering the foreign RWHT as a deduction under the general provisions of section 81 TCA 1997.

41. The Commissioner notes the evidence of the Appellant's witness 2 that he confirmed that [redacted]. The witness also confirmed that the foreign RWHT was the amount that was suffered by the Appellant and never received, that the full amount was invoiced to the operating entities, including the part that was never received by the Appellant and that the invoice amount was the amount in the Appellant's financial statements, including the amount that was never received by the Appellant.

42. In summary, the Respondent's position is that section 81 TCA 1997 was unavailable to the Appellant for the purpose of relieving foreign RWHT incurred and that Schedule 24 TCA 1997 was the appropriate mechanism to deal with foreign RWHT incurred, despite the Appellant having paid no corporation tax in this jurisdiction to enable it to claim a credit in accordance with Schedule 24 TCA 1997. The Respondent posited that it was therefore the position that the foreign RWHT was unrelieved tax paid.

43. Moreover, the Respondent argued that the correct approach to consideration of the foreign RWHT incurred by the Appellant, was to consider the exact provisions which cater for foreign RWHT i.e. Schedule 24 TCA 1997, which in the Appellant's circumstances provided no credit, as no corporation tax was paid in this jurisdiction. However, it was not the case that in circumstances where credit was not to be allowed in accordance with Schedule 24 TCA 1997, the Appellant was entitled to treat foreign RWHT as a deductible expense in accordance with the general provisions of section 81 TCA 1997. The general provisions in section 81 TCA 1997 were not available to relieve the imposition of the foreign RWHT incurred by the Appellant, when there existed special provisions in the TCA, which specifically catered for foreign RWHT incurred.

(ii) The Expert Witnesses

44. The Commissioner heard evidence from three expert witnesses in this appeal. The duty of an expert witness is to assist the Commissioner by providing evidence based on their knowledge, experience, and qualifications. An expert witness should at all stages provide independent assistance to the court or tribunal, by way of objective unbiased opinion, in relation to matters within the expertise of the expert witness. The fundamental requirements of an expert witness are objectivity, impartiality and independence.

45. In terms of the approach the Commissioner must take in relation to her consideration of expert evidence in any appeal, the Commissioner is mindful of the *dictum* of Mr Justice Clarke in the Supreme Court in *Donegal Investment Group plc v Danbywiske and others* [2017] IESC 14, wherein Clarke J. set out the role of a trial judge in considering expert evidence as follows:

"5.1 A starting point has to be to identify the proper role of a trial judge in assessing expert evidence. Charleton J. explained that role in James Elliott Construction Limited v. Irish Asphalt Limited [2011] IEHC 269, (para. 12 of the judgment) in the following terms:-

> *"Every expert witness has to be evaluated on the basis of sound reasoning. An expert witness is, however, no different to any other witness simply because he or she is entitled to express technical opinions; all of us are subject to human frailty: exaggerated respect based solely on a witness having apparent mastery of arcane knowledge is not an appropriate approach by any court to the assessment of expert testimony. Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability."*

5.2. In setting out the reasons why he preferred certain expert testimony over others in that case Charleton J. went on to say that:-

> *"Of these criteria, the most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been genuinely and objectively considered on the basis of their merit. A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team. Of particular importance in this case, therefore, has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view. As with demeanour, this is not readily demonstrated on a transcript of evidence. Rather, to a trial judge, it can be possible to see the degree to which a witness is thinking through the potential for an opposing theory before giving a reasoned answer. Experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and*

reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important."

……

5.6 While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and common sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis."

Expert Accounting Evidence

46. The Commissioner heard expert evidence from two witnesses in relation to accounting treatment and the financial standards. It is a well-established principle that a tax liability has to be determined by reference to the taxing provisions of the legislation. The Commissioner is satisfied that the accounting principles referred to are generally accepted accounting principles ("GAAP") which are non-statutory and non-binding guides, as to how a set of accounts is approached and that those accounts are frequently matters of judgment. Certainly, the Commissioner considers that the evidence of both expert witnesses confirmed that statement. The way a tax liability may be treated for accounting purposes may be different in certain circumstances.

47. Moreover, the Commissioner notes the uncontroverted evidence that the standards are industry agnostic and tax agnostic, such that they purely apply the rules of accounting and they do not deem to accommodate for any specific tax rules. The Appellant's expert witness 2 stated that there are tax aspects to the standards in the accounting rules, but they do not accommodate industry or tax specific matters. The witness confirmed that financial statements under FRS 101 are not designed to reflect determinations of tax law and that the financial standards provide guidance on how to account for tax transactions, but they do not dictate tax matters. It is not in dispute that the Appellant's Financial Statements were prepared in accordance with FRS 101. The experts agreed that FRS 102 is not applicable nor is FRS 16 which is now retired over ten years and replaced.

48. The Appellant has recorded foreign RWHT "below the line". The Commissioner notes the evidence of the Appellant's expert witness 2 that he has seen foreign RWHT recorded both above the line and below the line. The witness testified that FRS 101 is a principles based standard and one of the core components of the standard is the exercise of

judgment in preparing financial statements. The witness said that given the complexity of the business environment, there is no way that a set of accounting standards could accommodate all possible transactions, so there is a significant level of judgment involved in a number of key transactions and how to account for those in the context of the broad principles of the accounting standard. The witness testified that generally financial statements are prepared for the benefit of the shareholders, existing shareholders or potential shareholders, but they can also be used by creditors, lenders and other users.

49. The Commissioner notes the evidence of the Appellant's expert witness 2 that withholding tax is a tricky area and it is an area that is probably one of the most judgmental areas in the standards. The witness testified that in relation to withholding tax, if it is clear that the withholding tax is calculated based on a gross number, generally that would not be considered an income tax, because it does not meet the definition of net under the concepts. The witness stated that generally the judgment in that area is around whether the tax is based on a net or a gross percentage.

50. The Commissioner was directed by the Appellant to the decision in *Sun Insurance Office v Clark* [1912] AC 443 wherein at page 460 of the Judgment Lord Atkinson in the House of Lords, refers to the decision in *Gresham Life Assurance Society v Styles (Surveyor of Taxes)* [1892] AC 309 and he states that:

> "*A little consideration of one of the most illuminating authorities in the books upon this question of the mode of ascertaining the taxable gains and profits of trading and commercial businesses, namely, Gresham Life Assurance Society v. Styles (1), will show conclusively that, consistently with that authority, no such rule could be laid down as a matter of law. The very nature of the thing forbids it. That case clearly decided that the receipts of a business are not in themselves profits and gains within the meaning of the Income Tax Act; but that it is what remains of those receipts after there has been deducted from them the cost of earning them which constitutes the taxable profits and gains*".

51. In stark contrast, the Respondent placed considerable emphasis on the manner in which the Appellant's financial statements were prepared. Before setting out the position that is posited by the Respondent herein, the Commissioner considers that it is important to note that in the 2023 Determination, the Respondent submitted that the evidence of the two expert witnesses, both of whom were addressing accounting standards, was by no means central either way to the appeal and not in any way determinative. The Respondent's arguments herein appears to be a departure from the position it previously held, as set out in paragraph 43 of the 2023 Determination.

52. In this appeal, the Respondent argued that the starting point for any tax computation is the financial statements and that section 76A (1) TCA 1997 is relevant. Section 76A(1) TCA 1997 provides that the "*profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes*". The Respondent submitted that in order to identify the amount of the foreign royalty income that is actually chargeable to corporation tax, it is necessary to apportion expenses and reliefs to the royalty income and that expenses are matched with revenues generated, before consideration is given to any further reliefs which might be available pursuant to the Taxes Acts. Counsel for the Respondent submitted that the accounting evidence and the relevance of the accounting is most important. The Respondent submitted that the Appellant is trying to reclassify an amount which is within the accounts considered to be a below the line tax as a deductible expense. However, section 76A TCA 1997 makes it clear that the generally accepted accounting principles are followed in relation to the accounts and consideration is then given to the income to get the taxable income which is the amount after whatever expenses might be allowed. The accounts provide a proper picture of what the income is that will be subject to corporation tax. Senior counsel for the Respondent submitted that section 76A TCA 1997 is the starting point and end point in terms of considering what income is chargeable to tax and it is the income as per the financial statements.

53. The Commissioner notes that it is submitted by the Respondent that whilst there is no statutory definition of income in the TCA 1997, section 76(1) TCA 1997 provides that, except where otherwise provided by the Tax Acts, "*the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles.*"

54. The Commissioner is satisfied that having considered the expert evidence and facts herein, the evidence in relation to the accounting standards is by no means central to this appeal and not in any way determinative of the question of the availability of section 81 TCA 1997. This is the same conclusion that the Commissioner came to in the 2023 Determination and whilst not bound by her previous findings, the Commissioner considers that there is no reason to depart from her findings therein. This appeal relates to the application of Schedule 24 and section 81 TCA 1997 and whether the Appellant prepared its accounts "above the line" or "below the line" is not seminal.

55. The expert evidence assisted the Commissioner with her understanding of the various standards and the judgement that is applied to a set of accounts, in circumstances where the standards are principles based and do not provide a rigid and inflexible set of rules.

But the Commissioner considers that the appeal herein is concerned with the manner in which the TCA 1997 is applied, specifically how deductions and credits should be applied, and not accounting principles and that as per the evidence adduced, the accounting standards are subjective and adopt a principles based approach.

(iii) Is foreign RWHT a tax on income

56. The Commissioner will initially consider what the nature of the income is. The Commissioner observes that it is the Respondent's position that the foreign RWHT deducted in the source State (whether that source State is a DTA country or a non-DTA country) are taxes on income. In addition, the Commissioner observes that it is the Respondent's position that the fact that foreign RWHT may be applied to the gross income, should not be taken as an indication that foreign RWHT is not in the nature of a tax on income or profits.

57. The Respondent argued that the very basis on which double taxation relief is available under Ireland's DTAs and under Schedule 24 TCA 1997, for foreign RWHT incurred, is that foreign RWHT are taxes on income. The Respondent submitted that "*any assertion to the contrary would be inconsistent with the entire scheme that exists, both in Irish tax law and international double taxation treaties, for relieving double taxation*"[12]. As an example, Counsel for the Respondent directed the Commissioner to the DTA between Ireland and [redacted] where on the front page of the agreement it states "*Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*". [Emphasis added] The Respondent argued that the tax on income is avoided if the Appellant had carried on its business through a permanent establishment in each of the jurisdictions and that this is reflected in the DTA [redacted]

58. The Respondent submitted that if the Appellant had profits in Ireland, on the very same royalty income it would have applied for a credit in accordance with Schedule 24 TCA 1997, which is an acknowledgment that foreign RWHT is a tax on income, because it cannot claim a credit under Schedule 24 TCA 1997, unless the Appellant comes within the DTA, being a tax on income. The Respondent argued therefore if a credit is claimed, it is an acknowledgment that the foreign RWHT is a tax on income. The fact that the Appellant had no profits was of no consequence, such that the Appellant simply did not obtain credit relief, but it was not open to the Appellant to pick and choose, such that if it had profits it would concede that foreign RWHT was a tax on income, but in

[12] Booklet of Appeal Documents, page 320

circumstances where there were no profits, it claimed it was an expense to which section 81 TCA 1997 applied. Furthermore, the Respondent stated that it is "*a matter for the Appellant in terms of deciding their modus operandi and how they wish to operate and sell, or licence their IP into other jurisdictions…..if they decide to simply have ILPAs, well as a natural consequence of that they're going to suffer withholding tax, and if they're in a loss making position here, in accordance with the Taxes Consolidation Act they're not going to get any relief in respect of that foreign tax that was suffered abroad*."[13]

59. The Respondent argued that Part 35, section 826, schedule 24, section 77(6B) TCA 1997 and the whole global system that exists in terms of the alleviation of double taxation would be rendered nugatory, if the Appellant's assertions are accepted. The Respondent stated that in effect, the import of the 2023 Determination and the 2024 Determination is that tax on income is an expense and not a tax, and this calls into question the whole system of DTAs. Moreover, the Respondent submitted that it did not matter if the foreign RWHT was applied to the gross income or not, it was of no consequence as this was a tax on income, relievable in accordance with Schedule 24 TCA 1997.

60. The Respondent argued that the *Yates* decision deals with the real core issue herein, namely that these were taxes on income and the entitlement to relief derived from Schedule 24 TCA 1997, because they were recognised as taxes on income pursuant to the DTAs. The Respondent submitted that even if they were calculated in a crude manner, the *Yates* decision makes it clear that they come within the ambit of a tax on income. To suggest that foreign RWHT was an expense incurred and that it was incurred "*wholly and exclusively for the purpose of the trade*" was a red herring. Section 81 TCA 1997 was simply not applicable herein.

61. Conversely, the Appellant's position is that income tax or corporation tax is ascertained on the net income of a company, such that it is the profits earned by a company, taking its gross revenue and then deducting its operating expenses to arrive at its net income or profit. The Commissioner accepts this as uncontroversial. The Appellant argued that as foreign RWHT was applicable to gross receipts, it could not be a tax on profit. The Appellant stated that if it was a tax on income, then income means gross receipts as the tax was applied on the "journey to profit" as the foreign RWHT was applied without consideration of the Appellant's position. Foreign RWHT incurred by the Appellant was

[13] Transcript, Day 2, page 119

not a tax on the profits (net income) of the trade, but rather an unavoidable cost of its business and earning its profits of the trade.

62. The Commissioner has considered both parties' arguments in relation to the DST and the Respondent's Tax and Duty Manual[14] dated September 2022, in relation to the manner in which the Respondent approaches this tax. The Commissioner understands that the DST is levied in a number of jurisdictions and is a charge typically levied on gross revenues associated with the provision of digital services and advertising.

63. The Commissioner observes that the Respondent is prepared to accept that the DST is a deductible expense, on a case by case basis, if it has been incurred wholly and exclusively for the purposes of the trade. The Commissioner notes that senior counsel for the Respondent submitted that "*DST is a relatively new phenomenon.....the DTAs took a long time to evolve and I suspect there is probably an element of catch-up that will go on in due course. But from Revenue's perspective Revenue do not consider it to be a tax on income as such….whatever about the treatment of DST…it's of no consequence because the tax that you are concerned with is withholding tax on royalty income from abroad and the TCA has made specific provision as to how any deduction in respect of that is to be treated.*"[15] The Commissioner notes that it is the Respondent's submission that DST has limited application only to a small number of companies. The Commissioner agrees with the Appellant's submissions that this is not a basis for giving different tax treatment and that it is a most extraordinary position when distinguishing what is to be a deduction or not.

64. Of importance, the Commissioner observes that this is a tax on income which is deductible in accordance with the provisions of section 81 TCA 1997, in addition to the list as aforementioned. Thus, the Commissioner is satisfied that there is no bar to a tax on income being treated as a deduction for the purposes of section 81 TCA 1997, certainly the Respondent in its approach to the DST seems to confirm that a tax on income is capable of being treated as a deductible expense, but that it first must meet the test for deductibility, such that it was incurred wholly and exclusively for the purposes of the trade.

65. In congruence with her findings in the 2023 Determination, the Commissioner is satisfied that foreign RWHT is **a tax on income**. Nonetheless, the Commissioner is satisfied, as previously held, that this finding is not fatal to the Appellant's appeal. This finding is also in accordance the 2019 Determination, where it was held that "*there is no general*

[14] Booklet of Legislation and Guidance Material, page 408
[15] Transcript, Day 2, page 222

principle of law that specifically denies a deduction for taxes in accordance with the prescribed rules as set out under TCA, Section 81, where those taxes are not calculated after the ascertainment of profit."

66. Whilst the 2019 Determination and the 2023 Determination are not binding on the Commissioner herein, such that the Commissioner is free to come to a different conclusion, the Commissioner considers that those determinations are particularly relevant to this appeal and moreover, to be a correct analysis of the law in relation to a tax on income. The Commissioner is satisfied that foreign RWHT, being in the nature of a tax on income, does not automatically exclude it from consideration as a deduction under section 81(2)(a) TCA 1997. The Commissioner understands there to be many compulsory deductions imposed in the form of taxation that are permissible as a deduction pursuant to section 81 TCA 1997.

67. Furthermore, the Commissioner is satisfied based on the uncontroverted evidence of the Appellant's witnesses that the tax on income is a tax on the gross income or receipts of the Appellant, this includes the Appellant's expert witness 1 and the evidence in respect of the manner in which the foreign RWHT is applied in [redacted].

68. Before proceeding to consider the application of Schedule 24 TCA 1997 and the availability of section 81 TCA 1997, the Commissioner considers it appropriate to set out next herein, the jurisprudence establishing the well settled principles of statutory interpretation relating to taxation statutes.

(iv) Statutory interpretation

69. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

> "*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60.*

Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then 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 possible."

70. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

71. Furthermore, the Commissioner is cognisant of the decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the *dictum* of Murray J., wherein he stated that when interpreting a statute it must be borne in mind that:

"108…It is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".

116 … the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole…"

72. The *dictum* of Murray J in *Heather Hill* was considered and approved by the Court of Appeal in the recent decision in *Hanrahan*. The Court of Appeal noted that the trial judge had cited and relied on the approach to the interpretation of taxation legislation that

Murray J. in the Court of Appeal identified in the decision of *Used Car Importers Ireland Ltd. v Minister for Finance* [2020] IECA 298. Murray J., when considering the provision at issue, at paragraph 162 of the Judgment stated that:

"[it] *falls to be construed in accordance with well-established principle. The Court is concerned to ascertain the intention of the legislature having regard to the language used in the Act but bearing in mind the overall purpose and context of the statute.*"

73. Moreover, the Court of Appeal in *Hanrahan* at paragraph 83 held that:

"*Thus, the High Court correctly held that in interpreting taxation statutes generally, context and purpose are relevant. Therefore, not only does s. 811 direct Revenue and the court to have regard to the purpose of the provisions at issue but even in a more general manner the context and purpose of the statute is relevant."*

74. Of note, the Court of Appeal in *Hanrahan* at paragraph 79, when referring to the *dictum* of Murray J. in *Heather Hill,* in relation to the analysis of context and purpose, it stated that:

"Murray J. was very alive to the dangers of pushing the analysis of the context of the provision too far from the moorings of the language of the legislative section; the line between the permissible admission of "context" and identification of "purpose" may become blurred if too broad an approach to the interpretation of legislation is taken…..…He said that "the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown…"

75. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*". If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the

statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that

76. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of the *dictum* of McKechnie J. in *Dunnes Stores* at paragraph 66, wherein he states that:

> "*each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning*."

77. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

78. The Commissioner will now proceed to consider the respective statutory provisions articulated in this appeal, namely Schedule 24 and section 81 TCA 1997.

(v) Schedule 24 TCA 1997

79. The Appellant's appeal was made on the basis that it claimed an entitlement to a deduction pursuant to section 81 TCA 1997, in respect of foreign RWHT suffered for the relevant period. However, it was argued by the Respondent that section 81 TCA 1997 was not applicable to the foreign RWHT suffered, as it was a tax on income and there exists an entire scheme in the TCA, namely Schedule 24 TCA 1997, to deal with the imposition of foreign RWHT. The Respondent argued that section 81 TCA 1997 simply did not apply to relieve the foreign RWHT suffered by the Appellant for the relevant period. Therefore, the Commissioner will proceed to consider first, the Respondent's argument for the application of Schedule 24 TCA 1997.

80. Schedule 24 TCA 1997 provides for a system of credits for foreign taxes on certain types of income and Schedule 24 TCA 1997 sets out the "mechanics" for determining the amount of the credit that can be given against corporation tax in respect of foreign RWHT incurred. The operation of this relief is complex. The Commissioner understands

that in short, relief for foreign RWHT suffered on royalty income may be by way of: credit relief (i.e. foreign tax may be offset against Irish corporation tax payable); relief by reduction (i.e. income for Irish corporation tax purposes may be reduced by the foreign tax it suffered); or a combination of both. The treatment varies depending on whether or not the foreign RWHT has been applied in a country with which Ireland has a DTA. Relief by way of credit will be available in accordance with section 826 and Schedule 24 TCA 1997.

81. Importantly, in accordance with paragraph 4(1) of Schedule 24 TCA 1997, the amount of allowable credit shall not exceed *"the corporation tax attributable to that income*". This is described as "*the Irish measure of income*", such that where the trading income of a trade carried on by a company includes royalties, the amount of the income, relating to that royalty income, chargeable to tax may be reduced by the relevant foreign tax attaching to that income. However, the reduction is limited to the amount of the income for corporation tax purposes relating to the relevant royalties i.e. the Irish measure of the income.

82. Section 77(6B) TCA 1997 provides for foreign withholding tax that has arisen in a non-DTA state. Again, the reduction provided in accordance with section 77(6B) TCA 1997 cannot reduce the Irish measure of that income below zero, i.e. a loss cannot be created.

83. As the Appellant was in a loss making situation for the relevant period, the Respondent submitted that the Appellant was not in a position to avail of any relief by way of a credit or reduction for foreign RWHT suffered, as there was no Irish measure of income. Thus, the relief cannot reduce the Irish measure of the foreign income below zero and therefore the foreign RWHT suffered was simply unrelieved tax.

84. The Commissioner notes that the Respondent argued that the maxim *generalia specialibus non derogant* applied herein. The maxim provides that a general provision does not derogate from a special one. The Respondent submitted that in terms of statutory interpretation, whilst the maxim was not cited in the Judgment in *Hanrahan,* it is clear that in the context of the TCA, special provisions cannot be displaced or ignored. The Respondent directed the Commissioner to the opening words in section 81(2) TCA 1997 wherein it states "Subject to the Tax Acts" and it was submitted that it could not be clearer.

85. The Respondent argued that the TCA recognised the DTAs in accordance with section 826 TCA 1997 and that any income subject to foreign RWHT must be dealt with in accordance with the specific rules in the TCA, namely Schedule 24 and section 77(6B) TCA 1997. The Respondent submitted that it could not be clearer that there existed

special rules that were required to be followed to calculate what income is subject to corporation tax, in the context of foreign RWHT having been suffered in another jurisdiction. The Respondent argued that it was not optional, but mandatory, that regard was had to a special provision which catered specifically for the situation, rather than a general provision which catered for the general, and herein being a general right of deduction.

86. The Respondent submitted that the Commissioner in the 2019 Determination had no entitlement to consider the application of section 81 TCA 1997, as he was precluded from doing so in accordance with section 76 TCA 1997, where specific provisions apply. Moreover, section 81(2) TCA 1997 is instructive as it states "Subject to the Tax Acts". The Respondent stated that the 2018 Determination was correct as it determined that the foreign RWHT was a tax on income, therefore Schedule 24 TCA 1997 applied and that was the conclusion of the matter.

87. In addition, Counsel for the Respondent pointed out that section 76A(1) TCA 1997 uses the word "shall" when referring to GAAP. The Respondent argued that there were no adjustments to be made to the Appellant's accounts and where the experts agreed that the financial statements were prepared in accordance with GAAP, there were no adjustments to be made through the TCA. All that was required was that the profit was calculated by the Appellant.

88. The Appellant disagrees entirely with the position taken by the Respondent. It was argued by the Appellant that both Schedule 24 and section 77(6B) TCA 1997 provide the potential for a credit for foreign RWHT incurred by a company. However, there was nothing in the TCA 1997 generally or Schedule 24 TCA 1997 specifically, that mandated the Appellant to avail of that credit, if no credit existed. In addition, the very existence of Schedule 24 TCA 1997 and the system of credits, did not interfere with the general system of deductibility that had existed in the TCA for years. The Appellant submitted that the DTAs do not impose taxes and the DTAs do not set out that domestic provisions no longer apply, but rather DTAs sit beside domestic provisions and may provide relief, by way of a credit a system. That is different to the deduction system that existed already in the Tax Acts.

89. The Appellant submitted that the words in paragraph 7(1) of Schedule 24 TCA 1997 *"[w]here credit for foreign tax is to be allowed*" are pertinent and it was paragraph 7 that set out what was to occur if credit was to be allowed or taken at paragraph 7(3). The Appellant submitted that if credit was to be allowed there would be a blanket ban on a deduction as paragraph 7(3)(a) states that "*no deduction shall be made for foreign tax*".

The Appellant argued that this is very clearly setting out that if a taxpayer is within the credit system and a credit is to be allowed, then no deduction shall be allowed as the taxpayer is now within the credit system.

90. Moreover, the Appellant argued that the Respondent was wrong in its interpretation of paragraph 7(3)(c) of Schedule 24 TCA 1997, such that if election is made not to take the credit, in accordance with paragraph 10 of Schedule 24 TCA 1997, paragraph 7(3)(c) applies, because section 7(1) clearly states that paragraph 7 will only operate where credit is to be allowed and "*this paragraph shall apply in relation to the computation for the purposes of income tax or corporation tax of the amount of that income*". The Commissioner notes the wording in paragraph 7(3)(c) wherein it states *inter alia* that *"…..where <u>any part</u> of the foreign tax in respect of the income…..cannot be allowed as a credit…"* [Emphasis added]

91. In addition, the Commissioner notes the use of the word "reduction" in paragraph 7(3)(c) wherein it states that "…*the amount of the income shall be treated as reduced by that part of that foreign tax, but, for the purposes of corporation tax, the amount by which the income is treated as reduced…"* The Commissioner notes that the word "reduced" is used therein, which is different to the word deduction (i.e. reduction is different to deduction). The Commissioner has considered paragraph 10 in light of paragraph 7(3)(c) and considers there to be no nexus between the two. The Commissioner accepts the Appellant's argument that as a matter of statutory interpretation, either paragraph 7 applies or it does not, and in circumstances where paragraph 10 is invoked, paragraph 7(3)(c) is therefore not engaged. The Commissioner is satisfied that the words of the statute are clear and their meaning self-evident such that paragraph 7(1) provides that if credit is to be taken then paragraph 7(3) applies. It does not refer to paragraph 10.

92. The Appellant argued that legislation is applied to a set of facts, but the facts are such herein that the legislation does not apply, the credit is not to be allowed as it is in a loss making situation. Therefore, the Appellant never came within the system of credits and it was clear that the blanket ban on a deduction under the general provisions was if the credit is to be allowed in accordance with paragraph 7(1) of Schedule 24 TCA 1997. The Appellant submitted that the 2023 Determination and the 2024 Determination were correct in finding that where Schedule 24 TCA 1997 does not apply, there is no bar to the consideration of section 81 TCA 1997. Furthermore, even if a credit was available, the Appellant argued that paragraph 10 of Schedule 24 TCA 1997 permits a taxpayer to elect to take a credit.

93. Taking paragraph 10 firstly, the Commissioner is satisfied that the wording in paragraph 10 of Schedule 24 TCA 1997 very clearly and plainly states that "*credit shall not be allowed under the arrangements…if the person in question elects that credit shall not be allowed in respect of income*". [Emphasis added] The word elect is a word used in common parlance and a word that an ordinary member of the public would understand. However, the Commissioner has consulted the Oxford English Dictionary as to the meaning of the word "elect" which states that it is a verb meaning "*to pick out, choose (usually, for a particular purpose or function)*".

94. The Commissioner has no doubt that paragraph 10 of Schedule 24 TCA 1997 provides a right of choice, whether to take the credit. The Commissioner therefore considers that the Respondent's argument that the Appellant must take the credit was incorrect and also the argument that the Appellant was precluded from considering section 81 TCA 1997 was incorrect. The Commissioner notes the Respondent's argument that the Commissioner was incorrect in her 2023 Determination, such that she should not have considered section 81 TCA 1997 in light of the special system of credits established in accordance with section 826 and Schedule 24 TCA 1997. However, the Commissioner is satisfied that the 2023 Determination deals with a situation where a credit was unavailable and thus, the Commissioner concluded that there was nothing in law that precluded her from her consideration of the availability of a deduction in accordance with the provisions section 81 TCA 1997, in those circumstances.

95. In relation to the right of the Appellant to consider a deduction, the Commissioner is satisfied that during the relevant years, there was no absolute rule against a deduction for foreign RWHT on income, in light of the specific provisions in Schedule 24 and section 77(6B) TCA 1997. Rather, the Commissioner considers it to be the opposite. Having regard to the plain and ordinary meaning of the words in Schedule 24 TCA 1997, in context, and having regard also to the purpose of the provisions of the TCA as a whole, the Commissioner is satisfied that paragraph 7 of Schedule 24 TCA 1997 provides that where a credit is to be taken, a deduction is specifically denied. Thus, the corollary is that if no credit is to be taken and which right is expressly provided for in paragraph 10 in terms of election, paragraph 7(3)(a) is not applicable to preclude a deduction.

96. Furthermore and as stated, where a credit is to be allowed, paragraph 7(3)(a) of Schedule 24 TCA 1997 confirms that no deduction is available. Paragraph 7(3)(a) of Schedule 24 TCA 1997 expressly refers to the right of deduction and limits it if credit is to be taken. Thus, a taxpayer is either "in" Schedule 24 or "out". If "in" Schedule 24 TCA

1997, no deductibility is available and if "out" the possibility remains, subject to the tests to be applied in accordance with the general rules and established jurisprudence. The Commissioner is satisfied that this finding would concur with the 2018 Determination, whereby the taxpayer elected to take the credit, but was seeking a deduction (as opposed to a reduction) for the unrelieved portion of the foreign RWHT. It was correctly denied and whilst not expressly stated in the 2018 Determination that paragraph 7(3)(a) of Schedule 24 TCA 1997 was applicable to deny a deduction in those circumstances, the Commissioner herein is satisfied that the correct interpretation of the law is that paragraph 7 would apply to deny a deduction, where credit was allowed.

97. However, the Commissioner is satisfied that the factual matrix herein is not dissimilar to the 2019, 2023 and 2024 Determinations, whereby the availability of a credit was hindered either by the nature of the tax incurred or the taxpayer's financial circumstances, there being no profits for the purposes of corporation tax. As there was no blanket rule that denied the potential of a deduction in accordance with the section 81 TCA 1997, and the credit for foreign tax not being allowed against the Irish taxes chargeable in respect of any income (Paragraph 7(1)) in those appeals, the Appellants could avail of the general provisions of section 81(2) TCA 1997.

98. The Commissioner is satisfied that if there was an absolute prohibition on the ability to take a deduction in respect of foreign taxes, as is claimed by the Respondent, there would be no need for such a restriction, as set out at paragraph 7(3)(a) of Schedule 24 TCA 1997, where credit for foreign tax is to be allowed in accordance with paragraph 7(1). Thus, the legislators expressly precluded the possibility of taking a deduction in respect of the relevant foreign tax on income, where credit relief was to be allowed. Moreover, the words "*where credit for foreign tax is to be allowed*" would seem to suggest a lack of mandatory application. Hence, the Commissioner is satisfied that paragraph 7 of Schedule 24 TCA 1997 should be interpreted as providing a restriction on the ability to take a deduction in respect of foreign tax only in circumstances where "*credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income*" and where credit relief is claimed "*no deduction shall be made for foreign tax*.

99. Furthermore, the Commissioner was directed to the Respondent's Guidance Notes. The Commissioner agrees with the Appellant's submissions in respect of the Respondent's Guidance Notes being supportive of the interpretation set out in the preceding paragraph. The Commissioner notes that the Respondent's Guidance Notes in relation to paragraph 7 state that *"[w]here credit for foreign tax is to be allowed against any of the Irish taxes in respect of any income, the following applies… where a credit for the*

foreign tax is allowable against any of the Irish taxes, no deduction for the foreign tax is to be made in computing the amount of the foreign income for the purposes of income tax"[16].

100. Moreover the Guidance Notes deal with paragraph 10 of Schedule 24 TCA 1997. The Guidance Notes state that *"A person may elect not to accept credit for the foreign tax ... In that event, the "direct" foreign tax borne on the foreign income would generally be allowable as a deduction in arriving at the foreign income chargeable to Irish tax"* [Emphasis added] In that regard, the Appellant submits that "*The Revenue Schedule 24 Guidance on Paragraph 10 is very instructive because it speaks to the general position that applies when a taxpayer has elected out of the credit relief under Schedule 24."*

101. The Commissioner is satisfied that the Respondent's own Guidance Notes clearly point to a general position that where credit relief is not taken for foreign tax, that foreign tax would generally be allowable as a deduction. The Commissioner is satisfied that these provisions would not have been necessary if there were, as the Respondent argues, an overriding general prohibition against taking a deduction for foreign taxes on income in accordance with the provisions of section 81 TCA 1997.

102. Accordingly, it was the position that foreign RWHT suffered by the Appellant in the relevant period was not creditable for Irish tax purposes in accordance with Schedule 24 TCA 1997. Therefore, it follows that the general position was capable of being applied to the foreign RWHT and, as a credit in accordance with Schedule 24 TCA 1997 was not claimed in respect of the foreign RWHT, it was capable of being considered under the ordinary computational rules, as a deduction, subject to the usual test of deductibility. The Commissioner considers that the words "would generally be allowable as a deduction" are clear in this regard.

103. Therefore, the Commissioner will now proceed to consider the provisions of section 81 TCA 1997 hereunder, in the context of the Appellant's argument that foreign RWHT is a final cost of the Appellant and no credit for foreign RWHT was available to the Appellant, in accordance with Schedule 24 TCA 1997.

(vi) Section 81 TCA 1997

104. The Appellant argued that foreign RWHT was a cost incurred in carrying out its business in the respective jurisdictions in which it operated and as such, foreign RWHT suffered on gross receipts from foreign countries, should be a deductible expense under section

[16] Legislation and Guidance material, page 349

81 TCA 1997. The Commissioner notes the testimony of the Appellant's witness that foreign RWHT was suffered on gross income. The Appellant submitted that foreign RWHT was payable regardless of whether a profit or loss was generated on that transaction. Therefore, foreign RWHT was one of the costs of doing business.

105. The Respondent refutes that foreign RWHT suffered by the Appellant was a deductible expense under section 81 TCA 1997 and argued that there was no possibility of the Appellant reclassifying foreign RWHT as a deductible expense. The Respondent does not accept that foreign RWHT was an expense "*wholly and exclusively incurred for the purpose of the trade*" and therefore, cannot be deductible as an expense in accordance with section 81 TCA 1997. The Respondent argued that the Appellant paid foreign RWHT in the jurisdictions in which it carried out its business, for the reason that the Appellant was a non-resident and had no permanent establishment in those jurisdictions. The Respondent stated that it was open to the Appellant to set up a permanent establishment in those jurisdictions.

106. Section 81(2)(a) TCA 1997 provides that in computing the profits or gains to be charged to tax, no deduction is allowed for any expense, not being money "*wholly and exclusively laid out or expended for the purposes of the trade or profession*". The Commissioner is satisfied that it is the case that when arriving at business profits assessable to tax, a taxpayer must first look to section 81 TCA 1997 to determine what expenses are deductible. The section is drafted to restrict deductibility, but in accordance with subsection (2)(a), permits a deduction for an expense where it was "…..*money wholly and exclusively laid out or expended for the purposes of the trade or profession.*" The Commissioner is satisfied that the **test of deductibility** is that it must be made for the purpose earning the profits of the trade. The Appellant submitted that if a cost is incurred on the "journey to profit" it is capable of being a deductible expense.

107. The Appellant stated that foreign RWHT is similar to any other costs or expenses incurred by the Appellant. The Respondent argues that the consequence of what the Appellant is endeavouring to achieve by appealing the determinations issued by the Respondent is firstly, to impose on the Irish State an obligation to fund its liability to foreign taxes by permitting it to deduct those foreign taxes.

108. The Appellant contended that if a cost is ascertained on the **gross revenue** of a business and is paid subsequent to the calculation of profits, then it is a deductible expense. The Commissioner notes the evidence of the Appellant's witnesses, such that foreign RWHT is ascertained on gross revenue.

Case law

109. The Commissioner was directed by senior counsel for both parties to the appeal to numerous decisions of the superior courts, both within this jurisdiction and elsewhere, in addition to decisions of various Tribunals and decision making bodies, including the Commission, in support of the divergent position each party takes in this appeal. The parties argued for differing relevance and weight to be attached to the decisions and/or determinations. The Commissioner will now proceed to consider hereunder, the aforementioned decisions and/or determinations.

110. The Commissioner is satisfied that the **core test for deductibility** is set out in the decision in *Strong & Co*. In *Strong & Co.* the taxpayer, a brewing company which also carried on a trade as an innkeeper, sought to take a deduction for compensation paid to a customer injured by falling masonry at one of its premises. The claim was refused by the Commissioners of Inland Revenue and the company appealed. The Court of Appeal and the House of Lords upheld the Commissioner's refusal to grant a deduction. Whilst the appeal was decided against the taxpayer, the expense was found to be incurred by the taxpayer in their role as the building owner, rather than as part of the trade of innkeeping. The test articulated by Lord Davey in the House of Lords, as set out above, has established the principle that there must be a nexus between the expense and the earning of profits for deductibility. He opined that the words appear to mean "*for the purpose of enabling a person to carry on and earn profits in the trade*".

111. Furthermore, Lord Davey at page 453 of the decision states that:

> *"It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits"*.

112. This principle was upheld in the decisions in *MacAonghusa* and *Smith (Surveyor of Taxes) v Lion Brewery Company, Limited [1911] AC 150*. In the Irish decision of *MacAonghusa,* the Court was asked to consider whether the interest on a term loan taken out to redeem preference share capital was an expense of the company's trade. While this was not in connection with deductibility of taxes, the Supreme Court **endorsed the test in *Strong & Co.*** and the case was decided in favour of the taxpayer. The Court upheld that the interest payments were integral to the trading of the company and as such deductible. The purpose of the payment was key to the decision in that it was found to be for the purpose of earning profits, rather than the financing of the trade. If it had been for the latter purpose, Geoghegan J stated the payments could not have been deductible. Furthermore, he stated that the matter had to be approached by

making a finding of fact as to the purpose of the payment and in light of that it would become "*reasonably clear whether as a matter of law the payment [is] deductible or not".*

113. The Commissioner observes that the Supreme Court held, in dismissing the appeal, that the interest was a deductible expense, because it was laid out to retain the benefits of the borrowed money which enabled the respondent in that appeal to carry on its trade, thus expenditure incurred wholly and exclusively for the purposes of the trade. Geoghegan J. held at page 516 that:

"I have no doubt that, in this case, the learned Circuit Court Judge took the view that the ongoing interest payments were necessarily part and parcel of the trading of the company and were clearly deductible. In my opinion the Learned High Court Judge was correct in upholding that view".

114. In addition to *Strong & Co.*, the House of Lords also considered the decisions in *Dowdall O'Mahoney*, *Smith v Lion* and the decision of Lord Oaksey in *Smith's Potato Estates Limited.*

115. In *Smith's Potato Estates Limited,* Lord Oaksey considered whether certain legal costs incurred in connection with an appeal were moneys wholly and exclusively laid out for the purposes of the company's trade. Moreover, he considered whether an expense is incurred to earn profit or is an application of the profit. At page 297, he stated that:

"In my opinion, the real question which has to be decided in every case is whether the expense is one which is incurred in order to earn gain or profit from the trade, or is the application of the gain or profit when earned."

116. The decision in *Smith's Potato Estates* concerned legal and accountancy costs in fighting a tax appeal and the issue was whether or not they were deductible. The court found they were not deductible as they were not for the purpose of earning the profits of the trade, rather they were to determine what was the tax amount applied to those profits. The court approved the decision in *Strong & Co*. and at page 290, Lord Porter referred to the *dictum* of Lord Selborne in the decision in *Mersey Docks and Harbour Board v Lucas* (1883) 2 TC 25 at page 29, where Lord Selborne opined that:

"*it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used*".

117. Furthermore, at page 290, Lord Porter stated that:

"[W]hat your Lordships have to determine is whether the expense is incurred in order to earn gain, or is the application or distribution of that gain when earned.

118. In *Smith v Lion,* a brewery company, as an essential part of their business, acquired and held licensed houses which were "tied" to the brewery. Under the licensing legislation in force at that time, the Licensing Act 1904, compensation fund charges were levied on licences which could be recouped from rents paid by the licensee. The levy was thus a form of withholding tax on the rents paid to the brewery. In calculating the yearly profits of the business, the brewery company claimed a deduction for the levy imposed and which they were obliged to bear. It was contended that the sum was wholly and exclusively laid out for the purposes of their business activity as the system of "tied" houses was essential to their trade. While the decision was not unanimous it was decided in the brewery company's favour. Lord Atkinson with whom Earl Halsbury agreed held at page 159 that:

"In the present case the Respondents cannot set up the system of trading through tied houses, unless they first acquire these premises as owners in fee or lessees, and secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation levy attaches. The impost must, therefore, necessarily be paid in order to set up the system which it is found to be vital to their trade prospects to set up. And if the substance of the transaction be looked at this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a particular trade or business, such as that of an auctioneer, or a pawnbroker, or a publican.

It is an expenditure which must be incurred in order to earn receipts which, after the due deductions have been made, form the balance of the gains and profits assessable to the Income Tax, and may, therefore according to the decision of your Lordships' House, be properly deducted from those receipts".

119. The Appellant submitted that these cases deal with the concept that what is taxed are profits and not receipts (i.e. the gross income) and the case law establishes that that tax can be a deductible expense if it was on the journey to profit or if it was a cost of doing business or it was a liability that the company was exposed to. The Appellant contended that the *Harrods* decision was a clear example of this principle.

120. The Respondent contends that foreign RWHT was not a requirement of earning the receipts/income. There was no requirement, restriction, entry fee or charge for trading in the various jurisdictions in which the Appellant choose to trade globally. It was a tax which accrued once the receipts/income had been generated.

121. The test as set out in *Strong & Co.,* was also applied in the decision in *Harrods*. In *Harrods*, the taxpayer company which was incorporated and resident in the United Kingdom ("UK"), carried on a retail business in Argentina and as a requirement of doing business in that jurisdiction, the company was required to pay a substitute tax which was levied at a rate of 1% on the capital of the company. It sought a tax deduction for the annual tax. The substitute tax was payable whether or not there were profits liable to Argentine income tax. Under Argentine law there were sanctions to prevent non-payment of the substitute tax. A key point was when and how the tax was incurred. It was found that the tax was not payable on profits earned as a consequence of doing business in Argentina, but as a condition of carrying on business. Danckwerts L.J. held that:

"There are a number of authorities on the question of deductible expenses and the guiding principle appears to me to be that if the expense has to be incurred for the purpose of earning the company's profits, it is a deductible expense; on the other hand if the payment of the expenses or charges is made after the profits have been ascertained, then the expense is not deductible, because it is simply an application of the profits which have been earned."

122. Further, the Commissioner considers it relevant to consider the *dictum* of Buckley J. wherein at page 461, he held that:

"The tax is not, in my judgment, a tax which is of the same character as Income Tax or Excess Profits Tax; it is not a tax which can only be measured and the liability to which can only be ascertained after the profits position of the Company has been finally determined in any year. Payment of that tax is not, as it seems to me, an application of the Company's profits, nor is it a payment which in its nature could be said to fall to be made out of the earned profits of the Company, for it is not a tax the liability to which depends upon the Company having earned any profits. It is a liability which the Company has exposed itself to, or undertaken, in order that it may be able to carry on its business in the Argentine. And so it is, in my judgment, a liability which the Company has undertaken for the purposes of its trade, and the payment of the tax is, in my judgment, a payment wholly and exclusively made for the purposes of the Company's trade…."

123. Moreover, Danckwerts L.J opined at page 468 of the Judgment that:

"*In my opinion, the present case fails within the principle of Smith v Lion Brewery. The "substitute tax" was something which the Company was compelled to pay if it was to carry on business in Argentina, and if it could not carry on business in Argentina it*

could not earn profits. Consequently it was an expense which was necessarily incurred by it in order to carry on its trade and was wholly and exclusively laid out or expended for the purpose of the trade of the Company."

124. Relevant also is the *dictum* of Diplock L.J, at page 468 and 469, wherein he stated that:

"….can a tax question really be as simple as I think this is? But the only question here is: was the money paid by the Company in settlement of its liability for Argentine substitute tax "money wholly and exclusively expended for the purposes of the trade" which it carried on in the Argentine? In order to engage lawfully in its trading lawfully in the Argentine at all, whether or not it made a profit by doing so, it had to pay the substitute tax. That was the purpose for which the money was expended by the Company…. why then is it not deductible?

…….

It is for this reason that payment by a trader of United Kingdom or foreign fixes on profits after they have been earned is not a deductible disbursement. This seems to me to be the ratio decidendi of the Dowdall O'Mahoney case, the Rushden Heel Co. case and the Smith's Potato Estates case. But the Argentine substitute tax is not paid out of profits. Liability to the tax does not depend upon whether profits are made or not. It is a payment which the company is compelled to make if it has a business establishment in the Argentine at all, and it must have a business establishment if it is to carry on its trade. I can see no relevant difference between this tax and rates upon its business premises;"

125. The Respondent submitted that the *Harrods* decision has little relevance to the Appellant's appeal. The Respondent distinguished the decision in *Harrods* based on the factual circumstances, but specifically on the grounds that the company had a permanent establishment and the Argentinian tax was not charged on the basis of profits/income/receipts, but was charged entirely on the basis of certain capital of the company that was employed in the trade. Secondly, non-payment of tax could result in the company being precluded from trading. The Respondent submitted that the company was not permitted to have any form of business unless it paid this 1% of its capital, which is wholly distinguishable from the situation herein, as had the Appellant opened a branch in each of the jurisdictions it could have avoided the imposition of foreign RWHT. The company in *Harrods* had a branch.

126. The Commissioner does not agree that the decision is to be distinguished as argued by the Respondent. The tax in *Harrods* was charged not on the basis of profit or income of

the company and therefore, amounted to a liability the company had undertaken in order to trade in the Argentine. The Commissioner is satisfied that the tax in *Harrods* was unrelated to the income or profits of the company and furthermore, failure to pay the liabilities precluded the company from trading in the Argentine.

127. Moreover, the Appellant argued that it had no choice but to pay the foreign RWHT on the royalty payments, but that if it was in some way possible not to pay the foreign RWHT tax, it would cause significant reputational damage to the Appellant's business, being an entity not in compliance with its tax obligations. In addition, the Appellant argued that the absence of sanction is entirely irrelevant, as it does not bear at all on the question of whether the deductions incurred were wholly and exclusively for the purposes of the trade. The Commissioner accepts the arguments.

128. The Respondent also directed the Commissioner to the decision in *Allen Farquharson Brothers & Company* 17 TC 59 in support of its contention that "*the unavoidable nature of the withholding tax renders it less likely to comprise a deductible expense due to the absence of the element of volition*". The Commissioner does not consider the absence of volition to be of any significant relevance to her consideration of the application of section 81 TCA 1997 and to the question of whether foreign RWHT was expenditure incurred wholly and exclusively for the purposes of the Respondent's trade and thus, deductible in accordance with section 81 TCA 1997. As set out above, the Commissioner has already found that the test for deductibility is as set out in the decision in *Strong & Co* and affirmed in *MacAonghusa, Smith v Lion*, and *Harrods.* The Commissioner does not consider volition to be part of the test to be applied.

129. The Respondent placed significant reliance on the decision in *Yates* and the 2018 Determination. The question which arose in *Yates* was whether a turnover tax levied under Venezuelan law could correspond to UK income tax or corporation tax in the context of double taxation. Scott J. held that it could and did, in part. Having quoted article 54 of the Venezuelan tax code, Scott J. stated that:

> ''*The purpose behind art 54 is, in my opinion reasonably apparent from the language and context of the article. The article is dealing with profits of taxpayers 'not resident or not domiciled in Venezuela'; profits, that is to say, of foreign individuals or entities. There are obvious difficulties in obtaining full tax returns from foreign tax payers. The difficulty is dealt with in art 54 by simply providing for 10% of gross receipts to be deducted in order to produce the taxable income – the 'net profits' to use the expression employed in the article*."

130. Further, Scott J. held that:

"*But it is not said that no tax expressed as a charge on a percentage of gross receipts can, for s.498 purposes, correspond to United Kingdom income tax or corporation tax. And it is not, in my judgment, practicable to exclude a particular tax on the ground that the percentage to be deducted was not high enough to represent the likely level of expenses incurred by the foreign taxpayer in earning its gross receipts. Moreover, there were no facts before the Special Commissioner to justify a conclusion either that the 10% percent deduction was unrealistic in relation to the majority of business activities falling to be taxed under Article 54 or that the 10% deduction was unrealistic in relation to the extra expense incurred by the company, over and above its normal establishment expenses, in executing the Maraven contract*".

131. The Respondent submitted that the above dictum strongly supports the argument advanced on behalf of the Respondent and is a correct analysis of the nature of the foreign RWHT. The Respondent argued that it was a logical impossibility to describe a tax withheld as a consequence of earning receipts, to be an expenditure laid out to earn those receipts.

132. The Appellant does not agree with the Respondent's interpretation of *Yates,* as the issue considered in that case was whether the Venezuelan tax had the same function as UK income or corporation taxes. It was held by Scott J. that although the Venezuelan tax was computed on the basis that only 10% of the gross income was deductible, it was intended to be a **tax on profits** rather than on turnover. The Court held that the Venezuelan tax corresponded to income or corporation tax and was therefore creditable. In this regard, the Commissioner agrees with the Appellant and finds that the decision in *Yates* is of little persuasive value for the purposes of determining this appeal as it was considering a tax on profits which is different to the current position herein.

133. Moreover, there are cases in contradistinction, such as the *Dowdall O'Mahoney* decision where the House of Lords held, in a unanimous decision, that a UK branch of an Irish company was not entitled to deduct as an expense for UK income tax purposes, the proportion of income tax suffered in Ireland which corresponded to the profits of the UK branch. This decision provided that income tax applied to the 'profits' of a trade was not deductible as the tax was applied to the profits after they had been made and was not incurred "for the purposes of earning the profits". The court held that the tax did not satisfy the test of being on the journey to profit as it was a tax on profit and therefore not allowable. The Appellant argued that if the tax was imposed on the journey to profit it was deductible and that the foreign RWHT incurred herein was on the journey to earning the profits. The Appellant submitted that the foreign RWHT suffered by the Appellant

was clearly something which was incurred to earn the gain and it was not the application or distribution of the profit when earned, because it had not yet got to the calculation of profit.

134. Furthermore, the Respondent sought to rely on the decision in *Ashton Gas.* In *Ashton Gas*, the appellant company was subject to prescribed legislative rules concerning the quantum of dividends payable to its members out of the 'profits' of the company. The company paid a dividend to members without first making the necessary deduction for income tax payable by the company. The question under consideration for the courts was what amount represented 'profit' for the purposes of the prescribed dividend quantum. The House of Lords held that income tax (being a tax on profits) could not be deducted from profits. This was because the tax was itself chargeable on the profits and thus, the House of Lords held that the 'profits' ought to be calculated as being inclusive and not exclusive, of the amount of income tax payable for the year.

135. The judgment of the Earl of Halsbury observed the distinction between an expense and a tax applied to a profit and at page 12 of the decision he held that:

> "*Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax. But if you confound what is the necessary expenditure to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge upon the profits at all. The answer is that it is. The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax - you have no right to deduct the income tax before you ascertain what the profit is."*

136. The Appellant submitted that *Ashton Gas* was clear authority for the principle that tax applied to the ascertained profit of a trade is not deductible in ascertaining the profit itself. Such a tax should properly be considered as constituting "part of" the profits of the relevant taxpayer. The Appellant's profit is not ascertained at the point of suffering the foreign RWHT. Therefore, the foreign RWHT cannot be seen as a portion of the Appellant's profits exacted by the relevant tax authority. The Commissioner is satisfied that both decisions, namely *Dowdall O'Mahoney* and *Ashton Gas* can be distinguished, in circumstances where both cases considered the deductibility of taxes after the profit was ascertained. In this appeal, a consideration is required of taxes imposed on **gross receipts** prior to the deduction of expenses and the ascertainment of profit

137. The Commissioner has also considered the *Hong Kong* decision. The decision emphases the distinction between taxes which are a tax on profits/gains versus taxes which apply to the income itself. The Respondent dismissed the relevance of the decision on the basis that it is a decision of a Board in Hong Kong, over 30 years ago and therefore has little persuasive authority. The Commissioner is satisfied that the Hong Kong Board heard very extensive argument on all of the relevant principles herein and affirms the principles enunciated in much of the case law referred to.

138. The *Hong Kong* decision dealt with the Hong Kong equivalent of Section 81 TCA 1997 deductions, and the Commissioner considers that it is therefore a case which is on point, as opposed to *Yates* which is not on point. Whilst the legislation in *Hong Kong* was not identical to section 81 TCA 1997, the effect of it is the same as Section 81 TCA 1997. The Commissioner agrees with the Appellant's submission that it is far more relevant than a case on unilateral relief namely *Yates*. The Appellants submitted also that the *Hong Kong* decision is correct in its assessment of *Yates* such that it is irrelevant, as are the determinations in 2019, 2023 and 2024 in this jurisdiction.

139. Turning to the *Hong Kong* decision*,* the taxpayer was a shipping company which owned and operated container ships which supplied between Hong Kong, Taiwan and Australia and incurred taxes on gross receipts in those jurisdictions. The company claimed that the foreign taxes were deductible from its total profits because they were outgoings or expenses incurred in the production of the profits or for the purposes of producing such profits. It was held that to the extent the overseas taxes were charged on gross receipts and not on net income they were capable of being deducted when ascertaining the total profits. As such, part of the Australian taxes were not allowed as a deduction. In reaching its decision the Board considered a number of UK cases concerning the meaning of "*for the purposes of the trade*" and the UK provisions analogous to section 81 TCA 1997 and it found at paragraph 6 that:

> "*in each case the foreign tax was an impost on the gross receipts relevant to the territory concerned whether or not the profits are earned… However on the clear evidence … that the taxes were in each case a tax on turnover as opposed to net income, we are of the view that the "taxable income" treatment in Taiwan and Australia is but a mechanism, a device to subject to tax the amount representing the fixed proportion of the gross receipts, and does not change the fact that the tax is imposed on the gross receipts before any deduction is made in respect of outgoings or expenses*."

140. Further, the Board held at paragraph 17 of the decision that it was satisfied that:

"the Taxpayer could not have gone on earning income without paying the foreign taxes and that the foreign taxes must be paid whether or not profits were earned…"

141. The Appellant contended that *Hong Kong* decision was important, as it shows that in the case of jurisdictions where they deem a profit, the Board said it was a mechanism to get a rate, which was still imposed on the gross receipts, and, therefore, it was an impost on the gross and it was an expense on the journey to ascertain profit. This was relevant in the context of the evidence of the Appellant's expert witness 1 in relation to the position in [redacted] The Appellant submitted that there are now four decisions dealing specifically with foreign withholding tax namely, the *Hong Kong* decision, the 2018 Determination, the 2023 Determination and the 2024 Determination.

142. Both parties relied on decisions of Appeal Commissioners, which dealt with the deductibility of withholding tax, namely the decisions in the 2018 Determination, the 2019 Determination, the 2023 Determination and the 2024 Determination. The Appellant relied on the 2019 Determination and the Respondent distinguished same. The Respondent relied on the 2018 Determination and the Appellant distinguished this decision on the facts, which are different to the facts herein. The *Hong Kong decision* was cited in three of the four decisions, namely the 2019, 2023 and 2024 Determination. The 2018 Determination dealt with the deductibility of foreign RWHT suffered on licence income and the 2019 Determination with withholding tax on dividends for a company carrying on the trade of securities trading. The 2018 Determination found against the taxpayer and the 2019 Determination found for the taxpayer. The 2018 Determination takes no account of the *Hong Kong* decision. The 2023 Determination and the 2024 Determinations found in favour of the appellants. The Respondent submitted that the 2023 and 2024 Determinations are wrong in law, which the Commissioner will address in more detail hereunder.

143. In the 2018 Determination, it was held that taxes which are applied to a taxpayer's income (as distinct from profits) were incapable of constituting a deductible expense. At paragraph 30, it was held that:

"*Sequence is an important aspect in this analysis. Expenses deductible for the purposes of s.81(2)(a) are incurred in the course of a trade prior to the generation of income in the form of sales. For example, in the Appellant's trade, the cost of developing the software is first incurred, with sales subsequently generated in relation to that software once the software is brought to market. Tax is payable on the monies generated through sales. Usually that tax will be on profits, i.e. income after deductions, however, the fact that deductions are placed after income in the calculation*

of net profit is simply an accounting practice to assist in the computation of income for the purpose of, inter alia, ascertaining tax. In real time, the deductions/expenses are incurred prior to sales/turnover in that they comprise the cost of generating the product that is to be sold. Similarly, the cost of sales occurs before those sales are generated. Once the product has been made, it is brought to market and sold, turnover is generated and tax applied."

144. Furthermore, the submission of the Revenue Commissioners was accepted, as follows:

"... it is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts. ... So, when looked at in this light, and this is how Irish law says profits must be calculated, it is quite impossible to regard a tax on receipts as being expenditure laid out to earn those receipts. And the Revenue case is really that simple. I mean, this is a straightforward, logical impossibility".

145. The Appellant argued that this analysis was wrong. As stated above, the Commissioner is satisfied herein, that foreign RWHT is in the nature of a tax on income, having regard to the manner in which it is imposed. Nonetheless, there is no case law which states that taxes which are imposed on income are by their nature, non-deductible. Accordingly, the Commissioner does not accept, as held in the 2018 Determination, that "*It is a logical impossibility to describe a tax withheld as a consequence of earning receipts to be an expenditure laid out to earn those receipts*". The Commissioner has some reservations in terms of why the former Appeal Commissioner came to that conclusion, in the absence of case law to support the reasoning outlined. It is trite to state that the decision of the former Appeal Commissioner is not binding on the Commissioner herein.

146. The Commissioner notes that the 2019 Determination rejected that precise proposition in the 2018 Determination, holding at paragraph 99 of the decision that "*there is no general principle of law that specifically denies a deduction for taxes in accordance with the prescribed rules as set out under TCA, Section 81, where those taxes are not calculated after the ascertainment of profit.*" The Commissioner considers this to be a correct analysis of the law. As aforementioned, there are many compulsory deductions imposed by the State that are permissible as a deduction pursuant to section 81 TCA 1997.

147. Likewise, it is notable that the 2018 Determination takes no account of the *Hong Kong* decision which in coming to its decision, conducted a review of the applicable decisions referenced above, and permitted the deduction of taxes incurred on gross receipts

relying on the principles enunciated in *Harrods* and *Strong & Co*. Moreover, the 2018 Determination distinguishes the *Harrods* decision and relies on the decision in *Yates* to dismiss the Appellant's appeal. As aforementioned, the Commissioner is satisfied that the *Harrods* decision is significant for the Appellant in the within appeal and that the *Yates* decision is of little or no persuasive authority, in circumstances where *Yates* concerned a tax on profits and has no relevance to the facts herein.

148. Of critical importance in the 2018 Determination, was the fact that relief from double taxation was available and was claimed by the taxpayer under Schedule 24 TCA 1997. The 2018 Determination concluded that foreign RWHT was in the nature of tax on income, as this was the basis upon which relief from double taxation was available. The inference being that withholding taxes are taxes on income rather than expenses of the trade and that the provisions for relieving such income from double taxation were fully exploited. The Commissioner has set out above the provisions of Schedule 24 TCA 1997 that do not permit a deduction where credit is taken in accordance with paragraph 7 of Schedule 24 TCA 1997. Whilst not expressly stated in the 2018 Determination, paragraph 7 of Schedule 24 applied therein to deny a deduction.

149. In the present appeal, the position is entirely different, such that the Appellant was taxed on its royalty income without a corresponding entitlement to a credit for the foreign RWHT withheld on that income. In the 2019 Determination, there was no entitlement to relief from double taxation and it had not been claimed, a significant difference from the earlier 2018 Determination.

150. The 2019 Determination upheld the taxpayer's appeal. The dividend withholding tax for which the taxpayer was seeking a deduction was specifically excluded from availing of a credit for withholding tax suffered. Dividend withholding tax was determined to be the price of carrying out the business and non-recoverable dividend withholding tax impacted the profits of the trade. It was determined that while that dividend withholding tax was a tax on income, it was possible for a deduction to be permitted under section 81 TCA 1997, so long as the taxes were calculated prior to the ascertainment of profit.

151. It is the case that both the legal issues arising and the factual circumstances herein are similar to the 2023 Determination and the 2024 Determination. Notably, both involve a dispute in respect of deductions pursuant to section 81 TCA 1997 for foreign RWHT suffered on gross royalty payments from foreign jurisdictions pursuant to licensing agreements; both involve a loss making company, such that the relevant deductions pursuant to section 81 TCA 1997 served to augment such losses, where a credit in accordance with Schedule 24 was not to be allowed; and the appellant did not have a

branch or permanent establishment for corporation tax purposes in any of the foreign jurisdictions.

152. The 2023 Determination upheld the appellant's appeal. The appeal concerned similar factual matrix. The appellant's business involved the [redacted] as a means of generating the profits and the Appellant suffered foreign RWHT on its gross royalty income from the sales. Importantly a credit under Schedule 24 TCA 1997 was unavailable to the appellant, due to its particular financial circumstances, and thus no credit was to be allowed. The Commissioner concluded that foreign RWHT was a tax on income, but the fact that it was a tax on income did not preclude it from being considered a deductible expense in accordance with section 81 TCA 1997. The Commissioner determined that the test was that as set out in *Strong & Co*. and the Commissioner considered the full suite of jurisprudence relating to the test for deductibility, including whether a tax applied to gross income is capable of being a deductible expense. The Commissioner concluded that foreign RWHT must be incurred by the appellant in order to earn its profits from the trade; it was part and parcel of the business activities of the appellant and it was a foreseeable condition of earning the income and gains. Moreover, the Commissioner determined that foreign RWHT was incurred irrespective of whether the appellant made a profit and therefore, it was an unavoidable component in determining profit before tax.

153. The 2024 Determination also concerned a similar factual matrix as the Appellant's position herein. The 2024 Determination came to the same conclusions and decision as the 2023 Determination.

154. in relation to the 2023 Determination and the 2024 Determination, the Appellant submitted in its supplementary submissions that "[*o]n the basis that the legal issues and factual circumstance of the Recent TAC Determinations are similar to the legal issues and factual circumstances of the current appeal, the Appellant submits that the findings of Commissioner Millrine and Commissioner O'Driscoll in the Recent TAC Determinations (with which we agree for all the reasons set out above) should apply equally to the current appeal."*

155. Thus, the Commissioner is of the view that there are no reasons why she should not follow her decision in the 2023 Determination, in circumstances where the Commissioner has found herein that: there is no bar to a tax on income being treated as a deduction for the purposes of section 81 TCA 1997; the absence of "volition" is not of any significant relevance to the application of section 81 TCA 1997; the decision in *Yates* is of little persuasive value for the purposes of determining the legal

considerations under this appeal in circumstances where *Yates* concerned a tax on profits and has no relevance to the facts herein*;* the decisions in *Ashton Gas* and *Dowdall O'Mahoney* can be distinguished where the relevant taxes herein are imposed on gross receipts prior to the deduction of expenses and the ascertainment of profit; the 2019 Determination was correct in holding that there is no general principle of law that specifically denies a deduction for taxes in accordance with section 81 TCA 1997, where those taxes are not calculated after the ascertainment of profit; the issue of "sequencing" or the stage of a transaction at which the tax was applied is irrelevant; and a tax which is incurred irrespective of whether a company makes a profit represents a cost of doing business.

156. As is illustrated in the above referenced case law, the determinant or test is whether the tax in question was a tax on profits (which would not be deductible) or a tax incurred in earning profits (which should be). Herein, foreign RWHT was suffered irrespective of whether the Appellant earned any profits and withholding tax was calculated on the gross income and not the profits. The Commissioner accepts the evidence of the Appellant's witness 2, such that he confirmed foreign RWHT is assessed and collected on the gross income stream of the Appellant.

157. The Commissioner is satisfied that foreign RWHT must be incurred by the Appellant in order to earn or profit from the trade; it was part and parcel of the business activity and was a foreseeable condition of earning income and gains. Foreign RWHT was incurred irrespective of whether the Appellant made a profit. Therefore, incurring foreign RWHT was not merely foreseeable, it was an unavoidable component in determining profit before tax. The Appellant could not conduct its trade, namely the development, the management, the protection and the exploitation of intellectual property without incurring the foreign RWHT. The Appellant was in a position whereby credit was not to be allowed under Schedule 24 TCA 1997 in relation to the foreign RWHT suffered and thus, as set out in detail about under the hearing Schedule 24 TCA 1997, there was no absolute prohibition on the general deductibility of the tax on income in those circumstances. It is clear to the Commissioner that in such circumstances, the Appellant was not precluded from treating that foreign RWHT as an expense incurred in carrying on its business in those jurisdictions, if the **test of deductibility** as set out in *Strong & Co* was satisfied, which the Commissioner considers was met for the reasons set out hereunder.

158. The Commissioner considers the principles enunciated in the *Harrods* decision to be significant to the Appellant's appeal, as not dissimilar to the Appellant, the "substitute

tax" was something which the company was compelled to pay if it was to carry on business in Argentina, and if it could not carry on its business in Argentina it could not earn profits. Of importance, the withholding tax was incurred irrespective of whether the company in *Harrods* earned any profits. Therefore, such taxes represented a cost of doing business. The Commissioner considers this is analogous to the Appellant's position. Moreover, the Respondent's own expert witness 1 testified that it was a cost of doing business in those jurisdictions[17].

159. The Commissioner is satisfied that it was not possible for the Appellant to trade in the jurisdictions without incurring the imposition of the foreign RWHT. The Commissioner considers that the factual situation was akin to that in *Harrods*. In addition, as is evident from the decision in *Harrods* and the *Hong Kong* decision, there is a distinction to be made between taxes calculated before and after profits have been ascertained. As such, foreign RWHT was incurred by the Appellant irrespective of whether the Appellant generated any profits. Foreign RWHT was applied to the gross income of the Appellant. Therefore, the Commissioner is satisfied that the foreign RWHT suffered can be treated as a cost incurred for the purpose of earning the Appellant's profits. The Respondent argues that the Appellant chose to conduct business in such jurisdictions. The Commissioner rejects that argument entirely. The Commissioner observes that if the Respondent's argument is accepted, the Appellant would be effectively suffering a tax on income that it never receives, which cannot be correct.

160. The Commissioner was directed by senior counsel for the Appellant to the decision in *Quigley (Inspector of Taxes) v Harris* [2008] IEHC 403 and submitted that the decision provides guidance as to the approach to be taken herein and that consideration should be given to the characteristics of the foreign RWHT. The Appellant submitted that the characteristics of the foreign RWHT in every instance here are that it is payable on the gross, it is payable whether or not the Appellant was in a profit or loss situation and it was payable without any regard to the expenses of the Appellant. Therefore, taking those characteristics the question arises; in this jurisdiction would that be a tax on receipts/income or a tax on profit? If it was a tax on receipts/income, it would be a deductible expense. If it was a tax on profit, it would not be a deductible expense under the test in *Strong & Co*. The Commissioner agrees with the submission of the Appellant.

[17] Transcript, Day 1, page 247

Conclusion

161. The Appellant submitted that the starting point of this appeal is whether or not the Appellant is entitled to a deduction for the foreign RWHT suffered in foreign jurisdictions and whether or not it falls within the provisions of Section 81 TCA 1997, namely that it was wholly and exclusively laid out for the purpose of a trade or, as enunciated in the *Strong & Co*. decision, it was for the purpose of enabling the Appellant to carry on and earn profits in the trade. Once profits are ascertained, then tax is determined. The Respondent disagreed and argued that there existed a separate credit regime for relieving foreign RWHT in accordance with Schedule 24 TCA 1997, which the Appellant must avail of, even if the result was that it had no entitlement to a credit or reduction and thus, no relief.

162. The Commissioner is satisfied that there was a separate regime under Schedule 24 TCA 1997 which permitted a credit if the Appellant satisfied the relevant requirements. However, if no credit was to be allowed then a deduction was not prohibited. If a credit was to be taken a deduction was expressly denied under paragraph 7(3)(a) of Schedule 24 TCA 1997. As the Appellant was in the position that no credit was to be allowed, the Commissioner is satisfied that there was no prohibition on deduction and therefore, the Appellant was entitled to proceed to consider the deductibility of the foreign RWHT suffered under the general computational rules and on the straightforward application of the well-established principles that ordinarily apply. There was no need for the Appellant to engage Schedule 24 TCA 1997 herein.

163. Having carefully considered all of the evidence, case law and legal submissions advanced by senior counsel for both parties, in addition to the written submissions of the parties including, both parties' statement of case and outline of argument the Commissioner has taken her decision on the basis of clear and convincing evidence and submissions in this appeal. The Commissioner determines that the Appellant has shown on balance that in circumstances where a credit was not to be taken in accordance with Schedule 24 TCA 1997, there was no absolute prohibition on the deductibility in accordance with section 81 TCA 1997. Moreover, the Commissioner determines that the Appellant has shown on balance that it meets the test for deductibility as outlined by Lord Davey in the decision in *Strong & Co* and affirmed in the decision in *Harrods*. The principles were also upheld in the Irish decision *MacAonghusa*.

164. In the context of the facts of this appeal, the Commissioner is satisfied that, the following factors entitle the Appellant to treat foreign RWHT suffered, as a final cost of doing business in those jurisdictions:

(i) The Appellant's circumstances were such that it could not avail of credit for foreign tax, in accordance with Schedule 24 TCA 1997;

(ii) In circumstances where the credit was not to be allowed in accordance with paragraph 7(1) of Schedule 24 TCA 1997, no right of general deduction is precluded, in accordance with paragraph 7(3)(a) of Schedule 24 TCA 1997;

(iii) Even if the Appellant was in a position to avail of a credit in accordance with Schedule 24 TCA 1997, paragraph 10 of Schedule 24 TCA 1997 provides a right to elect that credit shall not be allowed;

(iv) The foreign RWHT was calculated prior to the ascertainment of profit, that is the tax is applied to gross royalty;

(v) The tax was calculated irrespective of whether the Appellant made a profit or a loss;

(vi) There was a nexus between the expense and the earning of profits for deductibility. The Appellant suffered foreign RWHT, for the purpose of enabling it to carry on and earn profits in the trade (as per Lord Davey in *Strong & Co.*);

(vii) The sequencing or the timing of when the liability was incurred was irrelevant, as was the absence of volition, to the test for deductibility under section 81 TCA 1997.

The Finance Act 2019

165. The Commissioner notes the amendment to section 81 TCA 1997, effected by the Finance Act 2019. The Commissioner observes that the Finance Act 2019 introduced a new subsection (p) to section 81(2) TCA 1997. It commenced from 1 Jan 2020 and whilst it was not applicable to the periods in question in this Appeal, it provides that: "*no sum shall be deducted in respect of…any taxes on income*".

166. The Respondent drew the Commissioner's attention to the decision in *Cronin* which makes clear that any such approach to the interpretation of statutes is entirely impermissible. In that case, the Supreme Court held that a Court cannot construe a statute in the light of amendments that may thereafter have been made to it. Griffin J. in his judgment in the Supreme Court at page 572, stated that:

"*An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be.*"

167. The Commissioner is satisfied that it is appropriate and correct to accept the Respondent's submission in this regard. The Commissioner is satisfied having regard to the jurisprudence that an amending provision cannot be used to interpret pre-existing statutory provisions. Therefore, the Commissioner undertook no consideration of the amended provisions herein.

168. Accordingly, based on a consideration of the evidence and submissions together with a review of the facts and documentation, the Commissioner is satisfied that in circumstances where foreign RWHT suffered by the Appellant, cannot be credited under Schedule 24 TCA 1997, and which was applied to the gross income of the Appellant, the foreign RWHT suffered was an expense necessarily incurred by the Appellant in order to carry on its trade and is "*wholly and exclusively laid out or expended for the purpose of the trade of the company*". The foreign RWHT suffered by the Appellant was an expense incurred in earning its profits and so should be deductible for Irish tax purposes under Section 81(2)(a) TCA 1997, as an expense wholly and exclusively incurred for the purposes of the business activity.

169. In reaching her conclusions in this appeal, the Commissioner has accepted the submissions advanced on behalf of the Appellant. For all of these reasons, the Commissioner reached the clear conclusion at the end, for the high quality of the work involved in this complex appeal, and for the clarity of submissions by all parties.

Determination

170. As such and for the reasons set out above, the Commissioner determines that the Appellant has succeeded in showing on balance that the Respondent was incorrect to issue the Notices of Determination dated [redacted], [redacted] and [redacted], pursuant to section 864 TCA 1997, in respect of the corporation tax periods ending [redacted] ("FY16"), [redacted] ("FY17") and [redacted] ("FY18") respectively.

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

Notification

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

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

Claire Millrine
Appeal Commissioner
27 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

Appendix 1

TAX APPEALS COMMISSION

[redacted]

BETWEEN:

[redacted]

The Appellant

-and-

THE REVENUE COMMISSIONERS

The Respondent

AGREED STATEMENT OF FACTS

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1 Outline of Appeal

1.1 This Appeal relates to the denial by the Respondent of a corporation tax deduction taken by the Appellant for the purposes of calculating its profits assessable to Irish corporation tax for the periods ending [redacted] ("FY16") and [redacted] ("FY17") (FY16 and FY17 together referred to as the "Appeal Periods").

1.2 The deduction was claimed in respect of foreign withholding tax ("WHT") incurred by the Appellant on charges raised by it for the use of intellectual property ("IP") by [redacted]

2 Background

2.1 The Appellant is a trading company incorporated and tax resident in Ireland.

2.2 [redacted]

[redacted] .

2.4 [redacted]

2.5 [redacted]

2.6 The Appellant controls and funds the development of the IP Assets and its principal activities consist of [redacted]

2.7 Each of the [redacted] Operating Entities requires access to the Appellant's IP Assets to [redacted]

2.8 During the Appeal Periods, the Appellant granted access to the IP to each of the Operating Entities under Intellectual Property Licensing Agreements ("IPLAs") [redacted] In return, the Operating Entities paid a royalty to the Appellant (the "Payments"). It is these Payments which are reduced by the WHT which is the subject of this Appeal.

2.9 The WHT was incurred by the Appellant by way of deduction from the Payments during the Appeal Periods.

FY16

2.10 The corporation tax return relating to FY16 was filed on [redacted] and included a claim for a deduction of the amount of the WHT incurred.

2.11 On [redacted] the Respondent wrote to the Appellant (the "FY16 Determination Letter") notifying the Appellant that, in the Respondent's view, the Appellant had incorrectly claimed a deduction for FY16, under section 81 TCA, amounting to €30,267,408 for the WHT, and of the Respondent's intention to make an amended assessment to corporation tax to deny that deduction.

2.12 On [redacted] the Appellant filed a Notice of Appeal appealing the FY16 Determination Letter and amended assessment issued by the Respondent in respect of the WHT deduction the subject of this Appeal.

FY17

2.13 The corporation tax return relating to FY17 was filed on [redacted] and included a claim for a deduction of the amount of the WHT incurred.

2.14 On [redacted] the Respondent wrote to the Appellant (the "FY17 Determination Letter") notifying the Appellant that, in the Respondent's view, the Appellant had incorrectly claimed a deduction for FY17 under section 81 TCA amounting to €48,379,118 for the WHT, and of the Respondent's intention to make an amended assessment to corporation tax to deny that deduction.

2.15 On [redacted] the Appellant filed a Notice of Appeal appealing the FY17 Determination Letter issued by the Respondent in respect of the WHT deduction the subject of this Appeal.

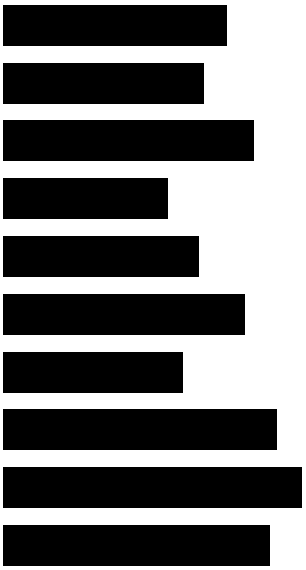
Tax Impact

2.16 [redacted]

2.17 [redacted]

3 **Jurisdictions**

3.1 [redacted]



3.2