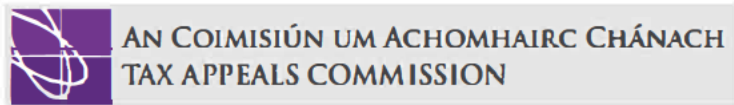

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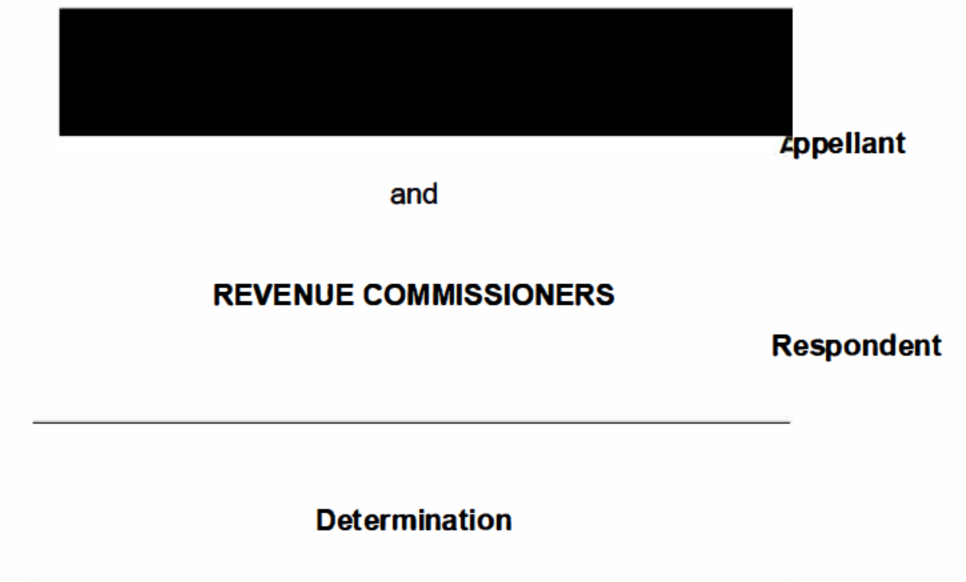

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is the appeal of a Notice of Estimation of the Revenue Commissioners ("the Respondent") made on 16 December 2021, whereby it found Limited ("the Appellant company") to owe income tax, USC and PRSI on payments made to its former employees in August 2017 in the amount of €226,149. The amount of tax assessed is €140,545.

2. The net issue in this appeal is whether these payments, made by the Appellant company shortly after the cessation of its trade on 4 August 2017, were paid to its former employees as a consequence of their removal from employment by reason of redundancy. If they were, the payments would be chargeable under section 123 of the Taxes Consolidation Act 1997 ("the TCA 1997") and benefit from the tax exemptions available under sections 201, 203 and Schedule 3 of the same legislation. The issue arises in circumstances where the Respondent, in its Notice of Estimation, assessed the payments as Schedule E remuneration paid to the former employees, chargeable to tax under section 112 of the TCA 1997, which the Appellant company had a duty to remit to it under the PAYE system. It did so on the grounds that, in its view, the Appellant company's business was

transferred on 5 August 2017 to another company, [redacted] Limited and that the employees retained their pre-existing positions of employment under that new employer.

3. In making this Determination the Commissioner had the benefit of hearing evidence from two of the directors of the Appellant company, which entered into voluntary liquidation in May 2019. This appeal was taken on the authority of the liquidator appointed to conduct the winding-up of the Appellant company.

Background

4. The Appellant company was established in 1999. For the entirety of its time in business it was engaged in the production of food, in particular of [redacted].

5. The Appellant company carried on its business from a leased premises on an industrial estate in [redacted] ("the factory premises"). The Commissioner heard evidence that the lease entered into by the Appellant company in 1999 for the factory premises was 35 years long.

6. At all material times the Appellant company had just two directors. One was [redacted] ("the first director") and the other was his daughter, [redacted] ("the second director").

7. The first director served as the Appellant company's managing director and was its sole shareholder from 2012 onwards. The Commissioner heard evidence from the first and second directors that the first director was the maker of all significant business decisions for most of the time that the Appellant company operated its business. They both said that the reason why the second director took up that role in 1999, at which stage she was 19 years old, was so as to satisfy the requirement under company law that the Appellant company have a minimum of two directors. The second director said that although in the early years of the business she fulfilled some of the duties of a director, such as signing annual accounts, she did not involve herself in the management of the affairs of the Appellant company and, in essence, carried out only secretarial and administrative tasks.

8. However, the Commissioner heard evidence that as time passed the second director became involved in the management of the Appellant company. She was, in particular, involved in ensuring compliance with food safety regulations and quality control, which duties were critical to the functioning of the business.

9. Aside from its two directors the Appellant company had a small number of employees. The evidence suggested that, with one exception, they were all employed in the production of food and had no managerial function. The only other person involved on the management side was a person named [redacted], who the first director described

as having fulfilled the role of production manager. She was, he said, integral to the functioning of the business and possessed a "vast knowledge of the food industry", having worked in it for 35 or 40 years.

10. The Commissioner was furnished with examples of contracts of employment of some of the Appellant company's employees. These were all signed on 17 February 2012, though in fact the relevant employees had all begun working for the Appellant company in previous years. The second director explained in her evidence that this was so because, in early 2012, the Appellant company had obtained the services of a human resources consultancy firm, which had advised that the terms of employment of all of its employees be set out in written contracts of employment. Nothing would appear to turn on this fact.

11. The Appellant company had one significant customer, a person involved in the food distribution business named ██████, who purchased almost all of its produce and sold it on to his own customers, the most significant of whom were ██████, ██████. The Commissioner heard evidence in the course of the appeal that the reason why the Appellant company did not sell directly to these supermarkets was that it did not have the requisite "*BRC"* food safety certification. The Commissioner heard that the reason why the company did not have this was, at least in part, because of the layout, size and refrigeration capacity of the factory premises.

12. Over time the Appellant company developed into a profitable and successful business. The first director gave evidence that from an early stage it was his expectation that, when the time came for him to retire, he would be succeeded by the second director, who would take over what he viewed as the family business. He could not, he said, see the business *"going to any other person in the world*".[1]

13. Both the first director and the second director gave evidence that they always had a good working relationship with one another. They said, however, that their personal relationship had become strained from about 2011 onward as a consequence of the first director seeking a divorce from his then wife, the second director's mother.

14. The Commissioner heard that at some point in 2015 the first director was diagnosed with a life-threatening illness that ultimately required him to have a ██████ operation in late 2016. Both the first and second directors gave evidence that after receiving the diagnosis, the first director's active involvement in the Appellant company diminished greatly. There was, however, some lack of consistency between them regarding the exact extent of the first director's involvement from 2015 on. The crux of the first director's

[1] Transcript of hearing, page 19.

evidence was that, aside from signing paperwork, he had almost no involvement in either the day-to-day management of the Appellant company, or in taking strategic business decisions. By his account, almost full control of the company had passed to the second director, who managed it with the help of [redacted]. He was, he said, simply in no condition at this time to work. By contrast, the second director's account was that the first director ceased to have involvement in the day-to-day management of the Appellant company, but all major strategic decisions remained subject to his input and approval.

15. The Commission does not consider that much if anything turns on this divergence of evidence between the two witnesses called by the Appellant company. In any event, both their evidence was that in early 2017 the first director signalled his intention to retire in the coming months. This information was communicated to the staff on 9 March 2017. Notwithstanding the first director's decision, he remained sufficiently engaged with the affairs of the Appellant company that in March 2017 he decided that a "*strategic review*" of its "*operations and structures*" had to be carried out. According to the first and second directors, the reason why this review was necessary was because the Appellant company's commercial model, whereby it did the great majority of its business with a single customer, [redacted], was becoming less profitable. As evidence of this, they pointed to the unaudited financial statements of the Appellant company for 2017, which disclosed a gross profit percentage for that year of 38.3% compared to 43% for the preceding year. In addition, the second director stated that there were *"huge structural issues"* arising from the cramped space available in the factory premises for food production and storage and from ageing machinery.

16. The first director said that when he considered who to get to conduct this review, he reached the conclusion that there was nobody better placed than the second director, assisted by [redacted]. He said that he therefore engaged them to carry this out and, viewing it as falling outside the normal duties arising from their employment, agreed to pay them for the provision of their services as independent contractors.

17. During the conduct of the audit, the Respondent queried the purpose of three payments of €30,000 (excluding VAT). In explaining that they related to the strategic review, the Appellant company's accountant furnished three separate invoices, dated 30 June 2017, 30 July 2017 and 30 September 2017, as evidence that the work was performed. The description of the services provided therein are, respectively "*Production Consultancy", "Business Development Consultancy"* and "*Business Cessation Consultancy".* Curiously, the sender of the invoice was in each instance not the second director and/or [redacted], but rather "[redacted] *Limited",* a company with the same address as the Appellant

company and a logo which the second director accepted in evidence bore a strong resemblance to that of the Appellant company. The second director was the sole director of [redacted] Limited, as well as being its only shareholder. When asked in cross-examination by counsel for the Respondent why it was that [redacted] Limited was paid for work that, on her own evidence, she and [redacted] had carried out for the Appellant company as independent contractors, the first director explained that she had established this company for the particular purpose of carrying out the strategic review. That was why it had been paid.

18. The second director further gave evidence that the invoice for "*Business Cessation Consultancy"* did not concern the strategic review. Instead, it concerned work done subsequently for the Appellant company by [redacted] Limited relating to the former's "*redundancy and closedown situation"* in preparation for the cessation of its trade in early August 2017.

19. The second director gave evidence of the work she carried out as part of the strategic review. She said that she was initially tasked by the first director with establishing whether it would be possible to have their food products made away from their premises by third parties. This, it was hoped, would permit the business to reduce its number of staff and deal directly with the supermarkets interested in purchasing its products, rather than with a middle man in the person of [redacted]. Her inquiries led her to believe, however, that this course was not viable, primarily for reasons related to food health and safety and cost. The second director also said that she looked into whether it would be possible for the Appellant company to move its premises to one that would be more suitable to the production and storage of food. She said that her efforts in this regard involved making phone calls to various estate agents. Having done so, she said it became clear that there was no suitable alternative premises in the vicinity of [redacted]. All that was on offer were unsuitable premises, with one example being a property located at or near to [redacted]. This line of inquiry was also deemed to be a non-runner.

20. The second director gave evidence that she communicated the findings of her strategic review to the first director orally in July 2017. The first director said that having heard that it was not possible either to outsource the production of food or find an upgrade on its existing premises and bearing in mind his serious ill-health, he decided that the time had come for the Appellant company to cease trading.

21. The Appellant company duly ceased trading on 4 August 2017. Around the same time it ended its lease of the factory premises. If the employees were provided with and signed written termination agreements, copies of the same were not furnished to the

Commissioner. Later, the Appellant company entered into a members' voluntary liquidation, though this did not occur until ███ 2019.

22. On 1 August 2017, three days before the Appellant company ceased to trade, ████████ Limited registered as an employer for PAYE/PRSI. As already noted, its sole director was the second director.

23. On 5 August 2017, twelve of the former employees of the Appellant company signed written contracts of employment with ████████ Limited. The Commissioner was provided with examples of these written contracts of employment. There was no dispute that they contained, in almost all respects, terms the same as the written contracts of employment signed by the Appellant company's employees in February 2012. It was, however, observed by the agent for the Appellant company that one difference was that employee holidays went from 21 days per annum to 20 days.

24. The activity of ████████ Limited, which commenced on 5 August 2017, was the production of the same food products previously produced by the Appellant company. It carried this on from the factory premises, having managed to negotiate a month-to-month rolling lease with its owner. All of the plant equipment and machinery already in situ in the factory premises was used by ████████ Limited in its own production activities. The second director gave evidence that ████████ Limited paid the Appellant company approximately €30,000 to acquire this plant and machinery, though no documentary evidence of this was supplied.

25. The Commissioner heard evidence that the suppliers of the Appellant company and ████████ Limited were, in effect, identical. Moreover, ████████ became ████████ Limited's only significant customer, just as was the case in respect of the Appellant company.

26. The second director emphasised in her evidence that it was imperative that upon the Appellant company ceasing to trade, there be no break in the production of food at the factory premises as otherwise the contracts held by ████████ to supply ████████, ████████, would be imperilled. Accordingly, ████████ Limited commenced its trading the day after the Appellant company brought an end to its own.

27. In examination-in-chief and cross-examination the second director explained there were three reasons why it had been essential to form a new company and, as she considered it, start a new business. Firstly, upon the first director stepping back from active involvement in the management of the Appellant company, ████████ became difficult to deal with. This she ascribed to his lack of respect for her own authority in the context

of the management of the affairs of the Appellant company. He was, she said, unable to view her as anything other than the person who had performed only administrative tasks years before. Secondly, she said that the lease agreement on the property, which still had about 17 years to run in August 2017, was onerous and she did not wish [redacted] Limited to be saddled with it. Forming a new company and starting afresh with a rolling month-to-month lease at the same level of rent offered greater flexibility and was far preferable. Lastly, she explained that she was concerned by the Appellant company's exposure to staff redundancy costs and saw the formation of a new company unencumbered by such costs as being beneficial to the interests of the business.[2]

28. On 2 September 2020 the Respondent commenced an Aspect Query into the affairs of the Appellant company. The Respondent's inquiry was later to become an audit, notified by way of correspondence dated 14 October 2021.

29. In the course of its inquiry into the tax affairs of the Appellant company, the Respondent queried payments of €276,758 recorded in the audited accounts for 2017 under the heading "*Directors' remuneration and transactions"* as *"fees".* On 17 February 2021 the Appellant company's accountant informed the Respondent that this sum in fact represented redundancy payments paid to its staff on the cessation of trading and the termination of their employment. Counsel for the Respondent put it to the second director in cross-examination that, in light of its description, it would not have been apparent to any reader of the Appellant company's accounts that the sum of €276,758 amounted to staff redundancy payments. The second director did not disagree in her evidence with this proposition.

30. Calculations provided subsequently to the Respondent by the Appellant company's accountant indicated that the €276,758 comprised statutory amounts paid to the Appellant company's non-managerial staff and increased amounts, equal to the maximum non-taxable sum allowed under section Schedule 3 of the same legislation, paid to the first director, the second director and [redacted].

31. The first and second directors were both asked in cross-examination by counsel for the Respondent why it was that the Appellant company's accounts for 2017, which they had both signed, recorded it as having 14 employees at the end of that year and, at the time of publication in 2018, stated it to be a "going concern". The first director's answer was that he was at this stage so ill that he did not give any great consideration to what he was signing. The second director's answer was that she had been unaware of the significance

[2] Transcript of hearing, page 149.

of these statements contained in the accounts and their inconsistency with the reality of the Appellant company's affairs.

32. On 15 December 2021, the Respondent notified the Appellant company that it was treating all but one of the payments made to its staff as remuneration chargeable to tax under section 112 of the TCA 1997. The exception in this regard was the sum of €50,609 paid to the first director, who had not taken up fresh employment with [redacted] Limited. Everyone else, having in its view been immediately 'fired and re-hired' to perform the same roles that they had held up to 4 August 2017, was considered to have had their pre-existing employment taken over by [redacted] Limited. They were not, the Respondent decided, in fact removed from their employment and there was no termination by way of redundancy.

33. In accordance with the content of this correspondence, the Respondent issued its Notice of Estimation on 16 December 2021, whereby it held that the Appellant company had a balance unpaid of €140,545 in income tax, PRSI and USC arising from payments to its employees of €226,149.

34. On 14 January 2022 the Appellant company, through its liquidator, [redacted], appealed the Notice of Estimation.

Legislation and Guidelines

35. Section 12 of the TCA 1997 provides:-

> *"Income tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described or comprised in the Schedules contained in the sections enumerated below—*
>
> *Schedule C – Section 17;*
>
> *Schedule D – Section 18;*
>
> *Schedule E – Section 19;*
>
> *Schedule F – Section 20.*
>
> *and in accordance with the provisions of the Income Tax Acts applicable to those Schedules."*

36. Section 19 of the TCA 1997, relating to income falling under Schedule E provides:-

> *"(1) The Schedule referred to as Schedule E is as follows:-*
>
> […]

2. Tax under this Schedule shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension or stipend payable out of the public revenue of the State, other than annuities charged under Schedule C, for every one euro of the annual amount thereof.

[…]"

37. Section 112 of the TCA 1997, relating to the charging of income tax under Schedule E, is entitled "*Basis of assessment, persons chargeable and extent of charge"* and provides:-

    "*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."*

38. Section 123 TCA 1997 is entitled "*General tax treatment of payments on retirement or removal from office or employment*". It provides:-

    "(1) This section shall apply to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodical payments (whether chargeable to tax or not) which would otherwise have been so made.

    (2) Subject to section 201, income tax shall be charged under Schedule E in respect of any payment to which this section applies made to the holder or past holder of any office or employment, or to his or her executors or administrators, whether made by the person under whom he or she holds or held the office or employment or by any other person."

39. Section 201 and Schedule 3 of the TCA 1997 set out reliefs and exemptions from tax that are available in respect of payments falling within the scope of section 123 of the TCA 1997.

Submissions

40. The following is a summary of the arguments made on behalf of the parties at the hearing of this appeal.

Appellant

41. It was submitted by the agent acting on behalf of the Appellant company that what had occurred was the genuine redundancy of its employees. The assertion that they were 'fired and re-hired' was, he said, misconceived. The Appellant company and the company that thereafter came to employ its former workers on 5 August 2017, ██████████ Limited, were entirely separate entities. The Appellant company was controlled by the first director. It was he who took the decision to bring an end to its trade and, ultimately, commence its winding-up. ██████████ Limited was controlled by the second director and it was she who had made the decision to establish this new company, commence trading in food production and hire staff to carry this out. It was inherent in the concept of 'firing and rehiring' that there be only one entity carrying out both acts. If the company firing and the company hiring were different from one another the redundancy in question had to be genuine. It was further submitted that there was no evidence upon which to conclude that there had been any assurance given by the Appellant company to its employees prior to the cessation of its trade that they would be offered employment by ██████████ Limited. That they were, with the exception of the first director, ultimately so hired was a decision taken by that company, not by it.

Respondent

42. The Respondent submitted that the employees of the Appellant company had not actually been made redundant on 4 August 2017. Counsel argued that, instead, ██████████ had taken over the business of the Appellant company and the positions occupied by its staff were those that existed prior to this happening.

43. In support of this submission, counsel for the Respondent referred the Commissioner to the judgment of the European Court of Justice in Case 24/85 *Spijkers v Gebroeders Benedik Abbatoir CV [1986] ECR 1119.* In this case, the Supreme Court of the Netherlands sought a ruling on the factual criteria by which to determine whether an existing "[…] *undertaking, business or part of a business"* has transferred from one owner to a new owner, with the consequence that the rights of and obligations owed to employees move in the same direction.

44. The facts of *Spijkers* were that a Dutch abattoir ceased its trading at the end of December 1982, at which point "*there was no longer any goodwill in the business".* Thereafter its slaughterhouse premises, various offices and "*certain specified goods"* were purchased by another company that itself commenced operating as an abattoir. All but two of the former employees of the vendor company were taken into the employment of the

purchaser. One of those employees not taken on argued before the Court that the fact that the purchasing company had acquired the tangible assets of the vendor company was sufficient on its own for there to have been a transfer of the abattoir business that had ceased to operate for a brief period. In agreeing with the submissions of the governments of the Netherlands and the United Kingdom that the question of whether there has been a transfer of an undertaking or business must be determined "*in light of of all of the circumstances characterising the transaction",* the Court held from paragraph 10 onwards:-

> *"The United Kingdom Government and the Commission suggest that the essential criterion is whether the transferee is put in possession of a going concern and is able to continue its activities or at least activities of the same kind. The Netherlands Government emphasizes that, having regard to the social objective of the directive, it is clear that the term 'transfer' implies that the transferee actually carries on the activities of the transferor as part of the same business.*
>
> *That view must be accepted. It is clear from the scheme of Directive No 77/187 and from the terms of Article 1 (1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity.*
>
> *Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.*
>
> *In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.*

It is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation set out above, in order to establish whether or not there is a transfer in the sense indicated above."

45. Counsel for the Respondent submitted that the judgment of the Court in *Spijkers* made clear that if a business was disposed of by one company to another as a "*going concern",* included as part of that disposal would be the obligations of the business toward the employees. The logic underlying this was that, as the business had never ceased to exist, the positions held by its employees could not by reason of the disposal alone have become redundant. Likewise, in the instant appeal the factual question that had to be answered was whether the positions held by the employees in the business of the Appellant company had ceased to exist. If [redacted] Limited had, in light of all of the facts of the transaction, taken on what constituted a "*going concern"* in the form of a food production business, then there were, with the exception of the position of the first director, no redundancies as a matter of fact and the payments made could not have been for that purpose. This meant that they should fall to be charged under section 112 of the TCA 1997 and the exemptions from tax available under sections 201, 203 and Schedule 3 to redundancy payments chargeable under section 123 of the same legislation should not have been availed of by the Appellant company.

Material Facts

46. The facts material to this appeal that were not in dispute were as follows:-

- the Appellant company was established in 1999 and carried on the trade of the production of food, [redacted];
- at all material times the Appellant company had two directors. One was the first director, who was its managing director and, from 2012, its sole shareholder. The other was the second director;
- notwithstanding her status as a director of the Appellant company, the second director's initial involvement in its affairs was administrative in nature and she left decisions regarding its management to the first director;
- over time the second director's involvement in the affairs of the Appellant company expanded such that she took on management duties;
- it was the first director's desire that the second director would succeed him in taking over the running of the business of the Appellant company;

- at all material times the Appellant company had just one major customer, ■■■■ ■■■■, who acquired its food products and sold them on to retailers such as ■■■■■■■■■■■■■■■■■■■■■■■■■■■■■;
- in 2015 the first director became gravely ill and in ■■■■ 2016 had ■■■■ ■■■■■;
- from the point of becoming ill the first director's involvement in the management of the affairs of the Appellant company diminished and the second director and another employee, ■■■■■■, took on these responsibilities. The first director continued to fulfil certain obligations arising from his directorship such as the signing of annual accounts;
- in early 2017 the first director decided that he was not going to return to manage the business of the Appellant company. The staff were informed of this decision on or about 9 March 2017;
- on 4 August 2017 the Appellant company ceased trading and terminated the employment of its employees;
- ■■■■■■■■■ Limited was registered for corporation tax and VAT on 13 June 2017 and PREM on 1 August 2017;
- the second director was the sole director of ■■■■■■■■■ Limited and its only shareholder;
- on 5 August 2017 ■■■■■■■■■ Limited entered into agreements with 12 of the Appellant company's former employees, whereby they were employed to work in roles that were the same as those previously held with the Appellant company. The terms of employment were, with the exception of minor differences, the same as those that existed between those employees and the Appellant company;
- also on 5 August 2017 ■■■■■■■■■ Limited commenced trading from the factory premises;
- ■■■■■■■■■ Limited's activity was the production of the same food products previously produced by the Appellant company;
- following the commencement of its activity, ■■■■■■■■■ Limited used the same suppliers as did the Appellant company previously;
- following the commencement of its activity, ■■■■■■■■■ Limited had the same customers as had the Appellant company previously;

- in August 2017 the Appellant company made payments to its former employees, including the first and second directors, in the overall amount of €276,758.49;
- the sums paid to the employees were, excluding the first director, the second Director and [redacted], reflective of the amounts that would have been due to them pursuant to the Redundancy Payments Act 1967 in the event of their redundancy;
- the sums paid to the first director, the second director and [redacted] were increased amounts reflecting the maximum tax free sum available to them in the event of their redundancy;
- in [redacted] 2019 the members of the Appellant company decided to commence a voluntary winding-up of the Appellant company;
- on 17 February 2021, following the commencement of an aspect query, the accountant acting for the liquidator appointed to carry out the winding-up informed the Respondent that the payments of €276,758.49 arising from redundancy had been made to its former employees. In so doing the accountant for the Appellant company informed the Respondent that these payments had been described in its audited accounts for 2017 as being "*Director's fees";*
- on 14 October 2021 the Respondent informed the liquidator of the Appellant company that it had been selected for an audit for the years 2016, 2017 and 2018;
- on 15 December 2021 the Respondent notified the Appellant company of its intention to assess it as owing tax on all but €50,609 (the amount paid to the first director) of the €276,758.49 claimed to be redundancy payments made to its former employees;
- the Respondent's Notice of Estimation issued on 16 December 2021. Thereby it assessed the Appellant company as owing €140,545 in PAYE, PRSI and USC.

Analysis and findings of contested law and fact

47. The question in this appeal is whether payments of €226,149 made by the Appellant company in August 2017 to persons who were its employees until the 4 August 2017 occurred as a consequence of the termination of their employment on the grounds of redundancy. This can only be so if the positions they held ceased to exist upon the termination of employment. If, as the Respondent contended, [redacted] Limited took over what was in reality a "going concern", the activities of which were capable of

being continued, then the payments made were not chargeable under section 123 of the TCA 1997 and the reliefs and exemptions from taxation under sections 201, 203 and Schedule 3 of the same legislation could not have applied.

48. Before proceeding further, the Commissioner wishes to point out that in this appeal it is the Appellant that bears the burden of proof on matters of fact. That this is so is clear from the judgment of the High Court in *Menolly Homes v The Appeal Commissioners & Anor [2010] IEHC 49,* where Charleton J held at paragraph 22:-

> *"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."*

49. In *Spijkers,* the European Court of Justice held that the "*decisive factual criterion*" for establishing whether a transaction resulted in an undertaking or business being transferred from one owner to another was "*whether the business in question* [retained] *its identity".* In this regard all of the factors characterising the relevant transaction needed to be examined. Having done this with reference to the facts of the instant case, the Commissioner is in no doubt that the food production business of the Appellant company was not brought to an end, but rather was taken over and continued by [redacted] Limited.

50. The factors that the Commissioner has taken into account in reaching this conclusion are as follows. Firstly, [redacted] Limited took over the leasing of the factory premises occupied for the previous 18 years by the Appellant company. In so doing it proceeded to pay the same monthly sum as the Appellant company to the owner, though it did so on a month-to-month basis rather than pursuant to a 35 year lease. All of the plant and machinery located in the factory premises that was essential for the production and storage of food was likewise taken over and used by [redacted] Limited. It would appear that, with the exception of the first director, whose redundancy payment was not part of the Respondent's assessment, all of the staff of the Appellant company made a seamless transition from being its employees to being employees of [redacted] Limited. They did not miss a day at work and, from the evidence given, performed exactly the same roles as before, save that the second director, who owned all of the shares in [redacted] Limited, took on the responsibility of being managing director. It was not contested that, save for their holiday entitlement being reduced by one day, the terms of employment of the employees, including their salaries, remained the same.

51. ████████ inherited the same major customer, ████████, from the Appellant company. The first and second directors were themselves clear in their evidence that it was critical that production of food continue at the factory premises. They said that if it did not, the entities that bought the food products from ████████ that were made at the factory, namely ████████, would not hesitate in seeking to source replacement products from elsewhere. It was, in other words, essential to ████████ Limited that the goodwill built up by the Appellant company over many years in business, which it clearly viewed as having passed to it, not be dissipated or lost altogether. That ████████ Limited wished to, and from the evidence in fact did, acquire and preserve the goodwill of the Appellant company is further apparent from the fact that the second director chose as the title for her new company one in which the name "████" was prominent. This name was, moreover, displayed prominently on a logo that bore a striking similarity to that used by the Appellant company.

52. It was contended on behalf of the Appellant company that there was no agreement between it and ████████ Limited that, once the decision was made by the former to terminate the contracts of its employees, they would be re-hired by the latter in the same positions on almost exactly the same terms. This is not credible. There was no gap at all between the cessation of the trading of the Appellant company and the commencement of that of ████████ Limited. For this to have happened there could only have been advance coordination between the persons controlling each company, who were of course father and daughter and both directors of the Appellant company. This is enough to ground the finding of fact that there was an agreement between the Appellant company and ████████ Limited regarding the termination and immediate hiring of the staff who worked at the business operating from the factory premises.

53. Notwithstanding that this is so, the Commissioner also considers it worth observing that the evidence of both the first and second directors was to the effect that there was a plan regarding the form in which the food production business would continue after the exit of the first director. The first director could not have been clearer in his evidence in this respect. He said that it was always his intention that the second director would inherit from him control of what he regarded as "the family business". Once the first director made his decision in 2017 to retire, the second director, by her own account, took legal advice regarding the manner in which she would take over its control. The advice she said she received was that the best way forward was the formation of a new company. One of the reasons for this was, she said, to attempt to avoid having large redundancy payment obligations to the staff that were in situ, while nonetheless retaining them as a

workforce. The others were that she believed, for reasons that are not obvious to the Commissioner, that the establishment of a new business would strengthen her hand in her dealings with ██████ and that she wished to escape the burden of a 35 year lease on the factory premises. Far from being indicative of the commencement by ██ ██████ Limited of a business distinct from that of the Appellant company, the evidence of the second director makes clear that she was merely continuing the existing one by means of a new company.

54. Quite some time in the appeal hearing was given over to the question of the "strategic review" that was alleged to have been carried out. Yet to the Commissioner's mind, if it did occur, its relevance is not obvious. It appeared to be suggested on behalf of the Appellant company that the conduct of the review was indicative of the existence of structural problems, leading to financial decline and inefficiency, that should cause the Commissioner to conclude that the business was terminated. However, it is plain that any such problems faced by the Appellant company up to the cessation of its trading on 4 August 2017 equally faced ████████ Limited when it commenced trading the following morning.

55. In view of the foregoing, Commissioner finds that the existing food production business was taken over and that the circumstances surrounding the transaction, including the involvement of the second director with both companies, points to this being a plan of action that the Appellant company would have been aware of prior to its cessation of trade and the termination of its contracts with its employees on 4 August 2017.

56. Accordingly, in addition to the findings of fact outlined at paragraph 46 herein, the Commissioner finds that:-

    - ████████ Limited took over a going concern in the form of what was previously the Appellant company's food production business; and
    - those in control of the Appellant company would have been aware at the time of the cessation of its trade on 4 August 2017 that its employees were to retain their existing positions in circumstances where its business was to be taken over by ████████ Limited.

57. In view of these findings, the payments made to the employees of the Appellant company cannot be said to have been made to its employees as a consequence of the termination of their positions of employment. As such, they were not chargeable under section 123 of the TCA 1997 and capable of being subject to the reliefs from taxation provided for under sections 201, 203 and Schedule 3 of the same legislation. The consequence of this

is that the payments at issue must instead be taken to be payments constituting profits or gains of its employees arising from their employment, chargeable under section 112 of the TCA 1997. As such, the Notice of Estimation of the Revenue Commissioners, which assessed these profits or gains as liable to income tax, PRSI and USC, which the Appellant company as their employer was under a duty to remit to the Respondent, was correct and stands affirmed.

Determination

58. The Commissioner determines that the Notice of Estimation of the Respondent, pursuant to which the Appellant company was found to have a balance of €140,545 in income tax, PRSI and USC on payments made to its employees in August 2017 in the amounts of €226,149 is correct and stands affirmed.

59. This Appeal is determined in accordance with Part 40A of the TAC 1997 and in particular section 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

60. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and 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 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties shall not receive any other notification of this determination by any other methods of communication.

Appeal

61. Any party dissatisfied with the determination has a right of appeal on a point or points of law only to the High Court 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
8 March 2024