



62TACD2024

Between:

[REDACTED]

**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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## Table of Contents

|  |    |
|--|----|
| <b>Introduction</b> .....  | 3  |
| <b>Background</b> .....  | 3  |
| <b>Legislation and Guidelines</b> .....  | 6  |
| <i>Section 19 of the TCA 1997</i> .....  | 6  |
| <i>Section 20 of the TCA 1997</i> .....  | 7  |
| <i>Section 112 of the TCA 1997</i> .....   | 7  |
| <i>Section 130 of the TCA 1997 (as in force from 1 January 2011 to 30 December 2020)</i> .....                         | 9  |
| <i>Section 548 of the TCA 1997 (as in force from 30 November 1997 to 24 December 2017)</i><br>.....                    | 14 |
| <i>Regulation 16 of the Income Tax (Employment) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001)</i> .....       | 15 |
| <b>Witness and Expert Evidence</b> .....   | 15 |
| <i>Witness Evidence – [REDACTED]</i> .....   | 15 |
| <i>Witness Evidence – [REDACTED]</i> .....   | 19 |
| <i>Witness Evidence – [REDACTED]</i> .....   | 20 |
| <i>Expert 1 – [REDACTED]</i> .....   | 22 |
| <i>Expert 2 – [REDACTED]</i> .....   | 28 |
| <i>Appellant’s Submissions</i> .....   | 36 |
| <i>Respondent’s Submissions</i> .....  | 39 |
| <b>Material Facts</b> .....  | 41 |
| <i>Whether a transfer of the goodwill of the sole trade business to the Appellant took place on [REDACTED]</i> .....   | 44 |
| <i>What the appropriate valuation of the goodwill of the sole trade business was at [REDACTED]</i><br>[REDACTED] ..... | 46 |
| <i>Commissioners findings of material fact</i> .....   | 53 |
| <b>Analysis</b> .....  | 55 |
| <i>Alternative Assessments</i> .....   | 56 |
| <i>Notices of Estimation to PAYE/PRSI/USC</i> .....  | 58 |
| <i>Schedule F assessments</i> .....  | 61 |
| <i>Assessment to Corporation Tax</i> .....   | 61 |
| <b>Determination</b> .....   | 61 |
| <b>Notification</b> .....  | 62 |
| <b>Appeal</b> .....  | 63 |

## Introduction

1. This is a consolidated appeal to the Tax Appeals Commission (hereinafter the “Commission”) pursuant to and in accordance with the provisions of the Taxes Consolidation Act 1997 (hereinafter the “TCA 1997”).
2. The appeal is brought by [REDACTED] (hereinafter the “Appellant”) against Notices of Amended Assessment to Corporation Tax, Dividend Withholding Tax (hereinafter “DWT”) and Employer’s Pay As You Earn and Pay Related Social Insurance (hereinafter “PAYE/PRSI/USC”) for the years 2012, 2013, 2014, 2015 and 2016 raised by the Revenue Commissioners (hereinafter the “Respondent”).
3. The amount of tax in dispute in this appeal is €326,078.49.
4. A related determination has been issued in a related appeal [REDACTED] M148/18.

## Background

5. [REDACTED] (hereinafter the “Director”) is a businessman who, between [REDACTED] and [REDACTED], carried on a sole trade, trading as “[REDACTED]” (hereinafter the “sole trade”), as a [REDACTED].
6. The Appellant was incorporated in [REDACTED] and at the time of its incorporation had two directors, the Director with a 99% shareholding and his wife with a 1% shareholding.
7. On [REDACTED] the Director was registered as an employee of the Appellant.
8. On [REDACTED] the Director transferred the goodwill of the sole trade business into the Appellant. The transfer of the sole trade into the Appellant included a valuation for the goodwill of the sole trade of €250,000.
9. In [REDACTED], the amount of €250,000 was credited to the Director’s director’s loan account in the Appellant.
10. The director’s loan account was drawn down between [REDACTED] and [REDACTED] as follows:

| Year | Amount drawn down from director’s loan account € |
|------|--|
|      |  |

|                      |           |
|----------------------|-----------|
| ████████████████████ | 61,682.36 |
| ████████████████████ | 63,579.80 |
| ████████████████████ | 54,886.23 |
| ████████████████████ | 55,360.08 |
| ████████████████████ | 14,491.53 |

11. On ██████████, the Appellant invoiced the sole trade business the amount of €50,000 plus Value Added Tax (hereinafter "VAT") at the rate of 23% of €11,500 totalling €61,500 for administration and secretarial services provided to the sole trade prior to that date.
12. The Director and his wife ceased to be directors of the Appellant on ██████████ when the Director's ██████ children were appointed as directors. The Director remained as an employee of the Appellant. The Director and his wife transferred their shares in the Company to their children in ██████ with a valuation of €1.
13. On 20 November 2015, the Respondent issued Notifications of Revenue Audit to the Appellant and to the Director.
14. As a result of the audits which took place, the Respondent issued the following Notices of Amended Assessment to the Appellant:

|    | Notice Type                  | Date       | Tax Type          | Period                       | Amount €   | Appeal Number |
|----|------------------------------|------------|-------------------|------------------------------|------------|---------------|
| 1. | Notice of Amended Assessment | 21/12/2017 | Corporation Tax   | Year ending 30/06/██████     | 291.00     | M160/18       |
| 2. | Notice of Assessment         | 15/12/2017 | DWT               | 30/06/██████                 | 50,000.00  | M82/18        |
| 3. | Notice of Estimation         | 22/12/2017 | PAYE / PRSI / USC | 01/01/██████ to 31/12/██████ | 147,896.00 | M151/18       |

|    |                      |            |                   |                              |           |        |
|----|----------------------|------------|-------------------|------------------------------|-----------|--------|
| 4. | Notice of Estimation | 27/12/2018 | PAYE / PRSI / USC | 01/01/██████ to 31/12/20██   | 53,905.89 | 92/19  |
| 5. | Notice of Assessment | 21/12/2018 | DWT               | 01/01/██████ to 31/12/██████ | 23,693.00 | 93/19  |
| 6. | Notice of Assessment | 09/12/2020 | DWT               | 31/12/██████                 | 11,072.00 | 10/21  |
| 7. | Notice of Estimation | 15/12/2020 | PAYE / PRSI / USC | 01/01/██████ to 31/12/██████ | 28,787.01 | 11/21  |
| 8. | Notice of Estimation | 16/11/2021 | PAYE / PRSI / USC | 01/01/██████ to 31/12/██████ | 7,535.59  | 345/21 |
| 9. | Notice of Assessment | 15/11/2021 | DWT               | 31/12/██████                 | 2,898     | 345/21 |

15. The Respondent also issued Notices of Assessment to Income Tax and Value Added Tax to the Director which are the subject of the determination in the related appeal ██████████.
16. The Respondent has, since the submission of appeal 93/19, indicated to the Appellant that it is not pursuing the Notice of Assessment to DWT for the period 01/01/██████ to 31/12/██████ in the amount of €23,693.00.
17. The first day of the oral hearing of this appeal was scheduled to take place on 31 May 2022. On that date, the Appellant applied for an adjournment to allow it to bring judicial review proceedings against the Respondent in relation to the validity of the Notices of Assessment, Notices of Amended Assessment and Notices of Estimation under appeal.
18. Having heard submissions from both parties, the Commissioner granted the adjournment for the purposes of allowing the Appellant to bring judicial review proceedings against the Respondent. The Appellant did not subsequently issue judicial review proceedings against the Respondent. The Appellant subsequently instructed alternative

representation. The oral hearing of this appeal recommenced on 24 April 2023 and was heard over a period of three days.

## Legislation

19. The legislation relevant to the appeal is as follows:

### Section 19 of the TCA 1997

#### *“Schedule E*

*(1) The Schedule referred to as Schedule E is as follows:*

#### *SCHEDULE E*

- 1. In this Schedule, “annuity” and “pension” include respectively an annuity which is paid voluntarily or is capable of being discontinued and a pension which is so paid or is so capable.*
- 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.*
- 3. Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for paragraph 2 of that Schedule.*
- 4. Paragraphs 1 to 3 are without prejudice to any other provision of the Income Tax Acts directing tax to be charged under this Schedule, and tax so directed to be charged shall be charged accordingly.*
- 5. Subsection (2) and sections 114, 115 and 925 shall apply in relation to the tax to be charged under this Schedule.*

*(2) Tax under Schedule E shall be paid in respect of all public offices and employments of profit in the State or by the officers respectively described below—*

- (a) offices belonging to either House of the Oireachtas;*
- (b) offices belonging to any court in the State;*
- (c) public offices under the State;*
- (d) officers of the Defence Forces;*
- (e) offices or employments of profit under any ecclesiastical body;*

*(f)offices or employments of profit under any company or society, whether corporate or not corporate;*

*(g)offices or employments of profit under any public institution, or on any public foundation of whatever nature, or for whatever purpose established;*

*(h)offices or employments of profit under any public corporation or local authority, or under any trustees or guardians of any public funds, tolls or duties;*

*(i)all other public offices or employments of profit of a public nature.”*

Section 20 of the TCA 1997

*“Schedule F*

*(1)The Schedule referred to as Schedule F is as follows:*

*SCHEDULE F*

- 1. In this Schedule, “distribution” has the meaning assigned to it by Chapter 2 of Part 6 and sections 436, 436A, 437, 816(2)(b) and 817.*
- 2. Income tax under this Schedule shall be chargeable for any year of assessment in respect of all dividends and other distributions in that year of a company resident in the State which are not specially excluded from income tax and, for the purposes of income tax, all such distributions shall be regarded as income however they are to be dealt with in the hands of the recipient.*

*(2)No distribution chargeable under Schedule F shall be chargeable under any other provision of the Income Tax Acts.*

Section 112 of the TCA 1997

*“Basis of assessment, persons chargeable and extent of charge.*

*(1) 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.*

(2) (a) *In this section, “emoluments” means anything assessable to income tax under Schedule E.*

(b) *Where apart from this subsection emoluments from an office or employment would be for a year of assessment in which a person does not hold the office or employment, the following provisions shall apply for the purposes of subsection (1):*

(i) *if in the year concerned the office or employment has never been held, the emoluments shall be treated as emoluments for the first year of assessment in which the office or employment is held, and*

(ii) *if in the year concerned the office or employment is no longer held, the emoluments shall be treated as emoluments for the last year of assessment in which the office or employment was held.*

(3) *Notwithstanding subsection (1) and subject to subsections (4) and (6), the income tax under Schedule E to be charged for the year of assessment 2018 and subsequent years of assessment in respect of emoluments to which Chapter 4 of Part 42 applies or is applied shall be computed on the amount of the emoluments paid to the person in the year of assessment.*

(4) *Where emoluments chargeable under Schedule E arise in the year of assessment 2017, and those emoluments are also chargeable to income tax in accordance with subsection (3) for the year of assessment 2018 or a subsequent year of assessment, the amount of the emoluments chargeable to income tax for the year of assessment 2017 shall, on a claim being made by the person so chargeable, be reduced to the amount of emoluments that would have been charged to income tax had subsection (3) applied for that year of assessment.*

(5) *Where a person dies and emoluments are due to be paid to that deceased person, the payment of such emoluments shall be deemed to have been made to the deceased person immediately prior to death.*

(6) (a) *In this subsection, “proprietary director” has the same meaning as it has in section 472.*

(b) *Subsection (3) shall not apply to—*

(i) *emoluments paid directly or indirectly by a body corporate (or by any person who is connected (within the meaning of section 10) with the body corporate) to a proprietary director of the body corporate, or*



*(ii) emoluments in respect of which a notification has issued under section 984(1).”*

Section 130 of the TCA 1997 (as in force from 1 January 2011 to 30 December 2020)

*Matters to be treated as distributions.*

*(1) The following provisions of this Chapter, together with sections 436, 436A and 437, and subsection (2)(b) of section 816, shall, subject to any express exceptions, apply with respect to the meaning in the Corporation Tax Acts of "distribution" and for determining the persons to whom certain distributions are to be treated as made; but references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.*

*(2) In relation to any company, "distribution" means -*

*(a) any dividend paid by the company, including a capital dividend;*

*(b) any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except, subject to section 132, so much of the distribution, if any, as represents a repayment of capital on the shares or is, when it is made, equal in amount or value to any new consideration received by the company for the distribution;*

*(c) any amount met out of assets of the company (whether in cash or otherwise) in respect of the redemption of any security issued by the company in respect of shares in, or securities of, the company otherwise than wholly for new consideration, or in the redemption of such part of any such security so issued as is not properly referable to new consideration;*

*(d) any interest or other distribution out of assets of the company in respect of securities of the company (except so much, if any, of any such distribution as represents the principal thereby secured, and, without prejudice to section 135(9), for this purpose no amount shall be regarded as representing the principal secured by a security in so far as it exceeds any new consideration received by the company for the issue of the security), where the securities are*

*-*

*(i) securities issued as mentioned in paragraph (c), but excluding securities issued before the 27th day of November, 1975,*

*(ii) securities convertible directly or indirectly into shares in the company or securities carrying any right to receive shares in or securities of the company, not being (in either case) securities quoted on a recognised stock exchange nor issued on terms which are reasonably comparable with the terms of issue of securities so quoted,*

*(iii) securities under which -*

*(I) the consideration given by the company for the use of the principal secured is to any extent dependent on the results of the company's business or any part of the company's business, or*

*(II) the consideration so given represents more than a reasonable commercial return for the use of that principal; but this shall not operate so as to treat as a distribution so much of the interest or other distribution as represents a reasonable commercial return for the use of that principal,*

*(iv) securities issued by the company and held by a company not resident in the State, where -*

*(I) the company which issued the securities is a 75 per cent subsidiary of the other company,*

*(II) both companies are 75 per cent subsidiaries of a third company which is not resident in the State, or*

*(III) except where 90 per cent or more of the share capital of the company which issued the securities is directly owned by a company resident in the State, both the company which issued the securities and the company not resident in the State are 75 per cent subsidiaries of a third company which is resident in the State,*

*or*

*(v) securities connected with shares in the company, where "connected with" means that, in consequence of the nature of the rights attaching to the securities or shares, and in particular of any terms or conditions attaching to the right to transfer the shares or securities, it is necessary or advantageous for a person who has, or disposes of or acquires, any of the securities also to have, or to dispose of or acquire, a proportionate holding of the shares;*

*(e) any amount required to be treated as a distribution by subsection (3) or by section 131;*

*(f) any qualifying amount (within the meaning of subsection (2C)) paid to an individual who at the time that amount is paid -*

*(i) is a beneficiary under the terms of a trust deed of an employee share ownership trust approved of by the Revenue Commissioners under Schedule 12 and for which approval has not been withdrawn and which trust deed contains provision for the transfer of securities to the trustees of a scheme approved of by the Revenue Commissioners under Schedule 11 and for which approval has not been withdrawn, and*

*(ii) would be eligible to have securities appropriated to him or her, had such securities been available for appropriation, under the scheme referred to in subparagraph (i).*

*(2A) For the purposes of subsection (2)(d)(iii)(I), the consideration given by the company for the use of the principal received shall not be treated as being to any extent dependent on the results of the company's business or any part of the company's business by reason only of the fact that the terms (however expressed) of the security provide -*

*(a) for the consideration to be reduced in the event of the results improving, or*

*(b) for the consideration to be increased in the event of the results deteriorating.*

*(2B) Subsection (2)(d)(iv) shall not apply as respects interest, other than interest to which section 452 or 845A applies, paid to a company which is a resident of a Member State of the European Communities other than the State and, for the purposes of this subsection, a company is a resident of a Member State of the European Communities if the company is by virtue of the law of that Member State resident for the purposes of tax (being any tax imposed in the Member State which corresponds to corporation tax in the State) in such Member State.*

*(2C) Notwithstanding section 519(6) and paragraph 13(4) of Schedule 12, 'qualifying amount' means an amount paid solely out of income consisting of dividends received in a chargeable period (within the meaning of section 321) in respect of securities (within the meaning of Schedule 12) held by the trustees of the employee share ownership trust referred to in subsection (2)(f)(i), but only to the extent that such income exceeds the aggregate of -*

- (a) any sum or sums spent to meet expenses of the trust,*
- (b) any interest paid on sums borrowed by the trust,*
- (c) any sum or sums paid to the personal representatives of a deceased person who was a beneficiary under the terms of the trust deed,*
- (d) any amount spent on the repayment of sums borrowed including any amount capable of being so spent, having regard to the conditions referred to in paragraph 11(2B)(d) or 11A(5)(d) of Schedule 12, and*
- (e) any amount spent on the acquisition of securities (within the meaning of Schedule 12) including any amount capable, at any particular time, of being so spent on such securities at their market value (within the meaning of section 548) at that time,*

*in the chargeable period.*

*(3)(a) Where on a transfer of assets or liabilities by a company to its members or to a company by its members the amount or value of the benefit received by a member (taken according to its market value) exceeds the amount or value (so taken) of any new consideration given by the member, the company shall be treated as making a distribution to the member of an amount equal to the difference (in paragraph (b) referred to as "the relevant amount").*

*(b)Notwithstanding paragraph (a), where the company and the member receiving the benefit are both resident in the State and either the former is a subsidiary of the latter or both are subsidiaries of a third company, being a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State, the relevant amount shall not be treated as a distribution.*

*(c)For the purposes of this subsection and subsection (4), 'tax', in relation to a relevant Member State other than the State, means any tax imposed in the Member State which corresponds to corporation tax in the State.*

*(d)For the purposes of this subsection and subsection (4) -*

*'EEA Agreement' means the Agreement on the European Economic Area signed at Oporto on 2 May 1992, as adjusted by the Protocol signed at Brussels on 17 March 1993;*

*'EEA State' means a state which is a contracting party to the EEA Agreement;*

*'relevant Member State' means -*

- (i)a Member State of the European Communities, or*
- (ii)not being such a Member State, an EEA State which is a territory with the government of which arrangements having the force of law by virtue of section 826(1) have been made.*

*(4)The question whether one company is a subsidiary of another company for the purpose of subsection (3) shall be determined as a question whether it is a 51 per cent subsidiary of that other company, except that that other company shall be treated as not being the owner of -*

- (a)any share capital which it owns directly in a company, if a profit on a sale of the shares would be treated as a trading receipt of its trade,*
- (b)any share capital which it owns indirectly and which is owned directly by a company for which a profit on the sale of the shares would be a trading receipt, or*

*(c) any share capital which it owns directly or indirectly in a company, not being a company which, by virtue of the law of a relevant Member State, is resident for the purposes of tax in such a Member State.*

*(5) (a) No transfer of assets (other than cash) or of liabilities between one company and another company shall constitute, or be treated as giving rise to, a distribution by virtue of subsection (2)(b) or (3) if they are companies -*

*(i) both of which are resident in the State and neither of which is a 51 per cent subsidiary of a company not so resident, and*

*(ii) which neither at the time of the transfer nor as a result of it are under common control.*

*(b) For the purposes of this subsection, 2 companies shall be under common control if they are under the control of the same person or persons, and for this purpose "control" shall be construed in accordance with section 11.*

*(c) Any amount which would be a distribution by virtue of subsection (3)(a) shall not constitute a distribution by virtue of subsection (2)(b)."*

Section 548 of the TCA 1997 (as in force from 30 November 1997 to 24 December 2017)

*"Valuation of assets.*

*(1) Subject to this section, in the Capital Gains Tax Acts, "market value", in relation to any assets, means the price which those assets might reasonably be expected to fetch on a sale in the open market.*

*(2) In estimating the market value of any assets, no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at the same time.*

*...*

*(4) Where shares and securities are not quoted on a stock exchange at the time at which their market value is to be determined by virtue of subsection (1), it shall be assumed for the purposes of such determination that in the open market which is postulated for the purposes of subsection (1) there is available to any prospective purchaser of the asset in question all the information which a prudent prospective*

*purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm's length.*

...

*(6) If and in so far as any appeal against an assessment to capital gains tax or against a decision on a claim under the Capital Gains Tax Acts involves the question of the value of any shares or securities in a company resident in the State, other than shares or securities quoted on a stock exchange, that question shall be determined in the like manner as an appeal against an assessment made on the company.*

*(7) Subsection (6) shall apply for the purposes of corporation tax as it applies for the purposes of capital gains tax."*

Regulation 16 of the Income Tax (Employment) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001)

*"16. On payment of emoluments referred to in Regulation 7, deductions or repayments of tax shall be made subject to, and in accordance with, the subsequent provisions of this Part of these Regulations."*

**Witness and Expert Evidence**

20. The following is a summary of the witness and expert evidence adduced to the Commissioner.

*Witness Evidence –* [REDACTED]

21. The following is a summary of the direct evidence adduced to the Commissioner by the Director.

22. The Director stated that his family had a background in the business of [REDACTED]. He stated that, immediately on leaving school [REDACTED], he had moved to [REDACTED] to enter into a [REDACTED] apprenticeship with [REDACTED] where he was involved with all aspects of running [REDACTED], [REDACTED].

23. On completing this apprenticeship he moved home [REDACTED] to work in the [REDACTED] family business where he was involved in the day to day business. He subsequently established [REDACTED].

24. In [REDACTED], due to family circumstances and the general economic climate of the time, he moved to [REDACTED] where he became the [REDACTED]. He saw this job as being a continuation of what he had been trained to do, [REDACTED].

25. [REDACTED]

26. He stated that in [REDACTED] he began to trade as "[REDACTED]" and offered services relating to [REDACTED]. [REDACTED]

27. The Director stated that he had a group of core customers and in addition to those, one off jobs would also come in to the business. [REDACTED]. The amount of time which this took varied, but he stated that it could take between 3 and 5 years from the initial stage of a project to completion. During his evidence, the Director submitted evidence of presentations and plans given to customers in relation to proposed projects.

28. He stated that the fees for such projects would generally be calculated as a percentage of the estimated total [REDACTED]. [REDACTED]

29. The Director gave detailed evidence to the Commissioner relating to projects undertaken in [REDACTED]. He stated that his son, [REDACTED], worked extensively with him during that period and that [REDACTED] would have [REDACTED] during that time. He also stated that his wife and daughter were involved in aspects of the projects.



30. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

31. [REDACTED]  
[REDACTED]  
[REDACTED]

32. He stated that from the beginning of the sole trade [REDACTED] the business took on "a life of its own" and developed in line with ongoing improvements in the technology [REDACTED] [REDACTED]. He stated that in [REDACTED] the sole trade had no Irish based real competitors with most of his core clients dealing with [REDACTED]. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

33. He stated that the work involved a lot of travel with him driving up to 60,000 miles per annum with a lot of the major outdoor work being focussed from [REDACTED]  
[REDACTED].

34. He stated that [REDACTED] the sole trade, along with him and his family, moved from [REDACTED] to [REDACTED] [REDACTED]. At that point his wife became involved directly in office support in the sole trade along with dealing directly with customer queries. [REDACTED]  
[REDACTED] She, he stated, was the only additional person involved in the business on a full time basis.

35. He stated that the years between 2000 and 2008 were a peak time for the sole trade but that from 2008, as a result of the economic crisis, some clients ceased business with him completely whilst others [REDACTED]. From [REDACTED] the business began to recover.

36. He stated that his [REDACTED] children [REDACTED] were all involved in the business on a part time basis whilst they studied. In particular, [REDACTED] was the oldest and was heavily involved in the sole trade, [REDACTED]  
[REDACTED]. He worked for the sole trade on weekends and also during college holidays. On completing his studies [REDACTED]

worked with the sole trade for approximately 20 hours per week. He stated that in [REDACTED] [REDACTED] secured employment elsewhere with a view to building his skills and experience. It was anticipated that after a time [REDACTED] would return to work with the sole trade.

37. He stated that his daughter, [REDACTED] expressed an interest in the sole trade. Whilst at college, she also worked with the sole trade in a similar manner as [REDACTED] and she also expressed an interest in pursuing a future in the business in future years.

38. He stated that he was of the opinion that the sole trade was limited by the amount of people working in it. He stated that he had limited business to “safer” markets and he felt that, because of developing trends and requirements [REDACTED], there was an opportunity to expand the business. This, he stated, also tied in with significant increases in spending by the government [REDACTED].

39. He stated that the Appellant had been incorporated in or around [REDACTED]. He stated that, as a result of his children expressing an interest in entering the business, along with the increased market potential, he decided to transfer the sole trade to the Appellant in [REDACTED].

40. He stated that at the time of the transfer of the sole trade to the Appellant in [REDACTED], he had planned for an expansion in business on the basis that a lot of the [REDACTED] projects which he had begun in previous years, and which had been stalled due to the economic crisis, were due to come back online.

41. In transferring the sole trade business to the Appellant, the Director placed a value of €250,000 on the sole trade business, which was recorded as a director’s loan in the Appellant accounts. He stated that over the years he had been approached by entities in relation to a potential sale of the sole trade business but that he had never seriously considered selling it. He stated that [REDACTED] he had hoped that his children would become more involved in the business and that, even if he had been offered €250,000 for the business at that time, he most likely would not have sold it.

42. He stated that, in his opinion the value of €250,000 for the goodwill of the sole trade business recorded in the Appellant accounts, vastly undervalued the business. This opinion, he stated, was based on the unexploited potential of the business.

43. He stated that [REDACTED] he had incorporated another company, [REDACTED], which was initially created to develop associated lines which the business had previously sub-contracted out [REDACTED]



■ which were difficult to secure in the market. He stated that he had also seen an opportunity in ■. He stated that the purpose ■ was to develop a standalone business, complementary to the existing business.

44. The Director stated that, in his Form 11 tax return for ■, a claim for retirement relief in the Capital Gains Tax section of the return was included.

45. The Director identified an unsigned document entitled "Business Purchase Agreement" which was related to a purchase of the sole trade by the Appellant. The Director confirmed that this document was never signed by him.

46. In addition, the Director identified a document which set out a list of equipment to the value of €3,240 which, he stated, represented a list of the fixed assets of the sole trade which transferred to the Appellant.

47. The Director also identified a copy of an invoice from the Appellant to him dated 30 June ■ in the amount of €50,000 plus VAT of €11,500 in relation "*To administration and secretarial services of €50,000 together with VAT*". He stated that in ■, on advice from an accountant, the administrative and secretarial services were split between the sole trade business and the Appellant, although he could not recall why this was done.

48. He stated that he did not receive cash or cheques or any other financial form to the value of €250,000 from the Appellant ■. He stated he did not draw €250,000 from the Appellant ■.

*Witness Evidence* – ■

49. The following is a summary of the direct evidence adduced to the Commissioner by ■ (hereinafter "Witness 1").

50. Witness 1 stated that he is the Director's son ■. ■

51. He stated that he worked on a part-time basis for the sole trade business from a very early age and this continued until he completed his third level education. Having completed his third level education, Witness 1 worked for the sole trade business, on a full time basis of between 25 and 30 hours per week, ■ In ■ he

moved to the United Kingdom to gain experience in a different type of business, and in sales and customer relations, which would complement the sole trade business.

52. He stated that the majority of the work which he did whilst working for the sole trade was [REDACTED]. In addition, he stated, he was involved in [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. This, he stated, was work which had previously been outsourced to third parties. [REDACTED]. [REDACTED]. [REDACTED].

53. He stated that [REDACTED] he was not in receipt of a regular wage from the sole trade. He was, he stated, living at home getting free bed and board and was given money when he was going out but that there was no such thing as a regular wage from the sole trade at that time.

54. Witness 1 stated that the years preceding [REDACTED], when he left the sole trade, had not been “great” but that “things were on the up”.<sup>1</sup> Business, he stated, was beginning to increase at that time and the prospects for the sole trade business seemed good. [REDACTED]. [REDACTED].

55. Witness 1 stated that, in his opinion, he and his sister [REDACTED] would have been able to take over the sole trade in the event of his father leaving. He stated that, in his opinion, the sole trade business was successful, that it had put him and his siblings through college. He stated that the extent of the sole trade business had evolved [REDACTED]. [REDACTED]. [REDACTED].

*Witness Evidence – [REDACTED]*

56. The following is a summary of the direct evidence adduced to the Commissioner by [REDACTED] (hereinafter “Witness 2”).

57. Witness 2 stated that she is the Director’s daughter [REDACTED]. [REDACTED]. She

<sup>1</sup> Transcript Day 2 substantive hearing page 116

stated that she had worked for the sole trade business for many years prior to going on to third level education [REDACTED]. She stated that she had seen the sole trade business working extremely well and that there was an opportunity for her and her siblings to educate [REDACTED] and, in time, to move back and take over the business.

58. She stated that she started working in the sole trade [REDACTED]. She started in a secretarial / administration capacity dealing with customer queries and with third party contractors. [REDACTED]  
[REDACTED]  
[REDACTED]

59. She stated that, [REDACTED], she worked for the sole trade business at weekends and during the holidays. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

60. Witness 2 stated that she had planned to work for the sole trade business on a full time basis. She stated that the sole trade business had been extremely successful up until the economic crash and that she did not have any doubts that the business would come back to, or even exceed, those levels.

61. She stated that she gained work in industry on completion of her third level education. She stated that, if her father had not been able to continue working in the sole trade business, she was confident that the sole trade business would have been able to sustain another, third, salary in time. This, she stated, was on the basis that [REDACTED] the economy was beginning to recover [REDACTED]. She stated that there was huge positivity for what was to come.

62. She stated that she first became aware that there were taxation issues being raised by the Respondent [REDACTED]. She stated that this cast a new shadow of uncertainty over the sole trade business. She stated that she had spent five years studying in college with a view to coming to work for the sole trade business and all of a sudden there was a grey shadow over the business.

Expert 1 – ██████████

63. The following is a summary of the direct evidence adduced to the Commissioner by ██████████ (hereinafter “Expert 1”) who is a Chartered Accountant having been in practice for in excess of 40 years in the areas of general accounting, assurance, taxation advice, business and corporate finance.
64. On 23 May 2022, Expert 1 completed a valuation report in relation to the goodwill of the sole trade business as at ██████████ which was submitted in support of the Appellant’s claim.
65. Expert 1, in his report, placed a value on the goodwill of the sole trade business ██████████ of €283,736 along with a value of €3,240 on the tangible fixed assets of the sole trade business.
66. He stated that there were three potential methods of valuation which could have been applied to the sole trade (a) discounted cash flow method, (b) net asset value method and (c) earnings valuation method. He stated that he used the earnings valuation method as the most appropriate method to this circumstance as did the valuation for the Respondent.
67. Expert 1 stated that he based his valuation on the methodology contained in the publication of the Institute of Chartered Accountants, “*The Valuation of Businesses and Shares: A Practitioner’s Perspective*” 2<sup>nd</sup> edition, authored by Mr Des Peelo (hereinafter “Mr Peelo’s book”).
68. He stated that his valuation is an independent one which seeks to reflect a valuation of the sole trade business at “fair value”. He stated that “fair value” is reached by balancing the lowest price which a purchaser might wish to pay with the highest price which a vendor might wish to receive.
69. He stated that, in chapter 5 of Mr Peelo’s book, the importance of future maintainable earnings as being the most important aspect of the valuation of businesses and shares is set out. That chapter states at paragraph 5-01 that the value of any business lies in its future profits.
70. He stated that, in chapter 6 of Mr Peelo’s book, advice is given that the appropriate starting point when valuing a small business, that is to say a business with profits of less than €500,000, is to use a multiple of 5 of future maintainable earnings. He stated that an examination must be undertaken to establish if there is any reason why the starting multiple of 5 should be increased. This, he stated, has become the standard method of valuing businesses in his over 30 years of experience.

71. In coming to the valuation, Expert 1 took account of the available financial information of the sole trade between [REDACTED] and [REDACTED] as follows:

i. The financial accounts of the sole trade business for the following accounting periods:

- a. 1 year: [REDACTED]
- b. 2 years: [REDACTED]
- c. 9 months: [REDACTED]
- d. 1 year: [REDACTED]
- e. 18 months: [REDACTED]

ii. The fact that all wages charged in the sole trade financial accounts were paid to family members. This, he stated, is significant in that in many cases in family businesses the amount in wages paid to family members does not reflect the economic value of the work carried out. As a result, he stated, it is necessary to substitute the wages paid to family members with the value of the input of labour that is required to run the business and the cost of that labour in the market place. The report prepared by Expert 1 contains workings of average wages for the years [REDACTED] inclusive, along with average wages for [REDACTED] for assistants, civil engineers / agronomists which were utilised in coming to the valuation of the sole trade business;

iii. The fact that consultancy fees of €50,000 charged for the period ending [REDACTED] [REDACTED] and a further consultancy fee of €50,000 charged for the period ending [REDACTED] [REDACTED] were fees invoiced to the sole trade business by a company controlled by the Director's [REDACTED] children;

iv. The fact that adjustments to net profits in the Financial Accounts were made to compute taxable profits as follows:

|                     | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
|---------------------|------------|------------|------------|------------|------------|
| Add back:           |            |            |            |            |            |
| Depreciation        | 8,921      | 59,411     | 11,751     | 22,690     | 29,299     |
| Private motor costs | 1,750      | 3,500      | 1,463      | 2,373      | 4,598      |
| Home loan interest  | 9,610      | 23,441     | 2,576      | 3,710      | 6,109      |

|                                     |        |        |        |        |        |
|-------------------------------------|--------|--------|--------|--------|--------|
| Total add back                      | 20,281 | 86,352 | 15,790 | 28,773 | 40,006 |
| Deduct:                             |        |        |        |        |        |
| Profit on sale of agricultural land |        |        |        |        | 28,958 |
| Tax Capital Allowances              | 2,778  | 7,587  | 5,198  | 5,197  | 7,998  |
| Total deduct                        | 2,778  | 7,587  | 5,198  | 5,197  | 36,956 |

72. Expert 1 stated that the most important figure in coming to a valuation is the amount of net profit. He stated that, having completed an examination of the sole trade business, he concluded that it was most appropriate that it would be valued on an after-tax earning basis. The following overview of the sole trade business is included in Expert 1's report:

|                       | ██████████<br>█<br>██████████<br>1 year | ██████████<br>█<br>██████████<br>2 years | ██████████<br>█<br>██████████<br>9 months | ██████████<br>█<br>██████████<br>1 year | ██████████<br>█<br>██████████<br>18 months | ██████████<br>█<br>██████████<br>75 months |
|-----------------------|---|--|---|---|--|--|
| Turnover              | 370,187                                 | 560,460                                  | 129,629                                   | 151,330                                 | 190,036                                    | 1,401,642                                  |
| Cost of Sales         | (111,441)                               | (24,014)                                 | (1,295)                                   | (1,297)                                 | (24,004)                                   | (162,051)                                  |
| Gross Profit          | 258,746                                 | 536,446                                  | 128,334                                   | 150,033                                 | 166,032                                    | 1,239,591                                  |
| Wages & Salaries (1)  | 45,340                                  | 138,022                                  | 15,435                                    | 36,358                                  | 23,530                                     | 258,685                                    |
| Consultancy Fees (2): |   |  |   |   |  |  |
| Connected Party       |   |  | 50,000                                    |   | 50,000                                     | 100,000                                    |
| Other                 |   |  |   | 9,034                                   | 1,330                                      | 10,364                                     |
| Total                 | 0                                       | 0  | 50,000                                    | 9,034                                   | 51,330                                     | 110,364                                    |
| Overheads (3)         | 45,672                                  | 115,886                                  | 25,808                                    | 40,934                                  | 34,746                                     | 253,046                                    |



|                            |         |         |        |        |        |         |
|----------------------------|---------|---------|--------|--------|--------|---------|
| Total (1)+(2)+(3)          | 91,012  | 253,908 | 91,243 | 86,326 | 99,606 | 622,095 |
| Operating Profits          | 167,734 | 282,538 | 37,091 | 63,707 | 66,426 | 617,496 |
| Depreciation               | 8,921   | 59,411  | 11,751 | 22,690 | 29,299 | 132,072 |
| Interest on business loans | 18,743  | 49,996  | 8,769  | 11,398 | 15,911 | 104,917 |
| Total                      | 27,764  | 109,407 | 20,520 | 34,088 | 45,210 | 236,989 |
| Net profit before tax      | 139,970 | 173,131 | 16,571 | 29,619 | 21,216 | 380,507 |

73. Expert 1 stated that the reduction in turnover of the sole trade business was consistent with the economic conditions which pertained from 2008 onwards, that is to say the economic crash which occurred at that time. Turnover in the sole trade fell from an annual average of €370,000 for the year ending April [REDACTED] to €280,000 for the years ending April [REDACTED] and [REDACTED], €172,000 for the year ending December [REDACTED], €151,000 for the year ending December [REDACTED] and €126,000 for the year ending December [REDACTED].

74. Expert 1 stated that, in coming to the valuation of the goodwill of the sole trade, he considered that establishing future maintainable after tax profits of the sole trade was important, as this is something which a purchaser of a business will want to examine. He stated that purchasers of a business will be less interested in the historic profits than they are in future maintainable profits. In that regard, he stated, he needed to examine the general economic information available in [REDACTED].

75. Expert 1 stated that, prior to the transfer of the sole trade to the Appellant, no financial forecasts had been prepared. He stated that in writing his report he needed to determine the prospects for the sole trade after its transfer to the Appellant in [REDACTED], this being relevant in determining future maintainable after-tax profits. In that regard, he reviewed the Economic and Fiscal Outlook document which was published by the Irish government in [REDACTED] and which, he stated, indicated that the Irish economy was set to return to growth in [REDACTED]. He stated that the Economic and Fiscal Outlook document set out that GDP was expected to grow by 1% in [REDACTED], 1.3% in [REDACTED], 2.4% in [REDACTED], 3% in [REDACTED] and 3% in [REDACTED]. The Economic and Fiscal Outlook document also set out that

growth between [REDACTED] and [REDACTED] was projected at 2.8% in real GDP terms on an annual basis.

76. Expert 1 also stated that he has reviewed part of the [REDACTED] Central Bank report which confirmed that, [REDACTED], the Irish economy had expanded by an estimated 3.4% in real GNP terms.

77. He stated that these reports assisted him in forming the view as to where the likely trend in profits was. He stated that he had seen from the sole trade financial accounts that the profits trend was downwards because of the property and financial crash

78. [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

79. Expert 1 stated that, from his examination of the labour costs required along with his examination of the economic information available, he adjusted the actual net profits of the sole trade to come to a figure of annual maintainable after tax profits as follows:

|                             | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>1 year | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>2 years | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>9 months | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>1 year | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>18 months | [REDACTED]<br>[REDACTED]<br>[REDACTED]<br>75 months |
|-----------------------------|--|---|--|--|---|---|
| Net profit before tax       | 139,970  | 173,131   | 16,571   | 29,619   | 21,216  | 380,507   |
| Add back:                   |  |   |  |  |   |   |
| Discretionary family wages  | 45,340   | 138,022   | 15,435   | 36,358   | 23,530  | 258,685   |
| Connected party consultancy |  |   | 50,000   |  | 50,000  | 100,000   |

|  |         |         |        |        |         |         |
|--|---------|---------|--------|--------|---------|---------|
| Depreciation                                     | 8,921   | 59,411  | 11,751 | 22,690 | 29,299  | 132,072 |
| Private motor costs                              | 1,750   | 3,500   | 1,463  | 2,373  | 4,598   | 13,684  |
| Home loan interest                               | 9,610   | 23,441  | 2,576  | 3,710  | 6,109   | 45,446  |
| Add back total                                   | 205,591 | 397,505 | 97,796 | 94,750 | 134,752 | 930,964 |
| Deduct:  |         |         |        |        |         |         |
| Profit on sale of agricultural land              |         |         |        |        | 28,958  | 28,598  |
| Economic salaries for staff required by business | 66,715  | 143,709 | 53,891 | 63,722 | 89,124  | 417,160 |
| Tax Capital Allowances                           | 2,778   | 7,587   | 5,198  | 5,197  | 7,998   | 28,758  |
| Deduct total                                     | 69,493  | 151,296 | 59,089 | 68,919 | 126,080 | 474,896 |
| Adjusted profits before tax                      | 136,098 | 246,209 | 38,707 | 25,831 | 8,672   | 455,518 |
| Annual average profit before tax                 |         |         |        |        |         | 72,883  |
| Provision for corporation tax at 12.5%           |         |         |        |        |         | 9,110   |
| Future annual maintainable after tax profits     |         |         |        |        |         | 63,773  |

80. Expert 1 stated that he considered that examining the actual results of the sole trade over a period of 75 months [REDACTED] was appropriate to allow for the effect of the financial crisis on the sole trade and the fact that the economy had regained a level of normality by [REDACTED].

81. Expert 1 stated that he came to a valuation of the goodwill of the sole trade at [REDACTED] as being €286,976 as follows:

|                                       | €       |
|---------------------------------------|---------|
| Future maintainable after tax profits | 63,773  |
| Earnings multiple                     | 4.5     |
| Value of business                     | 286,976 |
| Comprised of:                         |         |
| <b>Tangible Assets</b>                |         |
| Value of Plant and Equipment          | 3,240   |
| <b>Intangible Assets</b>              |         |
| Value of Goodwill                     | 283,736 |

82. Expert 1 stated a multiple of 5 implies that an investor requires a 20% annual return on investment, a multiple of 4 implies that an investor requires a 25% annual return on investment, a multiple of 3 implies that an investor requires a 33% return on investment and a multiple of 2 implies that an investor requires a 50% annual return on investment. Expert 1 commented that the expert on behalf of the Respondent had used a multiple of 2 in his valuation of the goodwill and that he considered an annual return on investment of 50% on the sole trade to have been very high and that it was unlikely that an investor would have gained that level of return on the sole trade at that time.

*Expert 2 – [REDACTED]*

83. The following is a summary of the direct evidence adduced to the Commissioner by [REDACTED] (hereinafter “Expert 2”) who is a Chartered Accountant, a Qualified Financial Advisor [REDACTED], having been in practice for in excess of 25 years in the areas of general accounting, assurance, taxation advice, business and corporate finance and the valuation of businesses.

84. On 25 May 2022, Expert 2 completed a valuation report in relation to the goodwill of the sole trade business as at [REDACTED] which was submitted on behalf of the Respondent.

85. Expert 2, in his report, placed a value on the goodwill of the sole trade business at [REDACTED] of €41,225.
86. Expert 2 stated that a third party could be attracted to a business for many reasons such as greater market share, geographical diversification, economies of scale / synergy, diversification, acquisition of new technology / expertise, vertical integrations i.e. the acquisition of a supplier.
87. In relation to a greater market share as a potential reason for a third party to purchase the sole trade business, he stated that greater market share is a very common motive for businesses to acquire others. However, he stated, there was no evidence of significant growth in the sole trade business when reviewing annualised turnover from [REDACTED]. He stated that, in the absence of a breakdown of customer figures for the sole trade, he analysed the customers of the Appellant for the period ending [REDACTED] and noted that the Appellant had 9 customers, two of whom were invoiced once. He stated that, given that the sole trade turnover had been declining in the period prior to [REDACTED], it appears that the business was unable to leverage its customer base to grow the trade. Therefore, he stated, he would not have expected a purchaser to have assessed that there was significant opportunity to expand business by acquiring the sole trade business.
88. He stated that geographical diversification is another common reason for business acquisition. A business may ask itself: why start in a new location from the beginning when it is possible to acquire an existing business and use it as a platform to growth in the area? From the customer list available, he stated, it can be seen that the sole trade's business was the provision of services to customers in [REDACTED]. He stated that, given the density of population [REDACTED] [REDACTED] [REDACTED] it is probable that there were a large number of potential customers. He stated that the Director did not manage to expand the sole trade business significantly after incorporation. He stated that, in his opinion, the Director's business was too small to attract the attention of a purchaser wishing to expand.
89. Referring to economies of scale / synergy, Expert 2 stated that businesses acquire or merge with others with a view to achieving economies of scale such as having one accounting and HR function for a larger number of staff and customers. He also stated that the combination of two business may produce greater effects through the sharing of knowledge and assets. He stated that, given the size of the sole trade, a merger with a similar business may have made economic sense for two sole traders who were willing to

work in partnership, but this is not what happened. He stated that transferring the sole trade to the Appellant increased the administration with the requirement to produce and file annual financial statements.

90. Expert 2, in discussing diversification, stated that businesses acquire or merge with others to add new products or services to an existing business. [REDACTED]

[REDACTED]

91. Expert 2 stated that acquisition of new technology / expertise is a key reason for business acquisition. He stated that it is particularly prevalent in the IT sector but is also relevant in other sectors where a business has new technology or specialist expertise. He stated that there is no reference to particular transferrable technology or expertise in the sole trade business documents. He stated that, whilst the Director may personally have had valuable experience and customers who were loyal to him, there is no evidence of staff, systems or processes that would have been transferrable to a third party purchaser. He stated that the Appellant's directors' statement indicates that this was a family run business involving his wife and three children. He stated that there was no evidence of wages being paid to family members after the transfer of the sole trade business to the Appellant. Therefore, he stated, it is unlikely that the Director's family members would have taken up employment if the sole trade business had been purchased by an unrelated third party.

92. He stated that vertical integration is another reason for acquisition, that is to say acquiring a business with whom a business has a close business relationship for example, the acquisition of a supplier. He stated that as it appears that the sole trade business was supplying services directly to customers, acquisition by a customer is not relevant to the valuation of the goodwill of the sole trade business.

93. Expert 2 stated that, in coming to his valuation of the goodwill of the sole trade business, he looked at the Form 11 returns submitted by the Director for the three years prior to [REDACTED] [REDACTED] and extrapolated the following financial information relating to the sole trade business:

|  | 18 months ending | 12 months ending | 9 months ending |
|--|------------------|------------------|-----------------|
|  | [REDACTED]       | [REDACTED]       | [REDACTED]      |

|                                       |                |                |                |
|---------------------------------------|----------------|----------------|----------------|
| <b>Turnover</b>                       | <b>190,036</b> | <b>151,330</b> | <b>129,629</b> |
| Purchases                             | (21,794)       | (1,255)        | (856)          |
| <b>Gross Profit</b>                   | <b>168,242</b> | <b>150,075</b> | <b>128,773</b> |
| <b>Expenses</b>                       |                |                |                |
| Wages and Salaries                    | 25,350         | 36,358         | 15,435         |
| Subcontractors                        | -              | -              | -              |
| Consultancy/Professional Fees         | 51,330         | 13,234         | 52,925         |
| Motor Expenses                        | 24,024         | 12,108         | 10,280         |
| Bad Debts                             | -              | -              | -              |
| Other Expenses                        | 47,981         | 36,066         | 21,811         |
| Difference                            |                |                |                |
| <b>Total admin expenses</b>           | <b>146,685</b> | <b>97,766</b>  | <b>100,451</b> |
| <b>Net Profit before Depreciation</b> | <b>21,557</b>  | <b>52,309</b>  | <b>28,322</b>  |
|                                       | <b>11%</b>     | <b>35%</b>     | <b>22%</b>     |
| Depreciation                          | (341)          | (22,690)       | (11,751)       |
| <b>Net profit per accounts</b>        | <b>21,216</b>  | <b>29,619</b>  | <b>16,571</b>  |

94. He stated that he took these results and adjusted the profit before depreciation by reversing cross charges between the sole trade and the Appellant and adding back interest and annualised the trading results of the sole trade in order to gain a comparable view of the sole trade business' trading trends as follows:

|                            | 18 months ending<br>██████████ | 12 months ending<br>██████████ | 9 months ending<br>██████████ |
|----------------------------|--------------------------------|--------------------------------|-------------------------------|
| Turnover                   | 190,036                        | 151,330                        | 129,629                       |
| <b>Annualised Turnover</b> | <b>126,691</b>                 | <b>151,330</b>                 | <b>172,839</b>                |

|   |               |               |                |
|---|---------------|---------------|----------------|
| <b>Profit before Depreciation</b>             | <b>21,557</b> | <b>52,309</b> | <b>28,322</b>  |
| Add back interest                             | 15,911        | 11,319        | 8,489          |
| Add back cross charges                        | 50,000        |               | 50,000         |
| Adjusted EBITDA                               | 87,468        | 63,628        | 86,811         |
| <b>Adjusted Annualised EBITDA<sup>2</sup></b> | <b>58,312</b> | <b>63,628</b> | <b>115,748</b> |
| Margin  | 46%           | 42%           | 67%            |

95. Expert 2 also stated that he had carried out a forward looking exercise into the financial accounts of the Appellant, as returned by the Appellant in its returns to the Respondent, which indicated the following annualised turnover for the Appellant:

| Period ending | Period ending | Period ending | Period ending |
|---------------|---------------|---------------|---------------|
| ██████████    | ██████████    | ██████████    | ██████████    |
| 132,192       | 164,056       | 160,997       | 133,243       |

96. The forward looking exercise into the financial account of the Appellant as returned by the Appellant in its returns to the Respondent, indicated profits / (losses) before tax for the Appellant:

| Period ending | Period ending | Period ending | Period ending |
|---------------|---------------|---------------|---------------|
| ██████████    | ██████████    | ██████████    | ██████████    |
| (17,080)      | 24,858        | 39,091        | 35,366        |

97. The following summary of the trading results of the sole trade business for the three years prior to ██████████ and the four years post ██████████ were set out in Expert 2's report:

<sup>2</sup> Earnings before Interest, Tax, Depreciation and Amortisation.



|                                     | 12 Mths      | 12 Mths       | 12 Mths       | 12 Mths       | 18 Mths       | 12 Mths       | 9 Mths         |
|-------------------------------------|--------------|---------------|---------------|---------------|---------------|---------------|----------------|
|                                     | ██████       | ██████        | ██████        | ██████        | ██████        | ██████        | ██████         |
| Turnover                            | 132,192      | 164,056       | 160,997       | 133,243       | 126,691       | 151,330       | 172,839        |
| <b>EBITDA</b>                       | <b>7,619</b> | <b>50,525</b> | <b>63,848</b> | <b>56,848</b> | <b>58,312</b> | <b>63,628</b> | <b>115,748</b> |
| Directors remuneration              | -            | -             | 31,115        | -             | -             | -             | -              |
| Wages & Salaries                    | 46,627       | 74,440        | -             | -             | -             | -             | -              |
| EBITDA – Directors Wages added back | 54,246       | 121,965       | 94,963        | 56,848        | 58,312        | 63,628        | 115,748        |
| Estimated Manager Salary            | (50,000)     | (50,000)      | (50,000)      | (50,000)      | (50,000)      | (50,000)      | (50,000)       |
| <b>Adjusted EBITDA</b>              | <b>4,246</b> | <b>71,965</b> | <b>44,963</b> | <b>6,848</b>  | <b>8,312</b>  | <b>13,628</b> | <b>65,748</b>  |

98. Expert 2 stated that there was no business plan available for the sole trade business when he was carrying out his valuation. He stated that, from the financial information available to him, it was clear that the sole trade business turnover had collapsed from an annualised turnover of €172,839 in ██████ to an annualised turnover of €126,691 in the year ending ██████. The sole trade's EBITDA for the same period went from €115,748 in ██████ to €58,312 in the year ending ██████.

99. Expert 2 stated that small businesses, such as the sole trade business in this appeal, do transfer for value. That value, he stated, is determined by the returns a potential purchaser expects to generate from the business. Therefore, he stated, assuming that the customers, staff, systems and processes of the business can be successfully transferred, future maintainable profits are the most important determinant of the business value.

100. He stated that, to reach a figure for weighted annual profits, he took the annualised profits of the sole trade business, adjusted it for the cost of hiring an employee to replace the Director at €50,000 as follows:

| Year | Sole Trader Profits (annualised) | Manager Salary | Profits adjusted and annualised                    | Weight     | Weighted Average |
|------|----------------------------------|----------------|--|------------|------------------|
| ■    | 115,748                          | (50,000)       | 65,748   | 1          | 65,748           |
| ■    | 63,628                           | (50,000)       | 13,828   | 2          | 27,256           |
| ■    | 58,312                           | (50,000)       | 8,312  | 3          | 24,936           |
|      |                                  |                |  |            | <b>117,940</b>   |
|      |                                  |                |  | Divided by | 6                |
|      |                                  |                | Weighted Average Profits (adjusted and annualised) |            | <b>19,657</b>    |

101. Expert 2 stated that it is then appropriate to take the weighted average profits (adjusted and annualised) and apply a multiple on that figure to arrive at a valuation. He stated that the use of weighting in his calculations is appropriate. He stated that the use of weighting places more emphasis on the profit or EBITDA in the years closest to the transaction which is appropriate when carrying out a historic valuation.

102. He stated that a small business is defined in Mr Peelo's book as a business with a turnover of €500,000 or less. He stated that the sole trade business was therefore a small business. He agreed with Mr Peelo's book which states that the appropriate starting multiple when valuing a small business is 5 and that multiple is then reduced considering various factors. He stated that the reduction of the multiple is not a science and that individual valuers will come to different multiples. He stated that he used a multiple of 2 time's weighted average profits to place a value on the goodwill of the sole trade business of €39,314.

103. He stated that the reason he decided upon using a multiple of 2 was that the sole trade's annual turnover was between €120,000 and €200,000. He stated that to reduce the multiple used to one quarter to 1.25 on the basis of turnover would have been harsh.

He stated that, in circumstances where there were no, or limited, personnel, structure or assets to transfer from the sole trade to the Appellant this directed him to reduce the multiple which he used to 2. He disagreed with Expert 1's interpretation of the meaning of multiples stating that, in his opinion, the use of a particular multiple in a valuation does not mean that a purchaser will recoup the purchase price of a business in a particular time period.

104. He stated that, in circumstances where financial information relating to the performance of the Appellant was available, he also performed the same exercise on the Appellant's finances as he had on the sole trade business finances to reach a figure for a weighted average EBITDA for the Appellant for the years 2012 to 2015 as follows:

| <b>Year</b> | <b>Adjusted EBITDA for the Appellant</b> | <b>Manager Salary</b> | <b>Profits adjusted and annualised</b>            | <b>Weight</b> | <b>Weighted Average</b> |
|-------------|--|-----------------------|---|---------------|-------------------------|
| ██████      | 58,312                                   | (50,000)              | 8,312   | 4             | 33,248                  |
| ██████      | 56,848                                   | (50,000)              | 6,848   | 3             | 20,544                  |
| ██████      | 94,963                                   | (50,000)              | 44,963  | 2             | 89,926                  |
| ██████      | 121,965                                  | (50,000)              | 71,965  | 1             | 71,965                  |
|             |  |                       |   |               | <b>215,683</b>          |
|             |  |                       |   | Divided by    | 10                      |
|             |  |                       | Weighted Average EBITDA (adjusted and annualised) |               | <b>21,568</b>           |

105. Applying a multiple of 2 to the Appellant's weighted average EBITDA (adjusted and annualised), Expert 2 placed a value on the goodwill of the sole trade of €43,137.

106. Expert 2 then took an average of the two valuations of €39,314, being the valuation of the goodwill of the sole trade business based on the financial information available on ██████

██████████, and €43,137, being the valuation of the goodwill of the sole trade based on the Appellant's financial information relating to the years ████████ to ████████ which became available subsequent to the transfer of the goodwill of the sole trade to the Appellant. This then gave a valuation of the goodwill of the sole trade business of €41,225.

107. Expert 2 emphasised that the use of the Appellant's financial information which became available subsequent to the transfer of the goodwill of the sole trade to the Appellant did not disadvantage the valuation of the goodwill of the sole trade and, in fact, increased the valuation amount.

108. Expert 2 stated that his figures for the sole trade and those of Expert 1 do not differ in any significant way and that, in effect, the differences in their valuations lie in the multiple to be used and whether to weight the earnings / profit figures to reflect proximity to the valuation date.

### **Appellant's Submissions**

109. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Appellant. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

110. The Appellant submitted that the main issue in this appeal is the valuation of the goodwill of the sole trade business which was transferred to the Appellant on ██████████.

111. It was submitted that the sole trade business had a goodwill which was capable of being transferred to the Appellant.

112. It was submitted that the Director had given evidence that the sole trade business was managing projects worth in the millions and that it had long term clients. It was submitted that the sole trade business, ██████████, had employed ██████████ in the form of Witness 1 and that a ██████████ was also employed on a part-time basis in the form of Witness 2.

113. It was submitted that the valuation of Expert 1 is the correct valuation for the goodwill of the sole trade at the end of ██████████. It was submitted that the issue which the Commissioner must decide upon is the level of maintainable future profits in the sole trade business and the multiple to be applied to the level of maintainable future profits at ██████████. It was submitted that every other potential point of valuation is agreed between the parties.

114. It was submitted that the valuation of businesses is not an exact science and that it involves a level of judgement and subjectivity on the part of a valuer.
115. It was submitted that at the end of [REDACTED] the economy had been in recession but that there were signs of growth both in the economy and in the industry in which the sole trade business operated, evidence of which was given by Expert 1. As a result, it was submitted, Expert 1 believed it was suitable to include the profits achieved by the sole trade business beginning in [REDACTED] onwards as part of his valuation. It was submitted that an average annual profit before tax amount of €72,833 over a period of 75 months, or 6.25 years, prior to [REDACTED] is the appropriate figure for future maintainable profits for the sole trade business as at [REDACTED].
116. It was submitted that to value the sole trade business only on recession era profits would undervalue it and that an inclusion of an element of pre-recession profits is appropriate and rational. It was submitted that, had a valuation taken place at the end of [REDACTED], a prospective purchaser for the sole trade business would have been in possession of the historical financial statements of the sole trade business which would have included the results recorded during the pre-recession. It was submitted that those results reflected at least the potential of the business if and when the economy recovered.
117. It was submitted that the inclusion of profits for [REDACTED] and [REDACTED] and [REDACTED] by Expert 2 in his valuation is incorrect. It was submitted that it is appropriate to apply the principle contained in section 548 (4) of the TCA 1997 to the valuation that is to say that it should be assumed for the purposes of the valuation that *“there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if such prospective purchaser were proposing to purchase it from a willing vendor by private treaty and at arm’s length.”*
118. It was submitted that the evidence given by the Director and both witnesses demonstrated an optimism in relation to the prospect of the sole trade business which was based on the reality of knowing the business and also its clients over many years. It was submitted that a potential purchaser would also have had access to that information in [REDACTED].
119. It was submitted that the transfer of the goodwill of the sole trade business to the Appellant was a transaction between connected persons, that is to say, between the Director and the Appellant of which the Director was a director and 99% shareholder. It was submitted that the transaction was a lawful transaction which occurred between two willing parties, which was recorded and evidenced in the accounts of the Appellant and was evidenced in a Capital Gains Tax return and income tax return made by the Director.

It was further submitted that this is also evidenced in the subsequent financial accounts of the Appellant which reflect the paying down of the director's loan to the Director.

120. It was submitted that the director's loan created in the Appellant, on foot of the transfer of the goodwill of the sole trade to the Appellant on [REDACTED], was repaid to the Director between [REDACTED]. This, it was submitted, demonstrated that the business was capable of returning the value of the goodwill of the sole trade to the original owners of the sole trade.

121. In relation to the appropriate multiple to be applied, it was submitted that the multiple used by Expert 1 was 4.5 which reflects a value of €283,976 but that the value placed on the goodwill of the sole trade business, and reflected in the transaction recorded in the Appellant financial accounts, was in fact €250,000. This reflects a multiple of 3.92 having been applied at the time of the transaction on [REDACTED].

122. It was submitted that the sole trade business was, [REDACTED], an established business which had an attractive force and which had traded over a period of [REDACTED] years since [REDACTED].

123. It was submitted that the Director had made a return of Capital Gains Tax as part of his income tax return for the year [REDACTED] wherein he reported that a transfer of goodwill from the sole trade business to the Appellant had taken place for the sum of €250,000. This resulted in a Capital Gains Tax assessment of €75,000 which was fully relieved by way of retirement relief. In support of this, the Appellant has submitted a Notice of Assessment to CGT for the year [REDACTED] which is dated [REDACTED] and which reflects an amount of €250,000 in chargeable gains for [REDACTED] and a CGT amount of €75,000 thereon. This Notice of Assessment to CGT for [REDACTED] also contains a relief from the CGT of €75,000. The basis of the relief is not contained in the document submitted although the Commissioner notes that it was submitted by the Appellant that the relief is retirement relief and the Respondent has not contested this claim.

124. It was submitted that the transfer of the goodwill of the sole trade business to the Appellant was not an anti-avoidance measure on the part of the Director, but rather that it was motivated by a desire on the part of the Director to provide shares in the Appellant to his children and a wish for them to work in and carry on the business.

125. It was submitted that the Director had given evidence that no dividend was paid by the Appellant during the period [REDACTED].

126. It was submitted that the Notice of Amended Assessment to income tax for the year [REDACTED] raised on the Director contains a charge to tax under Schedule E Directors

Emoluments of €250,000 and also contains a charge to tax under Schedule F Distributions of €250,000. It was submitted that the Respondent must choose which Schedule it wants to assess the €250,000 under. It was also submitted that in subsequent years, during the period of the actual repayment of the director's loan, Schedule E assessment and other allied assessments were also raised by the Respondent. The Respondent, it was submitted, was incorrect in raising assessments or amended assessment which were, in effect, double taxation of the Director. It was submitted that at the time of the transfer of the goodwill of the sole trade to the Appellant, there were not sufficient reserves in the Appellant to make a distribution of €250,000 and, therefore, it was not possible for the Director to have drawn down or been repaid €250,000 by the Appellant in [REDACTED].

127. The Appellant submitted that, in the circumstances of this appeal the Notices of Amended Assessment to income tax under Schedule F do not apply and should be vacated.

128. The Appellant did not make any submissions in relation to the matter of PAYE/PRSI/USC or DWT in its oral or written submissions to the Commissioner.

129. At the conclusion of the oral hearing, the Commissioner gave liberty to the Appellant's representatives to review the drawdown figures relating to the director's loan account which were provided by the Respondent during the course of the hearing. The Appellant subsequently wrote to the Commission and indicated that there is no disagreement in relation to those figures.

130. The Commissioner notes that the Appellant had, prior to the oral hearing, raised an issue in relation to the time limits which apply to the raising of assessments by the Respondent. Counsel on behalf of the Appellant confirmed on the final day of the oral hearing that this issue is no longer being relied on by the Appellant.

### **Respondent's Submissions**

131. The following is a summary of the submissions made both in writing and orally to the Commissioner on behalf of the Respondent. The Commissioner has had regard to all of the submissions whether written, oral or documentary received when considering this determination.

132. The Respondent submitted that there had been a transfer of the sole trade business to the Appellant on [REDACTED]. The Respondent submitted that the question which arises for the Commissioner is whether there was a transfer of goodwill during the transfer of the sole trade business and what the value of the goodwill was.



133. The Respondent submitted that it had issued alternative assessments to PAYE/PRSI/USC and to DWT. The Respondent indicated that it is not pursuing the assessment to DWT for the years [REDACTED] and [REDACTED] issued to the Appellant. The Respondent submitted that the correspondence issued to the Appellant at the time of raising the disputed assessments set out that the assessments to PAYE/PRSI/USC and to DWT are alternative assessments in relation to all periods.
134. The Respondent submitted that it had issued alternative assessments to income tax to the Director. The Respondent made it clear to the Commissioner that it seeks only to recover the appropriate tax once, either from the Appellant or from the Director.
135. It is the Respondent's position that the Director drew down funds from the Appellant in the years [REDACTED] to [REDACTED] inclusive which were Schedule E income. The Respondent submitted that the Commissioner could accept that the creation of the director's loan in the Appellant was a Schedule E emolument for the Director in [REDACTED]. The Respondent also submitted that the Commissioner could accept as an alternative that the drawdown amounts in the years [REDACTED] to [REDACTED] were Schedule E emoluments for the Director.
136. The Respondent submitted that, if the Commissioner is not satisfied that the draw down amounts fall under Schedule E, then they are a distribution and are therefore subject to DWT.
137. The Respondent submitted that, if the Commissioner finds that there was a transfer of goodwill from the sole trade business to the Appellant, the value of that goodwill equates to the value which Expert 2 arrived at, that being €41,225. The Respondent relied on Expert 2's report and oral evidence as to how that valuation was reached. The Respondent submitted that the Appellant has not submitted any evidence which justifies a valuation of €250,000.
138. It was submitted that the valuation arrived at by Expert 1 equates to multiplying the annualised profits for 2012 of the sole trade business by a multiple of 57 to reach the valuation of €283,736. This, it was submitted, is unrealistic.
139. It was submitted that the calculation of maintainable future profits of €63,773 by Expert 1 by reference to matters such as [REDACTED] reports and general economic data which showed a 2.8% growth forecast is unsustainable.
140. The Respondent submitted that the profits of the sole trade business were rapidly decreasing in the years up to [REDACTED]. It was submitted that there was no basis to include pre-recession era profits, or, if pre-recession era profits were included the appropriate manner to treat those profits would have been to weight them.



141. It was submitted that, in cross examination, the Director agreed that [REDACTED] was a typical year for the sole trade business and that the inclusion of [REDACTED] profits in the Appellant's valuation did not reflect the state of the sole trade business at the time of the transfer to the Appellant in [REDACTED].

142. In relation to section 548(4) of the TCA 1997 and the submission by the Appellant to the effect that it should be assumed that a prospective purchaser would be in possession of all of the relevant information at the time of a purchase, the Respondent submitted that a prospective third party purchaser in [REDACTED] would not have placed equal weight on the profits of the sole trade business in [REDACTED] as it would have on the profits of the sole trade in the period from [REDACTED]. The Respondent also submitted that the Appellant has not submitted any economic evidence, apart from the macro-economic evidence in the form of report, which suggested a return to the economic boom of [REDACTED] to [REDACTED].

143. The Respondent submitted that the optimism which the Director and his children placed in the sole trade business in their evidence was not justifiable in the circumstances of the financial information available. The Respondent submitted that Expert 2 had taken account of, and set out, the potential of the sole trade business as it existed in [REDACTED] in coming to his valuation.

144. The Respondent submitted that it is relevant that in [REDACTED] the Director transferred his shares in the Appellant to his children at a value of €1. The Respondent submitted that this, in the absence of the Appellant returns indicating that the transfer of the shares was to a connected party, must mean that the shares in the Appellant had no value for years after the transfer of the goodwill from the sole trade business to the Appellant.

### **Material Facts**

145. The following material facts are not at issue in the within appeal and the Commissioner accepts same as material facts:

- i. The Director is a businessman who, between [REDACTED] and [REDACTED], carried on a sole trade trading as "[REDACTED]", [REDACTED] [REDACTED].
- ii. The Appellant was incorporated in [REDACTED] and, at the time of its incorporation, had two directors, the Director with a 99% shareholding and his wife with a 1% shareholding.
- iii. On [REDACTED] the Director was registered as an employee of the Appellant.

- iv. On [REDACTED] the Director transferred the sole trade business into the Appellant. The transfer of the sole trade into the Appellant included a valuation for the goodwill of the sole trade of €250,000.
- v. In [REDACTED], the amount of €250,000 was credited to the Director's director's loan account in the Appellant.
- vi. The director's loan account was drawn down by €205,502 between [REDACTED] and [REDACTED]
- vii. On [REDACTED], the Appellant invoiced the Director the amount of €61,500 inclusive of Value Added Tax (hereinafter "VAT") at the rate of 23% for administration and secretarial services provided to the sole trade prior to that date.
- viii. The Director and his wife ceased to be directors of the Appellant on [REDACTED] when the Director's [REDACTED] children were appointed as directors. The Director remained as an employee of the Appellant.
- ix. The Director and his wife transferred their shares in the Company to their children in [REDACTED] with valuation of €1.
- x. On 20 November 2015, the Respondent issued Notifications of Revenue Audit to the Appellant and to the Director.
- xi. As a result of the audits which took place, the Respondent issued the following Notices of Amended Assessment to the Appellant:

| Notice Type                  | Date       | Tax Type        | Period                               | Amount €   | Appeal Number |
|------------------------------|------------|-----------------|--------------------------------------|------------|---------------|
| Notice of Amended Assessment | 21/12/2017 | Corporation Tax | Year ending 30/06/[REDACTED]         | 291.00     | M160/18       |
| Notice of Assessment         | 15/12/2017 | DWT             | 30/06/[REDACTED]                     | 50,000.00  | M82/18        |
| Notice of Estimation         | 22/12/2017 | PAYE/PRSI/ USC  | 01/01/[REDACTED] to 31/12/[REDACTED] | 147,896.00 | M151/18       |

|                      |            |                |  |           |        |
|----------------------|------------|----------------|--|-----------|--------|
| Notice of Estimation | 27/12/2018 | PAYE/PRSI/ USC | 01/01/ [REDACTED]<br>to<br>31/12/ [REDACTED] | 53,905.89 | 92/19  |
| Notice of Assessment | 21/1/2018  | DWT            | 01/01/ [REDACTED]<br>to<br>31/12/ [REDACTED] | 23,693.00 | 93/19  |
| Notice of Assessment | 09/12/2020 | DWT            | 31/12/ [REDACTED]                            | 11,072.00 | 10/21  |
| Notice of Estimation | 15/12/2020 | PAYE/PRSI/ USC | 01/01/ [REDACTED]<br>to<br>31/12/ [REDACTED] | 28,787.01 | 11/21  |
| Notice of Estimation | 16/11/2021 | PAYE/PRSI/ USC | 01/01/ [REDACTED]<br>to<br>31/12/ [REDACTED] | 7,535.59  | 345/21 |
| Notice of Assessment | 15/11/2021 | DWT            | 31/12/ [REDACTED]                            | 2,898     | 345/21 |

xii. The Respondent also issued Notices of Amended Assessment to Income Tax and Value Added Tax to the Director which are the subject of the determination in appeal M148/18.

xiii. The Respondent has, since the submission of appeal 93/19, indicated to the Appellant that it is not pursuing the Notice of Assessment to DWT for the period 01/01/ [REDACTED] to 31/12/ [REDACTED] in the amount of €23,693.00.

146. The following material facts are at issue in the within appeal:

- i. Whether a transfer of the goodwill of the sole trade business to the Appellant took place on [REDACTED] [REDACTED];
- ii. What the appropriate valuation of the goodwill of the sole trade business is.

147. The appropriate starting point for the examination of material facts is to confirm that in an appeal before the Commissioner, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of

*Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49 (hereinafter “*Menolly Homes*”), at paragraph 22, Charleton J. stated:

*“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”.*

*Whether a transfer of the goodwill of the sole trade business to the Appellant took place on*

■■■■ ■■■■

148. On the one hand, the Respondent does not accept as a material fact that a transfer of the goodwill of the sole trade business took place on ■■■■ ■■■■. On the other hand, the Appellant submits that a transfer of the goodwill of the business did take place on ■■■■ ■■■■.

149. There is no dispute between the parties that goodwill has been defined in *Halsbury’s Laws of England* as:

*“The goodwill of a business is the whole advantage of the reputation and connection formed with customers, together with the circumstances whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses.”<sup>3</sup>*

150. In addition, as submitted by the Respondent, the leading legal authority on the issue of goodwill is the decision of the House of Lords in *Inland Revenue Commissioners v Muller & Co.’s Margarine Ltd* [1901] AC 217 wherein Macnaughten LJ stated:

*“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start [...] It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of*

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<sup>3</sup> 4<sup>th</sup> ed. Vol 35, page 1206.



*which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.*

*For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again.”<sup>4</sup>*

151. The Commissioner heard evidence from the Director and both witnesses, all of whom had long standing interaction with the sole trade business. The Commissioner is satisfied on the evidence adduced that the sole trade business was a specialist business and that the Director was a specialist in the area of [REDACTED]. The Commissioner is further satisfied on the evidence adduced, that the sole trade business, and the Director, had built a reputation for specialist knowledge and excellence in the delivery of projects in the area of [REDACTED]. In addition, the Commissioner notes the evidence adduced that the sole trade business had continuing and repeat business with its customers.
152. As a result of the above, the Commissioner accepts that the sole trade business had built up goodwill in its years of trading from [REDACTED] to [REDACTED].
153. The Commissioner has considered the evidence adduced and the documentation submitted and is satisfied that a transfer of the goodwill of the sole trade to the Appellant took place on [REDACTED] for the following reasons:
154. The financial statement of the Appellant, which was first registered in [REDACTED], submitted for the year ending [REDACTED] and lodged with the Companies Registration Office contains a note relating to the acquisition by the Appellant of an intangible fixed asset. Note 6 of the financial statement set out that intangible fixed assets in the form of goodwill was acquired by the Appellant in the trading year ending [REDACTED] in the amount of €250,000. In addition, the financial statements of the Appellant for the subsequent years [REDACTED] and [REDACTED] which were submitted to the Commissioner all reflect the existence of an intangible fixed asset related to the goodwill provision which originally appeared in the Appellant’s financial statement for the year ending [REDACTED].

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<sup>4</sup> At 223-224

155. The Appellant's financial statement for the year ending [REDACTED] [REDACTED] also reflects the creation of a director's current account or loan which increased from €726 in [REDACTED].

156. The Commissioner accepts the evidence adduced by the Director that, during the course of the transfer of the sole trade business, and following advice from his then accountant, he transferred the goodwill of the sole trade business to the Appellant. He stated that the thinking behind the transfer of the sole trade business and its goodwill to the Appellant was that, at that time he was in his mid-50s and that he wanted to place the business in a position whereby his children would become part of the business. The Commissioner accepts that this was a rational and considered thought process and notes that, at that time, the Director's eldest son, who had been working for the sole trade business for two years, had taken up a position in a firm [REDACTED] to gain additional experience to allow him return to work for the business.

157. The Commissioner also notes that the Director's daughter was, at the time, almost finished with her third level education and that she also wished to work for the business. In the Commissioner's view, and from the evidence adduced, this was a family business in which every member of the family worked with differing degrees of input.

158. It is also the Commissioner's view, and the Commissioner accepts the evidence adduced to the effect that, that it was the Director's and his children's sincere wish that they would return to work for the business.

159. Having considered all of the evidence in the round, the Commissioner finds as a material fact that, on the balance of probabilities, the goodwill of the sole trade business was transferred to the Appellant on [REDACTED] [REDACTED].

160. **For the reasons set out above, the Commissioner finds as a material fact that the goodwill of the sole trade business was transferred to the Appellant on [REDACTED] [REDACTED].**

*What the appropriate valuation of the goodwill of the sole trade business was at [REDACTED] [REDACTED].*

161. By the Director's evidence, no valuation of the sole trade business was undertaken at the time of its transfer to the Appellant on [REDACTED] [REDACTED]. It therefore falls to the Commissioner to examine what the appropriate valuation of the goodwill of the sole trade business was at [REDACTED] [REDACTED].

162. Any valuation of the sole trade business at [REDACTED] [REDACTED] is, of necessity, a historic valuation and the Commissioner is mindful that both experts from whom she heard

evidence and received valuation reports were carrying out their valuations at a remove of ■ years from the valuation date.

163. At the outset, the Commissioner notes that Expert 2 on behalf of the Respondent acknowledged that businesses, such as the sole trade business, do transfer for value.

164. Both experts referred to Mr Peelo's book as being a work on which many valuers rely when carrying out valuations. Whilst not the case with the sole trade business in this appeal, at section 14-06 of Mr Peelo's book he discusses situations where proprietor-led business may not be saleable:

*"Any experienced accounting practitioner will recount that proprietor-led businesses are rarely saleable and eventually just disappear on a gradually crumbling basis until, finally, the pace of change or competition overtakes it, the proprietor falls ill or has had enough..."*

165. Expert 1 on behalf of the Appellant valued the sole trade business at ■■■■■ at €283,736 for reasons detailed in this determination.

166. Expert 2 on behalf of the Respondent valued the sole trade business at ■■■■■ at €41,225 for the reason detailed in this determination.

### **Future maintainable profits**

167. At the oral hearing of this appeal both Experts agreed on the application of future maintainable earnings when valuing a business. In Mr Peelo's book it states at section 5-01:

*"Future maintainable profits (FMP) are the most important aspect of the valuation of business and shares. **The value of any business lies in its future profits.**"*

168. Both experts agree that future maintainable profits are important when valuing a business. It emerged at the oral hearing that there was no substantive difference between the experts in relation to the actual profit figures for the sole trade business. The differences which arise between the experts lie in the appropriate number of years' profits to take into account and whether weighting should be applied to those profits in coming to a valuation for the sole trade business. The Commissioner notes that this was also the Director's position in oral submissions.

169. In Chapter 5 of Mr Peelo's book entitled "*Future Maintainable Profits*" he states the following in relation to the appropriate methodology to apply in estimating future maintainable profits:

*“5-10 The application of a **weighted average** to historical profits in order to estimate FMP is common valuation practice for companies with erratic profit histories...*

*The use of a weighted average is not a perfect system for estimating future profits, but often it is the best available method in the circumstances. Note that the heaviest weighting is given to the latest year. Occasionally, in a relatively stable business, though with cyclical aspects, a longer period of five years might be used.*

*5-11 A simple average of profits over the latest three financial years, or possibly over five on rare occasions, might be more appropriate than a weighted average in circumstances where the fluctuations year on year are relatively minor and there is little growth. There is no ‘norm’ as to which method (weighted or simple average) is best for the particular circumstances. This is a matter for judgement by the valuer.”*

170. On the one hand, Expert 1 is of the opinion that it is appropriate to take account of 6.25 years of profits in coming to a figure for future maintainable profits. This is justified on the basis that the period from [REDACTED] until [REDACTED] [REDACTED] represented an unprecedented financial crisis and, in Expert 1’s opinion, to rely solely on the profits for those years without reflecting the period prior to the financial crisis would not represent the business fairly.

171. In addition, Expert 1 did not weight the sole trade business profits and instead calculated a simple average of the profits over the 6.25 year period prior to [REDACTED] [REDACTED].

172. On the other hand, Expert 2 has stated that he is of the opinion that it is appropriate to take account of 3 years of profits in coming to a figure for future maintainable profits. In addition, Expert 2 weighted the profits applying most weight to the most recent year’s profits and the least weight to the furthest year’s profits. This approach was based on Expert 2’s own experience of valuing businesses and on the recommended valuation method contained in Mr Peelo’s book.

### **Multiple**

173. It is common case that, once a future maintainable profits figure has been reached, a multiple is applied to that future maintainable profits figure to reach a valuation for the business in question.

174. Expert 1 for the Appellant has applied a multiple of 4.5 to the figure for future maintainable earnings. In explaining his reasoning for using this multiple, Expert 1 pointed the Commissioner to the following in sections of Mr Peelo’s book:



*“6-05 A simple approach to the valuation of small businesses (perhaps defined as having FMP of less than €500,000 per annum) may be appropriate, as it is often difficult to establish and/or identify any form of comparison or precedent.*

*6-06 In this latter regard, one simple approach – which is completely unscientific and less than principled as to what a professional valuation is about – is for a valuer to consider a multiple of five and then to pursue the arguments, circumstances, comparisons, etc. as to why the multiple should be higher or lower than five. Superficial as it is, this approach tests and validates the reasoning that sets the multiple.”*

175. Both experts agreed that the choice of multiple in coming to a valuation is not a scientific choice but, rather, a subjective choice. Both experts also agreed that it is possible that two different valuers will utilise two different multiples in coming to their valuation and that does not invalidate the valuations reached.

176. Expert 1 also stated that the reason he had applied a multiple of 4.5 was based on the starting point of 5 as identified in Mr Peelo’s book and also on what an investor would have required as a return on the monies invested in the business having assessed the risk and the fact that this was a private business without a ready market. Expert 1 gave the example of where an investor requires a 20% annual return on investment, then a multiple of 5 will be used.

177. Expert 2 stated that the reason he had applied a multiple of 2 was based on his experience in valuing small business and also on the information contained in Mr Peelo’s book where he states at Chapter 14:

*“14-14 Experience in the marketplace suggests that a small business with a capability of independent existence, may be valued at one or two times annual sustainable net-of-tax profits. However, this is not always a guideline; such sales are difficult to achieve and usually only happen when a specialist business is involved.”*

178. The Commissioner must decide the appropriate valuation of the goodwill of the sole trade business as at [REDACTED]. The Commissioner notes the decision of the Supreme Court in *Donegal Investment Group Plc v Danbywiske and Others* [2017] IESC 14 wherein Clarke CJ stated:

*“9.1 For the reasons set out in this judgment I am satisfied that it is open to a trial judge to adopt a methodology or approach which differs from each of the approaches advocated in the expert testimony tendered by the parties. However, where a trial judge is persuaded to adopt a different approach, it is necessary for the judge to*

*structure the judgment in such a way that either expressly explains why the approach adopted is considered to be appropriate notwithstanding the expert evidence tendered or that, at a minimum, the reasoning of the trial judge in that regard can be inferred with some reasonable level of confidence.”*

179. The Commissioner considers that, on the balance of probabilities, the valuation tendered by Expert 2 on behalf of the Respondent is the most appropriate valuation of the goodwill of the sole trade business as at [REDACTED] for the following reasons:

i. Expert 2 used a weighted average approach in coming to a figure for future maintainable profits. The Commissioner considers that this is the appropriate approach on the basis of the guidance given in Chapter 5 of Mr Peelo’s book. The Commissioner notes that, in Mr Peelo’s book, the use of a simple average of profits over the latest three financial years, or possibly over five on rare occasions, might be more appropriate than a weighted average in circumstances where the fluctuations year on year are relatively minor and there is little growth. That is not the case in this appeal. By the figures submitted in Expert 1’s report, the annualised adjusted profits of the sole trade business had fluctuated significantly in the periods between [REDACTED] to [REDACTED] as follows:

|                             | [REDACTED]<br>■<br>[REDACTED]<br>1 year | [REDACTED]<br>■<br>[REDACTED]<br>2 years | [REDACTED]<br>■<br>[REDACTED]<br>9 months | [REDACTED]<br>■<br>[REDACTED]<br>1 year | [REDACTED]<br>■<br>[REDACTED]<br>18 months |
|-----------------------------|---|--|---|---|--|
| Adjusted profits before tax | 136,098                                 | 246,209                                  | 38,707                                    | 25,831                                  | 8,672                                      |

ii. Expert 2 applied a multiple of 2 to future maintainable profits in coming to his valuation. This is keeping with the guidance contained in Chapter 14 of Mr Peelo’s book for a proprietor led small business with a capability of independent existence from the proprietor, which both experts agree the sole trade was. The Commissioner notes that guidance contained in Mr Peelo’s book does not suggest that the application of a multiple of 4.5 to this business applies to the valuation of a business such as the one the subject matter of this appeal.

iii. The Commissioner has considered the fact that, in coming to his valuation, Expert 2 also utilised the information contained in the Appellant's financial accounts for the years [REDACTED]. When asked by the Commissioner, Expert 2 confirmed that he had done this as a "sanity check" in circumstances where the financial information was available and in circumstances where projections for the sole trade business from [REDACTED] onwards were not available to him and neither had they been created at that time. The Commissioner notes that the use of the forward looking figures advantages the Director in that it increases the future maintainable profits amount from €19,657 to an amount of €21,658.

iv. The Commissioner notes that the future maintainable earnings figure submitted by Expert 1 placed reliance on the Economic and Fiscal Outlook document published in [REDACTED] which set out that GDP was expected to grow by 1% in [REDACTED], 1.3% in [REDACTED], 2.4% in [REDACTED], 3% in [REDACTED] and 3% in [REDACTED]. Expert 1 also placed reliance on part of the [REDACTED] Central Bank report which confirmed that, in [REDACTED], the Irish economy had expanded by an estimated 3.4% in real GNP terms. Expert 1 also referred to the report on [REDACTED]

[REDACTED] Expert 1 considered that it was reasonable to assume that some of this additional expenditure would be spent on [REDACTED] resulting in extra work for the Appellant and underpinning its future after-tax maintainable profits.

v. The Commissioner accepts, and there is no dispute between the parties, that the economic conditions which prevailed from [REDACTED] onwards were recessionary. The Commissioner further accepts that the forecasts contained in the reports referred to by Expert 1 indicated growth was expected in the economy of 1% in [REDACTED], 1.3% in [REDACTED], 2.4% in [REDACTED], 3% in [REDACTED] and 3% in [REDACTED], and that in [REDACTED] the Irish economy had expanded by an estimated 3.4% in real GNP terms. The Commissioner also accepts that the [REDACTED]

[REDACTED]

- vi. In arriving at a future maintainable profit figure of €63,773, Expert 1 set out, *inter alia* that the adjusted annual profits for the sole trade business for ██████ were €136,098, for ██████ were €246,209, for ██████ were €38,707, for ██████ were €25,831 and for ██████ were €8,672. The Commissioner has considered the evidence and report of Expert 1 and, having noted the adjusted annual profits for the sole trade business of €8,672 for ██████, the Commissioner does not accept as credible that the future maintainable earning figure of €63,773 could be extrapolated from projected growth figures of 1% in ██████, 1.3% in ██████, 2.4% in ██████, 3% in ██████ and 3% in ██████.
- vii. The Commissioner further notes that Expert 1 is of the opinion that, in arriving at a future maintainable profit figure of €63,773 it is reasonable to include pre-recession profit figures in his calculation. In Mr Peelo's book, on which both Experts relied, at section 5-11 it is stated that a simple average of profits over the latest three financial years, or possibly over five on rare occasions, where the fluctuations year on year are relatively minor and there is little growth may be used. The Commissioner considers that the sole trade business had large fluctuations in its profit levels in the period from ██████ and, therefore, reliance on 6.5 years of financial information was, in the case of the sole trade business, not appropriate.
180. The Commissioner notes that the shares in the Appellant were transferred by the Director to his children in ██████ with valuation of €1. The Director was questioned under cross examination about this transaction. This transaction took place in ██████, four years after the transfer of the goodwill of the sole trade business to the Appellant. The Commissioner does not consider that this transaction has any relevance to the valuation of the goodwill of the sole trade business as at ██████ ██████ and, therefore, has not applied any weight to this transaction when considering this appeal.
181. The Commissioner further notes that, although the Director was asked on examination in chief about an unsigned document entitled "Business Purchase Agreement", counsel on behalf of the Appellant indicated that no reliance is being placed on this document. Therefore, the Commissioner has not applied any weight to that document when considering this appeal.
182. **For the reasons set out above, the Commissioner finds as a material fact that the valuation of the goodwill of the sole trade business as at ██████ ██████ was €41,225.**



*Commissioner's findings of material fact*

183. For the avoidance of doubt, the Commissioner makes the following findings of material fact:

- i. The Director is a businessman who, between [REDACTED], carried on a sole trade trading as "[REDACTED]", as a [REDACTED].
- ii. The Appellant was incorporated in [REDACTED] and, at the time of its incorporation, had two directors, the Director with a 99% shareholding and his wife with a 1% shareholding.
- iii. On [REDACTED] the Director was registered as an employee of the Appellant.
- iv. On [REDACTED] the Director transferred the sole trade business into the Appellant. The transfer of the sole trade into the Appellant included a valuation for the goodwill of the sole trade of €250,000.
- v. In [REDACTED], the amount of €250,000 was credited to the Director's director's loan account in the Appellant.
- vi. The director's loan account was drawn down by €205,502 between [REDACTED] and [REDACTED].
- vii. On [REDACTED], the Appellant invoiced the Director the amount of €61,500 inclusive of Value Added Tax (hereinafter "VAT") at the rate of 23% for administration and secretarial services provided to the sole trade prior to that date.
- viii. The Director and his wife ceased to be directors of the Appellant on [REDACTED] when the Director's [REDACTED] children were appointed as directors. The Director remained as an employee of the Appellant.
- ix. The Director and his wife transferred their shares in the Company to their children in [REDACTED] with valuation of €1.
- x. On 20 November 2015, the Respondent issued Notifications of Revenue Audit to the Appellant and to the Director.
- xi. As a result of the audits which took place, the Respondent issued the following Notices of Amended Assessment to the Appellant:

| Notice Type | Date | Tax Type | Period | Amount € | Appeal Number |
|-------------|------|----------|--------|----------|---------------|
|-------------|------|----------|--------|----------|---------------|

|                              |            |                 |                                    |            |         |
|------------------------------|------------|-----------------|------------------------------------|------------|---------|
| Notice of Amended Assessment | 21/12/2017 | Corporation Tax | Year ending 30/06/██████           | 291.00     | M160/18 |
| Notice of Assessment         | 15/12/2017 | DWT             | 30/06/██████                       | 50,000.00  | M82/18  |
| Notice of Estimation         | 22/12/2017 | PAYE/PRSI/USC   | 01/01/██████<br>to<br>31/12/██████ | 147,896.00 | M151/18 |
| Notice of Estimation         | 27/12/2018 | PAYE/PRSI/USC   | 01/01/██████<br>to<br>31/12/██████ | 53,905.89  | 92/19   |
| Notice of Assessment         | 21/1/2018  | DWT             | 01/01/██████<br>to<br>31/12/██████ | 23,693.00  | 93/19   |
| Notice of Assessment         | 09/12/2020 | DWT             | 31/12/██████                       | 11,072.00  | 10/21   |
| Notice of Estimation         | 15/12/2020 | PAYE/PRSI/USC   | 01/01/██████<br>to<br>31/12/██████ | 28,787.01  | 11/21   |
| Notice of Estimation         | 16/11/2021 | PAYE/PRSI/USC   | 01/01/██████<br>to<br>31/12/██████ | 7,535.59   | 345/21  |
| Notice of Assessment         | 15/11/2021 | DWT             | 31/12/██████                       | 2,898      | 345/21  |

xii. The Respondent has, since the submission of appeal 93/19, indicated to the Appellant that it is not pursuing the Notice of Assessment to DWT for the period ██████████ ██████████ in the amount of €23,693.00.

xiii. The goodwill of the sole trade business was transferred to the Appellant on ██████████ ██████████.

xiv. The valuation of the goodwill of the sole trade business as at [REDACTED] [REDACTED] was €41,225.

## Analysis

184. It is the Respondent's case that there was no transfer of goodwill from the sole trade business to the Appellant on [REDACTED] [REDACTED] and that, therefore, the creation of a €250,000 credit in the director's loan account of the Appellant amounted to an emolument of €250,000 to the Director in [REDACTED] under Schedule E and that the Notice of Estimation to PAYE/PRSI/USC for [REDACTED] raised on the Appellant applies. In the alternative, it is the Respondent's case that the creation of a €250,000 credit in the director's loan of the Appellant amounted to a distribution to the Director under Schedule F and that the Notice of Estimate to DWT for [REDACTED] raised on the Appellant applies.

185. Further and in the alternative, the Respondent has submitted that, if the Commissioner finds that there was a transfer of goodwill from the sole trade business to the Appellant on [REDACTED] [REDACTED], the goodwill was valued at €41,225 and that the balance of the drawdown of the director's loan account in [REDACTED] amounted to emoluments to the Director under Schedule E and that the Notices of Estimation to PAYE/PRSI/USC for [REDACTED] apply. In the alternative, it is the Respondent's case that the balance of the drawdown of the director's loan account in [REDACTED] [REDACTED] amounted to a distribution to the Director under Schedule F.

186. The Appellant has objected to the issuing by the Respondent of alternative assessments to income tax in this appeal. In addition, the Appellant has submitted that there was a transfer of goodwill to the value of €250,000 by the sole trade business to the Appellant on [REDACTED] [REDACTED]. It was submitted that, as part of the Director's income tax return for the year [REDACTED], the Director made a CGT return wherein he reported that a transfer of goodwill from the sole trade business to the Appellant had taken place for the sum of €250,000. This resulted in a CGT assessment of €75,000 on the Director which, he has submitted, was fully relieved by way of retirement relief. It is, therefore, the Appellant's position that the Notices of Estimation to PAYE/PRSI/USC and DWT raised by the Respondent should be reduced to nil.

187. The Respondent has submitted that it made clear to the Appellant that the assessments raised were alternative assessments and that the raising of the alternative assessments does not amount to double taxation of the Appellant.

188. Given the issues raised by the parties in this appeal, the Commissioner intends to structure this determination as follows:

- i. To address the issue of alternative assessments being raised by the Respondent;
- ii. To determine whether the Notices of Estimation to PAYE/PRSI/USC apply;
- iii. In circumstances where the Notices of Estimation to PAYE/PRSI/USC do not apply, to determine whether the Notices of Estimation to DWT apply;

189. The Commissioner notes that the Notice of Estimation to DWT for [REDACTED] has been withdrawn by the Respondent.

#### *Alternative Assessments*

190. The issue of the ability of the Respondent to raise alternative assessments has not been the subject of a decision by the Irish Courts. The Respondent has submitted that it is long established that the raising of alternative assessments is competent. In that regard, the Respondent referred the Commissioner to the decision of the Court of Appeal in *Bye (Inspector of Taxes) v Coren* [1986] STC 393 (hereinafter “*Coren*”) wherein Lawton LJ described the making of alternative assessments to income tax in the following terms:

*“He [the inspector of taxes] was following a practice which, so far as income tax is concerned, has long been accepted as being a sensible and proper way of dealing with difficult cases. The propriety of doing so was approved by this court in R v General Comrs of Income Tax for Freshwell, ex p Clarke [1974] QB 220, 47 TC 691.”*<sup>5</sup>

191. Lawton LJ dismissed the taxpayer’s submission that the alternative assessments were unfair and held:

*“I can see no unfairness. The alternative assessments were properly put forward and the taxpayers had a variety of routes by which they could avoid any problems of unfairness to them. They would have appreciated when they got the assessments that they were in alternative form. They would have appreciated when the assessments came in that what they had to do was to leave the position open so that after proper inquiry there could be a decision by the appropriate body, namely the General Commissioners, whether they had been trading in metal or they had made gains which would attract capital gains tax. When the assessments came in they could have appealed against both.”*<sup>6</sup>

192. The decision in *Coren* was cited with approval by the Court of Appeal in *Bird v IRC* [1989] A.C. 300 at page 325 where the validity of alternative assessments was upheld. In

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<sup>5</sup> At 394 to 395

<sup>6</sup> At 395



*University Court of the University of Glasgow v Customs & Excise Commissioners* [2003] STC 495, the Scottish Court of Session held the use of distinct but alternative assessments to VAT was competent, relying on the income tax authorities. Hamilton LJ observed:

*“It is unnecessary in these circumstances to rely on authority concerned with the use of alternative assessments in the context of direct taxes. It is, however, of interest to note that, in a series of cases, the courts have found no difficulty in recognising the validity in appropriate circumstances of alternative assessments without there being any express statutory provision sanctioning such procedure. In Bird v IRC [1988] STC 312 at 323, [1989] AC 300 at 325 Lord Keith observed that there was no objection to the Revenue pursuing as alternatives two incompatible claims to tax. He cited, with approval, the approach adopted by Bye (Inspector of Taxes) v Coren [1986] STC 393 (where Lawton LJ (at 394-395) described the like practice in income tax cases as being one which ‘has long been accepted as being a sensible and proper way of dealing with difficult cases’). The practical justification for the practice was explained in the Outer House by Lord Coulsfield in Lord Advocate v McKenna 1988 SLT 523 at 527, 61 TC 688 at 694; the competency of making separate assessments on an alternative basis was confirmed in the Inner House. In all these cases the primary ground of judgment did not depend on any specialty in the tax collection regime governing the taxes there in question... As with direct taxes, alternative assessments for VAT provide in appropriate cases a practical and workable machinery for the ultimate recovery of the tax properly due.”<sup>7</sup>*

193. The Commissioner was also referred to the determination made by former Commissioner O’Mahony in his determination 28TACD2022 in this regard.

194. The scope of the jurisdiction of an Appeal Commissioner has been set out in a number of cases decided by the Courts, namely; *Lee v Revenue Commissioners* [IECA] 2021 18 (hereinafter “Lee”), *Stanley v The Revenue Commissioners* [2017] IECA 279, *The State (Whelan) v Smidic* [1938] I.R. 626, *Menolly Homes Ltd. v The Appeal Commissioners* [2010] IEHC 49 and *the State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.

195. Most recently Murray J. in *Lee* held as follows:

*“From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and the powers vested in them to obtain their statutory objective, their jurisdiction is*

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<sup>7</sup> At 504 to 505.

*focussed on the assessment and the charge. The ‘incidental questions’ which the case law acknowledges as falling within the Commissioners’ jurisdiction are questions that are ‘incidental’ to the determination of whether the assessment properly reflects the statutory charge to tax having regard to the relevant provisions of the TCA, not to the distinct issue of whether as a matter of public law or private law there are additional facts and/or other legal principles which preclude enforcement of that assessment.”<sup>8</sup>*

196. Therefore, the role of the Commissioner is to focus on the assessment and the charge to tax. The Commissioner notes that on the first day of the hearing of this appeal on 31 May 2022, the hearing was adjourned following the application of counsel on behalf of the Appellant to allow the Appellant bring judicial review proceedings against the Respondent in relation to the validity of the Notices of Assessment, Notices of Amended Assessment and Notices of Estimation under appeal. The Appellant did not subsequently bring judicial review proceedings against the Respondent.

197. As a result, the Commissioner can and must focus on what the correct charge to tax in this appeal is.

*Notices of Estimation to PAYE/PRSI/USC.*

198. There is no dispute between the parties as to the operation of the charge to income tax under Schedule E of the TCA 1997.

199. Schedule E is contained in section 19 of the TCA 1997 which provides that:

*“(2)Tax under Schedule E shall be paid in respect of all public offices and employments of profit in the State...”*

200. The basis of assessment, persons chargeable and extent of the charge to tax under Schedule E is set out in sections 112 and 118 of the TCA 1997. Section 118 of the TCA 1997 relates to benefits in kind and does not apply to this appeal.

201. Section 112(1) of the 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*

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<sup>8</sup> At paragraph 64

*therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*

202. The Commissioner has already found as material facts that:

- i. the goodwill of the sole trade business was transferred to the Appellant on [REDACTED]; and
- ii. the valuation of the goodwill of the sole trade business as at [REDACTED] [REDACTED] was €41,225.

203. It is not in dispute between the parties that the Director drew down the director's loan as follows:

| Year                                      | Amount drawn down from director's loan account € |
|---|--|
| July [REDACTED] to December [REDACTED]    | 61,682.36  |
| January [REDACTED] to December [REDACTED] | 63,579.80  |
| January [REDACTED] to December [REDACTED] | 54,886.23  |
| January [REDACTED] to December [REDACTED] | 55,360.08  |
| January [REDACTED] to March [REDACTED]    | 14,491.53  |

204. The Appellant has not put forward any alternative explanation as to the reason for the credit of €250,000 to the director's loan in the Appellant other than attributing it to the transfer of the goodwill of the sole trade business to the Appellant.

205. The Commissioner has already found as a material fact that the value of the goodwill of the sole trade business was €41,225. The Commissioner is satisfied that of the €61,682.36 drawn down from the director's loan by the Director in [REDACTED], €41,225 related to the transfer of the goodwill of the sole trade to the Appellant on [REDACTED] [REDACTED].

206. The Appellant has not discharged the burden of proof to prove that the amounts drawn down, other than €41,225 relating to the goodwill of the sole trade, are not emoluments pursuant to the provisions of Schedule E.

207. It is the Respondent's position that the proposition that the creation of a director's loan in the Appellant's financial accounts for [REDACTED] was an emolument is a fall-back position and

that their preferred position is that the Director drew down the amounts from the director's loan in [REDACTED]. Nothing was argued before the Commissioner, or in written submissions, which establishes that the creation of a director's loan in a company's financial accounts amounts to an emolument under section 112 of the TCA 1997.

208. As a result, the Commissioner must find that the following amounts drawn down by the Director are emoluments pursuant to the provisions of Schedule E of the TCA 1997 and are subject to income tax pursuant to the provisions of section 112 of the TCA 1997:

| Year       | Amount drawn down from director's loan account € |
|------------|--|
| [REDACTED] | 20,457.36  |
| [REDACTED] | 63,579.80  |
| [REDACTED] | 54,886.23  |
| [REDACTED] | 55,360.08  |
| [REDACTED] | 14,491.53  |

209. It is agreed between the parties that the Director was an employee of the Appellant during [REDACTED].

210. Regulation 16 of the Income Tax (Employment) (Consolidated) Regulations 2001 (S.I. No 559 of 2001) provides that:

*"16. On payment of emoluments referred to in Regulation 7, deductions or repayments of tax shall be made subject to, and in accordance with, the subsequent provisions of this Part of these Regulations."*

211. No submissions were made by the Appellant in relation to the obligation, pursuant to part 42 (sections 983 to 997A) of the TCA 1997 and the Income Tax (Employment) (Consolidated) Regulations 2001 (S.I. No 559 of 2001), of employers to deduct at source under the PAYE system from emoluments payable to employees and office holders.

212. The Commissioner is therefore satisfied that, in circumstances where the amounts drawn down from the director's loan were emoluments paid to the Director, who was an employee of the Appellant, the Appellant had an obligation to deduct the appropriate PAYE/PRSI/USC and return it to the Respondent for the requisite years.

### *Schedule F assessments*

213. In circumstances where the Commissioner has found that the amounts drawn down by the Director in [REDACTED] were emoluments under Schedule E of the TCA 1997, it therefore follows that they cannot fall under Schedule F of the TCA 1997.

### *Assessment to Corporation Tax*

214. No submissions were made and no arguments were advanced to the Commissioner in relation to the Notice of Amended Assessment to Corporation Tax for the period ending [REDACTED] [REDACTED] in the amount of €291.

215. The Respondent submitted that the Notice of Amended Assessment to Corporation Tax was issued in relation to the invoice for €50,000 plus VAT issued by the Appellant to the sole trade business on [REDACTED] [REDACTED].

216. As no submissions have been made by the Appellant in relation to this matter, the Commissioner must find that the Appellant has not discharged the burden of proof to establish that the Corporation Tax of €291 for [REDACTED] was not payable.

### **Determination**

217. For the reasons set out above, the Commissioner determines the following:

218. The Commissioner determines that the Notice of Amended Assessment to Corporation Tax for the period ending [REDACTED] [REDACTED] raised by the Respondent on 21 December 2017 shall stand.

219. The Commissioner determines that the Notice of Assessment to DWT for the period ending [REDACTED] [REDACTED] raised by the Respondent on 15 December 2017 shall be reduced to nil.

220. The Commissioner determines that the Notice of Estimation to PAYE/PRSI/USC for the period ending [REDACTED] [REDACTED] raised by the Respondent on 22 December 2017 shall stand.

221. The Commissioner determines that the Notice of Assessment to DWT for the period ending [REDACTED] [REDACTED] to [REDACTED] [REDACTED] raised by the Respondent on 21 December 2018 shall be reduced to nil.

222. The Commissioner determines that the Notice of Estimation to PAYE/PRSI/USC for the period ending [REDACTED] raised by the Respondent on 27 December 2017 shall stand.
223. The Commissioner determines that the Notice of Assessment to DWT for the period ending [REDACTED] raised by the Respondent on 9 December 2020 shall be reduced to nil.
224. The Commissioner determines that the Notice of Estimation to PAYE/PRSI/USC for the period ending [REDACTED] raised by the Respondent on 15 December 2020 shall stand.
225. The Commissioner determines that the Notice of Assessment to DWT for the period ending [REDACTED] raised by the Respondent on 15 November 2021 shall be reduced to nil.
226. The Commissioner determines that the Notice of Estimation to PAYE/PRSI/USC for the period ending [REDACTED] raised by the Respondent on 16 December 2021 shall stand.
227. It is understandable that the Appellant may be disappointed with the outcome of his appeal. The Appellant was correct to check to see whether his legal rights were correctly applied.
228. This Appeal is determined in accordance with Part 40A of the TCA1997 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.
229. The Commissioner notes that the Respondent has emphasised that the Notices of Estimation to PAYE/PRSI/USC and the Notices of Assessment to Dividend Withholding Tax in this appeal are in the alternative to the Notices of Amended Assessment to income tax issued in appeal [REDACTED] M148/18 and that it will only seek to recover the appropriate tax once, either from the Appellant or from the Director.

### **Notification**

230. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) of the TCA 1997 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 shall not receive any other notification of this determination by any other methods of communication.

### **Appeal**

231. 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.



Clare O'Driscoll  
Appeal Commissioner  
25 March 2024