119TACD2024

Between

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought by ███████ ("the Appellant") of amended Notices of Assessment to corporation tax made by the Revenue Commissioners ("the Respondent") in respect of the accounting periods ended 28 August 2018 and 28 February 2019 ("the periods at issue").

2. The particular issue which falls to be determined is whether foreign withholding taxes, incurred by the Appellant on dividend payments that it received as a consequence of its holding shares in foreign based companies, constitute expenses that are deductible under section 81(2) the TCA 1997 for the purpose of calculating its profits or gains chargeable to corporation tax.

3. In determining this appeal, the Commissioner had the benefit of legal argument made by a director of the Appellant and counsel for the Respondent, based on agreed facts, which are set out in this Determination. Prior to the commencement of the hearing of the appeal, the Commissioner heard legal submission on whether the director of the Appellant should be permitted to represent the Appellant, in circumstances where the Supreme Court in *Battle v Irish Art Promotion Centre Ltd,* [1968] I.R. 252, held, in the context of court proceedings, that representation of a company by a director should not be permitted, save in exceptional circumstances. Having heard submissions from the parties the Commissioner permitted representation by the director of the Appellant and the appeal proceeded.

Background

4. The Appellant is an Irish resident special purpose company established to issue exchange traded securities. In so doing, it trades in financial instruments, including derivatives, equities, bonds and futures and is registered in the State as a "qualifying company" under section 110 of the TCA 1997.

5. In the course of its trading in financial instruments, the Appellant opted to acquire and hold shares in foreign resident companies that were 'cum-dividend' (i.e. in respect of which a dividend was due to be paid out in the future). As a consequence of this, over the periods at issue the Appellant received dividend payments in respect these shareholdings. The bulk of these payments arose from shareholdings in companies resident in the United States, though dividends were earned in a variety of countries. The full list of the same is set out in the part of this Determination entitled "*Material Facts".*

6. The total sum of the dividends received by the Appellant over the relevant periods was $478,390. This constituted 4.5% of its overall trading income, gains and losses over that time.[1]

7. A major proportion of the dividend payments received by the Appellant over the periods at issue were the subject of dividend withholding tax ("DWT"), deducted at source in the country of residence of the company in which the Appellant held shares. The sum of the dividend payments received over the periods at issue that were subject to foreign DWT was $396,240.

8. In the case of those resident in the United States, the rate of withholding tax applied was 30%. The precise rate varied from country to country.

9. The amount of DWT charged over the relevant periods in respect of dividends paid to the Appellant was €44,932 for the period ending 29 August 2018 and €44,508 for the period ending 28 February 2019.

10. The amount of DWT paid by the Appellant in respect of dividends that it received on foot of its shareholdings in foreign resident companies bore no relation to its profitability over the periods at issue.[2]

11. In its corporation tax returns for the periods at issue, the Appellant deducted the DWT that it had paid on foot of its receipt of dividends for the purpose of calculating its taxable income. However, in so doing it included an expression of doubt as to whether the DWT that it had paid in respect of the dividends received constituted expenses "*wholly and exclusively for the purposes of* [its] *trade",* which were deductible under section 81(2) of the TCA 1997.

12. Notwithstanding the Appellant's deduction in its corporation tax returns of the DWT incurred, the Appellant's financial statements for the period from 29 August 2017 to 28 February 2019 (i.e. those covering the periods at issue) record the gross amount of dividends received, including that portion subject to DWT, as part of its income. At the same time, the same financial statements account for the DWT incurred as forming part of the Appellant's operating expenses.

13. For the periods at issue, the Appellant returned nominal assessable profits of €983 for the period ended 28 August 2018 and €467 for the period ended 28 February 2019. That it did so was a consequence of it being a "qualifying company" under section 110 of the TCA 1997 which, though in receipt of income treated as falling under Case III of Schedule

[1] Agreed Statement of Facts of the parties, point 11.
[2] Agreed Statement of Facts of the parties, point 14;

D, was entitled to have its profits and gains computed as though its income fell under Case I of Schedule D (i.e. that relating to a trade). This meant that it could, pursuant to section 81(2) of the TCA 1997, treat as a deductible expense the interest and accrued liabilities paid to the holders of the notes it issued to fund its investment activity.

14. By correspondence of 1 December 2020, the Respondent informed the Appellant of its view that the DWT that it had paid for the periods at issue did not constitute a deductible expense under section 81(2) of the TCA 1997, *inter alia,* on the grounds that it was not an expense laid out "*wholly and exclusively for the purpose of* [the Appellant's] *trade".*

15. Subsequently, on 5 March 2021, the Respondent issued Notices of Amended Assessment for the periods at issue, which reflected its refusal of the deduction of DWT claimed by the Appellant in the amounts of €44,932 and €44,508 respectively. The effect of these refusals was that the Appellant was assessed to have balances of corporation tax payable of €12,081.15 and €12,245.

Legislation and Guidelines

16. Section 81 of the TCA 1997 is headed "*General rule as to deductions"* and provides, *inter alia*:-

    (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. [Enter Text]

    (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…"*
    >
    > […]

17. Section 77 of the TCA 1997, headed "*Miscellaneous special rules for the computation of income*" provides, inter alia:-

    "(6) The amount of any income arising from securities and possessions in any place outside the State 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 any sum paid in respect of income tax in the place where the income has arisen."

18. Section 826 TCA 1997, headed *"Agreements for relief from double taxation*" provides, *inter alia*, that double taxation agreements made by the Government shall take effect once an Order approved by Dáil Eireann has been made and the Oireachtas enacts legislation that makes the Order part of Irish law. The mechanism for the giving of relief from double taxation is set out in Schedule 24 of the TCA 1997.

19. Schedule 24 of the TCA 1997 is entitled "*Relief from income tax and corporation tax by means of credit in respect of foreign tax"* makes and sets out the mechanics for determining the amount of against, inter alia, Irish income tax and corporation tax in respect of foreign tax that can be given. Paragraph 7(1) therein provides:-

    "*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."*

20. Thereafter, Paragraph 7(3)(a) of Schedule 24 of the TCA 1997 provides that where credit for foreign tax incurred is to be allowed, "[…] *no deduction shall be made for foreign tax (whether in respect of the same or any other income)."*

21. Paragraph 10 of the Schedule 24 of the TCA 1997 provides:-

    "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."

22. Lastly, paragraph 4 of Schedule 24, entitled "*Limit on total credit – corporation tax"*, provides:-

    "(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."*

23. Together, these paragraphs of Schedule 24 are sometimes referred to as the "*Irish measure".* For the purposes of this appeal its relevance lies in the fact that the credit available for foreign tax incurred cannot exceed the amount of Irish corporation tax

attributable to that same income. In this instance, the level of credit available to the Appellant under Schedule 24 in respect of the DWT incurred was limited to the amount of corporation tax attributable to the Appellant's dividend income. As these were negligible sums for the periods at issue, only negligible amount of credit was there to be claimed under this mechanism.

Submissions

Appellant

24. At the heart of the Appellant's case was a simple premise, which was expressed in brief terms orally at the hearing of the appeal by its director. This was that the DWT charged on the foreign dividend amounts was a charge not on its profits or gains, but rather on its gross receipts or income. This, it said, was a critical feature of the case. Section 81(2)(a) of the TCA 1997 permits the deduction of expenses "[…] *laid out or expended for the purposes of the trade or profession* […]". In *Strong v Woodifield [1906] AC 448,* the House of Lords considered the meaning of *"Rule 1",* which was identical in its terms to section 81(2). Therein, at page 453, Lord Davey held:-

   "*These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits."*

25. According to the director of the Appellant, there existed no general legal principle to the effect that tax was precluded from being considered an expense laid out for the purpose of the carrying on of trade and the earning of profits. In saying this, he did not take issue with the long-established principle that a tax *on the profits or gains* of a business was not a deductible expense. This was so because, as the court held in *Commissioners of Inland Revenue v Dowdall O'Mahony & Co Ltd,* [1952] 33 TC 259, in a passage quoted at greater length in the part of this Determination relating to the Respondent's submissions, a tax on profits was not a cost relating to the generation or creation of profits, but rather "[…] *the application of those profits when made."*

26. However, a tax on the profits or gains of a business was not the kind of tax to which the Appellant had been subjected as a consequence of the earning of dividends in foreign countries. Instead, in each relevant jurisdiction the dividend amounts due to the Appellant were taxed at source, with the tax due being deducted by the payer of the dividend and remitted to the appropriate national authority. The director of the Appellant emphasised that, as a matter of agreed fact, the amount of tax owed in respect of its income attributable to dividends accruing from the holding of shares bore no relation to whether the Appellant made a profit from the conduct of its overall business activity, namely the

trading of financial instruments. This, he submitted, meant that the DWT had to be viewed not as an 'application of profits made', but rather as a tax imposed by the various jurisdictions in question on foot of its decision to carry out business there.

27. With this in mind, the director of the Appellant drew attention to the judgment of the Court of Appeal of England and Wales in *Harrods (Buenos Aires) v Taylor-Gooby,* [1964] 41 TC 450. In this case, the well-known department store Harrods, which was incorporated and resident in the United Kingdom, sought to carry on its business from a premises in Argentina. In order to so do, Harrods was required under Argentine law to pay a 'substitute tax', which was levied at a rate of 1% of its capital. This tax was payable whether or not Harrods made any profits from its activity in Argentina and the law of that country made provision for sanction if the tax on turnover was not paid. In finding that the tax was not one on profits earned, but rather a tax constituting a condition for the carrying on of business in the first place, Danckwerts LJ stated at page 468:-

> *"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 its 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."*

28. The case to which Dankwerts LJ referred, *Smith v Lion Brewery,* [1911] AC 150 concerned a brewery that acquired licensed houses, which were then let to tenants who covenanted to buy all their beer from the brewery. Under the Licensing Act 1904, "compensation fund" charges were levied on the licences which, though initially paid by the tenants, ultimately were borne by the brewery in circumstances where the cost was deducted from the rent it received. In affirming the earlier judgment of the Court of Appeal, the Earl of Halsbury and Lord Atkinson found that, in carrying out its trade, an aspect of which was the letting of its licenced premises, the brewery was obliged to pay the levy. It was, in other words, something that the brewery had to suffer regardless of whether it ended up making a profit from its trade and was thus an expense falling within the aforementioned "Rule 1".

29. The director of the Appellant submitted that the DWT that it paid was comparable to the levy that was found to be a deductible expense by the House of Lords in *Smith v Lion Brewery.* In aid of this submission he drew attention to *Hong Kong Inland Board of Review,* D43/91 [1991] 1 HKRC 80-154 ("the Hong Kong decision"). This case involved a Hong Kong incorporated shipping company that owned and operated container ships

that plied between Hong Kong, Australia, Taiwan and the Philippines. The shipping company was required by each of Australia, Taiwan and the Philippines to pay tax on its gross receipts earned in their country.

30. In finding that the foreign taxes suffered constituted expenses laid out for the purpose of earning profit, the Board of Review focused on two intertwined facts: first, the taxes were due whether or not the shipping company turned profit from its enterprise abroad and, secondly, it was legally required to pay the taxes and, if it did not do so, could be prevented from trading. Because of these facts, the taxes imposed by Australia, Taiwan and the Philippines were "*outgoings incurred in the production of profits"* and not an application of profits made.

31. In reaching this conclusion, the Board of Review chose to distinguish the case before it from the circumstances present in the case *Yates v GCA International Limited*, [1991] STC 157, which as will be seen the Respondent relied on. It did so because in *Yates* the particular Venezuelan tax at issue, which was a charge of 10% on 90% of the relevant company's gross receipts, expressly stated that the 90% was be deemed to constitute profit after the deduction of expenses. Consequently, it was held to be "irrelevant" for the purpose of deciding whether the taxes applied by Taiwan, Australia and the Philippines were deductible.

32. The director of the Appellant drew attention to the Commission Determination *08TACD2019,* an appeal which he submitted was in effect on all fours with the instant matter. The appellant was a company involved in the trading of derivative products and it was an agreed fact that it was a "market maker". For the purposes of this Determination, it suffices to say that a market maker is a trader required by law to buy and sell shares to and from willing investors, such that it promotes market liquidity. In short, the market maker appellant had, in trading derivative products, a duty to acquire shares in foreign companies from vendors seeking to sell them. Once acquired, some of these shares gave rise to dividend payments that were subject to DWT, taxed source in exactly the same manner as the payments at issue in the instant matter.

33. The market maker appellant sought to have the DWT treated as a deductible expense, which claim was refused for the same reasons as those given in this appeal. On appeal to the Commission, this decision was reversed. The reasons for this are explained in slightly more detail in the Analysis part of this Determination. In summary, however, the Appeal Commissioner found that the DWT on the acquisition of shares was an expense that appellant had to incur in order for it to be able carry out its market making trade and to make profit. It was therefore held to be one incurred wholly and exclusively for the

purposes of the trade. While accepting that the Appellant was not a regulated market maker with an obligation to provide market liquidity, the director submitted that its position was in essential terms no different. He submitted that in carrying out its business activity, the Appellant was not concerned with the receipt of dividends and, in this regard, pointed to its financial statements covering the period at issue. These, as noted in the preceding part of this Determination, disclosed that dividend payments represented only a minor part of the Appellant's income. It is worth highlighting at this point that counsel for the Respondent raised objection to the director for the Appellant seeking to introduce evidence into the hearing in the making of submissions. There had, he submitted, been no evidence proffered as to the nature of the Appellant's business and the facts agreed were not such as to permit the Commissioner to find that the part of its income accounted for as relating to the receipt of dividend payments was not part of its trade.

34. There were two other submissions of significance made by the director of the Appellant. First, he pointed out that, on 1 January 2020, section 81(2) of the TCA 1997 was amended by the section 20 of the Finance Act 2019, which inserted at "(p)" an exclusion on the deduction of "[…] *any taxes on income".* This, he said, was a clear indication that prior to this legislative amendment taxes on income were deductible. Secondly, the director of the Appellant pointed to written guidance issued by the Respondent, whereby it stated that Digital Services Taxes levied by other countries on income derived from the provision of digital services constituted a deductible expense. If such a tax could be deemed deductible, he submitted that there was no reason why the same, in principle, could not be said of other types of tax.

Respondent

35. Counsel for the Respondent submitted that at the heart of this appeal was the application of the longstanding general principle that, in order for an expense to have been incurred "*wholly and exclusively for the purposes of a trade or profession"*, and thus be deductible under section 81(2) of the TCA 1997, it must be one laid out so as to create a profit. Counsel submitted that it was "*a contradiction in terms"* to treat a tax on income generated by a trade as an expense related to the creation of a profit.

36. Counsel for the Respondent emphasised that the Appellant, as a company holding or managing "qualifying assets" within the meaning of section 110 of the TCA 1997, was entitled in calculating its taxable profit to deduct as an expense the interest or accrued liabilities paid to the holders of the notes it issued to fund its investment activity. This entitlement arose from the fact that, though its profits or gains were chargeable to corporation tax under Case III of Schedule D, section 110(2)(a) of the TCA 1997 permitted

those profits or gains to be computed in accordance with Case I, to which section 81 of the TCA 1997 concerning the general rules as to deductions applied. As such, the Appellant was in effect benefitting from a form of tax relief that permitted it to opt, notwithstanding the size of its revenue, to reduce its profit to a nominal sum. Its decision to do so accounted for its minimal profits for the periods at issue.

37. That this was so was important in the context of the Appellant's suggestion that refusal of the deduction of the DWT had resulted in an absurd and unfair situation where its tax on income for the periods in question was substantially greater than its profit levels. The fact that the DWT was greater was solely a consequence of the Appellant's choice to avail of the special deduction rules made possible as a consequence of section 110(2) of the TCA 1997. Had the Appellant not chosen to reduce its profits to nominal amounts, the level of credit available under Schedule 24 for DWT would have been greater and could have, in effect, reduced its exposure to foreign tax incurred altogether. The adverse impact of the Irish Measure was, it was submitted, entirely a consequence of the Appellant's exercise of its own volition.

38. Before embarking on an analysis of section 81 of the TCA 1997, counsel for the Respondent drew attention in oral submission to the authorities of *The Revenue Commissioners v O'Flynn Construction Limited,* [2013] 3 IR 533, *Dunnes Stores v The Revenue Commissioners [2019] IESC 50* and *Bookfinders Limited v The Revenue Commissioners [2020] IESC 60.* These, he submitted, made clear that a literal or "plain meaning" interpretation of a taxing provision should be applied in the first instance. Only where such an interpretive approach would yield a reading of that provision that was absurd should resort be had to a purposive method of interpretation. Furthermore, counsel laid emphasis on paragraph 111 of *Heather Hill v Management Company CLG v An Bord Pleanála [2022] IESC 43,* where Murray J, analysing the comments of O'Donnell CJ in relation to statutory interpretation in *The People (at the suit of the DPP) v AC,* [2022] 2 IR 49, stated on behalf of the whole of the Supreme Court:-

> *"O'Donnell C.J. (with whose judgment MacMenamin, Charleton, O'Malley and Woulfe JJ. agreed) explained the ambit of the literal approach (or as he framed it 'the plain meaning approach') in terms similar to those adopted by McKechnie J. in the cases to which I have referred earlier. It would be wrong, he said, to isolate the critical words and consider if they have a plain or literal meaning in the abstract. Instead ' if, when viewed in context, having regard to the subject matter and the objective of the legislation, a single, plain meaning is apparent, then effect must be given to it unless it would be so plainly absurd that it could not have been intended' (at para. 7) (emphasis*

added). The section, he held, was ambiguous and required additional words to make its meaning clear beyond dispute: 'certification' implied that the person was in a position to authoritatively state the truth of some fact or matter. Viewed in the light of the purpose of the provision – including the fact that it was intended to enable the admission of evidence against an accused in a criminal trial – it was properly limited in scope to situations in which the medical practitioner certified the record of an examination they personally carried out or which was carried out under their supervision. Were the position otherwise, as the judgment put it, a general practitioner in the West of Ireland could certify an examination conducted by a neurosurgeon in Dublin, an outcome that could not credibly be expected without far greater regulation within the legislation. Charleton J. arrived at a similar conclusion, observing 'the state of the law prior to the enactment and the purpose of the enactment are indispensable instruments for construction as well as the requirement that a court give to legislation its ordinary meaning' (at para. 24)."

39. Counsel then referred to paragraph 116 of Murray J's judgment in *Heather Hill*, which he considered apposite when considering whether section 81 of the TCA 1997 could or should be interpreted in a manner permitting the deduction of a foreign withholding tax incurred as a consequence of the earning of income. As the Commissioner considers paragraphs 112-115 also to be relevant, these too are quoted hereunder:-

"*112. I stress these features of the process of statutory interpretation here because there is both some merit to the suggestion in the Court of Appeal judgment that the High Court judge applied an overly literal interpretation to s. 50B, and (as I explain later) at the same time substance in the applicant's contention that the Court of Appeal pushed its analysis of the context too far from the moorings of the language of the section. The debate reveals an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases — that the line between the permissible admission of ' context' and identification of ' purpose', and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred. In seeking to maintain the clarity of the distinction, there are four basic propositions that must be borne in mind.*

113. First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington, [2001] 3 IR

251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan, [1979] IR 265 at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276).

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. Fourth, and at the same time, 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. However — and in resolving this appeal this is the key and critical point — the 'context' that is deployed to that end and ' purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

40. Counsel for the Respondent submitted that *Heather Hill* made clear that the literal or plain meaning of section 81(2) of the TCA 1997 could not be arrived at in a vacuum. When one considered the provision in conjunction with Schedule 24 of the TCA 1997, which permitted the claiming of credit for foreign tax paid up to the limit of the Irish measure, the conclusion should be reached that, by its plain meaning, section 81(2) of the TCA 1997 did not permit foreign tax borne as a consequence of the earning of income to be a deductible expense.

41. Counsel for the Respondent submitted that reading section 81(2) of the TCA 1997 in this manner was entirely consistent with long-standing case law to the effect that income tax borne was, as a general rule, not expenditure "*wholly and exclusively laid out for the purposes of the trade or profession".*

42. In this respect, he first opened the judgment of the House of Lords in *Ashton Gas Company v Attorney General & Ors [1906] AC 10.* This case concerned the meaning of legislation that provided that dividend payments to be divided among the shareholders of a gas company not exceed a given rate relative to is profits. The House of Lords, in finding that the profits ought to be calculated as inclusive of any income tax owed thereon, held at page 12:-

> *"My Lords, so presented the case appears to me to be perfectly clear. The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters the real nature of the profit. 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. I cannot understand how you can make the income tax part of the expenditure. I share Buckley J.'s difficulty in understanding how so plain a matter has been discussed in all the Courts at such extravagant length."*

43. Counsel for the Respondent then opened the judgment of High Court of England and Wales in *Yates v GCA International Limited*, [1991] STC 157. This concerned whether a tax of 20% on the turnover of a United Kingdom company that carried on a petroleum and

gas consultancy business in Venezuela constituted a "tax on income", such that it could avail of double taxation relief provided for in legislation of the United Kingdom. In finding that it did, Scott J held at page 168:-

> *"The purpose behind art 54* [i.e. Venezuelan taxing legislation] *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 open 'net profits' to use the expression employed in the article."*

44. Shortly after this passage, on the same page, Scott J stated:-

> "[...] *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.*

45. Then, at page 169, he held:-

> *"The intention of each of these articles, evidenced from the language used therein, is to charge 'net profits'. That expression is used in each of the Chapter IV articles. To the extent that art 54 and the other articles seek to charge net profits to income tax, they are, in my judgment, serving the same function as income tax and corporation tax serve in the United Kingdom in relation to the profits of a business carried on by an individual or by a company, as the case may be. That was the conclusion to which the Special Commissioner came. I agree with it, and would dismiss the Crown's appeal against that part of his decision."*

46. Counsel for the Respondent submitted that the judgment in *Yates* answered the core point grounding the Appellant's case. The mere fact that the DWT at issue was calculated on the Appellant's gross foreign dividend receipts did not exclude those taxes imposed as being on its income. It was submitted that the DWT should be taken to be a tax on income and, counsel argued, from this it should follow that it was not a tax incurred for the purpose of generating its profits or gains, but rather one consequent on them having being earned. Therefore, it could not be said that the DWT constituted expenses falling within the scope of section 81 of the TCA 1997 that were capable of deduction for the purpose of calculating taxable income.

47. As further authority for the proposition that a tax on income was not deductible, counsel for the Respondent opened *Commissioners of Inland Revenue v Dowdall O'Mahony & Co Ltd,* [1952] 33 TC 259, a case where a company with branches in the United Kingdom and Ireland sought to claim as a tax deduction against tax due in the United Kingdom that income tax suffered in Ireland. On this issue, the Court of Appeal of England and Wales held at page 274:-

> "*On the first question it was contended on behalf of the Appellants that the authorities establish that the payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade and that this is so whether such taxes are United Kingdom taxes or foreign or dominion taxes, and reliance was placed upon the cases of Strong v Woodifield,* [1906] AC 448; 5 TC 215; *Commissioners* […]"

48. On this, Lord Oaksey held:-

> "*On the first question I am of the opinion that taxes such as those now in question, namely, income tax, corporation profits tax and excess profits tax, are not, according to the authorities, wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade: they are the application of those profits when made and not the less so that they are exacted by a dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by dominion or foreign governments."*

49. Counsel for the Respondent submitted that the position in respect of the DWT incurred by the Appellant was exactly the same as the tax at issue in *Dowdall & O'Mahony.* These taxes represented not expenditure laid out wholly and exclusively to earn profits in the form of dividends, but rather were the application of those profits that had been earned.

50. Counsel for the Respondent then cited the judgment of the House of Lords in *Strong v Woodifield,* [1906] AC 448. There, the court had to consider whether money paid out by the proprietor of an inn to a customer who was injured by falling masonry fell within the deduction test applicable in that jurisdiction, which mirrored section 81 of the TCA 1997. In holding that it did not, the House of Lords expressed the view that the compensation payment was not a disbursement made 'for the purpose of the trade' in the following terms:-

> "*I doubt whether the damages in the present case can properly be called a trading loss. I prefer to decide the case upon Rule 1* [i.e. the rule equivalent to section 81 of

the TCA 1997], *which applies to profits of trades* […]. *I think that the payment of these damages was not money expended "for the purpose of the trade". These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade etc. I think the disbursements permitted are such as are made for that purpose. 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. In short, I agree with the judgment of the Master of the Rolls."*

51. The foregoing passage, it was submitted, further encapsulated why, as a general rule, tax on income could not constitute a deductible expense.

52. Reference was also made to the judgment of the High Court of England and Wales in *Allen v Farquharson Bros & Co,* [1932] 17 TC 59, a case in which a company sought to deduct as an expense the cost of obtaining legal advice and representation in bringing an appeal against a tax assessment. In respect of this, Finlay J held at page 64 that a deductible expense:-

    "[…] *means something or other which the trader pays out; I think some sort of volition is indicated. He chooses to pay out some disbursement; it is an expense; it is something which comes out of his pocket. A loss is something different. This is not something which he expends or disburses. That is a thing which, so to speak, comes upon him ab extra.*

53. In respect of this, counsel made the point that DWT was deducted at source from the dividend payments due to the appellant. The Appellant did not volunteer to pay it. Rather it was something required of it. This was a further feature distinguishing it from a deductible loss under section 81 of the TCA 1997.

54. Counsel for the Appellant then moved to consider the cases on which the Appellant relied in support of its claim, which he characterised as exceptions to the general rule of the non-deductibility of tax on income, beginning with *Harrods.* He submitted that the "substitute tax" at issue in that case was plainly not comparable to a tax on income at all. It was, instead, a cost that Harrods was obliged to pay as a company registered outside of Argentina but carrying out economic activity within it. This cost came in the form of a tax charged at the rate of one per cent annually on its capital and was due irrespective of whether a profit was made from the activity carried out in Argentina. It was, in short, a prerequisite to carrying out its business and was thus something laid out in order that profits might thereafter be earned. Precisely the same analysis was applicable in respect of *Smith v Lion Brewery,* where the brewery company, in the conduct of its business

relating to the letting of licensed premises it owned, was required to pay a "*compensation levy"* under the Licensing Act, 1904. Though this too was a tax, it was one that was in no way consequent to the earning of profits or gains. Rather, it was a necessary, and mandatory, cost associated with the effort to earn them.

55. Counsel for the Respondent referred to the Commission Determination *02TACD2018.* There, the Appeal Commissioner was required to consider whether foreign withholding tax imposed on gross royalty payments received by the appellant in question in other jurisdictions constituted deductible expenditure laid out for the purpose earning profits or gains. In finding that it did not, the Appeal Commissioner focused on the fact that withholding tax was a tax on income, levied *after* it had been earned. In her view the timing of the imposition of the tax was significant, if not determinative, and she was minded to agree with the case made by the Respondent that it was akin to a "logical impossibility" that a tax imposed in the wake of the receipt of income could constitute a disbursement made to generate it. As regards the point made that the withholding tax in question was imposed on gross royalty revenue, without ostensible regard to whether profits were earned, the Appeal Commissioner was persuaded that the logic evident in *Yates* was applicable to the case before her. Just as the taxing of 90% of that company's Venezuelan turnover at a rate of 10% represented an attempt by that country's authorities to tax profits or gains, the taxing of gross royalty receipts in the case before her did not preclude the withholding tax from being a tax on profits or gains. In the event, the Appeal Commissioner held that it was such a tax.

56. Counsel for the Respondent then addressed the Tax Appeals Commission Determination *08TACD2019,* in which the Appeal Commissioner hearing the appeal found that withholding tax incurred by the Appellant on dividend payments it had received constituted a deductible expense. In this regard, he said that the circumstances of the case made the tax at issue an exception to the general rule that tax on income is not expenditure laid out for the purpose of earning profits. This was so because, as in the aforementioned case of *Strong v Lion Brewery,* and also the *Hong Kong* decision, the tax was one which the appellant in that case had no choice but to incur if it wished to carry out its business in the foreign countries which imposed the withholding tax. The appellant in *08TACD2019* was a company involved in the trading of derivative products and it was an agreed fact in the appeal that it was a "market maker". As such, it was required by law to buy and sell shares to and from willing investors, such that it ensured market liquidity. In short, the appellant in that appeal had, in trading derivative products, no option but to acquire shares in foreign companies in respect of which it received dividend payments

that were then taxed at source in the same manner as the dividend payments at issue in the instant matter.

57. Counsel for the Respondent thus sought to distinguish the Appeal Commissioner's determination in *08TACD2019.* The Appellant, in contrast to the market maker, had no obligation to acquire the cum-div shares that it did, which gave rise to DWT on the dividends received. Counsel emphasised that the limit of its agreement on the facts regarding the nature of the Appellant's business was that it was a company involved in the trading of financial instruments, including shares. There was no agreement whatever that the Appellant, in order to carry out its trade, was obligated to acquire the shares that it did.

58. Counsel for the Respondent briefly addressed the Appellant's submission concerning the amendment of section 81 of the TCA 1997 by the insertion under section 20 of the Finance Act 2019 of subsection (2)(p), which created an express exclusion under legislation of the deduction in computing profits or gains of sums constituting "*taxes on income".* In this regard, he submitted that in *Cronin (Inspector of Taxes) v Cork and County Property Company,* [1986] IR 599 the Supreme Court held that seeking to establish the meaning of a statutory provision in light of a subsequent amendment by the Oireachtas was not a permissible interpretive approach. This was evident from page 572 of the Court's judgment, which states that:-

> "*An amendment to 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 statue is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be".*

59. This statement of the law, which would appear to have been reaffirmed by the Supreme Court in *The Revenue Commissioners v Droog [2016] IESC 55* at paragraph 5.1 therein, was a clear indication that the express exclusion of taxes on income from being deductible expenses upon coming into force of the Finance Act 2019 at the start of 2020, was irrelevant for the purpose of establishing its meaning prior to that point.

Material Facts

60. The facts material to this appeal are as follows:-

    - the Appellant is an Irish resident special purpose company established to issue exchange traded securities and is a "qualifying company" under section 110 of the TCA 1997;

- in the course of its trading in financial instruments, the Appellant opted to acquire and hold shares in foreign listed companies in respect of which it received dividend payments;
- over the periods at issue the Appellant received dividend payments in the amount of $396,240 as a consequence of holding these shares that were subject to DWT;
- of this amount, $344,836 constituted dividend payments related to the Appellant's holding of shares in companies resident in the United States. The remainder constituted dividend payments related to the Appellant's holding of shares in companies resident in Brazil, Israel, Canada, China, Spain, the Netherlands, Denmark, Japan, South Korea, France, Italy, Belgium, Bermuda, the United Kingdom, and the Marshall Islands;
- each of the aforementioned countries charging DWT did so on the gross dividend sum received by the Appellant. The rate applicable to the United States was 30%, though it varied from country to country. Nothing turns on this variation;
- the total DWT charged over the periods at issue was $103,353. Of this, $52,388 (€43,932) related to the period ended 28 August 2018 and $50,954 (€44,508) related to the period ended 28 February 2019;
- in every instance the DWT charged bore no relation to the profitability of the company over the relevant period at issue;
- the Appellant's financial statements for the period 29 August 2017 to 28 February 2019 record under the heading "Income" and opposite the entry "Dividend Income" the gross amount of dividend payments then received;
- the foreign DWT charged over the periods at issue was accounted for in the same financial statements as part of the Appellant's overall operating expenses, which were deducted from its gross gains over the period covered by the financial statements in computing its profit;
- the Appellant's profits for the periods at issue were calculated under accepted accounting standards, specifically FRS 102;
- on 23 December 2019, the Appellant filed its corporation tax returns for the periods at issue. In so doing the Appellant sought as a deduction against its income, which included the foreign dividend payments received over the periods at issue net of DWT, the DWT charged over the same time, specifically €43,932

for the period ending 28 August 2018 and €44,508 for the period ending 28 February 2019;

- the Appellant's corporation tax return for the period ended 28 August 2018 left it with €983 of assessable profits, tax of €246 and a surcharge of €25;
- the Appellant's corporation tax return for the period ended 28 February 2019 left it with assessable profits of €467, tax of €117 and a surcharge of €6;
- these nominal amounts of profit were arrived at in circumstances where the Appellant was able as a consequence of section 110 of the TCA 1997 to deduct as expenses the interest owed and fair value movement on the notes issued to fund its trading activity;
- in making its returns, the Appellant elected under Schedule 24(10) of the TCA 1997 that credit should not be allowed against Irish tax chargeable in respect of the DWT suffered over the periods at issue;
- in its corporation tax returns for the periods at issue the Appellant included expressions of doubt regarding the deductibility of the DWT incurred over the periods at issue
- on foot of the corporation tax returns submitted by the Appellant, on 05 March 2021 the Respondent issued Notices of Amended assessment for the periods at issue;
- in respect of the period ended 28 August 2018, the Respondent decided to refuse the Appellant's claim for a deduction in respect of DWT incurred in the amount of €43,932. As a consequence of the refusal of this claim, the Appellant was assessed as having a balance payable of €12,081.15;
- in respect of the period ended 28 February 2019, the Respondent decided to refuse the Appellant's claim for a deduction in respect of DWT incurred in the amount of €44,508. As a consequence of the refusal of this claim, the Appellant was assessed as having a balance payable of €12,245.37;
- the Appellant appealed these Notices of Amended Assessment by way of Notice of Appeal delivered to the Commission on 1 April 2021.

Analysis

61. It is important to observe at the outset of this part of the Determination that this appeal was argued on the basis of agreed facts, and it is on those facts alone that the Commissioner will decide whether, as a matter of law, the assessments appealed were in error or correct. As was held by the Court of Appeal in *Hanrahan v Revenue Commissioners [2024] IECA 113* (Donnelly J and Butler J giving a joint judgment for the Court):-

    "*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* […]."

62. There was no dispute between the parties that the key question of law and fact arising was whether the DWT incurred by the Appellant over the periods at issue constituted expenses laid out "*wholly and exclusively* […] *for the purposes of* [its] *trade".* Furthermore, they were in agreement that there was ample case law to suggest that the answer to this question was to be gained by asking whether the DWT was a cost incurred for the purpose of creating or generating profits or, alternatively, was expenditure that, in the wording of Lord Oaksey in *Commissioners of Inland Revenue v Dowdall O'Mahony & Co Ltd,* instead represented the "*application of those profits when made".* Were the DWT incurred found to be the former, it would be deductible. Were it found to be the latter, it would not be. Indeed, as described succinctly by Lord Davey in *Strong v Woodifield:-*

    "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".

Determination 08TACD2019

63. In the course of oral argument, the director of the Appellant placed emphasis on the previous Determination of the Appeal Commissioner in *08TACD2019.* He appeared to do

so, at least in part, on the grounds that the Appellant's trading activity and that of the trading company in that appeal, were in essence the same. As a consequence, it was submitted the Appellant's claim for the repayment of DWT incurred on foot of trading should succeed for the very same reasons.

64. As was noted already, *08TACD2019* concerned whether DWT suffered by a "market maker" involved in the buying and selling of shares could be claimed as a deductible expense. It is clear from the Appeal Commissioner's determination that he heard extensive expert evidence, called by both parties, about the exact nature of the business of that appellant. Having considered it, he held that, in fulfilling its market making duty to stand ready to buy and sell financial securities from and to willing vendors and buyers, the purpose of the appellant's acquisition of shares was not to earn dividends, though this was a 'side-effect', but rather to hedge its position with the financial securities acquired so as to be as close to "delta neutral" as possible. The receipt of dividend income was thus not the purpose of the business, rather its purpose was to earn income from the "bid-ask spread" on the products acquired and sold in its capacity of market maker.

65. This is only a brief summary of the Appeal Commissioner's detailed analysis of the trade of a "market maker" and its relevance to the outcome of that appeal in so far as the receipt of dividend income was found, as a matter of fact, not to be for the purpose of earning profits or gains. However, it is clear to the Commissioner that it cannot be held on the facts agreed by the parties in the instant appeal that the Appellant's acquisition of shares that were "cum-div", and thus generated income in the form of dividend payments, was not part of its business model for the making of profits. For any such finding to be made the Commissioner would either have to have heard evidence regarding the nature of the Appellant's business, which did not happen, or the Respondent would have to have been prepared to agree to more than the fact that the Appellant's activity involved the trading of exchange-traded securities, which it was not. In the course of submission, both written and oral, the Appellant emphasised the agreed fact that its dividend income represented merely 4.5% of its "profits, gains and losses". This is so, however it does not seem to the Commissioner that a finding may be made that the earning of dividend income was not a purpose of its business simply because it was the lesser part of its overall income. Accordingly, to the extent that the Appellant sought to have the reasoning in *08TACD2019* applied to the instant case wholesale, the Commissioner refuses to do so.

66. However, the fact that it is not possible to equate the circumstances of the Appellant in the instant appeal with those of the appellant in *08TACD2019* does not dispose of the matter at issue. It remains possible that the facts as agreed by the Respondent might

permit the Commissioner to find that the DWT incurred was laid out for the purpose of the Appellant's trade in financial products, including equities, which business included the acquisition of shares so as to earn profit, *inter alia,* through the receipt of dividend income.

67. The focus of the submissions of the parties at the oral hearing of this appeal was on the availability of relief under section 81(2) of the TCA 1997. In this respect, the parties were agreed that relief under section 77(6) of the same legislation, which made provision for the deduction from income earned outside of the State in respect of securities or possessions of foreign tax paid thereon, could not be availed of by the Appellant. This was on account of the stipulation within the wording of section 77(6) that such deduction was only available where it could not be made under, or was not forbidden by, another provision of the TCA 1997. In the Appellant's case, it said deduction under section 77(6) of the TCA 1997 was not available because it was under section 81(2) of the TCA 1997.[3] In the Respondent's case, it said that the relief under section 77(6) of the TCA 1997 was not open to the Appellant because Schedule 24 of the TCA 1997 allowed it to claim credit for foreign tax paid up to the Irish measure of tax. As relief in excess of the Irish measure was forbidden, so too was any relief greater than that under section 77(6).

68. The Commissioner agrees with the above to the following extent. The first question to be addressed is whether section 81(2) of the TCA 1997 permits the deduction of the DWT at issue from the Appellant's income for the periods at issue for the purpose of establishing what is taxable. If the answer to this in the affirmative, then it appears to the Commissioner that no further analysis is essential. If the answer is in the negative then it would be necessary to consider whether section 77(6) of the TCA 1997 might present an alternative route to deduction.

Schedule 24 of the TCA 1997 and its relevance to interpreting the meaning of Section 81(2)

69. At an early point in his oral submissions, counsel for the Respondent put forward arguments concerning the impact of Schedule 24 on how the plain meaning of section 81(2) of the TCA 1997 should be interpreted. As noted earlier in this Determination, he suggested, in this respect, that any interpretation of section 81(2) to the effect that a tax in the nature of the foreign DWT would constitute a deductible expense would amount to an abrogation of the will of the Oireachtas. This was so because it had opted to make specific provision for relief from foreign tax in the form Schedule 24 of the TCA 1997. Citing the maxim "*generalia specialibus non derogant"* (i.e. a general provision will not be held to undermine the effect of special provision made to deal with a particular situation),

[3] Though it did argue in submission that, were it found that deduction of DWT was not available under section 81(2), then it was under section 77(6) of the TCA 1997.

he submitted that to interpret tax as constituting an expense or disbursement laid out *"wholly and exclusively for the purposes of the trade"* under section 81(2) was permitting the Appellant to circumvent the conditions for relief from foreign tax incurred that were prescribed under Schedule 24, in particular the prohibition of relief over and above the 'Irish measure.'

70. With respect to the supposed abrogation of the will of the Oireachtas, it is necessary to examine the wording of Schedule 24 of the TCA 1997. Paragraph 7(1) therein, which relates to the effect on the computation of income of the allowance of credit, provides that the paragraph is to apply "*Where credit for foreign tax is to be allowed".* Paragraph 10 therein then provides that "[…] *no credit shall be allowed* […] *if the person in question elects that the credit shall not be allowed."* It was therefore envisaged by the Oireachtas that persons could opt in or out as regards the claiming of credit. Not only that, but the effect of paragraph 7(3) is that "*no deduction shall be made for foreign tax"* where *"credit for foreign tax is to be allowed"* pursuant to paragraph 7(1). It would of course not be necessary to mention a prohibition on the claiming of a deduction where election was made for credit unless the converse was true – i.e. that where one declines to elect under paragraph 10, deduction might be claimable.

71. This leads the Commissioner to make two observations. The first is that, read together, paragraphs 7 and 10 of Schedule 24 suggest that, in at least some circumstance, a tax incurred may constitute a deductible expense. The second is that section 81(2) and Schedule 24 of the TCA 1997 appear to be alternative possible means of avoiding or reducing the burden of double taxation. This leads the Commissioner to the conclusion that the latter provision does not represent "context", such as was referred to in *Heather Hill v Revenue Commissioners,* altering what would be the otherwise plain meaning of the wording of section 81(2) in a manner that would prohibit the claiming of a deduction in respect of a foreign tax suffered.

Interpreting the wording of section 81(2) of the TCA 1997

72. Returning then to wording of section 81(2) of the TCA 1997, it was the submission of counsel for the Respondent that it was apparent from the authorities of *Ashton Gas* and *Strong v Woodifield* that, whatever about the relevance and effect of Schedule 24 of the TCA 1997, as a "general principle" evident from a long line of authorities, tax incurred should not normally be treated as an expense incurred "*wholly and exclusively for the purposes of a trade* […]*".* The cases of *Smith v Lion Brewery, Harrods (Buenos Aires) v Taylor-Gooby* and the *Hong Kong decision* represented, he said, rare exceptions to the

rule that an amount of tax could be deducted for the purpose of determining taxable income.

73. As regards the particular tax suffered by the Appellant, the Respondent said that it was clear it was no exception to this general rule. In this respect, the Appellant's status as a company availing of relief under section 110 of the TCA 1997 was relevant. While the amount of tax that was available to be credited under Schedule 24 was minimal on account of the Irish measure, this was only because the Appellant had opted to make use of another form of relief, namely deductions under section 110 of the TCA 1997, to reduce its assessable income and tax due to very small sums.

74. Before proceeding further, the Commissioner first wishes to draw attention to a Determination of the Commission, *128TACD2023*, which issued following the hearing of this appeal. This concerned the deductibility of foreign withholding tax applied to royalty payments received by the appellant company from licensees based abroad. As with the tax on the dividend payments received in the instant case, the withholding tax applied to each royalty payment, which was deductible at source, was calculated on the gross sum received. The tax therefore bore no relation to whether the appellant company was in fact profitable over the period in which it was charged. In *128TACD2023*, the Appeal Commissioner held that the royalty withholding tax at issue, though constituting tax on income, was deductible under section 81(2) of the TCA 1997. This was so because the tax in question was not on 'profit made'. Rather, it was a tax on the gross royalty paid that arose by virtue of the fact that the appellant company conducted trade abroad. In this respect, the fact that it was charged at the time, or immediately after, the royalty income had been earned did not did mean that it was non-deductible. In this respect, the Appeal Commissioner expressly disagreed with and departed from the reasoning applied in the earlier Commission decision of *02TACD2018.*

75. In reaching this conclusion, the Appeal Commissioner found the logic of the Court of Appeal in *Harrods* and the Inland Revenue Board of Review in the *Hong Kong* decision to be convincing and applicable to the matter before her. She noted that the latter of these authorities had not, it appeared, been opened to the Appeal Commissioner who decided *02TACD2018.* As in the case of the appellant in *128TACD2023*, both Harrods and the Hong Kong-based shipping company had to pay taxes that were not dependent on the earning of any profit (the particular taxes being on capital and gross receipts respectively). As a consequence, the taxes they suffered were held to be, as described in the *Hong Kong* decision, "*expenses incurred in the production of profits".* They were thus incurred wholly and exclusively for the purposes of their trade and therefore were deductible.

76. Furthermore, the Appeal Commissioner in *128TACD2023* rejected the argument of the Respondent that the judgment of the High Court of England and Wales in *Yates* meant that the royalty withholding taxes in question could be construed, notwithstanding their being calculated on the gross amount received, as taxes on profit. In this regard she observed that the Venezuelan tax at issue in *Yates* was expressly stated to constitute a tax on profit, albeit that it was calculated on the basis of company turnover. That it did so clearly marked it out from the taxes considered in *Harrods,* the *Hong Kong* decision and the matter before her.[4]

77. It appears to the Commissioner that two questions arise from *128TACD2023*. The first is whether the findings of law made in that appeal were in error, such that the outcome of the instant matter might be determined in favour of the Respondent. The second is whether, even if there were no such errors, the particular facts of this appeal are such that it might be distinguished, again with the effect that the appeal might be determined in the Respondent's favour.

78. As regards the first of these questions, the Commissioner is satisfied that the law as expressed by his colleague in *128TACD2023* is correct. In the course of submission, counsel for the Respondent argued that there existed a general principle that tax, and in particular a tax on income, could not constitute a deductible expense laid out wholly and exclusively for the purposes of a trade or business. The Commissioner does not consider this to be correct. In *Ashton Gas,* the court held that the "fallacy" presented to it by the company claiming a deduction was that one could seek to deduct from the *profit* chargeable to income tax, the income tax (i.e. the tax on the profit already made) itself. However, none of the authorities cited in the appeal suggest that there is a presumption that a tax, whatever its specific nature, cannot be an expense and that this presumption may be disapplied only as an exception.

79. It was an agreed fact in this appeal that the DWT at issue was calculated not on profits, but rather on part of the Appellant's gross income. The Commissioner is not prepared to deem the DWT applied to be a tax on profit, as counsel for the Respondent suggested might be done. That the court in *Yates* accepted that a Venezuelan tax calculated on turnover was in reality a tax on profit was, as noted by the Appeal Commissioner in*128TACD2023,* and by the Inland Board of Review in the *Hong Kong* decision, to be

[4] The Commissioner also notes the existence and relevance to the issues arising in the instant appeal of the later Determination *42TACD2024.* Therein, the Appeal Commissioner hearing that appeal, which also concerned a claim for the deduction of foreign royalty withholding tax, allowed the appellant's claim on, *inter alia,* grounds that were the same as those of the Appeal Commissioner in *128TACD2023.* Because, for the purposes of the issues arising in this appeal, *128TACD2023* and *42TACD2023* are relevant for exactly the same reasons, the Commissioner has seen fit to cite only the former in the main body of the Determination.

attributable to an express provision of that legislation that left no doubt that this was what was intended. The simple fact that it constitutes a foreign withholding tax is not, in the Commissioner's view, sufficient to allow an equivalent finding to be made in this appeal.

80. Although the determination in the *Hong Kong* decision is persuasive only, the Commissioner agrees with the Appeal Commissioner in *128TACD2023* that the reasoning contained therein is cogent and applicable in principle to instances where a company suffers a tax, such as the withholding tax in this appeal that is calculated on gross receipts. The Commissioner further observes that counsel for the Respondent sought to distinguish the tax applicable in *Yates* with the DWT at issue on the grounds that in *Yates* the shipping company was "required" to pay the tax in order to trade, whereas, he said, there was no such requirement on the Appellant. This argument is not one with which the Commissioner agrees. The DWT in question was deducted at source by the payee on every gross dividend payment made, which deduction was then remitted to the relevant tax authority. It is quite clear that the Appellant had no opportunity to refuse to pay the sum and, perhaps more significantly, would have been in breach of the law even if it did and would as a matter of inevitability have been subject to some form of sanction. The Commissioner finds that, no less than in *Yates,* the Appellant was compelled if it wished to continue to conduct that part of its trade, whereby it invested in foreign shares and received dividend payments, to suffer withholding tax on the gross amount of dividend payments received.

81. It should be noted that at the oral hearing, counsel for the Respondent expressed the view that, for the purposes of the issues arising in this appeal, there was no difference whatever in principle between foreign income derived from royalty payments and foreign income derived from share dividends.[5] The Commissioner agrees with this and finds that there is no basis for distinguishing the instant appeal from the Determination of the Appeal Commissioner in *128TACD2023* on the grounds that one related to dividend income and the other royalty income.

82. In circumstances where it does not appear that there is any difference in principle between a withholding tax applied to income from dividends arising from the holding of foreign shares and that applied to royalty income, a proposition itself advanced by the Respondent, the Commissioner finds there to be no reason for the outcome in the instant matter to be different. In making this finding, the Commissioner considers the Appellant's status as a company whose income is treated as chargeable under Case III of Schedule D, but is nonetheless entitled, on account of section 110(2) of the TCA 1997, to deduct

[5] Transcript of hearing, page 96.

expenses incurred "wholly and exclusively for the purposes of […] trade […]" as if its income falls under Case I, is not relevant to the outcome of the appeal. It was the clear intent of the Oireachtas to permit companies such as the Appellant to deduct such expenses as fall under section 81(2) of the TCA 1997. The Commissioner cannot see why, this being so, the question of the Appellant's entitlement should be analysed differently to any other taxpayer conferred with the right to deduct under that provision. There was agreement that the financial statements of the Appellant covering the period at issue were prepared in accordance with accepted accountancy standards. The Commissioner can see nothing that would indicate that the question that needs to be addressed is anything other than whether each expense claimed fits within the test for deduction applicable to all persons whose income falls to be computed for tax purposes as falling under Case I. This is whether the expense in question was laid out for wholly and exclusively for the purposes of the relevant trade.

Finance Act 2019

83. Lastly, and for the avoidance of doubt, the Commissioner wishes to emphasise that the foregoing conclusions have been reached without having regard to the amendment after the periods at issue of section 81 of the TCA 1997 by means of section 20 of the Finance Act 2019, which inserted at (p) an exclusion on the deduction of "[…] *any taxes on income".* On its face, and with the caveat that the Commissioner has not heard submissions on the question, it would appear arguable that this amendment has the effect that a claim for the deduction of DWT of the kind at issue would now be excluded. As was rightly submitted by counsel for the Respondent however, no inference can be drawn from subsequent amendment as to the meaning of the wording of a statue prior to that amendment (see *Cronin (Inspector of Taxes) v Cork and County Property Company,* [1986] IR 599). The wording of legislation prior to amendment must be assessed on its own terms and using the appropriate tools of statutory interpretation referred to in some detail previously in this Determination. This is what the Commissioner has done in reaching his view as to the correct meaning of section 81 of the TCA 1997 as it applied over the periods at issue.

Determination

84. The Commissioner finds that the appealed Notices of Assessment to corporation tax, made in respect of the accounting periods ended 28 August 2018 and 28 February 2019, whereby the Respondent assessed the Appellant to have balances payable of €12,081.15 and €12,245 respectively, were in error. This is so on the grounds that the Appellant's claims for the deduction of DWT incurred in respect of dividend payments

received should have been allowed. The Appellant’s liability should thus be adjusted to reflect the returns originally filed by the Appellant, whereby corporation tax of €246, along with a surcharge of €25, was owed for the period ending 28 August 2018 and corporation tax of €117, along with a surcharge of €6, was owed for the period ending 28 February 2019.

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

Notification

86. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

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

Conor O’Higgins
Appeal Commissioner
1 July 2024