AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

163TACD2024

Between

[redacted]

Appellant

and

CRIMINAL ASSETS BUREAU

Respondent

Determination

Contents

Introduction

1. This Determination concerns an appeal under section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") of a notice of the Criminal Assets Bureau ("the Respondent") of 30 January 2019 to require [redacted] ("the Appellant") to give security in the amount of €250,000 in respect of taxes that are or may become due from him. The notice was issued pursuant to section 960S(2) of the TCA 1997. Subsection (5) of the same legislation confers on the Appellant the right to appeal the notice to the Tax Appeals Commission ("the Commission").

2. The Appellant and [redacted], his spouse with whom he is assessed jointly under section 1017 of the TCA 1997, also appealed Notices of Assessment to income tax for the years 2016 and 2017 made on 13 March 2019. They did so on the grounds that they were wrongly refused relief in respect of tax they alleged had already been deducted from their assessable income under the PAYE system. However, the Appellant and his spouse indicated at the appeal hearing that they were withdrawing their appeals brought in respect of these assessments.[1] Accordingly, this Determination relates to the Appellant's appeal of the notice issued to him under section 960S(2) only and does not concern his spouse.

Background

3. The Appellant is a person who has been involved for many years in the used car sales business, whether on his own account as a sole trader or as a proprietary director of a limited company.

4. The Appellant first registered with the Respondent for income tax in October 2003 and VAT in May 2007. It was not in dispute that in the years 2007 – 2011 he operated a used car dealership as a sole trader from a premises in [redacted].

5. In June 2011, the Appellant and his wife established [redacted] Limited ("the Company"), which in effect took over the business previously operated by the Appellant as a sole trader.

6. On or about May 2014, following an investigation conducted by the Respondent, the Appellant undertook to review his personal tax affairs. Thereafter, the Appellant filed outstanding Form 11 income tax returns for the years 2007 – 2012, supplementary VAT 3 returns from May/June 2007 to Jan/June 2009 and VAT 3 returns from July/December 2009 to July/December 2011.

[1] Transcript of hearing, page 29.

7. These returns, which disclosed previously undeclared income and VAT receipts, gave rise to self-assessed liabilities to VAT in the amount €345,764 and income tax in the amount of €241,007.89 for the years 2007 – 2012.[2] When interest accrued on the sum of the declared VAT and income tax in the amount of €586,771.89 was taken into account, the Appellant owed the Exchequer in excess of €800,000.

8. In July 2014, the Appellant proposed to pay the amount of €450,000 in settlement of the above liability. It is clear that this proposal was acceptable to the Respondent and the Revenue Commissioners, though they maintained that it was an *"informal verbal agreement"* that was "*never formalised",* rather than a binding contract.[3] This stance was maintained by the Respondent at page 6 of its Statement of Case, delivered in the course of the within appeal.

9. Whatever the status of the agreement, the Appellant made payments totalling €360,000 in ten instalments in settlement of his personal tax liability, the last of which was made on 2 June 2017.

10. On 18 October 2017, the Respondent sent 'final demand' correspondence to the Appellant, in circumstances where he had by that stage failed to pay to the Respondent the amount of €450,000 which was proposed in July 2014. The amount demanded in this correspondence was €398,020.95, which figure comprised the unpaid balance of the full VAT and income tax liabilities totalling €586,771.89 that were self- assessed in 2014, plus interest accrued thereon.

11. Notwithstanding the final demand correspondence, in subsequent correspondence of 13 June 2018, the Respondent indicated that under the terms of the "*Historical agreement*" pursuant to which he had undertaken to pay €450,000, "*€88,231.22 remains outstanding".*

12. The Appellant gave evidence at hearing that, after the receipt of the correspondence of 13 June 2018, he did provide the Respondent with just over €60,798 of the aforementioned amount of €88,231.22. He said that he did so by way of the presentation of a cheque for €30,000 and a bank draft for €30,798. Moreover, he said that he was led to believe that a claim for the refund of VRT previously paid to the Revenue Commissioners in the amount of €27,434 would be allowed. Thus, he said that he had adhered to the terms of the agreement whereby he had to pay €450,000 in final settlement of his VAT and income tax liabilities for the period 2007 – 2012.

[2] See "Table 1" at paragraph 3 of the Respondent's Statement of Case.
[3] See Respondent's Statement of Case, page 6 and correspondence of Chief State Solicitor's Office of 22 December 2020.

13. It is clear from the evidence of the Appellant and the submissions of both parties at hearing that, firstly, the Respondent took the view that the source of the €60,798, paid by way of cheque and bank draft, was the sale of an asset belonging to the Company, namely lands at [redacted], County [redacted]. As is set out hereunder, the Company itself had tax liabilities at this time and the Respondent was not prepared to allocate the sums received from this source to the reduction of the Appellant's own personal liabilities to VAT and income tax. Secondly, it is clear that while the Appellant made the claim for the refunding of €27,434, this claim was subsequently refused on its merits by the Revenue Commissioners and, therefore, the Respondent did not consider the sum owed by the Appellant to be reduced by that amount.

14. In the course of the appeal hearing, the Appellant stated that the aforementioned lands disposed of that constituted the source of the €60,798 were owned by the Company in name only. They were, he said, held on trust for his benefit. The Appellant did not provide any documentary evidence to support the existence of such a trust. Counsel for the Respondent put it to the Appellant that the relevant Land Registry Folio stated the owner to be the Company as of 17 January 2017. The Appellant did not disagree that this was what the Folio provided, but maintained that it was not reflective of its true ownership.

15. It is also clear that the Appellant did not appeal the refusal of the Respondent to allow the Appellant's claim for the refund of VRT of €27,434.

The liabilities of the Company

16. As already noted, the Company was established in 2011. Its two directors were the Appellant and his spouse, who owned 51% and 49% of its shares respectively.

17. On or about March 2017, the Respondent assessed the Company as owing VAT for the period January to April 2015 in the amount of €152,106. The Respondent's assessment was not appealed.

18. On 18 October 2017, the Respondent sent the Company a final demand for the payment of outstanding VAT and employer's PAYE/PRSI in the amount of €299,736.96, including interest. The portion of the demand relating to VAT, and excluding interest accrued in respect thereof, included the aforementioned sum of €152,106 assessed by the Respondent, plus an additional amount of €68,498.68 that was self-assessed by the Company. The amount of employer's PAYE/PRSI due, excluding interest, was in the sum of €33,712.75.

19. At the hearing of the appeal, the Appellant gave evidence that the amount of €152,106 assessed for the period January – April 2015 arose from the Company's charging of VAT

on its margin of profit made on the sale of certain vehicles that had been supplied to it by a company based in the United Kingdom. The Respondent had decided that, in selling these vehicles, the Company had availed of the 'VAT margin scheme' in circumstances where the conditions for doing so, prescribed by section 87 of the TCA 1997, had not been met. The Appellant contended in his evidence at the appeal hearing that this decision was in error and he should have been permitted to avail of the scheme.

20. On 30 January 2019, the Company was placed in voluntary liquidation and Mr [redacted] of [redacted] was appointed its liquidator ("the Liquidator"). The Liquidator was not present at the hearing of the appeal to give evidence. However, another employee of that firm, Mr [redacted] ("Witness 2"), who said he had worked on the liquidation and was familiar with it, was called to give evidence by the Respondent.

21. Witness 2 stated that upon the Liquidator taking control of the Company, it was discovered that it had no assets and there were "*limited books and records made available*". In this regard, he said that among the records missing were "*Nominal ledgers. The company didn't produce cash flows, didn't produce management accounts."* In relation to the Company's tax affairs, he said that it had not been discharging its liabilities to VAT, corporation tax and employer's PAYE/PRSI as they fell due. Vehicles were being held for future sale by the Company on a "sale or return" basis (i.e. they were not owned by the company), yet its financial statements included large figures for stock. The fact of the matter was that the Company had, he said, been trading while insolvent.

22. Witness 2 gave evidence that arising from the liquidation the Liquidator sought, and the Appellant consented to, disqualification from being a company director for a period of ten years. He further stated in evidence that it was his view that the Appellant had not co-operated fully with the Liquidator, in the winding-up of the Company. This was both disputed by the Appellant in his own evidence and challenged his cross-examination of Witness 2.

23. Based on the records that were available, the Liquidator calculated that at the time of its entry into voluntary liquidation, the Company had outstanding VAT liabilities in the amount of €187,908.89, corporation tax in the amount of €1,502.05 and employer's PAYE/PRSI in the amount of €72,317.13.

24. The Appellant was asked in cross-examination about a second bank account that he opened in [redacted] in [redacted] in July 2016 in the name of the Company. The Appellant agreed with counsel for the Respondent when it was put to him that between the opening of the account and the end of December 2018 *"over 2.5 million went through* [it] *in turnover".* This was so in circumstances where the Company filed its final VAT return in

July 2017. The Appellant did not explain why no VAT returns were necessary after that period until the end of 2018.

25. On 30 January 2019, the Respondent issued a notice under section 960S of the TCA 1997 requiring the provision of bond security in the amount of €250,000. The notice stated:-

> "*Security should take the form of a guarantee provided by any financial institution licensed by the Central Bank of Ireland to carry on a banking business in the State."*

26. The correspondence also stated that, in the absence of an appeal by the Appellant of the notice, it was from that point an offence for him to engage in the sale of goods or supply of services without providing the requisite security.

27. The Appellant duly appealed the notice to the Commission by way of Notice of Appeal delivered on 27 February 2019.

28. The Appellant gave oral evidence in the course of the Appeal hearing that he had made efforts to obtain bond security in the amount of €250,000 from numerous banks and other financial institutions. He said that on each occasion he was informed that these entities did not provide such a product or service.

The recommencement of the Appellant's sole trade

29. The Commissioner heard evidence that on 1 May 2019, the Appellant commenced trading under the name "[redacted]*"* from the same premises as that previously occupied by the Company. The Appellant gave evidence that since recommencing trade in a personal capacity he had not failed to make VAT returns and pay what tax was owed, including VAT. This assertion, of which the Respondent had notice given that it was included in the Appellant's written submissions, was not challenged in cross-examination.

The conviction of the Appellant

30. Lastly, the Commissioner heard evidence that on [redacted], the Appellant was convicted in [redacted] Court of the offence of having custody or control of a false instrument under section 29 of the Criminal Justice (Theft and Fraud) Offences Act 2001. Both the Appellant and Detective Sergeant [redacted] ("Witness 1"), who was called by the Respondent to give evidence, stated that on [redacted] 2016, officers of the Respondent and customs officers carried out an inspection at the premises of the Company, in the course of which they discovered two United Kingdom-registered vehicles in its garage in respect of which no VRT had been paid. These vehicles were duly seized by customs. On [redacted] 2016, the Appellant emailed the Respondent two invoices

ostensibly recording their purchase by the Company from a dealer in Northern Ireland named "[redacted]" on [redacted] 2016. The significance of this was that the Company, according to the information in the invoices, was at the time of the inspection still inside the 30-day period from the date of importation allowed by Section 3(f) of S.I. No. 400 of 2010 for the registration of the vehicles. Both the Appellant and Witness 1 gave evidence that the invoices produced were forged, which fact the Respondent discovered on foot of its own inquiries and led to the Appellant's conviction for the aforementioned offence and his receipt of a [redacted] custodial sentence, [redacted].

31. The Appellant gave oral evidence at the appeal hearing that the vehicles were, despite his production of the forged invoices, at the date of the Respondent's inspection at the premises of the Company only in the State for less than 30 days. The Appellant had no material to corroborate this claim. He said he produced the invoices in circumstances where he had "panicked". He regretted doing so and had paid the price for his wrongdoing.

Legislation and Guidelines

32. Section 960S of the TCA 1997 is headed "*Security for taxes"* and provides:-

"(1) In this section –

"tax" means –

(a) income tax deductible in accordance with Chapter 4 of Part 42 and any regulations made under that Chapter,

(b) tax deductible in accordance with Chapter 2 of Part 18 and any regulations made under that Chapter,

(c) universal social charge chargeable in accordance with Part 18D, or

(d) value-added tax chargeable in accordance with the Value-Added Tax Acts, or

(e) local property tax deductible in accordance with the Finance (Local Property Tax) Act 2012."

(2) The Revenue Commissioners may, where it appears requisite to them to do so for the protection of the revenue, require a person carrying on a business, to give security, or further security, of such amount and in such manner and form as they

may determine, for the payment of any tax which is, or may become, due from that person from the date of service on that person of a notice in writing to that effect.

(3) Where a requirement under subsection (2) arises, the Revenue Commissioners shall cause a notice in writing to that effect to be served on the person.

(4) Where a person is served with a notice in accordance with subsection (3), it shall be an offence for that person to engage in business until such security, or further security, is provided to the Revenue Commissioners.

(5) A person aggrieved by a notice served on that person in accordance with subsection (3) may appeal the notice to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of that notice.

(6) Where a person gives a notice of appeal in accordance with subsection (5), subsection (4) shall not apply until the Appeal Commissioners determine the matter."

33. The Tax and Duty Manual of the Revenue Commissioners, updated in June 2024, entitled *"The Requirement for Security Bonds. Section 960S TCA 1997"*, states at paragraph 1.1 that the Revenue Commissioners may require the provision of security where:-

> "[…] *Revenue has concerns that certain fiduciary taxes (Employer's Income Tax/PRSI/USC/LPT, VAT, RCT deducted at source) will not be paid."*

Submissions

Appellant's submissions

34. The Appellant submitted that he should not be taken to be a "*threat to the exchequer*". He had, he said, fulfilled all of his filing and paying obligations since resuming sole trading as a car dealer in [redacted] 2019. In his view to be required to provide security under section 960S of the TCA 1997 was unnecessary. In submission, he emphasised that part of his evidence where he stated that he had approached numerous financial institutions and asked would they act as bond providers in the amount sought by the Respondent. In each instance however they had refused to do so.

Respondent's submissions

35. Counsel for the Respondent began by submitting that the burden of proof in the appeal lay, as in the great majority of tax appeals, on the Appellant. In this regard, he relied on

the following regularly cited words of Charleton J at paragraph 22 of his judgment in *Menolly Homes v Appeal Commissioners & Anor* [2010] IEHC 49:-

> *"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."*

36. Counsel for the Respondent then cited the judgment of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18 as authority that, in deciding whether security under section 960S of the TCA 1997 is required to protect tax due, the question of "[…] *whether or not there has been a compromise between the Revenue Commissioners and the taxpayer"* is one falling outside the jurisdiction of the Commissioner. He then submitted:-

> "*If a taxpayer sincerely believes that they have reached some sort of an agreement, or that a tax isn't due and owing on foot of some sort of contractual or other arrangement, they can bring proceedings for legitimate expectation or* […] *judicial review* […]. *The key point is, it's a matter for another day in another forum."*[4]

37. Counsel for the Respondent submitted that the Appellant in his personal capacity did not comply with the obligation to file income tax and VAT returns between 2007 and 2012 in the time required by legislation. He emphasised that it was only upon the Respondent's intervention had the Appellant disclosed a self-admitted personal liability in the amount of €586,771.89, which increased to an amount in excess of €800,000 when interest then owed was taken into account.[5] In relation to the agreement to pay the sum of €450,000, which had not been met, Counsel stated:-

> "[The Appellant] *seems to be suggesting that he doesn't owe money to the Exchequer. That's not accepted by* [the Respondent] *in any way, but per* [Lee v Revenue Commissioners [2021] IECA 18] *you don't have to adjudicate upon that. The key point is that, on his own admission and on his own tax affairs there was a very, very considerable liability to the Exchequer and he was a non-filer for many years."*

38. Counsel for the Respondent submitted that the Appellant's conduct in relation to the production of forged invoices laid bare his lack of credibility as a witness and the risk he posed the revenue of the State into the future. So too, did the fashion in which he managed the business of the Company, of which he was proprietary director along with

[4] Transcript of hearing, page 74.
[5] Transcript of hearing, page 47.

his spouse. As with the Appellant, the Company also had a history of non-filing returns and non-payment of tax. Upon its winding-up, it owed to the Exchequer VAT, corporation tax and employer's PAYE/PRSI in the amount, at a minimum, of €261,728.07, excluding interest.

39. Furthermore, the Appellant's evidence in relation to the portion of the Company's liability concerning the improper use of the margin scheme over the period January – April 2015 revealed, according to counsel for the Respondent, a continuing lack of insight on his part regarding his tax obligations. The Company had never appealed this assessment and it was not open to the Appellant to seek to dispute the merits of an assessment dating from October 2017 in the course of an appeal hearing concerning a different issue.

40. Lastly, Counsel for the Respondent addressed a question from the Commissioner regarding the standard of review that should be applied to the decision of the Respondent to impose a bond. He stated that in his view it was open to the Commissioner to take his own view as to what amount was "*right and proper in the circumstances*".[6]

Material Facts

41. The facts material to the determination of this appeal that were not in contest were as follows:-

    - the Appellant is a person who, from 2007 – 2011 operated a car dealership as a sole trader from a premises in [redacted];
    - the Appellant registered for income tax in October 2003 and VAT in May 2007;
    - on or about June 2011 the Appellant and his spouse established the Company, which company proceeded to operate a car dealership business from [redacted];
    - the Appellant and his wife owend 51% and 49% of the Company respectively;
    - in May 2014, the Appellant was the subject of an investigation by the Respondent;
    - following this investigation, the Appellant filed outstanding Form 11 income tax returns for the years 2007 – 2012, supplementary VAT 3 returns from May/June 2007 to Jan/June 2009 and VAT 3 returns from July/December 2009 to July/December 2011;
    - the returns filed by the Appellant disclosed previously undeclared income and VAT receipts, which gave rise to self-assessed liabilities to income tax and VAT

[6] Transcript of hearing, page 78.

for the years 2007 – 2012 in the combined amount of €586,771.89, excluding interest and applicable penalties/surcharges;

- at some point in 2014, the Appellant offered to pay €450,000 in settlement of the personal tax owed. This proposal was acceptable to the Respondent/the Revenue Commissioners;
- the Appellant made payments totalling €360,000, the last of which was made in June 2017;
- on 18 October 2017, the Respondent sent final demand correspondence to the Appellant in circumstances where he had by that stage failed to pay to it the full amount of €450,000. The amount demanded in this correspondence was in the sum of €398,020.95, which figure was comprised of the unpaid balance of the amount of €586,771.89, assessed as owing in 2014, plus interest accrued to the date of the demand;
- on 13 June 2018, the Respondent sent the Appellant correspondence that stated that under the terms of the "*Historical agreement*", pursuant to which he had undertaken to pay the amount of €450,000, "*€88,231.22 remains outstanding".*
- the Appellant thereafter presented the Respondent with a cheque in the amount of €30,000 and a bank draft in the amount of €30,798 in purported part satisfaction of the unpaid balance of the sum of €450,000;
- the Respondent did not credit the Appellant with these amounts in circumstances where it took the view that the sums of €30,000 and €30,798 were derived from the sale of an asset, namely lands in [redacted], belonging to the Company, which itself had large amounts of tax outstanding at that time;
- the Respondent refused to credit the Appellant with the sum of €27,434 claimed as a VRT refund. The Respondent did so in circumstances where it decided that the conditions for the VAT refund were not met;
- the decision to refuse the VRT refund in the amount of €27,434 was not appealed;
- the Respondent assessed the Company as owing VAT for the period January – April 2015 in the amount of €152,106. The assessment that this was owed was not appealed;

- on 18 October 2017, the Respondent sent the Company a final demand for the payment of outstanding VAT and employer's PAYE/PRSI in the amount of €299,736.96, including interest;
- on 30 January 2019, the Company was placed in voluntary liquidation and a liquidator was appointed;
- the Company was, prior to its being placed in liquidation, trading while insolvent;
- following the liquidation of the Company, the Appellant consented to his disqualification from being a company director for a period of ten years;
- in July 2016, the Appellant opened a bank account in the name of the Company in [redacted]. Between this time and December 2018 in excess of €2.5 million passed through the bank account;
- the last VAT return made by the Company was in July 2017;
- the Appellant recommenced operating as a sole trader in the car dealership business in [redacted] 2019;
- since recommencing trading the Appellant has made VAT returns in respect of each VAT period;
- on 21 January 2020, the Appellant was convicted in [redacted] Court of the offence of having custody or control of a false instrument under section 29 of the Criminal Justice (Theft and Fraud) Offences Act 2001 and given a [redacted] custodial sentence, [redacted];
- the conviction related to the Appellant's production to the Respondent of forged invoices purportedly relating to the purchase by the Company of two vehicles from the United Kingdom, in respect of which no VRT had been paid, within the preceding 30 days.

Analysis

42. At the outset of this part of the Determination, it is noted that counsel for the Respondent, in reply to a query from the Commissioner, suggested in oral submission that the standard of review to be applied in this appeal of the Respondent's decision is that of *de novo* hearing on the issue. This means, in other words, that the task of the Commissioner is to assess, based on all the information available at the time of the appeal, whether there is a need for security and, if so, the amount that is required to protect the revenue of the

State. The Commissioner agrees with this submission regarding the interpretation of section 960S(4) of the TCA 1997, this being the subsection conferring on the Appellant the right of appeal, and the appeal is not to be reviewed based on another standard, such as whether the decision of the Respondent to require the provision of security in the amount of €250,000 was one that was reasonable.

43. At the same time, in written and oral submission counsel for the Respondent contended that the burden of proving factual matters relevant to the determining of this appeal should, in accordance with the reasoning of Charleton J in *Menolly Homes v Appeal Commissioners & Anor,* lie with the Appellant.

44. At issue is the correctness of the Respondent's decision that it is "*requisite* […] *for protection of the revenue"* that the Appellant, if he is to carry on a business, provide security of €250,000 in the form of a bond in respect of tax which "*is, or may become*, *due"*. The Respondent came to view the bond as required by reference to the Appellant's own tax history and conduct in related areas. It was submitted that it is within the Appellant's power to produce material that might persuade the Commissioner either that no security at all is required, or that its amount should be varied downwards. The Commissioner thus agrees with the Respondent's positon that it is the Appellant who bears the burden of proof in respect of factual matters in contest in this appeal and so finds as a matter of law.

45. Notwithstanding the question of where lies the burden of proof, there were only a few factual matters in this appeal in dispute. There was disagreement on the part of the Appellant with the evidence of Witness 2 that he and his spouse did not co-operate with the Liquidator of the Company in the course of the winding-up. In circumstances where the Liquidator, did not himself give evidence in the appeal, the Commissioner is unprepared to find that there was a lack of co-operation on their part following the commencement of the winding-up.

46. There was dispute over the plausibility of the Appellant's evidence that the United Kingdom-registered vehicles that were seized by the Respondent/Customs at the Company's premises in [redacted] had only been in the State at that time for less than thirty days. While of limited relevance to the question arising for determination in this appeal, in circumstances where the Appellant admitted he produced false invoices to the Respondent regarding their supposed date and place of acquisition, the Commissioner considers the Appellant's account on this matter to be improbable and finds as fact that they were in the State for longer than the 30 days allowed under legislation without the payment of VRT.

47. There was also the question of the provenance of the €60,798, paid in two payments of €30,000 and €30,798, which the parties were agreed the Appellant gave to the Respondent so as to reduce his liability. The Appellant took issue in his evidence with the view of the Respondent that these funds were derived from the sale of an asset of the Company, namely lands in [redacted]. The Commissioner finds that the Appellant furnished no corroborating documentary material to verify his assertion in oral evidence that the lands in question, which he accepted were in the name of the Company prior to their disposal, were held "in trust" by the Company for his benefit. As such, the Commissioner finds that there is a want of proof sufficient to overcome the evidential burden resting with him to show that the funds he furnished in two tranches of €30,000 and €30,798, were derived from his own resources and not those of the Company, which itself had sizeable tax liabilities.

48. Turning from questions of fact to those of law, in oral submission the Respondent made the point that the Appellant's liability to the Exchequer for the years 2007-2012 at the time of his late filing of VAT and income tax returns in 2014 was, when one took into account interest owed, an amount in excess of €800,000.[7] That this was so was not in dispute. However, the Commissioner considers it necessary to observe that, based on the wording of section 960S(1) of the TCA 1997, interest accrued does not fall within the meaning of "tax" for the purposes of the provision. This is because section 960S(1) of the TCA 1997 gives an exhaustive list of the type of tax that "*is, or may become, due",* in respect of which a bond may be deemed "*requisite* […] *for the protection of the revenue".* The taxes enumerated in this subsection are, specifically, income tax "*deductible in accordance with Chapter 4 of Part 42"* (i.e. under the PAYE system), RCT, USC, VAT and LPT. No mention is made of interest and the Commissioner finds this to mean, as a matter of law, that it does not come within the scope of "tax" which may be protected under section 960S of the TCA 1997 by requiring the provision of security.

49. Furthermore, Table 1 of the Respondent's Statement of Case set out the Appellant's liability to the Exchequer at the time of the filing of his returns in 2014 as being, excluding interest, €586,771.89. This previously undeclared figure comprised VAT in the amount of €345,764 and self-assessed income tax in the amount of €241,007.89. As observed in the preceding paragraph of this Determination, the former of these taxes falls within the scope of section 960S, along with four other types of 'fiduciary tax' that a business must collect by way of deduction from its employees, or in the case of RCT from its subcontractors, and then remit to the Revenue Commissioners. Indeed, this is what the

[7] Transcript of hearing, page 74.

Revenue Commissioners' own guidelines on section 960S of the TCA 1997 suggest.[8] Self-assessed income tax falling under the Part 41 of the TCA 1997 is not specified in section 960S(1) of the TCA 1997 as being one of the taxes that might give rise to the need for the provision of security. As such, the Appellant's past and potential self-assessed income tax cannot be part of the equation in assessing the tax, if any, that is or may become due that requires the provision of security.

50. This is not to say, however, that the Appellant's record of late disclosure and non-payment of self-assessed income tax should not be taken into consideration in analysing and predicting the risk that he might do so in the future in relation to other taxes that do fall within the scope of section 960S of the TCA 1997. Non-disclosure and/or failure to pay one type of tax is clearly relevant to the question of whether he might do so in respect of another.

51. Much the same logic applies in relation to the taxes owed by the Company. The Respondent put the taxes owed by the Company at the forefront of its written submissions and the Appellant was cross-examined both on this issue and the manner in which the Appellant and his spouse ran its business. In so far as this may have been done to point to what tax the Appellant owes, the Commissioner finds that they cannot be associated with him. Section 960S of the TCA 1997 is focused on safeguarding, by means of the imposition of security on a person, specific types of taxes that may become due "*from that person".* The Company was a limited company with a separate legal personality from its two directors, the Appellant and his spouse. It was the Company, which has been dissolved, from which the taxes in the form of employer's PAYE/PRSI, VAT and corporation tax, amounting to at least the amount of €261,728.07, were due. These were not the liabilities of the Appellant and his spouse.

52. However, in assessing the level of risk that the Appellant poses in respect of the potential non-payment of his own tax falling within the scope of section 960S of the TCA 1997 in the future, it is of course appropriate to take into consideration the fact that the Company, which he controlled along with his spouse, failed to remit to the Revenue Commissioners VAT charged to its customers, income tax deducted from its employees and corporation tax.

53. Likewise, it is pertinent that the Appellant admitted in cross-examination that the same company had a second bank account into which credit in the amount of €2.5 million arrived between its opening in July 2016 and the end of 2018, yet its last VAT3 return

[8] Tax and Duty Manual, *"Requirement for Security Bonds",* June 2024, page 3.

was made in July 2017. Despite having the opportunity in his evidence to shed light on the provenance of these funds and perhaps explain why no VAT3 returns post July 2017 were necessary, he did not do so.

54. Next there is the production in [redacted] 2017 of forged documents in order to avoid the consequences of the non-payment by the Company of VRT on vehicles it imported from the United Kingdom. This is a clear basis for concluding that, even after the Appellant's disclosure in 2014 of major sums of unpaid taxes of his own, he remained unprepared to pay tax legally due and was willing to be dishonest in his dealings with the Respondent and the Revenue Commissioners if it suited his ends.

55. The Commissioner accepts the submission of counsel for the Respondent that, in assessing what tax falling under section 960S of the TCA 1997 "is […] due", the judgment of the Court of Appeal in *Lee v Revenue Commissioners,* which concerned appeals of income tax assessments, suggests that his jurisdiction does not extend to considering whether there was a binding contract between the parties that reduced the amount the Appellant owed from that which was self-assessed in 2014. However, even if the Commissioner is wrong as a matter of law in this regard and the jurisdiction of the Commissioner is broader in the context of an appeal of a notice issued under section 960S of the TCA 1997 than that of an income tax assessment, it would make no material difference to the outcome of this appeal. This is so because the Commissioner has already found that (a) the Appellant has failed to prove the two payments totalling €60,798 were made out of his own resources rather than those of the Company; and (b) the claim for the repayment of VRT in amount of €27,434 was refused on its merits and the refusal was never appealed. Thus, the Appellant has not proved that he ever adhered to the terms of the agreement to pay €450,000 and has produced nothing to rebut the Respondent's contention, which appears to be supported by correspondence, that the agreed consequence of the failure to do so was that the original sums of VAT and income tax that were self-assessed in 2014 became due. As noted already, the sum self-assessed in 2014 in respect of VAT was in the amount of €345,764.

Whether security is required

56. The question that now arises for determination in the first instance is whether security is required to protect the revenue that is, or may become, due? The Commissioner finds that it is required. This view is grounded, in the first instance, on the Appellant's historic record of failure to file returns and pay tax owed in connection with his car dealership business, including but not limited to the tax of VAT that is enumerated in section 960S(1) of the TCA 1997. Added to this are several additional factors. Firstly, there is the

subsequent record of the Company, which likewise failed to fulfil its duty to remit to the Revenue Commissioners large amounts of VAT, employer's PAYE/PRSI and corporation tax. Then there is the production by the Appellant of false invoices in [redacted] 2017, which fact speaks to a preparedness to be dishonest in his dealings with those to whom he might owe tax. Likewise, the evidence of Witness 2 regarding the absence of proper record keeping by the Appellant and his spouse as directors of the Company is further cause for concern that the Appellant, in running the same type of business as a sole trader, might not be transparent in his dealings with the Revenue Commissioners and it will be difficult to know whether the true amount of fiduciary taxes falling under section 960S(1) of the TCA 1997 that are owed to the Exchequer are being recorded and returned to it.

The level of security required

57. Having determined that security under section 960S of the TCA 1997 is required for "*the protection of the revenue*", it is necessary to determine whether €250,000, being the sum arrived at by the Respondent, is the correct amount at this point in time or whether it should be varied.

58. As noted previously in this Determination, in its written and oral argument the Respondent appeared to argue in favour of its bond amount by reference to personal tax owed by the Appellant. The Commissioner has held already that, in so far as this was done to identify tax "due" from the Appellant, this was in error. So too was the emphasis placed on the level of interest owed by the Appellant, which the Commissioner took to mean that it should be factored into the calculation of the security.

59. The Commissioner has already stated those facts that he believes indicate that the Appellant poses a risk to the revenue. However, in assessing the level of risk, which must have a bearing on the security amount, consideration must be given to the fact that the Appellant's history of non-payment of his own tax dates from a time that is well in the past. So too, though to a lesser extent, is the similar history of the Company. On its own, this chronology might not be of great significance. However, the evidence of the Appellant, which was outlined in his pre-hearing written submissions and was not challenged or contradicted by the Respondent when stated in evidence at the hearing of the appeal, was that since resuming sole-trading in [redacted] 2019 he has never failed in his obligation to make VAT returns and pay the sums declared. There are therefore grounds to believe that the Appellant is less likely than he was in the past to fail in his obligation to comply with his filing obligations and in future send taxes collected by him and held on a fiduciary basis to the Revenue Commissioners.

60. In the Commissioner's view, the net effect of the foregoing is as follows. There is no dispute that the Appellant has paid €360,000 towards the overall amount of €586,771.89 in VAT and income tax owed to the Revenue Commissioners. The Commissioner heard no evidence in the course of the appeal from either party regarding how his payments were apportioned between his VAT liability, falling within the scope of section 960S of the TCA 1997, and his income tax liability, failing outside it. The VAT liability in the sum of €345,764 constituted 59%, and the income tax liability in the sum of €241,007.89 constituted 41%, of the overall sum of €586,771.89. In the absence of any contrary information, the Commissioner is compelled to conclude that this is how the figure of €360,000 was apportioned between the VAT owed and income tax owed. Thus, the amount of VAT that the Appellant paid over in respect of his VAT liability was €212,400 (59% of €360,000), leaving a sum outstanding of €133,364.

61. In all of the circumstances, the Commissioner is of the view that the sum of €200,000 is the requisite security that the Appellant should be required to provide "for protection of the revenue". This sum incorporates the €133,364 in VAT due, plus an additional amount to take into account a degree of risk in respect of taxes falling within the scope of section 960S of the TCA 1997 that may become due in future. The figure arrived at does not take into account or seek to protect taxes which section 960S of the TCA 1997 was not intended to protect, in particular the personal income tax of the Appellant. Nor is it computed on the basis of any interest owed on taxes due. It is in the view of the Commissioner a sum proportionate to the risk now posed to the Exchequer.

The type of security

62. Section 960S of the TCA 1997 provides that security should be "*in such a manner and form as* [the Respondent] *may determine".* In this instance the Respondent determined that the security should be in the form of a bond. The Commissioner does not find any reason, and heard no submission on, why this should be departed from and does not do so.

Determination

63. The Determination of the Commissioner is that the security required to be provided by the Appellant for the protection of the revenue is in the amount of €200,000, which figure is a reduction on the amount of €250,000 decided on by the Respondent in the notice of 30 January 2019, the subject matter of this appeal.

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

Notification

65. 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

66. 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
15 August 2024

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997