Between

148TACD2024

and

Appellants

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by ("the First Appellant") and ("the Second Appellant") (together "the Appellants") against alternative assessments raised against them by the Revenue Commissioners ("the Respondent").

2. The assessment against the First Appellant was for income tax for the tax year 2021 in the amount of €213,852.44. The assessments against the Second Appellant were for income tax, social insurance contributions (PRSI) and universal social charge (USC) (together referred to as "PREM") for February - December 2021 in the total amount of €296,314.96.

3. The question to be determined herein is whether payments made to the First Appellant by the Second Appellant constituted a director's loan, as claimed by the Appellants, or whether they constituted disguised salary payments, as claimed by the Respondent.

Background

4. The First Appellant is an entrepreneur and businessman based in the United Kingdom (UK). In 2020, he established the Second Appellant in the State, and was its sole director and shareholder. In 2021, the First Appellant withdrew amounts totalling €290,468.22 from the bank account of the Second Appellant.

5. On 25 February 2023, the Respondent raised the assessment to income tax against the First Appellant in the amount of €213,852.44. On 24 February 2023, the Respondent raised the following assessments to PREM against the Second Appellant:

Period	**Amount €**
February 2021	80,697.72
March 2021	90,387.09
April 2021	21,661.19
May 2021	4,878.64
June 2021	6,373.41
July 2021	4,971.10
August 2021	2,452.40
September 2021	4,670.55
October 2021	19,142.27
November 2021	16,035.71
December 2021	45,044.88

Total	296,314.96

6. The Appellants appealed against the assessments to the Commission on 23 March 2023. The two appeals were heard together on 18 June 2024. The parties were represented by counsel.

7. As the Respondent has raised alternative assessments against the Appellants, and as both appeals are concerned with the same issue, the Commissioner considers it appropriate to issue a joint determination in respect of both appeals (together "the appeal").

Legislation and Guidelines

8. Section 112(1) of the Taxes Consolidation Act 1997 as amended ("TCA 1997") states that

"*Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment*."

9. Section 118(1) of the TCA 1997 states that

"*Subject to this Chapter, where –*

(a) a body corporate incurs expense in or in connection with the provision, for any of its directors or for any person employed by it in an employment to which this Chapter applies, of –

(i) living or other accommodation,

(ii) entertainment,

(iii) domestic or other services, or

(iv) other benefits or facilities of whatever nature, and

(b) *apart from this section the expense would not be chargeable to income tax as income of the director or employee,*

then, sections 112, 114 and 897 shall apply in relation to so much of the expense as is not made good to the body corporate by the director or employee as if the expense had been incurred by the director or employee and the amount of the expense had been refunded to the director or employee by the body corporate by means of a payment in respect of expenses, and income tax shall be chargeable accordingly."

10. Section 122 of the TCA 1997 states *inter alia* that

"*(1)(a) In this section –*

"employee", in relation to an employer, means an individual employed by the employer in an employment –

(a) to which Chapter 3 of this Part applies, or

(b) the profits or gains of which are chargeable to tax under Case III of Schedule D

including, in a case where the employer is a body corporate, a director (within the meaning of that Chapter) of the body corporate…

"loan" includes any form of credit, and references to a loan include references to any other loan applied directly or indirectly towards the replacement of another loan;

"preferential loan" means, in relation to an individual, a loan, in respect of which no interest is paid or interest is paid at a preferential rate, made directly or indirectly to the individual…

"preferential rate" means a rate less than the specified rate…

"the specified rate", in relation to a preferential loan, means…(iii) in any other case, the rate of 13.5 per cent per annum or such other rate (if any) prescribed by the Minister for Finance by regulations…

(2) Where, for the whole or part of a year of assessment, there is outstanding, in relation to an individual, a preferential loan, the individual shall, subject to subsection (4), be treated for the purpose of section 112 or a charge to tax under Case III of Schedule D, as having received in that year of assessment, as a perquisite of the office or employment with the employer who made the loan, a sum equal to the difference between the aggregate amount of interest paid in that year and the amount of interest which would have been payable in that year, if interest had been payable on the loan at the specified rate and the individual…shall be charged to tax accordingly."

11. Section 438(1)(a) of the TCA 1997 states that

"*Subject to this section, where a close company, otherwise than in the ordinary course of a business carried on by it which includes the lending of money, makes any loan or advances any money to an individual who is a participator in the company or an associate of a participator, the company shall be deemed for the purposes of this section to have paid in the year of assessment in which the loan or advance is made an annual payment of an amount which, after deduction of income tax at the standard rate for the year of assessment in which the loan or advance is made, is equal to the amount of the loan or advance*."

12. The Respondent's Notes for Guidance on the TCA 1997 in respect of section 122, state *inter alia* that

"*A charge to tax in respect of preferential loans arises where loans are made to employees at a rate which is either nil or at a rate lower than normal commercial rates. The charge to tax is on the difference between the amount of interest paid on the preferential loan and the amount of interest which would be payable if the loan had been subject to an interest rate of 4 per cent in the case of loans qualifying for mortgage interest relief under section 244 or 13.5 per cent in all other cases. The charge arises for each year, or part of a year, for which the preferential loan is outstanding. The amount charged is treated as if it were interest actually paid by the employee and is eligible for relief subject to the normal restrictions on the eligibility of interest…*

"employee" is an individual employed by an employer in an employment which is assessable to tax under Schedule E or Case III of Schedule D. Where the employer is a company, a director of the company is also treated as an employee...

"loan" includes any form of credit or a loan which, directly or indirectly, replaces a loan (this ensures that a preferential loan is caught by the section irrespective of the guise in which it is made)…

Where, for the whole or part of a year of assessment, there is outstanding in relation to an individual a preferential loan, the individual is regarded for the purposes of section 112 or a charge to tax under Case III of Schedule D, as having received in that year a perquisite of his/her office or employment with the employer who made the loan. The amount of the perquisite to be so charged is the difference between the aggregate interest paid in that year and the interest which would have been payable if interest had been payable on the loan or loans at the specified rate."

13. The Respondent's Tax and Duty Manual Part 05-01-30, "Guidelines for Determining Employment Status for Taxation Purposes" considers the Supreme Court's judgment in

Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza [2023] IESC 24 ("*Domino's*"), and states *inter alia* that

> "*The five-question decision making framework is expanded on in this section. As detailed above, questions one to three must be answered 'yes' for there to be a contract of employment, with questions four and five then considered.*
>
> *3.1 Work/wage bargain*
>
> *The Supreme Court reframed the 'mutuality of obligation' test as simply being a reasonable description of the work/wage bargain. It is necessary to establish if there is an exchange of work for remuneration before a working arrangement could be categorised as an employment contract…*
>
> *3.2 Personal service*
>
> *This question considers whether the worker has agreed to provide their services to the business personally… A typical characteristic of an independent contractor or self-employed person is that they are free to hire other people, on his or her own terms, to do the work which has been agreed to be undertaken…*
>
> *3.3 Control*
>
> *Control refers to the ability, authority, or right of a business to exercise control over a worker concerning what work should be done, and how, when and where it should be done… There must obviously be a minimum level of control before a relationship can be capable of being an employment contract…*"

Evidence

[redacted] – *The First Appellant*

14. The First Appellant stated that he was the owner of the Second Appellant. He had lived in the UK for his whole life. He started and ran companies for a living. He had been involved in [redacted]. The Second Appellant was established in 2020.

15. [redacted] The First Appellant was the sole shareholder in, and director of, the Second Appellant. He stated that in its early days, his role involved [redacted], finding an outsourcing centre with staff [redacted] and engaging a marketing company. He stated that the outsourcing team dealt

with all [redacted]. He was not involved in the day-to-day work of the Second Appellant.

16. He stated that he took loans from the business in lieu of dividends. He stated that they were recorded as loans by the Second Appellant: "*I recorded -- well, I suppose the first accountants presented me with a list of payments and asked me what they were and I told them they were loans*."

17. He stated that he did not have a written contract of employment with the Second Appellant. He did not have pension entitlements or health insurance. The Second Appellant could not demand that he do work or control him. He had no salary agreement with the Second Appellant. All of the equipment required by the Second Appellant was provided by the outsourcing company.

18. He stated that he had taken two large dividends from the Second Appellant, and prior to that had taken loans in lieu of dividends. The loans were repaid with the dividend payments. His original accountants, [redacted] had been slow to provide him with information, so he took on a new accountant, [redacted], in early 2022.

19. He was brought through his Irish tax return for 2021. His gross taxable income was stated to be €31,834, which he stated was benefit in kind on the loan from the Second Appellant. He paid tax of €3,066.83. He was also brought through his UK tax returns for the relevant periods.

20. The Second Appellant's financial statements for the period ended 31 August 2021 had a debtor figure of €204,790, which the First Appellant stated was the cumulative balance of his loan as at 31 August 2021. The Appellants had also provided a Director's Loan Statement which set out the transactions from the Second Appellant to the First Appellant. The cumulative balance as at end August 2021 on this statement was the same as stated on the Second Appellant's financial statements. Note 9 on the Second Appellant's financial statements, under "Related Party Transactions" stated that "*An unsecured loan made to the director was outstanding at the end of the year in the amount of €204,790*."

21. The next set of financial statements for the Second Appellant were for the period until 31 December 2022. Note 7 on these financial statements stated that the amount of the director's loan was zero. Note 10, titled "Transactions with Director", showed that the director's loan was repaid by way of a dividend payment of €990,000. A Dividend Withholding Tax ("DWT") return was provided, which showed that the distribution date was 12 December 2022. DWT was 0%, because the First Appellant was resident in the UK. He stated that he paid tax on the dividend payment in the UK.

22. The First Appellant stated that his new accountant told him there were company law implications regarding the director's loan, and that there was benefit in kind tax due on the loan. He stated that he filed benefit in kind tax returns and set about filing the dividend return. In order to get the dividend return he needed a residency certificate from HMRC in the UK, but there were delays with this because he had outstanding tax returns in the UK. After filing those tax returns, he stated that he had to request the residency certificate three or four times before it was provided by HMRC. When he received it, his accountant filed the dividend return and the loan was repaid. Due to the delay by HMRC, the loan was outstanding for longer and the First Appellant incurred additional benefit in kind tax.

23. The First Appellant was also brought through the Second Appellant's corporation tax ("CT") return for January to August 2021. The CT return stated that the director owed €204,790 to the Second Appellant. It also stated that "*Value of other benefits or facilities for Director's use*" was €4,502, which the First Appellant states that he understood was the benefit in kind tax on the loan.

24. He stated that the monies from the Second Appellant to him were treated as loans because he always intended to pay them back.

25. On cross examination, he was asked why he had stated he was an employee of the Second Appellant on his UK tax returns. He stated that this was the way the form was structured. He agreed that he had stated that his employer was the Second Appellant. He accepted that he was in control of the Second Appellant. He did not agree that he had used the Second Appellant as a "*personal bank account*", and stated that "*I've taken loans from that company because it was cash rich, in lieu of dividends.*"

26. It was put to him that the loan statement showed 140 instances where he had taken money out of the Second Appellant for his own use. He stated that he had borrowed the money, but stated that there was no loan documentation for the transactions. He stated that he did not pay any interest to the Second Appellant. When it was put to him that in 2021 he took €204,720 out of the Second Appellant and paid tax of only €4,502, he stated "*We paid whatever the calculation said at the time*."

27. He accepted that the loan constituted more than 75% of the net assets of the Second Appellant at the time. He stated that he did not know it was a criminal offence to breach the summary approval procedure rules prescribed by company law for the making of loans to directors. He was not aware of the reporting obligations to the Corporate Enforcement Authority. He did not agree that he only took steps to ensure compliance after the Respondent intervened.

28. He did not agree that he was vague in his answers to the Respondent when he was interviewed in June 2022. He did not accept that the monies constituted salary payments to him.

29. On re-examination, he stated that it was necessary to enter the Second Appellant in the box for “employer” in his UK tax returns because the relevant box did not say “employer or directorship”, and that he had ticked the relevant box to day he was a company director. He stated that, in the Respondent’s note of its interview with him in June 2022, there was no reference to him saying that he received the monies from the Second Appellant as salary.

[redacted] – *Appellants’ accountant*

30. The witness stated that she first became involved with the Appellants in April 2022. The First Appellant was having an issue with his previous accountants who were late filing the annual return. She got the relevant information from the previous accountants, and stated that she saw that there was a director’s loan on the trial balance information.

31. She stated that she was provided with a list of the transactions on the director’s loan account from its inception in February 2021 until August 2021, and she added the transactions from September 2021 onwards. She said that as soon as she saw the account she told the First Appellant that there were implications, that he needed to pay benefit in kind on the interest, that there was an implication for income tax on the Second Appellant’s CT return, and that there were company law implications for loans of more than 10% of the balance sheet. She said that she told the First Appellant that they needed to start acting on it straight away, which they did.

32. She was referred to a list of CT payments made by the Second Appellant. On 2 June 2022 it paid €51,198, which she stated was income tax on the director’s loan grossed up – the value of the director’s loan at 31 August 2021 was approximately €204k, which represented 80%, which was then grossed up to 100% and income tax of 20% was paid thereon. She also was brought through a list of P30 returns filed on behalf of the Second Appellant.

33. There was also a spreadsheet showing a schedule of the monthly balances on the loan account, including benefit in kind charged at 13.5% interest. She was asked why the amount of benefit in kind, €4,502, was inputted as “salary/wages” in the Second Appellant’s 2021 CT return: “*I always get a little confused, to be honest. It's never really clear. It was director's loan, I don't know why I didn't put it in. Because it was a BIK on -*

and to me that was more salary than anything else. But I am open to correction on that. But to me - well, like, it was relating to his director's loan, I put it in there. I put it in there."

34. She stated that the income tax payable, €51,198, was a receivable as it was repayable back to the Second Appellant when the loan was repaid, and this was done in the company accounts. The income tax payment of €51,198 was refunded to the Second Appellant by the Respondent on 7 July 2023 following the repayment of the loan.

35. She was asked why the Second Appellant's financial statements for the period ended 31 August 2021 stated, at Note 9, that "*An unsecured loan made to the director was outstanding at the end of the year in the amount of €204,790.*" She stated that it was described as a director's loan because it was due to be repaid via a dividend from the profits of the company, and she knew this because the First Appellant told her.

36. Regarding the Second Appellant's financial statements for the period ended 31 December 2022, she stated that they showed that the director's loan had been paid off in December 2022 via a dividend. Therefore, as at 31 December 2022, there was no director's loan. She was asked what the figure of €135,213 for "Director's salary" related to, and she stated that it was the grossed up amount of the benefit in kind on the director's loan.

37. On cross examination, she stated that she had previously seen instances of directors taking out loans that did not comply with company law. She did not report such instances to the Corporate Enforcement Authority because she was not an auditor. She stated that she was not previously aware that the Respondent had corresponded with the Second Appellant in March 2022. She confirmed that the P30s were only filed after she was hired.

38. She confirmed that the loans were non-recourse, and agreed that if the First Appellant was insolvent or unable to be located, the Second Appellant would not have been able to get its money back.

Submissions

Appellants

39. In written submissions, the Appellants stated that the Second Appellant had not taken a tax deduction for the loans/advances to the First Appellant and had not taken a tax deduction for the dividend. The Second Appellant had therefore suffered a tax cost. Additionally, the First Appellant had accounted for the dividend and paid tax thereon in the UK. Both Appellants therefore had fully accounted for tax on the director's loan and the dividend.

40. The Respondent had mischaracterised the director's loan, and incorrectly treated it as if it were remuneration/salary from the Second Appellant to the First Appellant. A perquisite must be a benefit that can be turned to account; *Tennant v Smith* [1892] AC 150. In this instance, the First Appellant did not acquire any asset that could be turned to account. The monies provided to him remained owing to the Second Appellant. Therefore, they did not constitute a perquisite.

41. Under company law, the loan was voidable by the Second Appellant. However, this was not the same as saying the loan was void *ab initio*. A voidable transaction was fully valid unless and until someone with the power to do so terminated the transaction. In 90TACD2022, the Commission determined that the status of the original loan for company law purposes and the question of whether it was *ultra vires* or not was not a relevant consideration because the director nonetheless incurred a debt to the company as reflected in the financial statements. In this case, the Second Appellant did not wish to void the loan, and had affirmed the transaction in a general meeting of the company. Therefore, there was no issue with the legality of the loan.

42. The Second Appellant had provided a preferential loan to the First Appellant. Therefore, section 112 of the TCA 1997 only had application in respect of the deemed interest on the loan. The Appellants had properly applied this charging provision. It was clear therefore that there could not be both a charge under section 112 as a payment (where there was none) and a charge on the preferential loan deemed interest.

43. In oral submissions, counsel for the Appellants stated that all of the earnings of the Second Appellant, and all of the monies advanced by it to the First Appellant, went through the company's accounts and were accounted for in the financial statements. Therefore, the circumstances were very different to those in *Stephens v Pittas* [1983] STC 576, where monies were purloined straight from the till.

44. The Second Appellant never sought to void the loan, which had been repaid by means of the dividend payment to the First Appellant. The Appellants' tax affairs were in order. Tax had been paid on the benefit in kind. There was no basis for contending that the First Appellant was employed by the Second Appellant and that the loan he took was an emolument to him. The first test in *Domino's* was whether there was a work for wage bargain. In this case, there was no such bargain and therefore no employment contract. The Second Appellant had not claimed any tax deduction in respect of the monies, which it could have done if they were emoluments.

45. As the First Appellant was the proprietary shareholder of the Second Appellant, he would have been on the S rate of PRSI if resident in the State so there should not have been

any employer PRSI levied in any event. As a UK resident, there should not have been any employee PRSI applied in respect of the First Appellant either.

46. In *Tennant v Smith* [1892] AC 150, the House of Lords considered whether the provision of a residence to a bank agent constituted an emolument. The agent was not entitled to sublet the bank house or use it for other than bank business, and, in the event of his ceasing to hold his office, he was under obligation to quit the premises forthwith. Lord Halsbury stated that "*the thing sought to be taxed is not income unless it can be turned into money.*"

47. Lord Watson stated that

    "*It is clear that the benefit, if any, which a bank agent may derive from his residence in the business premises of the bank is neither salary, fee, nor wages. Is it, then, a perquisite or a profit of his office? I do not think it comes within the category of profits, because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage - in other words, money - or that which can be turned to pecuniary account*."

48. Lord Macnaghten stated that

    "*But a person is chargeable for income tax under Schedule D, as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket. And the benefit which the appellant derives from having a rent-free house provided for him by the bank, brings in nothing which can be reckoned up as a receipt or properly described as income."*

49. Lord Field stated that

    "*…it appears to me that the residence of the appellant upon the bank premises, which although rent free could not in any way be converted by him into money or money's worth, cannot be held to be either a gain, profit, perquisite, or emolument, within the meaning of the statutes*."

50. Lord Hannen stated that

    "*Different considerations would apply to the case of an agent who as part of his remuneration has a residence provided for him which he might let. That which could be converted into money might reasonably be regarded as money - but that is not the case before us*."

51. In this case, the First Appellant only had the use of the monies provided to him by the Second Appellant. He had repaid the money, and therefore there was no profit. It did not fall within section 112, and at most fell within section 122.

52. In *Connolly v McNamara* 3 ITC 341, the High Court considered the UK judgment in *Tennant v Smith*. Teevan J stated that "*Put in very general terms, it can be said that if there is a measurable profit, it is assessable, if not, then there can be no assessment. It is profit which is assessable*." The First Appellant had repaid the monies, and therefore he had not accrued any profit.

53. Counsel also opened the House of Lords judgment in *Hochstrasser v Mayes* [1960] AC 376, which considered the payment to an employee to compensate him for a loss incurred following a transfer of his employment. Lord Denning stated that "*So tested the question simply is: Was this £350 received by Mr. Mayes a "profit" from his employment? I think not, for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word.*" Similarly, the advances to the First Appellant did not constitute remuneration.

54. Section 122 of the TCA 1997 defined a loan as "*any form of credit*". It did not state that it had to comply with company law requirements. It was deliberately broad and expansive, and captured the monies advanced by the Second Appellant to the First Appellant. Pursuant to the judgment in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, it was necessary to read section 112 in context with sections 118 and 122.

55. In reply, counsel stated that the indicia of a loan were that it would be repaid, and that an overdraft also constituted a loan. The Respondent seemed to be arguing against the judgment in *Domino's* and against its own guidance note in contending that the First Appellant was an employee.

56. In further written submissions, delivered after the hearing to deal with the PRSI point, the Appellants stated that the Respondent had assessed the Appellants for both employer and employee PRSI. Under the Social Welfare (Consolidation) Act 2005, there were no specific provisions relating to directors, and PRSI exposure was conditional upon the existence of a contract of service. If no such contract existed, the director would at most be considered a self-employed contractor.

57. In its submissions, the Respondent had not made any argument that there was a work for wage bargain. It accepted that there was no contract of employment. It accepted that the First Appellant did not have to act personally and that there was no element of control

of him. Therefore, the First Appellant was not an employee of the Second Appellant. Consequently, he was not an employed contributor and should not have been assessed to PRSI at all. In the worst case scenario, which was not accepted, the appropriate class would have been class S which would have meant no exposure to employer PRSI. The Respondent, in its submissions, had failed to address the alleged exposure to PRSI at all.

58. In response to the Commissioner's request to provide evidence of tax paid in the UK on the dividend payment from the Second Appellant to the First Appellant, the Appellants' agent provided the First Appellant's UK tax returns for the years ended April 2023 and April 2024. His April 2023 return showed a calculation of £851,246 in respect of "Dividends from foreign companies" with income tax due of £338,589.83. There was also a screenshot of a HMRC document showing that the First Appellant had paid the income tax due.

Respondent

59. In written submissions, the Respondent stated that the payments to the First Appellant were disguised in the Second Appellant's records as a loan. The Respondent considered the payments to constitute salary/wages to the First Appellant, and they had thus been re-grossed by reference to the applicable income tax rate. There was also a liability to USC and PRSI.

60. The Respondent held an investigation meeting with the Appellants in June 2022. The Respondent asked the First Appellant why he took a loan from the company rather than salary or emoluments. He was unclear in his response, suggesting that he had taken advice on whether to take payment in the form of a director's loan or dividend.

61. The provision of the loan, if it had occurred, would have been in breach of the Companies Act 2014, and therefore illegal, and would have required reporting to the Corporate Enforcement Authority.

62. Section 986A of the TCA 1997 targets employers who fail to operate statutory PAYE obligations, and who thereby may obtain a payroll cost advantage at the expense of the Exchequer. In addition, the non-operation of the PAYE system confers an unfair tax advantage on those who receive their emoluments, or part of their emoluments, without PAYE deductions. In this case, the payments to the First Appellant should have been taxed as emoluments under section 112 of the TCA 1997.

63. In oral submissions, counsel for the Respondent submitted that the Appellants had failed to provide evidence to support the contention that the significant volume of payments in the transactions ledger comprised a loan made by the company to its director. Consequently, there had been a failure to discharge the burden of proof.

64. There was no proper paperwork regarding the alleged loan. Therefore, it was not possible to know if it was repayable on demand, or whether it had a repayment date. It seemed to be the case that the First Appellant was able to take money out of the company at whim, and he did so. There were around 140 transactions in the ledger, with values ranging from very small amounts up to approximately €24,000. Some of the transactions were for rent payments, some had gone to a local takeaway. As a result, it seemed that the First Appellant was using the money from the Second Appellant for personal matters.

65. Approximately €204,000 was taken out of the Second Appellant between January and August 2021. This constituted over 75% of the company assets and left in the region of €60,000 remaining in the company. There was no summary procedure availed of by the Second Appellant to approve the advance of monies. The First Appellant was living off the company's money and profiting from his role within the company. While the failure to comply with company law was not determinative, it was relevant to understanding the context.

66. It was submitted that the First Appellant was an employee director of the Second Appellant. The lack of an employment contract, or health insurance or pension benefits, was not determinative. He was the only shareholder and director, and he took charge of the Second Appellant. He hired the outsourcing company, and was the only person running the Second Appellant. Therefore, the money he took out of the Second Appellant was in return for that role. The question of control was irrelevant because he was essentially the company. The Appellants' accountant had said that she considered the benefit in kind payment of €4,502 to constitute salary more than anything else.

67. There was none of the indicia of a normal loan. There was no evidence to show that DWT had been paid in the UK. *Tennant v Smith* supported the Respondent's position, because the monies received by the First Appellant were convertible into cash in that he was able to spend them – they were obviously different to a benefit in kind like a house or a car. 90TACD2022 was distinguishable because in that case there was interest charged on the loan and proof of repayment. The First Appellant had the significant benefit of the monies tax free.

68. If the Commissioner agreed with the Respondent's view, any refunds owing to the Appellant for, e.g. tax paid on the benefit in kind, could be addressed separately by the

parties. However, the Respondent was satisfied that the payments constituted Schedule E emoluments. It was necessary for the Commissioner to look at the reality of the situation, i.e. that the First Appellant was the decision maker of the Second Appellant and was in control of it, and that the monies taken out of the company were for the work that he was doing.

69. Counsel confirmed that the assessments were in the alternative. The Respondent's view was that the assessment against the Second Appellant was paramount, but it was a matter for the Commissioner to determine. The Commissioner allowed the Respondent additional time to put in written submission dealing with the Appellants' argument that PRSI was not applicable to them.

70. In further written submissions, delivered after the hearing to deal with the PRSI point, the Respondent stated that its position was that the payments should be taxed as an emolument. Where a non-resident is a director of an Irish company, their remuneration from that office is within the charge to Irish income tax. It was plainly the case that the First Appellant was an employed director of the Second Appellant, which he ran, even if he had not regularised the position by, for example, putting a contract of service in place.

71. In response to the submission of the First Appellant's UK tax returns, the Respondent submitted that the information submitted after the fact was irrelevant, and that a "*taxpayer cannot use a company's money as income and then seek to tidy that up after the fact as a way of claiming that there is no issue*." The First Appellant freely took payments from the Second Appellant whenever he wanted without any of the normal indicia of a loan applying, or any of the requirements of company law applying to the purported loans. The monies clearly represented wages rather than loans.

Material Facts

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

    72.1. The First Appellant is an entrepreneur and a resident of the UK.

    72.2. The First Appellant set up the Second Appellant in the State in 2020. The Second Appellant is a company

72.3. The First Appellant was (and is) the sole director and sole shareholder of the Second Appellant. The First Appellant utilised an outsourcing company to run the day-to-day business of the Second Appellant.

72.4. The First Appellant did not have an employment contract with the Second Appellant. He was not in receipt of pension entitlements or health insurance benefits from the Second Appellant. He had no work for wage bargain with the Second Appellant, had not agreed to provide services to it personally, and was not subject to its control.

72.5. In 2021, the First Appellant withdrew amounts totalling €290,468.22 from the bank account of the Second Appellant. The First Appellant intended to repay the monies to the Second Appellant, and did so by way of offset from a dividend payment to him from the Second Appellant in December 2022.

72.6. There was no loan documentation provided by the Appellants showing the terms and conditions of the loan afforded to him. There was no interest charged by the Second Appellant. However, the transactions were recorded on the Second Appellant's trial balance and in its financial statements.

72.7. Tax was paid on the benefit in kind accruing to the First Appellant from the monies advanced to him by the Second Appellant. The First Appellant paid dividend withholding tax in the UK on the dividend payment made to him by the Second Appellant.

Analysis

73. The burden of proof in this appeal rests on the Appellants, who must show that the Respondent was incorrect to raise the alternative assessments on them. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010] IEHC 49 ("*Menolly Homes*"), Charleton J stated at paragraph 22 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.*"

74. In this appeal, the Respondent contends that payments made to the First Appellant from the Second Appellant constituted disguised salary/wages to him for his work on behalf of the Second Appellant. It raised alternative assessments against the Appellants on this basis. The Appellants contend that the monies constituted a loan that was repaid by the First Appellant to the Second Appellant, and that he was not an employee of the company.

Therefore, the net issue to be determined in this appeal is whether the payments constituted a loan or emoluments.

75. The Commissioner was provided with a detailed spreadsheet showing approximately 140 transfers from the Second Appellant to the First Appellant, or for his benefit, between February and December 2021. The cumulative balance of the transfers as of 31 December 2021 was €290,468.22. The transactions range from €11/12 to a takeaway to a transfer to a third party in the amount of €24,000.

76. The Commissioner agrees with the Respondent that it appears that the First Appellant was using the monies from the Second Appellant for day-to-day living expenses. However, the Commissioner does not consider that this in itself is determinative of whether the monies constituted a loan or emoluments.

77. Section 112 of the TCA 1997 charges income tax under Schedule E "*on every person having or exercising an office or employment of profit mentioned in that Schedule… in respect of all salaries, fees, wages, perquisites or profits whatever therefrom*." Therefore, in order for the monies received by the First Appellant to be subject to Schedule E income tax, they must constitute "*salaries, fees, wages, perquisites or profits whateve*r" from an "*office or employment of profit*."

78. The Respondent's position was that the Appellant was an employee director as he was solely in control of the Second Appellant, and that therefore the monies constituted salary/wages to him for his work on behalf of the Second Appellant. The Appellants stated that the First Appellant was not an employee of the Second Appellant, and that the day-to-day work of the Second Appellant was not performed by the First Appellant but instead by an outsourcing company.

79. The Commissioner agrees with the Respondent that the First Appellant established the Second Appellant and organised the hiring of the outsourcing company. The First Appellant stated as much in his evidence at the hearing. However, the Commissioner does not agree that this necessarily means the First Appellant should be treated as an employee of the Second Appellant.

80. The Appellant sought to rely on the recent Supreme Court judgment in *Domino's*, and referred to the Respondent's Tax and Duty Manual Guidelines on the judgment. The judgment sets out a five-step test for determining whether an individual is engaged as an employee. The first three steps must all be answered in the affirmative in order for an individual to be classed as an employee. The first step is that there is a work for wage bargain between the individual and the business. The second is that the worker has

agreed to provide services personally to the business. The third is that the business is able to exercise control over the worker.

81. The Commissioner considers that the evidence before him suggests that none of the three above steps have been met in respect of the Appellants. The First Appellant's evidence was that he had no salary arrangement with the Second Appellant. He had no employment contract and was not entitled to health or pension benefits. He had not undertaken to provide any services to the Second Appellant, and had engaged an outsourcing company to run its day-to-day business. The Second Appellant could not exercise any control over him.

82. The Commissioner is satisfied that, pursuant to the test enunciated by the Supreme Court, the First Appellant was and is not an employee of the Second Appellant. He considers that the Respondent did not engage with the test set out in *Domino's* at all, but rather asserted that the First Appellant was an "employee director". However, it did not point to a different test for ascertaining if someone is an "employee director" as compared to an ordinary employee. Therefore, the Commissioner considers that the appropriate test to be applied is as set out in *Domino's.*

83. The Respondent sought to rely on certain evidence to support its assertion that the First Appellant was an employee of the company. On his UK tax returns, he had inserted the Second Appellant's name in the box under "Your employer's name". However, the Commissioner is satisfied that nothing turns on this. The heading of the relevant section states "*Complete an 'Employment' page for each employment or directorship*", but there was no specific box for directorship name. The First Appellant had also marked the relevant box to indicate that he was a company director.

84. The Respondent also sought to rely on its notes of the meeting with the First Appellant in June 2022, which it contended showed he was vague about what the monies advanced to him actually were. The relevant part of the notes states

    "*[The Respondent] enquired why [the First Appellant] took a loan from the company rather than a salary or regular emoluments.*

    [The First Appellant] was unclear in his response, suggesting he had taken advice on whether to take payment via a director's loan or dividend."

85. The Commissioner does not consider that this note supports the suggestion that the First Appellant was unclear as to whether or not the payments constituted a salary. According to the note, there was no reference by him to a salary, and this was also his evidence at the hearing. The Respondent did not proffer alternative evidence to suggest otherwise.

86. Thirdly, in her evidence, the Appellants' accountant stated that she was unclear where to input the benefit in kind tax of €4,502 in the Second Appellant's 2021 CT return. She inputted it as "salary/wages" and stated that "*It was director's loan…and to me it was more salary than anything else. But I am open to correction on that*." The Commissioner considered her evidence to be rather confused on this point. The evidence was not helpful to the Appellants, but the Commissioner does not consider it to be particularly significant, and certainly not significant enough to outweigh the evidence which showed that the First Appellant was not an employee. Consequently, the Commissioner finds that the First Appellant was not an employee of the Second Appellant.

87. It is also necessary to consider whether the monies constituted a loan or a perquisite. The Respondent has drawn attention to the lack of documentation to support the Appellants' contention that the monies were a loan, and has stated that the payments did not have any of the "*indicia*" of a loan. Therefore, it submitted that they should be considered a perquisite subject to section 112.

88. The Commissioner considers that the lack of documentation specifically concerning the loan is not helpful to the Appellants. It is unclear whether the provision of monies was for a specific term or repayable on demand, or whether there were any other terms and conditions applying. However, he does not agree with the Respondent that none of the normal indicia of a loan apply. He considers that the most fundamental indicium of a loan of money is that it is to be repaid. Furthermore, he notes that section 122 of the TCA 1997 defines a loan broadly as "*any form of credit*" and does not limit the definition to, for example, a loan with a specified term or amount.

89. The Commissioner notes that, while no specific loan documentation was provided, the monies advanced to the First Appellant were accounted for in the Second Appellant's accounts and financial statements. Accordingly, the situation herein is not comparable to that in *Stephens v Pittas*, where the controlling shareholder misappropriated monies from the company.

90. In this instance, the Commissioner is satisfied that the monies advanced to the First Appellant were repaid by him. The Second Appellant's financial statements for the period ended 31 August 2021 recorded that an unsecured loan to the First Appellant in the amount of €204,790 (at that stage) was outstanding. The financial statements for the period ended 31 December 2022 showed that the loan was paid off by means of a dividend payment to the First Appellant. The evidence of the First Appellant was that he always intended to pay the monies back, and the Appellants' accountant stated that he told her that he intended to repay the monies. As a result, the Commissioner finds that it

was the intention of the Appellants that the monies paid to the First Appellant would be repaid, and they were in fact subsequently repaid.

91. Consequently, the Commissioner finds that there was no "*measurable profit*", as stated in *Connolly v McNamara,* from the provision of the loan to the First Appellant, as it was repaid by him. While he had the use of the monies for a period of time, they were not taxable as an emolument, as they could not be "*converted by him into money or money's worth*", as per *Tennant v Smith.* Therefore, the monies did not constitute a perquisite taxable pursuant to section 112.

92. The First Appellant did derive a benefit from the loan, and was obliged to pay tax on the benefit pursuant to section 122 of the TCA 1997. As no interest was paid by him, the loan was a "preferential loan", and he was therefore obliged to pay income tax on the amount of interest at the specified rate of 13.5%. The Commissioner is satisfied that the Appellants accounted for the tax due on the loan. He is further satisfied, based on the documentation submitted after the hearing at his request, that the First Appellant paid DWT on the dividend payment in the UK.

93. In its submissions, the Respondent drew attention to what it said were breaches of company law in the provision of the monies to the First Appellant, although it accepted that these could not be determinative. The Commissioner did not understand the First Appellant to concede that the loan was illegal but he did accept that there were "issues" with how it was provided. However, it goes without saying that the Commission has no jurisdiction to police alleged breaches of company law, which is a matter for the Corporate Enforcement Authority. The Commission's jurisdiction "*is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA*", as per *Lee v Revenue Commissioners* [2021] IECA 18.

94. In 90TACD2022, the Commission determined that the status of the loan in that appeal for company law purposes, and whether or not it was *ultra vires* the powers of the company, was not a relevant consideration, because even if it was *ultra vires*, the director nevertheless incurred a debt to the company. Similarly, in this case, the Commissioner is satisfied that the First Appellant incurred a debt to the Second Appellant irrespective of the status of the debt under company law.

95. Additionally, while the parties differed as to whether the Appellants began to regularise matters before or after the Respondent began its investigation into them, the Commissioner considers that nothing turns on this point for the purposes of the determination of the appeal. The Commissioner's role is determine whether or not the Respondent has correctly assessed the Appellants to additional taxation.

96. In *Menolly Homes,* Charleton J stated that

> "*Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection.*"

97. It is not open to the Respondent, or the Commission on appeal, to determine that a taxpayer should be liable to an amount of tax because it might disapprove of the manner in which the taxpayer manages its affairs. Tax is only payable if it properly arises in law. In this instance, the Commissioner is satisfied that the Appellants have shown that the monies provided to the First Appellant constituted a loan rather than emoluments. Consequently, he determines that the assessments raised against the Appellants should be reduced to nil, and the appeal is successful.

Determination

98. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the alternative assessments raised against both Appellants should be reduced to zero.

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

Notification

100. 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

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

Simon Noone
Appeal Commissioner
9 August 2024