AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

77TACD2024

Between

[redacted]

Appellants

and

THE REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This is an 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. This appeal is brought by [redacted] (hereinafter the "Appellant") against a Notice of Estimation in relation to Pay As You Earn / Pay Related Social Insurance and Universal Social Charge (hereinafter "PAYE / PRSI / USC") for the year 2017 raised by the Revenue Commissioners (hereinafter the "Respondent") on 13 December 2022 and against a Notice of Amended Assessment to Corporation Tax for the accounting period ending 31 December 2017 raised by the Respondent on 14 December 2022.

3. The amount of tax in dispute in this appeal is €14,658.15.

4. The determination in this appeal should be read in conjunction with a related determination which has been issued in a related appeal [redacted] (hereinafter the "Director") 90/23.

Background

5. The Appellant is a limited company which was incorporated in 1995 and which provides [redacted] services to various customers, both individual and corporate.

6. The Director is a director and 90% shareholder in the Appellant and has been since 2006. The Appellant's Secretary is [redacted] who is also a 10% shareholder in the Appellant.

7. During 2017, the Director was also a director, company Secretary and 50% shareholder in [redacted] (hereinafter the "Restaurant"). The Restaurant was incorporated in [redacted] and had a primary business of the operation of an [redacted] restaurant. [redacted] (hereinafter the "Mr X") was also a director and 50% shareholder in the Restaurant during 2017. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.

8. A dispute arose between the Director and Mr X in relation to the Restaurant and on 20 June 2017, the Director and Mr X entered into a mediated agreement entitled "Compromise Agreement" and also a Share Purchase Agreement which provided as follows:

"WHEREAS:

The Parties have been in dispute in relation to [redacted] *(the Dispute).*

The Dispute has been the subject of a mediation conducted under an agreement to mediate dated 1st June 2017 between the Parties and the Mediator.

The Parties have agreed to settle the Dispute on terms set out below (the Settlement Agreement).

THE PARTIES HAVE AGREED as follows:

(1) [redacted] *will sell and* [redacted] *will acquire* [redacted] *entire shareholding and interest in* [redacted] *in consideration of the following:*

(a) [redacted] *companies will submit two invoices to* [redacted] *totalling €60,000 in respect of management services charges to* [redacted] *provided over the past two years;*

(b) [redacted] *will pay both invoices referred to in 1(a) above, on or before 29 June 2017, subject to Bank releasing* [redacted] *from his personal guarantee for the borrowings of* [redacted]*;*

(c) If the Bank does not release [redacted] *from his personal guarantee until after 29 June 2017,* [redacted] *shall withhold payments of both invoices until such later date provided that such release shall be provided no later than 7 July 2017;*

(d) [redacted] *shall in addition repay the balance of* [redacted] *Director's Loan in full at the same time as the invoices are paid;*

(e) [redacted] *shall execute a Stock Transfer form in favour of* [redacted] *on the same date as the Bank shall release him from his personal guarantee;*

(f) [redacted] *shall not compete for or treat with the landlord's Receiver in any respect whatsoever in respect of a lease of* [redacted] *from where* [redacted] *currently trades and has been in possession since November 2015, in respect of the superior interest or otherwise howsoever;*

(2) On or before 29 June 2017, [redacted] will write to [redacted], signed by the Parties, to confirm the terms of his remuneration including his right to receive 10% of the profits of [redacted].

(3) The Parties have had the opportunity to take legal advice on the effect and import of this Settlement Agreement before signing the Settlement Agreement.

(4) This Settlement Agreement is governed by the laws of Ireland and the Courts of Ireland shall have jurisdiction to determine any dispute or difference arising.

(5) This Settlement Agreement is made in full and final settlement of all disputes arising between the Parties from their shareholding in [redacted] or otherwise howsoever.

(6) The Parties agree to keep the terms of this Settlement Agreement confidential.

(7) [redacted] shall, upon executing Stock Transfer form, relinquish all Bank account and other payment authority and shall return all records and property of the company to [redacted]."

9. The Compromise Agreement submitted to the Commissioner was not signed by either party, but did contain the parties names typed where a signature would be expected.

10. On 29 June 2017, the Director as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided as follows:

"THIS AGREEMENT is made on 29th June 2017

BETWEEN

(1) [redacted] OF [redacted] (hereinafter referred to as the "Vendor")

(2) [redacted] OF (the "Purchaser") [redacted],

WHEREAS

(A) [redacted] (CRO Number [redacted]) is a private limited company incorporated in Ireland with its registered office at [redacted] (the "Company").

(B) The Company has an authorised share capital of €100,000.00 divided into 100,000 Ordinary Shares of €1.00 each which 100 Ordinary Shares are issued, credited as fully paid up.

(C) The Vendor is the beneficial owner of 50 Ordinary Shares in the capital of the Company which he has agreed to sell and which the Purchaser has agreed to purchase on the terms and subject to the conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS

"Encumbrances" means:-

(i) Any adverse claim or right or third party right or other right or interest;

(ii) any equity;

(iii) any option or right of pre-emption or right to acquire or right to restrict;

(iv) any mortgage, charge, assignment, hypothecation, pledge, lien, encumbrance or security interest or arrangement of whatsoever nature;

(v) any reservation-of-title; or

(vi) any hire purchase, lease or instalment purchase agreement;

The "Shares" means the 50 Ordinary Shares of €1.00 each in the capital of the Company beneficially owned by the Vendor.

2. SALE AND PURCHASE OF THE SHARES

2.1 On the terms and subject to the conditions of this Agreement, the Vendor as beneficial owner, hereby agrees to sell and the Purchaser hereby agrees to purchase the Shares free from all Encumbrances and with the benefit of all rights whatsoever nature attaching or accruing to the Shares including all rights of any dividends and distributions declared, paid or made in respect of the Shares on the date of this Agreement.

2.2 The Purchaser shall not be obliged to complete the purchase of any Shares unless the purchase of all the Shares is completed simultaneously in accordance with the provisions of this Agreement.

3. PURCHASE CONSIDERATION

The purchase consideration payable by the Purchaser for the purchase of the Shares shall be the sum of fifty payable [on completion] [as set out below].

4. COMPLETION

Completion shall take place on the date of this Agreement and at completion, the Vendor and Purchaser shall:-

i. Deliver to the Purchaser a duly executed share transfer in respect of the Shares together with the relevant certificate in respect thereof;

ii. Resign as director of the Company and Secretary of the Company;

iii. Procure that a meeting of the board of directors of the Company is held at which the share transfers referred to at (i) above are approved for registration (subject only to stamping); and

iv. The Purchaser shall pay Fifty Euro cash to the Vendor as consideration for the transfer of the Shares;

v. The Company shall pay in full the Vendor's directors loan account, that amount being thirty thousand and eighty one euros;

vi. The Company shall pay to [redacted] the sum of sixty thousand euros plus VAT at 23% as management fees for the period from the 1st November 2015 to the 28th of June 2017.

5. WARRANTIES

i. The Vendor Shall not compete for or treat with the Landlord's Receiver in any respect whatsoever in respect of a lease of [redacted], from where [redacted] currently trades.

ii. The Vendor shall not be held liable in any regard if the Purchaser fails in whatever respect to guarantee his tenure of [redacted], from where [redacted] currently trades.

iii. The Purchaser acknowledges that [redacted] is currently occupying [redacted] on the grounds of a Care Takers Agreement and there is currently no lease granted in favour of [redacted].

iv. The Purchaser shall not hold [redacted] responsible or liable for any if its part in the management of [redacted].

6. CONFIDENTIALITY

(i) Each party agrees to hold strictly confidential the existence and contents of these terms unless that information is generally known or the disclosure of that information is required by law.

7. GOVERNING LAW AND JURISDICTION

This Agreement shall in all respects be governed by and construed in accordance with the laws of Ireland and the parties hereto hereby submit to the exclusive jurisdiction of the courts of Ireland."

11. The Share Purchase Agreement submitted to the Commissioner at the oral hearing was signed by the Director and by Mr X. Neither signature was witnessed.

12. On 30 May 2017 the Appellant raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Appellant raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged by the Restaurant into the Appellant's bank account in respect of the two invoices.

13. Between 30 June 2017 and 7 July 2017, the Appellant transferred six payments of €10,000 each to the Director's joint bank account with [redacted] totalling €60,000. The six payments were recorded in the Director's director's loan account in the Appellant's financial statements. The VAT received was returned by the Appellant to the Respondent and does not form part of the dispute between the parties in this appeal.

14. The Restaurant submitted a claim for a refund of VAT paid in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.

15. On 15 March 2019 the Respondent commenced an audit into the Appellant's and the Director's tax affairs. During the course of the audit into the Appellant's tax affairs three discrepancies arose, two of which have been the subject of agreement between the parties:

    15.1. The Appellant had included €21,500 in rental income in calculating its trading profit. It was agreed that this should be accounted for separately as it is subject to Corporation Tax at 25%;

    15.2. Invoices for costs or expenses which were not deductible in the amount of €8,662 were identified and the Appellant accepted that these should be added back.

15.3. The third discrepancy which arose related to an analysis of the Appellant's receipts which identified what the Respondent contended were unrecorded sales of €29,935. As a result, the Respondent added back €26,374 to the Appellant's receipts with the balance of €3,560 being VAT.

16. In circumstances where the amount of €29,935 did not appear elsewhere in the books and records of the Appellant, it was treated by the Respondent as being a payment from the Appellant to the person in control of its books, records and cash, that being the Director. This then gave rise to a liability on the part of the Appellant to PAYE / PRSI / USC which was the subject of a Notice of Estimation to PAYE / PRSI / USC which was raised by the Respondent on 13 December 2019 in the amount of €14,658.15.

17. In addition, the Respondent excluded the payment of €60,000 received by the Appellant from the Restaurant when calculating the Appellant's net income. This was on the basis that the payment was, in fact, a payment from the Restaurant to the Director for the purchase of the Director's shares in the Restaurant.

18. On 14 December 2019, the Respondent raised a Notice of Amended Assessment to Corporation Tax on the Appellant reflecting €26,374 in unrecorded sales and excluding the €60,000 payment received from the Restaurant. This resulted in the Appellant's assessed liability to Corporation Tax for 2017 being -€1,480, reflecting a repayment to the Appellant.

19. The Appellant has appealed against the Notice of Estimation to PAYE / PRSI / USC raised and also against the Notice of Amended Assessment to Corporation Tax raised.

20. In addition, the Respondent issued a Notice of Assessment to Capital Gains Tax (hereinafter "CGT") to the Director on the basis that the €60,000 payment was a payment made to the Director for the purchase of his shareholding and interest in the Restaurant, which gave rise to a liability to CGT on the part of the Appellant.

21. The Respondent also issued a Notice of Amended Assessment to income tax to the Director which reflected the omission of the €60,000 payment as the Appellants income on the basis that it was a payment received by the Appellant on behalf of the Director.

22. The Respondent has submitted that it does not seek to recover tax under all of the tax heads to which the Notices of Assessment and Notices of Amended Assessment were issued to the Appellant and the Director. The Respondent submitted that it seeks to recover the tax assessed under the Notice of Assessment to CGT issued to the Director.

23. The Respondent has submitted that the Notice of Amended Assessment to income tax issued to the Director and the Notice of Amended Assessment to PAYE / PRSI / USC issued to the Appellant were raised by the Respondent on the basis that, during the course of the audit, the Appellant had suggested that the payment of €60,000 may have been remuneration to him for services rendered by him to the Restaurant. The Respondent does not seek to recover under these notices if the Director is unsuccessful in his appeal against the Notice of Assessment to CGT.

24. The Respondent submitted that the Notice of Amended Assessment to Corporation Tax issued to the Appellant reflects, *inter alia*, an adjustment to the Appellant's income for 2017 on the basis that the €60,000 payment was not a payment made to the Director for the purchase of his shareholding and interest in the Restaurant.

25. Both the Notice of Assessment to CGT and the Notice of Amended Assessment to income tax issued by the Respondent to the Director are the subject of the determination in appeal 90/23.

Legislation and Guidelines

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

Section 26 of the TCA 1997

> *"General scheme of corporation tax.*
>
> *(1) Subject to any exceptions provided for by the Corporation Tax Acts, a company shall be chargeable to corporation tax on all its profits wherever arising.*
>
> *(2) A company shall be chargeable to corporation tax on profits accruing for its benefit under any trust, or arising under any partnership, in any case in which it would be so chargeable if the profits accrued to it directly, and a company shall be chargeable to corporation tax on profits arising in the winding up of the company, but shall not otherwise be chargeable to corporation tax on profits accruing to it in a fiduciary or representative capacity except as respects its own beneficial interest (if any) in those profits.*
>
> *(3) Corporation tax for any financial year shall be charged on profits arising in that year; but assessments to corporation tax shall be made on a company by reference to accounting periods, and the amount chargeable (after making all proper deductions) of the profits arising in an accounting period shall where necessary be apportioned between the financial years in which the accounting period falls.*

(4) Subsection (3) shall apply as respects accounting periods ending on or after the 1st day of April, 1997, as if—

(a) the period beginning on the 1st day of January, 1996, and ending on the 31st day of March, 1997, and

(b) the period beginning on the 1st day of April, 1997, and ending on the 31st day of December, 1997,

were each a financial year.."

Section 65 of the TCA 1997

"*Cases I and II: basis of assessment*

(1) Subject to this Chapter, income tax shall be charged under Case I or II of Schedule D on the full amount of the profits or gains of the year of assessment.

(2) Where in the case of any trade or profession it has been customary to make up accounts—

(a) if only one account was made up to a date within the year of assessment and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year of assessment;

(b) if an account, other than an account to which paragraph (a) applies, was made up to a date in the year of assessment, or if more accounts than one were made up to dates in the year of assessment, the profits or gains of the year ending on that date or on the last of those dates, as the case may be, shall be taken to be the profits or gains of the year of assessment;

(c) in any other case, the profits or gains of the year of assessment shall be determined in accordance with subsection (1).

(3) Where the profits or gains of a year of assessment have been computed on the basis of a period in accordance with paragraph (b) or (c) of subsection (2) and the profits of the corresponding period relating to the preceding year of assessment exceed the profits or gains charged to income tax for that year, then, notwithstanding anything to the contrary in section 66(2), the profits of that corresponding period shall be taken to be the profits or gains of that preceding year of assessment and the assessment shall be amended accordingly.

(3A) As respects the year of assessment 2001, subsection (2) shall apply as if in both paragraph (a) and paragraph (b) of that subsection "74 per cent of the profits or gains of the year ending on that date" were substituted for "the profits or gains of the year ending on that date".

(3B) For the purposes of subsection (2)(a), an account made up for a period of one year to a date falling in the period from 1 January 2002 to 5 April 2002 shall, in addition to being an account made up to a date in the year of assessment 2002, be deemed to be an account for a period of one year made up to a date within the year of assessment 2001, and the corresponding period in relation to the year of assessment 2000-2001 for the purposes of subsection (3) shall be determined accordingly.

(3C) Notwithstanding subsection (3), where the profits or gains of the year of assessment 2001 have been taken to be the full amount of the profits or gains of that year of assessment in accordance with subsection (2)(c), and the full amount of the profits or gains of the year of assessment 2000-2001 exceed the profits or gains charged to income tax for that year of assessment, then, the profits or gains of the year of assessment 2000-2001 shall be taken to be the full amount of the profits or gains of that year of assessment and the assessment shall be amended accordingly.

(3D) Notwithstanding subsection (3), where the profits or gains of a period of one year ending in the year of assessment 2002 have been taken to be the profits or gains of that year of assessment in accordance with subsection (2)(b), and the profits or gains charged to income tax for the year of assessment 2001 are less than 74 per cent of the profits or gains of the corresponding period relating to the year of assessment 2001, then, the profits or gains of the year of assessment 2001 shall be taken to be 74 per cent of the profits or gains of that corresponding period and the assessment shall be amended accordingly.

(3E) For the purposes of subsection (3D), where, apart from this subsection, a period (in this subsection referred to as the "relevant period") would not be treated as the corresponding period relating to the year of assessment 2001 by virtue of the fact that the relevant period ends on a date falling in the period from 1 January 2001 to 5 April 2001, the relevant period shall, notwithstanding any other provision of the Income Tax Acts, be treated as the corresponding period relating to that year of assessment.

(3F) Notwithstanding subsection (3), where the profits or gains of the year of assessment 2002 have been taken to be the full amount of the profits or gains of that year of assessment in accordance with subsection (2)(c), and the full amount of the profits or gains of the year of assessment 2001 exceed the profits or gains charged to income tax for that year of assessment, then, the profits or gains of the year of assessment 2001 shall be taken to be the full amount of the profits or gains of that year of assessment and the assessment shall be amended accordingly.

(4) In the case of the death of a person who, if he or she had not died, would under this section have become chargeable to income tax for any year of assessment, the tax which would have been so chargeable shall be assessed and charged on such person's executors or administrators, and shall be a debt due from and payable out of such person's estate."

Section 76 of the TCA 1997 (in force from 6 April 2011 to 31 December 2017)

"Computation of income: application of income tax principles

(1) Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment.

(2) For the purposes of this section, "income tax law", in relation to any accounting period, means the law applying to the charge on individuals of income tax for the year of assessment in which that accounting period ends, but does not include such of the enactments of the Income Tax Acts so applying as make special provision for individuals in relation to matters referred to in subsection (1).

(3) Accordingly, for the purposes of corporation tax, income shall be computed and the assessment shall be made under the like Schedules and Cases as apply for the purposes of income tax, and in accordance with the provisions applicable to those Schedules and Cases, but (subject to the Corporation Tax Acts) the amounts so computed for several sources of income, if more than

one, together with any amounts to be included in respect of chargeable gains, shall be aggregated to arrive at the total profits.

(4) Nothing in this section shall be taken to mean that income arising in any period is to be computed by reference to any other period (except in so far as this results from apportioning to different parts of a period income of the whole period).

(5) Subject to section 77 and to any enactment applied by this section which expressly authorises such a deduction, no deduction shall be made for the purposes of the Corporation Tax Acts in computing income from any source—

(a) in respect of dividends or other distributions, or

(b) in respect of any yearly interest, annuity or other annual payment or any other payments mentioned in section 104 or 237(2), but not including sums which are, or but for any exemption would be, chargeable under Case V of Schedule D.

(6) Without prejudice to the generality of subsection (1), any provision of the Income Tax Acts, or of any other statute, which confers an exemption from income tax, provides for the disregarding of a loss, or provides for a person to be charged to income tax on any amount (whether expressed to be income or not, and whether an actual amount or not), shall, except where otherwise provided, have the like effect for the purposes of corporation tax.

(7) This section shall not have effect so as to apply for the purposes of corporation tax anything in subsections (1), (2), (3), (4A), (5) and (6) of section 71.

(8) Where by virtue of this section or otherwise any enactment applies both to income tax and to corporation tax—

(a) that enactment shall not be affected in its operation by the fact that income tax and corporation tax are distinct taxes but, in so far as is consistent with the Corporation Tax Acts, shall apply in relation to income tax and corporation tax as if they were one tax, so that, in particular, a matter which in a case involving 2 individuals is relevant for both of them in relation to income tax shall in a like case involving an individual and a company be relevant for such individual in relation to income tax and for such company in relation to corporation tax, and

(b) for that purpose, references in any such enactment to a relief from or charge to income tax or to a specified provision of the Income Tax Acts shall, in the absence of or subject to any express adaptation, be construed as being or including a reference to any corresponding relief from or charge to corporation tax or to any corresponding provision of the Corporation Tax Acts."

Section 81 of the TCA 1997 (as in force from 3 April 2010 to 31 December 2017)

"*General rule as to deductions*

(1) The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.

(2) Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of -

(a) any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession;

(b) any disbursements or expenses of maintenance of the parties, their families or establishments, or any sums expended for any other domestic or private purposes distinct from the purposes of such trade or profession;

(c) the rent of any dwelling house or domestic offices or any part of any dwelling house or domestic offices, except such part thereof as is used for the purposes of the trade or profession, and, where any such part is so used, the sum so deducted shall be such as may be determined by the inspector and shall not, unless in any particular case the inspector is of the opinion that having regard to all the circumstances some greater sum ought to be deducted, exceed two-thirds of the rent bona fide paid for that dwelling house or those domestic offices;

(d) any sum expended for repairs of premises occupied, or for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the trade or profession, over and above the sum actually expended for those purposes;

(e) any loss not connected with or arising out of the trade or profession;

(f) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade or profession;

(g) any capital employed in improvements of premises occupied for the purposes of the trade or profession;

(h) any interest which might have been made if any such sums as aforesaid had been laid out at interest;

(i) any debts, except bad debts proved to be such to the satisfaction of the inspector and doubtful debts to the extent that they are respectively estimated to be bad and, in the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debts shall be deemed to be the value of any such debts;

(j) any average loss over and above the actual amount of loss after adjustment;

(k) any sum recoverable under an insurance or contract of indemnity;

(l) any annuity or other annual payment (other than interest) payable out of the profits or gains;

(m) any royalty or other sum paid in respect of the user of a patent;

(n) without prejudice to the preceding paragraphs any consideration given for goods or services, or to an employee or director of a company, which consists, directly or indirectly, of shares in the company, or a connected company (within the meaning of section 10), or a right to receive such shares, except to the extent -

(i) of expenditure incurred by the company on the acquisition of the shares at a price which does not exceed the price which would have been payable, if the shares were acquired by way of a bargain made at arm's length,

(ii) where the shares are shares in a connected company, of any payment by the company to the connected company for the issue or transfer by that company of the shares, being a payment which does not exceed the amount which would have been payable in a transaction between independent persons acting at arm's length, or

(iii) of other -

(I) expenditure incurred, or

(II) payment made to the connected company,

by the company in connection with the right to receive such shares which is incurred or, as the case may be, made for bona fide commercial purposes and does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is the avoidance of liability to income tax, corporation tax or capital gains tax;

(o) any sum paid or payable under any agreement or understanding whereby a person is obliged to make a payment to a connected person resident in any territory outside the State for an adjustment made, or to be made, to the profits of the connected person for which relief may be afforded under the terms of an arrangement entered into by virtue of subsection (1) or (1B) of section 826, or for a similar adjustment made to the profits of a connected person resident in a territory in respect of which there are not for the time being in force any arrangements providing for such relief.

(3)(a) In respect of a company -

(i) interest payable by the company, and

(ii) expenditure on research and development incurred by the company,

shall not be prevented from being regarded for tax purposes as deductible in computing profits or gains of the company for the purposes of Case I or II of Schedule D by virtue only of the fact that for accounting purposes they are brought into account in determining the value of an asset.

(b)Any amount shall not be regarded by virtue of paragraph (a) as deductible in computing profits or gains of a company for the purposes of Case I or II of Schedule D for an accounting period to the extent that -

(i) a deduction has been made in respect of that amount in computing such profits or gains for a previous accounting period, or

(ii) the company has benefited from a tax relief under any provision in respect of that amount for a previous accounting period."

<u>Section 959AA of the TCA 1997 (as in force from 21 March 2016 to 18 December 2018)</u>

Chargeable persons: time limit on assessment made or amended by Revenue officer

(1)Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period -

(a)an assessment for that period, or

(b)an amendment of an assessment for that period,

shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and -

(i)no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii)no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.

(2)Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period -

(a)where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,

(b)to give effect to -

(i)a determination of an appeal against an assessment,

(ii)a determination of an appeal, other than one made against an assessment, that affects the amount of tax charged by the assessment, or

(iii)an agreement within the meaning of section 949V.

(c)to take account of any fact or matter arising by reason of an event occurring after the return is delivered,

(d)to correct an error in calculation in the assessment, or

(e)to correct a mistake of fact whereby any matter in the assessment does not properly reflect the facts disclosed by the chargeable person,

and tax shall be paid or repaid (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment.

(3)Nothing in this section affects the operation of section 804(3), 811, 811A, 811C, 811D or 1048.

Section 959AB of the TCA 1997 (as in force from 23 October 2014 to 31 December 2023)

Persons other than chargeable persons: time limit on Revenue assessment and amended assessment

(1)Subject to the other provisions of this section, a Revenue assessment on a person other than a chargeable person may be made or amended by a Revenue officer at any time not later than 4 years after the end of the chargeable period to which the assessment relates.

(2)In a case in which emoluments to which subsection (3) applies are received in a year of assessment subsequent to that for which they are assessable, a Revenue assessment on a person other than a chargeable person may be made or amended by a Revenue officer for the year of assessment for which the emoluments are assessable at any time not later than 4 years after the end of the year of assessment in which the emoluments were received.

(3)The emoluments to which this subsection applies are emoluments within the meaning of section 112(2), including any payments chargeable to tax by virtue of section 123 and any sums which by virtue of Chapter 3 of Part 5 are to be treated as perquisites of a person's office or employment, being emoluments, payments or sums other than those taken into account in an assessment to income tax for the year of assessment in which they are received and, for the purposes of subsection (2) -

(a)any such payment shall, notwithstanding anything in section 123(4), be treated as having been received at the time it was actually received, and

(b)any such sums which are not actually paid to that person shall be treated as having been received at the time when the relevant expenses were incurred or are treated for the purposes of Chapter 3 of Part 5 as having been incurred.

(4)Nothing in this section affects the operation of section 811, 811A, 811C or 811D."

Section 990 of the TCA 1997 (as in force from 21 March 2016 to 31 December 2018)

"Estimation of tax due for year

(1)Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as "other officer") has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respective income tax months comprised in any year of assessment was greater than the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer -

(a) may make an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and

(b) may serve notice on the employer specifying -

(i) the total amount of tax so estimated,

(ii) the total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and

(iii) the balance of tax remaining unpaid.

(1A)(a)Where -

(i) a notice is served on an employer under subsection (1) in relation to a year of assessment (being the year of assessment 2000-2001 or a subsequent year of assessment), and

(ii) prior to the service of the notice, the employer had failed to submit to the Collector-General, in relation to that year of assessment, the return required by Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001),

then, if, within 14 days after the service of the notice, the employer -

(I) sends that return to the Collector-General, and

(II) pays any balance of tax remaining unpaid for the year of assessment in accordance with the return, together with any interest and costs which may have been incurred in connection with the default,

the notice may, subject to paragraph (c), stand discharged and any excess of tax which may have been paid may be repaid.

(b) If, on expiration of the period referred to in paragraph (a), the employer has not complied with subparagraphs (I) and (II) of paragraph (a), the balance of tax remaining unpaid as specified in the notice shall become due and recoverable in the like manner as if the balance of tax had been charged on the employer under Schedule E.

(c) Where action for the recovery of tax specified in a notice under subsection (1) has been taken, being action by means of the institution of proceedings in any court or the issue of a certificate under section 960L, so much of paragraph (a) as relates to the discharge of the notice shall not, unless the Collector-General otherwise directs, apply in relation to that notice until that action has been completed.

(d) Where -

(i) the amount of tax estimated in a notice under subsection (1) is remitted and the return required by Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) is not submitted, or

(ii) the inspector or other officer has reason to believe that the amount estimated in the notice is less than the amount which the employer was liable to remit,

the inspector or other officer may amend the amount so estimated by increasing it and serve notice on the employer concerned of the revised amount estimated and such notice shall supersede any previous notice issued under subsection (1).

(2) Where a notice is served on an employer under this section and prior to such service the employer had sent to the Collector-General the return required by Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) -

(a) an employer aggrieved by a notice served under this section on that employer may appeal the notice to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of that notice;

(b) on the expiration of that period, if no notice of appeal is received or, if notice of appeal is received, on determination of the appeal by agreement or otherwise, the balance of tax remaining unpaid as specified in the notice or the amended tax as determined in relation to the appeal shall become due

and be recoverable in the like manner and by the like proceedings as if the balance of tax or the amended tax had been charged on the employer under Schedule E.

(3) A notice given by the inspector or other officer under this section may extend to 2 or more years of assessment."

Witness Evidence

27. The following is a summary of the witness evidence adduced to the Commissioner.

Witness Evidence – [redacted]

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

29. The Director stated that in 2015 he started the Restaurant business together with Mr X. He stated that Mr X was paid a salary for his work at the Restaurant and that he had the skills to run the business. The Appellant stated that did not take any salary from the Restaurant.

30. He stated that the Appellant provided [redacted] services to the Restaurant in compliance with health and safety rules which require that [redacted]. The Appellant was the only one providing [redacted] services to the Restaurant.

31. The Director stated that, in 2015 when the Restaurant was formed, he and Mr X injected €40,000 into it and that they also provided a personal guarantee for a €60,000 bank loan which the Restaurant drew down.

32. He stated that in 2017, due to various circumstances, he and Mr X entered into a mediated agreement whereby it was negotiated that the Director would be released from the personal guarantee, his director's loan with the Restaurant would be repaid and that €60,000 plus VAT would be paid to the Appellant on the production of two invoices from the Appellant to the Restaurant.

33. The Director stated that the payment of €60,000 did not relate to the purchase of his shares in the Restaurant by Mr X. Rather, the Director stated that, in circumstances where there had not been an agreement in place between the Appellant and the Restaurant for the [redacted] services rendered between 2015 and 2017, he had calculated the value of the work which the Appellant had performed for the Restaurant as being €60,000 plus VAT.

34. The Director stated that the work which had been carried out by the Appellant for the Restaurant had not been tracked through the till system which the Appellant operates and, instead, the work had been documented in docket books which would have been updated when deliveries were made by the Appellant to the Restaurant. He stated that the Appellant had not invoiced the Restaurant for the services provided on an ongoing basis.

35. The Director stated that the Appellant also had other corporate customers to whom it provided [redacted] services. He stated that the Appellant invoiced those corporate customers at the end of each month and that the credit payment terms for corporate customers were within 30 days, however many corporate customers did not pay within those terms and were late with their payments. Payments from corporate customers were made by card transactions and / or by direct lodgement into the Appellant's bank account.

36. He stated that the till tracking system in use by the Appellant reflected walk-in retail customers who required [redacted] services and some, but not all, corporate customer work. Other corporate customers, he stated, operated by way of docket books and were not recorded on the till tracking system The till tracking system, he stated, was not a cash receipt or sales tracking system [redacted]. The till tracking system did, however, allocate pricing against individual items. He stated that the till tracking system was a dynamic system which could be changed, if necessary, as [redacted] was processed.

37. The Director agreed with an analysis of the till tracking system for 2017 which had been carried out on behalf of the Appellant and with an analysis of the Appellant's bank account for 2017 which had been carried out by the Respondent which showed:

    37.1. Sales recorded on Appellant's till tracking system of €219,477.08;

    37.2. Total sales lodgements to Appellant's bank account of €297,846.10; and

    37.3. Direct customer lodgements to the Appellant's bank account of €108,324.37.

38. The Director denied that there had been any suppression of sales in the Company at all and denied that there had been suppression of sales by the Company in 2017 in the amount of €29,935 as alleged by the Respondent.

39. He stated that, in his opinion, any difference between the till tracking system receipt amount and the lodgement amount to the bank account for 2017 can only be explained by delayed payments from corporate customers.

40. The Director stated that he had become aware that the Restaurant had encountered some difficulties in relation to a repayment claim it had made relating to the VAT payment it had made to the Appellant on foot of the mediated agreement. He stated that the Restaurant's accountant had sent him correspondence from the Respondent which had deemed the €60,000 payment from the Restaurant to the Appellant as a payment to him personally and that the Respondent had deemed that taxes were owed by the Restaurant on foot of that payment. He stated that nothing had ever been put to him by the Respondent during the course of the audit which suggested that any wrongdoing had been carried out by him.

Submissions

Appellant

41. The following is a summary of the submissions made to the Commissioner on behalf of the Appellant.

42. The Appellant raised a preliminary objection to the contested assessments such that it was submitted that the Respondent Officer did not approach the raising of the contested assessments with an open mind and that, prior to engaging with the Appellant and raising the assessments, he had closed his mind to the explanation which the Appellant gave in relation to the disputed payments. Therefore, the Appellant submitted, the contested assessments were not valid on the basis that the Respondent Officer had fettered his discretion by disregarding matters that he was bound in law to consider before adjudging that an assessment arose in his reasonable and / or best belief.

43. The Appellant submitted that, between 2015 and 2017, it had a trading relationship with the Restaurant such that it provided [redacted] services to the Restaurant which were not contemporaneously invoiced to the Restaurant. The [redacted] services provided by the Appellant to the Restaurant were, it was submitted, recorded in a docket book and were not recorded through the till tracking system which the Appellant also operated. The docket book which recorded the [redacted] services from the Appellant to the Restaurant was not available for submission to the Commissioner.

44. The Appellant submitted that the Director’s relationship with Mr X broke down to such an extent that the mediated Compromise Agreement and Share Purchase Agreement were entered into. This, it was submitted, was to give effect to the Director's exit from the Restaurant.

45. It was submitted that part of the agreement reached was such that a reconciliation of debits and credits between the Appellant and the Restaurant was undertaken for the [redacted] services provided. As a result, it was submitted, the Appellant issued invoices in the amount of €60,000 plus VAT at 23% of €13,800 to the Restaurant. The Appellant submitted that it treated the amounts received from the Restaurant in the correct manner and returned VAT and Corporation Tax to the Respondent. In oral submissions to the Commissioner during the oral hearing, Counsel on behalf of the Appellant confirmed to the Commissioner, and agreed with the Respondent, that at no point was the Restaurant recorded as a debtor in the Appellant's financial statements.

46. The Appellant denied that the €60,000 plus VAT of €13,800 received by it from the Restaurant were for the purpose of purchasing the Director's shares in the Restaurant. The Appellant submitted that Mr X purchased the Director's shares in the Restaurant by way of a payment of €50 in cash.

47. The Appellant denied that there had been a suppression of its sales for 2017 and pointed to a provision in its financial statement for 2017 wherein there is a provision for debtors.

48. In pre-hearing submissions, the Appellant submitted that the raising of alternative assessments by the Respondent raised an issue in relation to time limits for the Respondent to raise the contested assessments, however this ground of appeal was withdrawn at the oral hearing.

Respondent

49. The following is a summary of the submissions made to the Commissioner on behalf of the Respondent.

50. The Respondent submitted that the Commissioner does not have jurisdiction to determine the validity of the contested assessments and that the Commissioner's jurisdiction is limited to determining the correct amount of tax, if any, relating to the contested assessments.

51. The Respondent submitted that both the Compromise Agreement and the Share Purchase Agreement establish that the invoices issued by the Appellant were part of the consideration for the purchase by Mr X of the Director's shares in the Restaurant.

52. The Respondent submitted that during the course of the audit carried out on the Appellant and the Director, it had been put to the Director that the payment of €60,000 plus VAT at 23% from the Restaurant to the Appellant was consideration received by the Director for the sale of his shares in the Restaurant to Mr X.

53. The Respondent submitted that, as it considered the €60,000 payment received by the Appellant from the Restaurant was received on behalf of the Director in relation to the sale of his shares in the Restaurant to Mr X, it had excluded the payment of €60,000 received from the Appellant's income for 2017.

54. The Respondent submitted that, based on an analysis of the Appellant's till tracking system and bank accounts, there had been a suppression of sales reported in the Appellant's annual Corporation Tax return for 2017. The Respondent submitted that the analysis had shown the following:

    54.1. Sales recorded on Appellant's till tracking system of €219,477;

    54.2. Total sales lodgements to Appellant's bank account of €297,846; and

    54.3. Direct customer lodgements to the Appellant's bank account of €108,324.

55. The Respondent submitted that, excluding the direct customer lodgements to the Appellant's bank account which did not go through the till tracking system, the sales lodgements to the Appellant's bank account which did go through the till tracking system totalled €189,522 which comprised €45,211 in cash lodgements and €144,311 in credit / debit card receipts. In circumstances where the Appellant used a dual system for recording transactions, that is to say a till tracking system and a docket book system, the Respondent submitted that the till tracking system indicated sales of €219,477. The Respondent submitted that this left a shortfall of €29,955 which had been unaccounted for by the Appellant.

56. The Respondent submitted that, in circumstances where the Director had confirmed that the Director was the person in charge of the Appellant's monies and accounts, it was reasonable to assume that the shortfall in sales of €29,955 was untaxed wages in the Director's hands. The Respondent submitted that the Appellant had not submitted any evidence which explains where the shortfall may have stemmed from and, in the circumstances, the Notice of Assessment to PAYE / PRSI / USC raised on the Appellant was correct.

Material Facts

Uncontested material facts

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

57.1. The Appellant was incorporated in 1995 and provides [redacted] services to various customers, both individual and corporate.

57.2. The Director has been director of the Appellant since 2006. The Appellant's Secretary [redacted] who was also a 10% shareholder in the Appellant.

57.3. During 2017, the Director was also a director, company Secretary and 50% shareholder in the Restaurant.

57.4. The Restaurant was incorporated in 2012 and had a primary business of the operation of [redacted] restaurant. Mr X was also a director and 50% shareholder in the Restaurant during 2017.

57.5. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.

57.6. In 2017 the Appellant was a director and shareholder in two separate companies which are not relevant to this appeal.

57.7. A dispute arose between the Appellant and Mr X in relation to the Restaurant and on 20 June 2017, the Appellant and Mr X entered into a mediated agreement entitled "*Compromise Agreement*" which provided that the Director would sell his shareholding and interest in the Restaurant to Mr X in consideration for, *inter alia*, the Director's companies submitting two invoices to the Restaurant totalling €60,000.

57.8. On 29 June 2017, the Appellant as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided that the Director would sell his shares in the Restaurant to Mr X in consideration for the payment of €50. The terms of completion of the purchase of the Director's shares included a term that the Restaurant would pay the Appellant €60,000 *plus VAT at 23%* as management fees for the period from the 1st November 2015 to the 28th of June 2017.

57.9. On 30 May 2017 the Appellant raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Appellant raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged into the Appellant's bank account by the Restaurant.

57.10. Between 30 June 2017 and 7 July 2017, the Appellant transferred six payments of €10,000 each to the Director's joint bank account with [redacted]

totalling €60,000. The six payments were recorded in the Director's director's loan account in the Appellant's financial statement.

57.11. The Restaurant submitted a claim for a refund of VAT in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.

57.12. On 15 March 2019 the Respondent commenced an audit into the Appellant's tax affairs. Following completion of the audit the Respondent raised a Notice of Estimation to PAYE / PRSI / USC on 13 December 2019 in the amount of €14,658.15 on the basis that it had treated the amount of €29,955 (inclusive of VAT in the amount of €3,560) which did not appear elsewhere in the books and records of the Appellant, as being a payment from the Appellant to the person in control of its books, records and cash, that is to say the Director.

57.13. The Respondent excluded the payment of €60,000 received by the Appellant from the Restaurant when calculating the Appellant's net income for 2017 on the basis that the payment was, in fact, a payment from the Restaurant to the Director for the purchase of the Director's shares in the Restaurant.

57.14. On 14 December 2019, the Respondent raised a Notice of Amended Assessment to Corporation Tax on the Appellant reflecting €26,374 in unrecorded sales and excluding the €60,000 payment received from the Restaurant. This resulted in the Appellant's assessed liability to Corporation Tax for 2017 being -€1,480, reflecting a repayment to the Appellant.

57.15. On 10 January 2023 the Appellant submitted a Notice of Appeal to the Commission appealing both the Notice of Assessment to CGT and the Notice of Amended Assessment to Income Tax.

Disputed material facts

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

58.1. Whether the Appellant provided management and consultancy services to the Restaurant;

58.2. Whether the Appellant provided [redacted] services to the Restaurant;

58.3. Whether the 2017 invoices related to [redacted] services provided by the Appellant to the Restaurant; and

58.4. Whether there had been a suppression of sales receipts by the Appellant in 2017.

59. 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".*

60. The standard of proof applicable in an appeal to an Appeal Commissioner is the balance of probabilities.

Whether the Appellant provided management and consultancy services to the Restaurant:

61. In direct evidence to the Commissioner, the Director stated that the Appellant provided [redacted] services to the Restaurant. He described the nature of the services provided as being to ensure compliance with health and safety rules [redacted].

62. On cross examination, when asked about whether the Appellant provided management and consultancy services to the Restaurant, the Director stated:

> "*It was – maybe it was just an error that we put down "management fees" on it instead but the VAT was paid and it would have been claimed, there would have been no loss to the – there was no loss to anyone in a sense.*"[1]

63. The Appellant has not provided any evidence, whether oral or documentary which tends to establish that it provided management and consultancy services to the Restaurant. In addition, the Commissioner notes that Counsel on behalf of the Appellant submitted, and agreed with the Respondent, that at no point was the Restaurant recorded as a debtor in the Appellant's financial statements.

[1] Transcript page 87, lines 2 to 6.

64. As a result of the above, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that it provided management and consultancy services to the Restaurant.

65. The Commissioner therefore finds as a material fact that the Appellant did not provide management and consultancy services to the Restaurant.

Whether the Appellant provided [redacted] services to the Restaurant:

66. The Director has given direct evidence to the Commissioner that the Appellant provided [redacted] services to the Restaurant. He described the nature of the services provided as being to ensure compliance with health and safety rules [redacted]

67. The Director also stated that the provision of the [redacted] services by the Appellant to the Restaurant was recorded in docket books and was not recorded through the Appellant's till tracking system. The Appellant has not submitted the docket books which it claims the [redacted] services were recorded in, nor has the Appellant submitted any other documentary evidence in relation to the [redacted] services which it claims were provided to the Restaurant in the period from late 2015 when the Restaurant was first registered with the Companies Registration Office until June 2017.

68. The invoices raised by the Appellant were raised utilising a VAT rate of 23%. The Commissioner notes that [redacted] services are charged at the reduced rate of VAT as categorised in Schedule 3 paragraph 20(1)(a) of the Value Added Tax Consolidation Act 2010, the relevant rate being 13.5%. The Director, in cross examination, opined that the VAT rate charged in the invoices was an error.

69. In addition, the Commissioner notes that there was no provision in the Appellant's financial statements which recorded the Restaurant as a debtor.

70. As a result of the above, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that it provided [redacted] services to the Restaurant. This is on the basis that:

    70.1. The Appellant has not provided any documentary evidence relating to the claimed [redacted] services from it to the Restaurant;

    70.2. The VAT rate charged on the invoices raised by the Appellant to the Restaurant does not relate to [redacted] services;

70.3. There was no provision in the Appellant's financial statements which recorded the Restaurant as a debtor.

71. The Commissioner therefore finds as a material fact that the Appellant did not provide [redacted] services to the Restaurant.

Whether the 2017 invoices related to [redacted] *services provided by the Company to the Restaurant:*

72. The Appellant raised two invoices on the Restaurant totalling €60,000 plus VAT at 23% of €13,800 totalling €73,800. The first invoice was dated 30 May 2017 in the amount of €40,000 plus VAT at 23% of €9,200 totalling €49,200. The details of the invoice state that it was for "*Management and Consulting fees due for the period 10th November 2015 to 31st December 2016*".

73. The second invoice was dated 29 June 2017 in the amount of €20,000 plus VAT at 23% of €4,600 totalling €24,600. The details of the invoice state that it was for "*Management and Consulting fees due for the period 1st January 2017 to the 29th of June 2017*".

74. In direct evidence to the Commissioner, the Director stated that the invoices were raised in relation to [redacted] services which the Appellant had provided to the Restaurant. The Commissioner has already found as material facts that the Appellant did not provide management and consultancy services to the Restaurant and that the Appellant did not provide [redacted] services to the Restaurant.

75. In considering this material fact, the Commissioner has had regard to the Compromise Agreement and to the Share Purchase Agreement entered into by the Director.

76. The Compromise Agreement provided that the Director would sell his shareholding and interest in the Restaurant to Mr X in consideration for, *inter alia*, the Director's companies submitting two invoices to the Restaurant totalling €60,000.

77. The Share Purchase Agreement provided that the Director would sell his shares in the Restaurant to Mr X in consideration for the payment of €50. The terms of completion of the purchase of the Director's shares included a term that the Restaurant would pay the Appellant €60,000 *plus VAT at 23%* as management fees for the period from the 1st November 2015 to the 28th of June 2017.

78. The Commissioner notes that neither the Compromise Agreement nor the Share Purchase Agreement make reference to the payment of the €60,000 payment by the Restaurant being for [redacted] services. The Compromise Agreement does not specify

what the payment relates to or to what entity the payment would be made. The Share Purchase Agreement states that the €60,000 payment would include a VAT element and would relate to management fees.

79. Having already found as material facts that the Appellant did not provide management consultancy or [redacted] services to the Restaurant and taking into consideration the provisions of the Compromise Agreement and the Share Purchase Agreement, the Commissioner considers that the Appellant has not discharged the burden of proof to establish that the 2017 invoices related to [redacted] services provided by it to the Restaurant.

80. As a result of the above, the Commissioner finds as a material fact that the 2017 invoices did not relate to [redacted] services provided by the Appellant to the Restaurant.

Whether there had been a suppression of sales receipts by the Appellant in 2017:

81. On the one hand, the Respondent has submitted that there was a suppression of sales receipts by the Appellant in 2017. This is based on an analysis of the Appellant's till tracking system for 2017 and the lodgement made to Appellant's bank account. On the other hand, the Appellant denies that there has been any suppression of sales.

82. In his evidence to the Commissioner, the Director stated that the Appellant's till tracking system was not an income tracking system and stated that, whilst it tracked the receipt of work and allocated pricing to that work, it did not reflect the receipt of payments from customers. The Director gave evidence that some corporate customers do not settle their outstanding invoices within the 30 day credit period extended to them. In addition, it was submitted that corporate customer work registered on the till tracking system in November and/or December of a particular year would not necessarily be due for payment until the following year. As a result, it was submitted that some work which was registered on the till tracking system would not be paid until the following year. In support of this claim the Appellant identified the following transactions:

    82.1. A payment from "[redacted]" of €3,572.41 received on 9 January 20217 which he identified as relating to an invoice issued by the Appellant in November or December 2016;

    82.2. A payment from [redacted]" of €4,124.19 received on 16 January 2017 which he identified as relating to an invoice issued by the Appellant in November or December 2016;

82.3. A payment from "[redacted]" of €4,460.35 received on 25 January 2017 which he identified as relating to an invoice issued by the Appellant in November or December 2016.

83. The Commissioner has considered the submissions on behalf of the Appellant, the documentation received in relation to payments received in 2017, along with the evidence adduced by the Director and accepts, on the balance of probabilities, that some of the work carried out by the Appellant in November and December 2017 and which was registered on the Appellant's till tracking system would not have been paid until 2018. In relation to this, the Commissioner has had regard to the analysis of the lodgements into the Appellant's bank account in January 2017 and notes that a total of €24,640.78 was received by the Appellant in the form of direct lodgements from corporate customers. The Commissioner accepts, on the balance of probabilities that these payments related to work carried out in late November / December of 2016. The Commissioner further accepts that the same pattern of payments from corporate customers would have occurred throughout 2017 and that corporate work registered on the Appellant's till tracking system in late November / December would not, on the balance of probabilities, have been paid until January 2018.

84. As a result of the above, the Commissioner finds as a material fact that there was no suppression of sales by the Appellant in 2017 and that the discrepancy identified by the Respondent may be explained by the credit terms of 30 days extended by the Appellant to its corporate customers.

Commissioner's findings of material fact:

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

85.1. The Appellant was incorporated in 1995 and provides [redacted] services to various customers, both individual and corporate.

85.2. The Director has been director of the Appellant since 2006. The Appellant's Secretary was [redacted] who was also a 10% shareholder in the Appellant.

85.3. During 2017, the Director was also a director, company Secretary and 50% shareholder in the Restaurant.

85.4. The Restaurant was incorporated in 2012 and had a primary business of the operation of an [redacted] restaurant. Mr X was also a director and 50% shareholder in the Restaurant during 2017.

85.5. The Restaurant had 100 fully paid up and issued shares with the Appellant owning 50 shares and Mr X owning 50 shares.

85.6. In 2017 the Appellant was a director and shareholder in two separate companies which are not relevant to this appeal.

85.7. A dispute arose between the Appellant and Mr X in relation to the Restaurant and on 20 June 2017, the Appellant and Mr X entered into a mediated agreement entitled "*Compromise Agreement*" which provided that the Director would sell his shareholding and interest in the Restaurant to Mr X in consideration for, *inter alia*, the Director's companies submitting two invoices to the Restaurant totalling €60,000.

85.8. On 29 June 2017, the Appellant as Vendor and Mr X as Purchaser entered into an agreement entitled "Share Purchase Agreement" which provided that the Director would sell his shares in the Restaurant to Mr X in consideration for the payment of €50. The terms of completion of the purchase of the Director's shares included a term that the Restaurant would pay the Appellant €60,000 *plus VAT at 23%* as management fees for the period from the 1st November 2015 to the 28th of June 2017.

85.9. On 30 May 2017 the Appellant raised an invoice on the Restaurant in the amount of €40,000 plus Value Added Tax (hereinafter "VAT") of €9,200 totalling €49,200. In addition, on 29 June 2017 the Appellant raised an invoice on the Restaurant in the amount of €20,000 plus VAT of €4,600 totalling €24,600. On 29 June 2017 €73,800 was lodged into the Appellant's bank account by the Restaurant.

85.10. Between 30 June 2017 and 7 July 2017, the Appellant transferred six payments of €10,000 each to the Director's joint bank account with [redacted] totalling €60,000. The six payments were recorded in the Director's director's loan account in the Appellant's financial statement.

85.11. The Restaurant submitted a claim for a refund of VAT in relation to the invoices raised by the Company. On foot of this, the Respondent investigated the claim and, during the course of the investigation, Mr X supplied the Respondent with the Compromise Agreement and the Share Purchase Agreement.

85.12. On 15 March 2019 the Respondent commenced an audit into the Appellant's tax affairs. Following completion of the audit the Respondent raised a Notice of Estimation to PAYE / PRSI / USC which was raised by the Respondent on 13 December 2019 in the amount of €14,658.15 on the basis that it had treated the

amount of €29,955 (inclusive of VAT in the amount of €3,560) which did not appear elsewhere in the books and records of the Appellant, as being a payment from the Appellant to the person in control of its books, records and cash, that is to say the Director.

85.13. The Respondent excluded the payment of €60,000 received by the Appellant from the Restaurant when calculating the Appellant's net income for 2017 on the basis that the payment was, in fact, a payment from the Restaurant to the Director for the purchase of the Director's shares in the Restaurant.

85.14. On 14 December 2019, the Respondent raised a Notice of Amended Assessment to Corporation Tax on the Appellant reflecting €26,374 in unrecorded sales and excluding the €60,000 payment received from the Restaurant. This resulted in the Appellant's assessed liability to Corporation Tax for 2017 being -€1,480, reflecting a repayment to the Appellant.

85.15. On 10 January 2023 the Appellant submitted a Notice of Appeal to the Commission appealing both the Notice of Assessment to CGT and the Notice of Amended Assessment to Income Tax.

85.16. The Appellant did not provide management and consultancy services to the Restaurant.

85.17. The Appellant did not provide [redacted] services to the Restaurant.

85.18. The 2017 invoices did not relate to [redacted] services provided by the Appellant to the Restaurant.

85.19. There was no suppression of sales by the Appellant in 2017.

Analysis

Preliminary Objection

86. The Appellant has submitted a preliminary objection to the Commissioner which challenged the validity of the disputed assessments.

87. Counsel on behalf of the Appellant made submissions at the oral hearing in relation to an assertion that the Respondent's officer had approached the raising of the disputed assessments with a closed mind and had therefore acted *ultra vires* his powers.

88. 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.

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

> *"The issue is, first and foremost, one of statutory construction. The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation."*[2]

90. He went on to state:

> "*…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 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.*"[3]

91. In his conclusion, Murray J stated:

> "*The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933,934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and*

[2] At paragraph 20
[3] At paragraph 64

see if the assessment has been properly prepared in accordance with those statutes…"[4]

92. Therefore, The Commissioner has no jurisdiction to determine the validity of assessments raised by the Respondent or whether an officer of the Respondent has acted *ultra vires* his powers. The role of the Commissioner is restricted to focusing on the assessments and the charge to tax. As a result, the Commissioner can and must focus on what the correct charge to tax in this appeal is.

93. In its Notice of Appeal the Appellant had claimed that the Respondent was out of time to raise the disputed assessments. The Commissioner notes that, at the oral hearing, Counsel on behalf of the Appellant confirmed that this element of the Appellant's claim was not being pursued. As a result, the Commissioner makes no comment on this matter.

Substantive appeal

94. As previously noted, *Menolly Homes* established that the burden of proof in tax appeals is on the taxpayer to establish that the relevant tax is not payable.

€60,000 payment to Appellant by Restaurant:

95. The Commissioner has already found as a material fact that the Appellant did not provide services, whether [redacted] or management and consultancy, to the Restaurant. In addition, the Commissioner has found as a material fact that the 2017 invoices did not relate to the provision of [redacted] services by the Appellant to the Restaurant.

96. As noted earlier in this determination, the provisions of the Compromise Agreement provide that the Director would sell his shareholding and interest in the Restaurant to Mr X in consideration of, *inter alia*, the payment by the Restaurant of two invoices in the total amount of €60,000 submitted by the Director's companies.

97. The provisions of the Share Purchase Agreement provide that the Director would sell his shares in the Restaurant to Mr X in consideration of, *inter alia*, the payment to the Appellant by the Restaurant of the sum of €60,000 plus VAT at 23% as management fees for the period from 1 November 2015 to 28 June 2017.

98. As determined in appeal 90/23, the Director did not provide any alternative explanation for the payment of €60,000 by the Restaurant to the Appellant which tends to establish that the payment was other than suggested by the Compromise Agreement and the Share

[4] At paragraph 76

Purchase Agreement both of which link the payment with the sale of the Director's shares in the Restaurant to Mr X. The same must apply to the Appellant in this appeal.

99. It therefore follows that the €60,000 received by the Appellant from the Restaurant was not income on the part of the Appellant, rather it was a payment received by the Appellant on behalf of the Director. As a result, the Commissioner must find that the Respondent was correct in excluding the amount of €60,000 from the Appellant's income in 2017 for the purposes of the calculation of income tax.

PAYE / PRSI / USC

100. The Commissioner has already found as a material fact that there was no suppression of sales, in the manner alleged by the Respondent, by the Appellant in 2017 in the amount of €29,955. It must therefore follow that the Director, as person in charge of the Appellant's monies and accounts, could not have been in receipt of the amount of €29,955 in suppressed sales.

101. As a result, the Commissioner finds that the Notice of Estimation to PAYE / PRSI / USC raised by the Respondent shall not stand.

Determination

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

    102.1. The Commissioner determines that the Notice of Estimation to PAYE / PRSI / USC raised by the Respondent on 13 December 2022 shall be reduced to nil.

    102.2. The Commissioner determines that the Notice of Amended Assessment to Corporation Tax raised by the Respondent on 14 December 2022 shall stand.

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

Notification

104. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ is being sent via digital email communication **only** (unless the Appellant opted for postal communication and

communicated that option to the Commission). The parties shall not receive any other notification of this determination by any other methods of communication.

Appeal

105. 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 April 2024