



Between

65TACD2024

██████████

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) by ██████████ (“the Appellant”) against the failure by the Revenue Commissioners (“the Respondent”) to make a determination, under section 195 of the Taxes Consolidation Act 1997 as amended (“TCA 1997”), that the Appellant’s artworks ██████████ “Work 1”) and ██████████ “Work 2”) qualified for artists’ exemption.
2. The appeal proceeded by way of a hearing on 23 February 2024.

Background

3. Section 195 of the TCA 1997 provides for the exemption from income tax of certain earnings of writers, composers and artists, and is commonly known as “artists’ exemption”. The maximum amount of income that can be exempt from income tax is €50,000 per annum.
4. On 8 December 2022, the Appellant claimed artists’ exemption in respect of the two artworks, ██████████. ██████████ Work 1, was a moving-image artwork and ██████████ Work 2, was a billboard that was displayed ██████████. The Appellant

stated that the two artworks were a diptych, i.e. “*two artworks which have been made to be seen together.*” Following a request for clarification from the Respondent, the Appellant clarified that the application for the artworks was made under category (d): “a painting or other like picture”.

5. On 24 January 2023, the Respondent notified the Appellant that it was refusing the application for artists’ exemption, on the basis that Work 1 was a film and therefore did not come within the categories of work listed in section 195(1), and that Work 2 was excluded under paragraph 8(v) of the guidelines drawn up pursuant to section 195(12) of the TCA 1997 by the Arts Council and the Minister for Arts, Heritage and the Gaeltacht (“the Guidelines”).
6. On 12 June 2023, the Appellant appealed the Respondent’s failure to make a determination pursuant to section 195(6) of the TCA 1997. The appeal proceeded by way of a remote hearing on 23 February 2024. The Appellant appeared in person. The Respondent was represented by [REDACTED], Assistant Principal.
7. At the hearing, the Appellant stated that they had received an opinion from the Arts Council on the artworks, and the Commissioner stated that he would allow the submission of the opinion within 14 days of the hearing. The Commissioner also asked the Appellant to submit a copy of Work 1, as only a script and stills had been submitted to date. The Appellant subsequently submitted a copy of the opinion of the Arts Council as well as a link to view Work 1 online. On 21 March 2024, the Respondent submitted a reply to the additional submissions received from the Appellant, in which it stated *inter alia* that the Arts Council’s opinion “*should not be taken as an opinion that the works fall within the scope of the Artists Exemption.*” The Commissioner confirms that he has considered all the material submitted by the parties.

Legislation and Guidelines

8. Section 195 of the TCA 1997 provides *inter alia* as follows:

“(1) ... ‘work’ means an original and creative work which is within one of the following categories:

(a) a book or other writing;

(b) a play;

(c) a musical composition;

(d) a painting or other like picture;

(e) a sculpture.

(2) (a) This section shall apply to an individual...

(ii) (I) who is determined by the Revenue Commissioners, after consideration of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, to have written, composed or executed, as the case may be, either solely or jointly with another individual, a work or works generally recognised as having cultural or artistic merit, or

(II) who has written, composed or executed, as the case may be, either solely or jointly with another individual, a particular work which the Revenue Commissioners, after consideration of the work and of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, determine to be a work having cultural or artistic merit.

[...]

(12) (a) An Comhairle Ealaíon and the Minister for Arts, Heritage, Gaeltacht and the Islands shall, with the consent of the Minister for Finance, draw up guidelines for determining for the purposes of this section whether a work within a category specified in subsection (1) is an original and creative work and whether it has, or is generally recognised as having, cultural or artistic merit.

(b) Without prejudice to the generality of paragraph (a), a guideline under that paragraph may –

(i) consist of a specification of types or kinds of works that are not original and creative or that have not, or are not generally recognised as having, cultural or artistic merit, including a specification of works that are published, produced or sold for a specified purpose, and

(ii) specify criteria by reference to which the questions whether works are original or creative and whether they have, or are generally recognised as having, cultural or artistic merit are to be determined.

(13) (a) Where a claim for a determination under subsection (2) is made to the Revenue Commissioners, the Revenue Commissioners shall not determine that the work concerned is original and creative or has, or is generally recognised as having, cultural

or artistic merit unless it complies with the guidelines under subsection (12) for the time being in force.

(b) Paragraph (a) shall, with any necessary modifications, apply to (i) a determination by the Appeal Commissioners under subsection (8) on an appeal to them under subsection (6) in relation to a claim mentioned in paragraph (a)...

9. The Guidelines provide *inter alia* as follows:

“Original and Creative

4. A work shall be regarded as original and creative only if it is a unique work of creative quality brought into existence by the exercise of its creator’s imagination.

Cultural Merit

5. A work shall be regarded as having cultural merit only if by reason of its quality of form and/or content it enhances to a significant degree one or more aspects of national or international culture.

Artistic Merit

6. A work shall be regarded as having artistic merit only if its quality of form and/or content enhances to a significant degree the canon of work in the relevant category.

[...]

Types of Works Excluded from the Artists Exemption Scheme

8. Notwithstanding anything else in these Guidelines, a work -

(a) shall not be an original and creative work, and

(b) shall not have, or shall not be generally recognised as having, cultural or artistic merit,

if, in the opinion of the Revenue Commissioners following, where appropriate, consultation with the Arts Council, it is a work of any of the types or a combination of the types, specified in paragraphs (i) to (vi) below...

(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes.”

Submissions

Appellant

10. In written submissions, the Appellant stated that the artworks had been acquired by the Arts Council in [REDACTED] [REDACTED] and added to its collection. To be added to the Arts Council Collection, an artist must demonstrate originality and represent the cultural integrity of contemporary art in Ireland.
11. This demonstrated the cultural and artistic merit of the artworks and that they were original, ambitious and exemplary of Irish cultural and artistic merit. Therefore, it could be stated that the artworks fulfilled the requirements for artists' exemption.
12. Regarding Work 1, it had been refused by the Respondent on the ground that it was a film. The Appellant disputed this, and stated that it was funded under a visual arts bursary rather than a film bursary. It differed from narrative film which was funded for profit under Screen Ireland. Further, Work 1 was funded for installation in an art gallery.
13. Work 1 was commissioned by [REDACTED] and further supported by the Arts Council Visual Arts Bursary. When applying for Arts Council funding for Work 1, the application was required to be framed under then current Covid-19 guidelines. Therefore, the decision to record a play as a screenplay and exhibit in a gallery as a video installation was a response to the public health guidelines provided at the time of making the funding application. Under no circumstances was this a film production.
14. Furthermore, the Appellant provided examples of similar artworks that had previously been granted artists' exemption by the Respondent, including video installations under (d) a painting or other like picture, and screenplays under (b) a play.
15. Regarding Work 2, it had been refused by the Respondent on the basis that it was created primarily for advertising, publicity and information purposes. This was incorrect; it was a picture artwork that was displayed [REDACTED] in order to comply with Covid-19 health guidelines. Under no circumstances was the image used as an advertisement. The Arts Council does not acquire advertisements for inclusion in its collection.
16. The Appellant provided an example of a billboard installed and erected on a street that was granted artists' exemption by the Respondent. The Appellant stated that [REDACTED] [REDACTED] had confirmed that the work was commissioned as an artwork and not as an advertisement.

17. In oral submissions at the hearing, the Appellant reaffirmed their written submissions. The Appellant stated that the criteria for granting artists' exemption were similar to the criteria used by the Arts Council in determining whether to acquire artworks, and that consequently this demonstrated that the Appellant's artworks qualified for artists' exemption.
18. The Appellant stated that the artworks were a diptych and were intended to be shown together. While the Appellant believed that Work 1 and Work 2 should be considered together for the purposes of the appeal, they were willing for the Commissioner to consider the works separately if the Commissioner was of the view that one was exempt but the other was not. While Work 1 may have been described as a film, it was very different to a film for profit that would be screened in a cinema. The Arts Council did not acquire such films for inclusion in its collection.

Respondent

19. In written submissions, the Respondent stated that five applications were made on behalf of the Appellant for a determination that the artworks qualified for artists' exemption. The applications were made under category (a), "a book or other writing", category (d), "a painting or other like picture" and category (e), "a sculpture". Following a request for clarification from the Respondent, the Appellant stated that the applications were being made under category (d), "a painting or other like picture".
20. Regarding Work 1, the Respondent concluded that it was a film and therefore not included within the categories of artworks that qualified for exemption. Regarding Work 2, the Respondent concluded that it was excluded under paragraph 8(v) of the Guidelines as it was a type of work created primarily for advertising, publicity, information, decorative or other similar purposes.
21. At the hearing, ██████ provided a general outline of the scope of section 195 and the Guidelines. She stated that Work 1 was described as a film on its script and it seemed clear to the Respondent that therefore it did not qualify. She stated that the Respondent considered that the purpose of Work 2 was to advertise what was on display inside ██████ (i.e. Work 1).
22. She stated that the Respondent had considered the artworks separately, as they had been submitted separately, and had concluded that neither qualified for the exemption. She stated that the Respondent had no objection to the Commissioner considering them separately. However, the Appellant had stated that the works were a diptych, and if the Commissioner considered them together, and concluded that one of them did not qualify,

it would be necessary to conclude that neither were exempt as it did not appear that section 195 or the Guidelines allowed for a work to be partly exempt.

23. ██████████ acknowledged that the Arts Council had acquired the artworks, but stated that the criteria were different and did not necessarily mean that they qualified for exemption from tax. She stated that the Respondent examined each artwork submitted to it independently, and that simply because a different artwork was granted exemption did not mean that every other artwork of a similar type would also. In response to a question from the Commissioner, she stated that the Respondent accepted that, if the Appellant's artworks were not excluded from the exemption, they satisfied the requirements of being original and creative, and having cultural or artistic merit.

Material Facts

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

24.1. The Appellant claimed artists' exemption for two artworks, Work 1 and Work 2, on 8 December 2022.

24.2. The Respondent refused to grant artists' exemption for both artworks. It refused to grant an exemption to Work 1 on the basis that it was a film and therefore not included within the scope of the types of works included in section 195 of the TCA 1997. It refused to grant an exemption to Work 2 on the basis that it was an advertisement for Work 1 and therefore excluded by paragraph 8(v) of the Guidelines.

24.3. The Respondent accepted that both works otherwise satisfied the requirements of being original and creative, and having cultural or artistic merit.

24.4. Work 1 was a film, and could not be classified as a play, or as a painting or other like picture.

24.5. Work 2 was not an advertisement for Work 1. It was an original artwork that had been acquired by the Arts Council for inclusion in its collection.

Analysis

25. The burden of proof in this appeal rests on the Appellant, who must show that the Respondent's failure to determine that the artworks qualified for artists' exemption was incorrect. In the High Court case of *Menolly Homes Ltd v. Appeal Commissioners* [2010]

30. Therefore, having determined that Work 1 is a film, the Commissioner must consider whether the work falls within the scope of section 195. 'Film' is not one of the types of work listed in section 195(1); however, neither is 'film' explicitly excluded by the section or the Guidelines. It could be argued that an expansive interpretation of "(b) a play" or "(d) a painting or other like picture" could potentially include a film.
31. However, in interpreting the scope of section 195, the Commissioner considers it necessary to apply the following principle of Kennedy CJ from *Revenue Commissioners v Doorley* [1933] IR 750:

“If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable.” (emphasis added)

32. Therefore, exemptions from taxation must be construed strictly. The Commissioner is not satisfied that, on this basis, a film such as Work 1 can be said to come within the scope of the types of work specified in section 195(1). Rather, the Commissioner considers that, were he to determine that Work 1 comes within the definition of either “a play” or “a painting or other like picture”, he would be doing what was prohibited by the Supreme Court in *Doorley*; i.e. enlarging the operation of the exemption “*beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter*”.
33. Consequently, the Commissioner is satisfied that the Respondent was entitled to refuse to grant the exemption for Work 1. In so finding, he notes that the Appellant has referred to works by other artists described as “screenplays” that were granted exemption under “(b) a play”, as well as visual artworks granted exemption under “(d) a painting or other like picture”. However, the Commissioner can only have regard to the artworks before him in this appeal, and the fact that the Respondent granted exemption to other works that are not before him cannot operate to bind him to take a particular view of the works under consideration herein.

34. Furthermore, the Commissioner notes and accepts the evidence of the Appellant that Work 1 was created in light of the Covid-19 restrictions in place at the time. However, the Oireachtas did not expand the types of works within the scope of section 195 as a result of the Covid-19 restrictions, and therefore it is not open to the Commissioner to broaden the scope of the section in this appeal.

35. Turning now to Work 2, the Commissioner notes that the Respondent refused to grant exemption for this artwork on the basis of paragraph 8(v) of the Guidelines, which excludes:

“(v) types or kinds of photographic, drawing, painting or other like works which are primarily of record, or which primarily serve a utilitarian function, or which are created primarily for advertising, publicity, information, decorative or other similar purposes”

The Respondent considered that the purpose of Work 2 was to advertise Work 1.

36. The Commissioner has considered a print-sized copy of Work 2, which was a large billboard fixed [REDACTED]. As stated by the Respondent, Work 1 was being exhibited within [REDACTED]. However, the Commissioner does not agree with the Respondent that Work 2 can properly be considered to be an advertisement. He notes that there is no writing or text on the artwork, whether referring to Work 1 or at all, so it does not seem to him that Work 2 can simply be said to be referring to or advertising Work 1.

37. In the Arts Council opinion submitted by the Appellant, [REDACTED] stated that “this work is part of the Arts Council Collection, and is an excellent example of an original work of contemporary art...this work in no way is an advertisement or piece of marketing/promotion. It is an original artwork and must be understood and valued as such.” While the Respondent has submitted that the Arts Council’s opinion should “*should not be taken as an opinion that the works fall within the scope of the Artists Exemption*”, the Commissioner has found the opinion helpful in determining whether Work 2 should be classified as an advertisement or an artwork.

38. Having regard to the views of the Arts Council, the fact that it has been acquired by the Arts Council for its collection, and his own consideration of the work, the Commissioner is not satisfied that the Respondent was correct to conclude that Work 2 was an advertisement. Rather, the Commissioner is satisfied that the work comes within the scope of “(d) a painting or other like picture”.

39. In order to qualify for artists’ exemption, the Guidelines provide that an artwork must be “*both original and creative and a work which has, or is generally recognised as having,*

either cultural or artistic merit.” In her evidence at the hearing, [REDACTED] for the Respondent stated that, if the Commissioner found that paragraph 8(v) did not apply to exclude Work 2, the Respondent accepted that Work 2 satisfied the requirements of being original and creative, and having cultural or artistic merit. Consequently, as he is satisfied that paragraph 8(v) does not apply to Work 2, the Commissioner finds that Work 2 does qualify for artists’ exemption.

40. In her evidence, [REDACTED] confirmed that the Respondent could apportion the exemption between Work 1 and Work 2 if necessary. It seemed to the Commissioner that the Appellant was reluctant for the works to be considered separately, but did not object to the Commissioner proceeding to do so, and as set out above, the Commissioner is satisfied that it is appropriate to make a separate determination for each of the works.
41. For the reasons as set out herein, the Commissioner is satisfied that Work 1 does not qualify for artists’ exemption, but that Work 2 does qualify. However, he notes in passing that if he was obliged to consider the two works together as one, he would find that the one work did not qualify for the exemption, as he agrees with the submission of the Respondent that section 195 and the Guidelines do not appear to allow for a ‘split’ determination in respect of a single artwork.

Determination

42. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in failing to determine that Work 1, [REDACTED] [REDACTED] qualifies for artists’ exemption under section 195 of the TCA 1997. However, he is satisfied that Work 2, [REDACTED], does qualify for artists’ exemption under section 195. Therefore, the Respondent’s failure to determine that both works qualify for artists’ exemption is varied.
43. In conclusion, it is determined that Work 1 does not qualify for artists’ exemption, and Work 2 does qualify for artists’ exemption.
44. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

45. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For

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

Appeal

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



Simon Noone
Appeal Commissioner
21st March 2024