AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between 85TACD2024

[redacted]

Appellant

and

The Revenue Commissioners

Respondent

Determination

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Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant"), in relation to the following matters:

   1.1. A Notice of Amended Assessment to Corporation Tax raised by the Revenue Commissioners ("the Respondent") on 27 December 2017, for the period ending 31 December 2012 (the "CT Assessment"), in the sum of €18,615;

   1.2. A Notice of Assessment to Dividend Withholding Tax ("DWT") raised by the Respondent on 22 December 2017, for the period ending 31 December 2012 (the "DWT Assessment"), in the sum of €29,784, and

   1.3. A Notice of Estimation of Amounts Due Employer PAYE/PRSI ("PREM") raised by the Respondent on 10 December 2019, in respect of the period ending 31 December 2012 ("the Notice of Estimation"), in the sum of €83,023.

2. The appeal proceeded to a hearing over three days, on 22 November 2023, 23 November 2023 and 19 December 2023. The Appellant was represented by junior counsel and the Respondent was represented by two senior counsel. In addition to submissions from the parties' representatives, the Commissioner heard sworn oral testimony from the Appellant's witness [redacted] ("the Appellant's witness").

3. The appeal proceeded in an unorthodox manner, whereby counsel for the Appellant confirmed that there were no witnesses being called to give evidence on behalf of the Appellant and that the appeal was proceeding on the basis of legal submissions only. However, following the conclusion of legal submissions being made by counsel for the Appellant, counsel for the Appellant stated that the Appellant's witness would give evidence. This announcement was subsequent to lengthy submissions being made by counsel for the Appellant as to the admissibility of the documentary evidence submitted in the appeal and there being no requirement for a witness to be called to give evidence in relation to the Appellant's appeal. The Commissioner sets out in greater detail hereunder at "Preliminary matters", the methodology adopted by the Appellant in relation to its appeal.

Background

4. During 2012, the Directors of the Appellant were the Appellant's witness and ██████████ ████. The Appellant's registered address was at ████████████████████ The Appellant stated that its principal business activity was taxation services.

5. The Appellant submitted that the ████████████████████████ was established pursuant to a Settlement dated **3 December 2012** between ██████████████████████████████ ██████ ("the Settlor") and ████████████████████████████ as Trustee (the "Original Trustee"). The details of the stated Employment Benefit Trust ("EBT") are set out below as follows:

The ████████████████████████ Employment Benefit Trust 2012

Date of Deed of Settlement	3 December 2021
Original Name of Trust	██████████████████████████
Settlor	████████████████████████████████████
Appointer	████████████████████████████████████
Protector	████████████████████████████████████
Date of Payment made to Settlor	21 December 2012
Date of Deed of Appointment	21 December 2012
New Name on Trust New Protector New Appointer	██ █████████ ███████████████████████████████ ██████████████████████████

6. The Appellant submitted that by way of correspondence dated **14 December 2012**, █████████████████████████████████████ offered the Appellant the opportunity to acquire the stated EBT, which it was "*in the process of funding*" to the sum of £121,000.

7. The document entitled “Deed of Settlement” dated 3 December 2012 between ████████████████, (“the Settlor”) and ████████████ ███ as Trustee (the “Original Trustee”) states that the “Trust Fund” means the property in the Second Schedule. At “The Second Schedule” it states *“[t]he sum of Ten Pounds Sterling*”.[1]

8. The Appellant stated that in **December 2012**, it entered into an agreement with the Settlor of the pre-existing and pre-funded EBT, whereby the sum of £123,420 (€148,923) was paid to the Settlor by the Appellant in order to acquire the EBT. The Appellant contended that the purpose of the EBT was to reward and incentivise employees.

9. The Appellant contended that the Settlor of the EBT was a third party entity that settled and fully constituted the EBT, and which was unconnected to the Appellant at all times. In return for a payment to the Settlor of the EBT, the Trustee agreed to change the name of the EBT to “*The ████████████ Employee Benefit Trust 2012*”, to narrow down the then existing class of potential beneficiaries of the EBT to remove potential beneficiaries other than employees of the Appellant, as defined by the Deed of Appointment, and to change the Protector of the EBT to the Appellant’s witness.

10. The Appellant submitted that on **17 December 2012**, it was furnished with a loan facility offer from ████████████ in the sum of £121,000 which on **18 December 2012**, the Appellant accepted.

11. Furthermore, it is contended for by the Appellant that on **21 December 2012** the Trustees of the EBT agreed to advance a loan to the Appellant’s witness in the sum of £121,000. The stated purpose of this loan was to enable the Appellant’s witness to repay on behalf of the Appellant, the loan it acquired from ████████████, in the sum of £121,000.

12. Following the above referenced estimate and assessments being raised by the Respondent for the year 2012, the Appellant duly appealed to the Commission.

Legislation and Guidelines

13. The legislation relevant to this appeal is as follows:-

14. Section 112 TCA 1997, Basis of assessment, persons chargeable and extent of charge, provides:-

[1] Appellant Book of Documentation, page 63

(1) Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

(2)(a) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.

15. Section 983 TCA 1997, Collection and recovery of income tax on certain emoluments (PAYE system), *inter alia* provides that:-

"*emoluments*" *means anything assessable to income tax under Schedule E, and references to payments of emoluments include references to payments on account of emoluments;*

16. Section 436A TCA 1997, Certain Settlements made by close companies, *inter alia* provides that:-

(1)(a) In this section—

"*member*", *in relation to a company, includes a participator in the company other than a loan creditor of the company;*

……………

"*relevant settlement*", *in relation to a close company, means a settlement made by, or on behalf of, the close company other than a settlement which—*

(i) is made expressly for the exclusive benefit of one or more than one person, who is neither a member of the company nor a relative of such a member, and

(ii) does not allow at any time for the possibility of providing any benefit to such member or relative;

"*settlement*" *has the same meaning as in section 10 and* "*settled*" *shall be read accordingly.*

(2) Where any amount, in money or money's worth, is settled by, or on behalf of a close company on or after 21 January 2011 in connection with a relevant

settlement, that amount shall, for the purposes of the Tax Acts, be deemed to be a distribution by the company to the trustees of the settlement.

17. Section 10 TCA 1997, Connected persons, *inter alia* provides that:-

(1) *"settlement" includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property*.

18. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides that:-

(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;

………………..

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

19. Section 81A TCA 1997, Restriction of deductions for employee benefit contributions, *inter alia* provides that:

(1)(a) In this section -

"*employee benefit scheme*" *means a trust, scheme or other arrangement for the benefit of persons who are employees of an employer;*

……………………

(b) For the purposes of this section –

(i) an employee benefit contribution is made if, as a result of any act or omission—

(I) any assets are held, or may be used, under an employee benefit scheme, or

(II) there is an increase in the total value of assets that are so held or may be so used (or a reduction in any liabilities under an employee benefit scheme).

(2)(a) *This section applies where -*

(i) *a calculation is made of the amount of a person's profits or gains to be charged to tax under Case I or II of Schedule D for a chargeable period beginning on or after 3 February 2005, and*

(ii) *a deduction would, but for this section, be allowed by the Tax Acts for that period in respect of employee benefit contributions made, or to be made, by that person (referred to in this section as the "employer").*

20. Section 172K TCA 1997, Returns, payment and collection of dividend withholding tax, *inter alia* provides that:-

(1) *Any person (in this section referred to as "*the accountable person*"), being a company resident in the State which makes, or an authorised withholding agent who is treated under section 172H as making, any relevant distributions to specified persons in any month shall, within 14 days of the end of that month, make a return to the Collector-General which shall contain details of—*

21. Section 433 TCA 1997, Meaning of "*participator*", "*associate*", "*director*" and "*loan creditor*" *inter alia* provides:-

(1) *For the purposes of this Part*, "*participator*", *in relation to any company, means a person having a share or interest in the capital or income of the company and, without prejudice to the generality of the foregoing, includes—*

(d) *any person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for such person's benefit.*

Submissions

Appellant's evidence

22. The Appellant's witness gave evidence on behalf of the Appellant. The Commissioner sets out hereunder, a summary of the evidence:-

22.1. The witness testified that he is a Director and employee of the Appellant and joined the Appellant in or around 2009. The witness gave evidence that a Deed of Settlement was made by [redacted], as the Settlor and [redacted] who are the original trustees, establishing an EBT called the [redacted]. The witness made reference to the beneficiaries of the EBT and the correspondence dated 14

December 2012 offering the EBT for sale. Reference was made to the second schedule of the Deed of Settlement and the sum of £10 and that the Settlor was in process of funding the EBT to the sum of £121,000.

22.2. Reference was made to the Deed of Appointment dated 21 December 2012 and the Instrument of Appointment and Retirement of Trustees dated 21 February 2013, whereby the [redacted] retires as trustee and [redacted] is appointed as a new trustee. The witness testified that in his role as a Protector of the Settlement, he gave his consent to the change of Trustee.

22.3. The witness testified that the Appellant borrowed £121,000 from [redacted] and the Appellant paid the Settlor for the EBT, which was [redacted], under the Deed of Appointment. The witness stated that he then applied to the Trustees for a loan of £121,000 and that he used that money to repay [redacted] on behalf of the Appellant, clearing the borrowing of the Appellant. The witness gave evidence that he had a credit on his Director's loan account with the Appellant, in the sum of £121,000.

22.4. Reference was made to a document entitled [redacted]. The witness testified that it is a screenshot sent by [redacted] showing the movements on the account for the EBT. The witness stated that it confirmed that the EBT had been funded by £121,000 and on 21 December 2012, when the Trustees granted the loan to the witness, the transfer went directly to [redacted]. The witness stated that it also showed that a payment was made on 14 December 2012 from [redacted] into this account, which was the funding of the EBT. Reference was made to the financial statements of the Appellant and to the MD 1 form completed by the witness in the name of [redacted].

22.5. The witness was cross examined by senior counsel for the Respondent. It was put to the witness that he did not see fit to put the record straight that the financial statements were not filed with the Companies Registration Office ("CRO"). It was put to the witness that there were ample reserves in the Appellant and that there was no need to borrow funds. The witness stated that there was no cash available to the Appellant. Reference was made to page 188 and it was put to the witness that the accounts disclose €800,000 available to the Appellant in cash. The witness testified that there are short term loans in place that the Appellant has

not been in a position to realise, hence there is no cash available to it in that sum, despite it being under in the financial accounts as current assets.

22.6. The witness testified that the Appellant is owned 100% by [redacted] [redacted], that in turn is 60% owned by the [redacted] Trust which is a discretionary trust, the beneficiaries of which include the witness and his wife and the remaining 40% is owned by the [redacted] Discretionary Trust which under the class of beneficiaries [redacted] is a beneficiary of. The Trustee of both is a company called [redacted] and the Director and shareholder of that is a man by the name of [redacted]

22.7. The witness testified that the he would have requested [redacted] [redacted] to retire in favour of [redacted]. Reference was made to the Director's loan account and the witness gave evidence that the loan amount that was due to the witness increased as he took a loan from the EBT to repay the loan from [redacted]. It was put to the witness that there was no pressing need to acquire an EBT. The witness stated that it was approaching the company's year-end and the Appellant wanted to do that. It was put to the witness that all of this facade was to create a scheme to claim a tax deduction and to pay money to the witness. The witness testified that there was a loan granted to him. The witness testified that there was a transaction done whereby his liability was taken over. It was put to the witness that he received €148,000 and the witness agreed. The witness agreed that the Appellant repaid him on 13 February 2013. It was put to the witness that there is no proof that anyone other than him benefitted from the EBT.

22.8. It was put to the witness that being Protector effectively gives him control over the EBT. The witness stated that the role of Protector is that of a fiduciary, so it is there as a backstop to ensure that the Trustee abides by the terms of the EBT and it has veto power over certain functions of the Trustee, but it certainly cannot control the Trust. It was put to the witness that the Settlor was never paid funds and that the Loan agreement with [redacted] is for the benefit of [redacted]. The witness testified that [redacted] [redacted] held funds on behalf of [redacted], the Settlor, and that he was informed by [redacted] that they were holding the funds on behalf of [redacted] by way of a telephone call. The witness stated that he did not need to have that information in writing.

Appellant's submissions

23. Submissions were made by counsel appearing on behalf of the Appellant. The Commissioner sets out hereunder, a summary of the submissions made at the hearing of the appeal, in addition to the Appellant's written submissions:-

    23.1. The use of alternative assessments is a matter that has not been considered or indeed approved by the Courts of Ireland. The alternate assessments give rise to a number of particular problems, not least that the Respondent cannot believe that both alternatives are true and as such, knew or ought to have known that at least one alternative is void ab initio.

    23.2. The payment to the Settlor of the EBT does not represent the payment of an emolument to which section 112 TCA 1997 applies. In order for a payment to arise from an office or employment, it must be made by reference to services rendered by the employee by virtue of the office or employment and it must be a reward for those services.

    23.3. The payment to the Settlor of the EBT merely facilitated a mechanism for providing future benefits to potential beneficiaries and was not the provision of benefits to beneficiaries in itself nor the payment of emoluments. The payment by the Appellant to the Settlor was not an emolument to the employees of the Appellant from their employment or arising "therefrom" within the meaning of section 112(1) TCA 1997.

    23.4. To be considered taxable as earnings within the meaning of section 112 TCA 1997, a payment must come from an employment. Reference was made to the decisions in *J D Dolan (Inspector of Taxes) v "K" National School Teacher* I ITR 656 *("Dolan v K")* and also *EP O'Coindealbhain (Inspector of Taxes) v Gannon* III ITR 484. The facts herein cannot be considered a salary or emoluments or benefit due to an employee nor the "*application*" of any salary or emoluments or benefit due to an employee.

    23.5. Reference was made to the decision in *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* (2017) UKSC 45 ("the *Rangers* decision"). There is no basis for the Respondent's position that the payment made by the Appellant to a third party constitutes a payment of emoluments to which section 112 TCA 1997 applies.

23.6. The payment to the Settlor of the EBT does not constitute a distribution pursuant to section 436A TCA 1997 and the deduction in respect of the payment for corporation tax purposes should not be denied on this basis.

23.7. The making of the payment by the Appellant to the Settlor of the EBT should not and cannot be regarded as a Settlement nor as money being "settled". Section 436A TCA 1997 cannot be considered applicable to the Appellant in the circumstances.

23.8. The payment made by the Appellant to the Settlor of the EBT was made wholly and exclusively for the purposes of the trade of the Appellant, was not otherwise disallowed, and the Appellant was entitled to treat the payment to the Settlor as a deductible expense, in accordance with the provisions of section 81 TCA 1997.

Respondent's submissions

24. Submissions were jointly made by both senior counsel appearing on behalf of the Respondent. The Commissioner sets out hereunder a summary of the submissions made at the hearing of the appeal, in addition to the Respondent's written submissions:-

24.1. There is no provision in the TCA 1997 which limits the Respondent's entitlement to raise an alternative assessment or an alternative estimate irrespective of an initial assessment having been appealed. The notice of estimation to PREM and the assessment to DWT were issued on an alternative basis.

24.2. Reference was made to the decision in *Lord Advocate v McKenna* [1989] SC 158 ("*McKenna*"). This was not an appeal against an assessment, but rather HMRC had taken proceedings to enforce an assessment. There were three alternative assessments raised in relation to a land transaction that had occurred. Lord Coulsfield considered the issue of alternative assessments and stated that:

> "*In this situation when the Revenue served these three notes of assessment on the defender in 1985, these assessments were clearly alternative in what was described in the first sense of alternative, namely A, or B, or C. This practice of making alternative assessments in a situation where the Revenue may have insufficient information to do otherwise is long established……….*
>
> *The practical justification for doing so is that Revenue may often have been supplied with inadequate information and be quite unable to determine what is the proper basis of assessment. As a result in order to prevent loss of tax properly payable, it may be necessary to issue alternative assessments and*

allow the proper result to be worked out through the processes of appeal or claim for relief. The competency of alternative assessments being established it is, in my opinion, plain that the assessments in the present case are on their proper construction alternative".

24.3. In 2019, the Respondent issued the PREM Estimate. In 2019, the Respondent did not have any of the documents that are comprised in "*Revenue Book of documentation II",* which was furnished to the Respondent on 14 September 2023. There was no question of the Respondent being in receipt of full or indeed adequate information in this matter.

24.4. Had the Appellant wished to challenge the validity of the alternative PREM Estimate, it had every opportunity to do so by way of judicial review, a jurisdiction that comes within the restrictions contemplated by Murray J. in the decision in *Lee v Revenue Commissioners* [IECA] 2021 18 ("the *Lee* decision").

24.5. Reference was made to section 112 TCA 1997. There was a conferring of a credit to Appellant's witness by means of his Director's loan account which comes directly within the definition of an emolument for Schedule E. The term "emoluments" is broadly defined and it covers all benefits derived from an office of employment. It was a direct payment by the Appellant to the Appellant's witness and the credit to the Director's loan account of the Appellant's witness related to his employment with the Appellant.

24.6. The fact that the liability was not discharged until 2013 is irrelevant. It was earned in 2012 and it accrued in 2012 and is therefore subject to tax for that chargeable period. Reference was made to the decision in *McKeown (Inspector of Taxes) v Patrick J. Roe* I ITR 214 ("*McKeown*"), where the High Court found in favour of the Revenue Commissioners that the relevant year in terms of the charge to tax under Schedule E, is when it is earned and accrues.

24.7. There is no requirement for a Schedule E liability to tax that the emoluments be paid directly to the employee in question. The Court has always accepted there will continue to be a liability even if they are paid indirectly or routed to a third party. Reference was made to the *Rangers* decision in support of this argument.

24.8. Section 112 TCA 1997 is intended to have a broad application and is intended to capture all and every reward or recompense received in consideration for the employment of the individual by the tax paying company. In addition, reference

was made to the Judgment in *Dolan v K* and O'Coindealbhain *(Inspector of Taxes) v Gannon.*

24.9. The PREM Estimate should be confirmed on the basis of a direct benefit which accrued to the Appellant's witness from his employer, the Appellant, in the context of his employment, as acknowledged by him by means of the credit to his Director's loan account. This comes directly within the definition of emolument in accordance with the provisions of section 112 TCA 1997.

24.10. The entirety of the documents submitted by the Appellant in this appeal do not give effect to the transaction as contended for by the Appellant, namely the acquisition of an EBT, prefunded to the amount of £121,000. Alternatively, it is a redirection of earnings, within the meaning of the *Rangers* decision, which comes also within the definition of section 112 TCA 1997.

24.11. Reference was made to Section 436A TCA 1997. In making submissions on this point, it must be done through the prism of a fiction, because the fiction is that the arrangements contended for were actually effected by the documents and evidence that has been produced, even though the principal submission is that the contrary is the position.

24.12. The purpose of this section, which is an anti-avoidance section, is to prevent trusts or arrangements being used in order to distribute profits without incurring any tax on them. There are four requirements that have to be satisfied. Firstly, an amount of money or money's worth has to be settled. Secondly, it must be by or on behalf of a closed company. Thirdly, it must be on or after 21st January 2011. Fourthly, it must be in connection with a relevant settlement.

24.13. If the Appellant's submissions are accepted, that this arrangement gave rise to the structure contended for, it falls within the provisions of Section 436A TCA 1997 as a deemed distribution and is subject to DWT on that basis.

24.14. Reference was made to section 81 TCA 1997 and its applicability to the Appellant's circumstances.

24.15. There is no evidence adduced that any payment was paid to the Settlor of the EBT. Insofar as there was any movement of funds from ██████████ ████, the movement of funds was to the Trustee, not to the Settlor. The evidence of the Appellant's witness in that regard is that he understood that the Settlor in this case did not have a bank account, which is an extraordinary proposition.

24.16. There was no acquisition of a prefunded EBT in the sum of £121,000. All that existed was a movement of money from [redacted] to [redacted] on 18 December 2012, and back from [redacted] to [redacted] on or after 21 December 2012, with the net result of conferring on the Appellant's witness, a credit to his Director's loan account with the Appellant on 31 December 2012. That credit was ultimately met and the loan repaid six weeks later on 13 February 2013. The Appellant has produced no loan agreement between it and the Appellant's witness.

Material Facts

25. The Commissioner carefully considered the evidence of the Appellant's witness. The Commissioner did not consider the Appellant's witness to be forthcoming with information in relation to this appeal and the evidence was riven with inconsistencies. In addition, the Commissioner notes the multiple roles played by the Appellant's witness *inter alia* Director, employee and Trustee. The Commissioner notes that it was the Appellant's witness, as Director of [redacted] that completed the MD1, MD4 and MD5 forms submitted to the Respondent. Moreover, the Appellant's witness failed to bring to the Commissioner's attention the error in the submission made by counsel for the Appellant wherein he stated that the documents were executed under "seal" and the financial accounts were filed with the CRO. Having observed the witness give evidence, the Commissioner considers his credibility as a witness to be in doubt.

26. Therefore, having considered the testimony of the Appellant's witness, together with the documentation submitted in this appeal and the submissions made at the hearing of the appeal, the Commissioner makes the following findings of material fact:

26.1. The Directors of the Appellant include the Appellant's witness.

26.2. The Appellant's witness was an employee of the Appellant.

26.3. The Appellant furnished a document purporting to be a facility letter in respect of a loan from [redacted] to the Appellant in the sum of £121,000.

26.4. No loan agreement between the Appellant's witness and the Trustees of the EBT for the sum of £121,000 or any other amount was submitted in this appeal.

26.5. The Appellant's Nominal Account details in relation to its Director's loan account in the name of the Appellant's witness show a credit to the account in the sum of €148,923.07, on 31 December 2012.

26.6. On 31 December 2012, the Appellant's Director's loan account in the name of the Appellant's witness for 2012, shows a credit in the sum of €140,398.

26.7. On 13 February 2013, the Appellant made a payment from its current account to the Appellant's witness, in the sum of €140,000.

26.8. There was no evidence adduced that any payment was paid to the Settlor of the EBT. Insofar as there was any movement of funds from [redacted] [redacted], the movement of funds was to the Trustee, not to the Settlor.

26.9. There was no evidence adduced that [redacted] accepted funds in a nominee capacity on behalf of the Settlor of the EBT and it is recorded nowhere within the documents submitted in this appeal.

Analysis

27. At the outset, the Commissioner considers that it is appropriate to examine the question of where the burden of proof falls in this appeal. It is trite law that 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* ("*Menolly Homes*") [2010] IEHC 49 at paragraph 22, Charleton J. states that:

   "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".

28. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgment of Charleton J. in *Menolly Homes,* wherein he states that:

   "*Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute…"*

29. It appears the statements regarding the evidential burden made by Charleton J. in *Menolly Homes* are premised on the information relating to the matter or matters which must be proved in a tax appeal, being within the particular knowledge of the Appellant. The passage at paragraph 22 as set out above by the Commissioner is much quoted before the Commission and means that in this appeal all factual issues arising should stand to be proved by the Appellant.

30. The issues to be determined in the instant appeal are the application of section 112 TCA 1997 to the facts herein and in the alternative, whether the payment made to the Settlor of the EBT is a deemed distribution in accordance with section 436A TCA 1997. If the Commissioner finds that section 436A TCA 1997 is not applicable to the Appellant's circumstances, then it arises for consideration whether section 81 TCA 1997 is applicable herein.

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

    31.1. To address the issue of the admission of documentary evidence;

    31.2. To address the applicability of a time limit in respect of the Notice of Estimation raised by the Respondent on 10 December 2019, in respect of the period ending 31 December 2012;

    31.3. To address the alternative Notice of Estimation and Notice of Assessment to DWT being raised by the Respondent;

    31.4. To determine the substantive matter being the Notice of Estimation to PAYE/PRSI, the Notice of Assessment to DWT and the Notice of Amended Assessment to Corporation Tax.

Preliminary matters

Admission of documentary evidence

32. At the commencement of the appeal, counsel for the Appellant submitted that the Appellant was proceeding on the basis of legal submissions only and that it was not intending to call witness evidence on behalf of the Appellant. Counsel for the Appellant indicated that he was presenting the Appellant's appeal on the basis of legal submissions only. (Nevertheless, once the Appellant had concluded its legal submissions, counsel for the Appellant announced that it was calling the Appellant's witness to give evidence on behalf of the Appellant.) The Respondent submitted that there are no agreed facts herein and the burden of proof in a tax appeal rests firmly on the Appellant.

33. In response, counsel for the Appellant argued that "*we are relying on that documentation as facts. It will be up to you to decide whether you accept the documentation as fact or not, but there is no questioning as to the documents. If I take the accounts as one document, it's a matter of public record, it's a matter that is submitted in the CRO…….Therefore I say that my position is that I do not need to either have representatives of the company or the auditor…… the documents are a document in and*

of themselves that are signed, a public record document and I say that is the proof that I need to give on that…..Other documentation are deeds, made under seal, and if they wish to question that, then they need to plead that they are questioning the document made under seal".[2] The Commissioner was not directed to any principles established in case law or relevant legislative provisions that would permit the Commissioner to take the approach contended for by the Appellant.

34. Counsel for the Respondent submitted that it is not open to the Commissioner to treat any of the documents submitted as evidence. Furthermore, it was argued that the financial statements do not prove themselves and what is in issue here is the manner in which items in the financial statements have been treated. Moreover, the deeds do not prove themselves, in particular the Deed of Settlement is governed by ████ law and no expert on ████ law is proffered by the Appellant, in relation to what the law of ████ is. Furthermore, the Respondent submitted that the entirety of the deeds and documents herein are wholly irregular.

35. The Respondent argued that if the documents submitted by the Appellant are accepted as evidence in this appeal, the Commissioner would be precluding the Respondent from cross examining or testing the evidence. References were made to section 949AC TCA 1997, such that the section does provide some degree of latitude in terms of documentation. However, counsel for the Respondent submitted that what the Commissioner is required to have is evidence and in the absence of evidence, there is nothing upon which a determination can be made. Accordingly, the appeal should be dismissed on the basis that it would be grossly unfair and contrary to the most basic principles of fair procedures if the documents were admitted, in circumstances where the Respondent has no opportunity to cross-examine or test that evidence.

36. The Commissioner is satisfied that section 949AC TCA 1997 provides for the admission of evidence whether or not it would be admissible in court proceedings. Its existence, however, does not mean that a Commissioner must admit such evidence. If a party to an appeal wishes to depart from the rules of evidence, in circumstances where the other side objects to this course, it is incumbent on them to give reasons as to why this departure should be allowed.

37. Counsel for the Appellant argued that there is no unfairness and that the Commissioner should put herself "*back in the position that the Inspector of Taxes was when he raised his assessment*". Counsel submitted that whilst the Appellant could come to the hearing

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[2] Transcript, Day 1, page 7

with six or seven witnesses to prove every single document, this case only relates to a small quantum and there is "*the cost of getting an auditor, getting trustees from abroad to attend…when clearly they have signed the documents, there's no dispute around the documents.*"[3] Moreover, it was submitted that this is a technical point and either the Appellant falls within the provisions or does not. The Respondent submitted that it is the application of those provisions to the facts of the case, as found by the Commissioner, that will determine the issue.

38. It is important to note that, during the afternoon of day 1 of the hearing of this appeal, counsel for the Appellant accepted that the documents he referred to as "documents under seal" were in fact, not documents under seal. When referring to the Deed of Settlement dated 3 December 2012, counsel for the Appellant submitted that "*I do not believe this document is under seal, now that I look at the document…… It is executed as a deed but it is not under seal which would be normal under Irish law.*"[4] Counsel for the Appellant then proceeded to argue that it was a business document and that "*anything to do with this arrangement should be considered a business transaction and a business document".*[5]

39. Moreover, despite it being argued by counsel for the Appellant that the Appellant's accounts are admissible as evidence on the basis that they are public documents filed with the CRO, it transpired that in fact, these accounts are not the abridged financial accounts of the Appellant filed with the CRO. Of note, the submission of counsel for the Appellant as to their admissibility was that "*It is a matter of public record like a birth cert or death cert*" and it was repeatedly suggested that these documents are admissible in evidence on that basis. In addition, neither the Appellant's witness nor the Appellant's tax agent who were present at the hearing corrected the record for the Commissioner, so that the Commissioner would not be under any misapprehension as to the status of these documents when it came to her considerations. The matter came to light during cross examination of the Appellant's witness.

40. The Appellant then sought to rely on the provisions of section 14 of the Irish Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. The Commissioner did not accept that it was open to the Appellant to rely on this provision. Moreover, the Appellant had not complied with section 15 of the Irish Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, in this regard.

[3] Transcript, Day 1, page 27
[4] Transcript, Day 1, page 127
[5] Transcript, Day 1, page 135

41. At the conclusion of submissions from both parties on this point, the Commissioner indicated to the parties that at this remove, she would not proceed to make a decision on the issue of the admission of the documentation as evidence in this appeal, but intended to proceed on a *de bene esse* basis, in terms of the documentation.

42. Nevertheless, the requirement for a decision by the Commissioner in relation to this issue of admissibility became moot following the conclusion of opening submissions by counsel for the Appellant, when he indicated that the Appellant intended to offer "*evidence by means of affidavit and that that affidavit would be prepared by [the Appellant's witness] and it would be full and complete evidence as to his role regarding the documents that you have and the operation of the scheme if you are prepared to accept that*".[6] Counsel for the Appellant thereafter stated that the Appellant's witness would give evidence in relation to the Appellant's appeal.

43. The Respondent objected to the Commissioner permitting the Appellant to call a witness in circumstances where the Appellant had made its submissions and indicated that it was not calling evidence in relation to its appeal, thus its case was closed. In particular, the Respondent pointed out that the Appellant's witness was present at the hearing of the appeal throughout the day, whilst legal submissions were being made, but chose not to give evidence on behalf of the Appellant.

44. Having considered the submissions of both parties in this regard and in particular, having considered the Commissioner's obligations in accordance with section 949H TCA 1997 as to flexible proceedings, the Commissioner considered that the balance of fairness lay in permitting the Appellant to call its witness to give evidence, despite the unusual sequencing.

45. The Commissioner considers it important to state that at this juncture counsel for the Appellant confirmed that the Appellant was abandoning its arguments in relation to the admission of the documentary evidence, in circumstances where it was now offering *viva voce* evidence in relation to its appeal and further it was confirmed that no decision of the Commissioner was required in this regard.[7]

Time limit – the four year rule

46. The Appellant submitted that the Respondent raised the Notice of Estimation to PREM for the year ending 2012, on 10 December 2019, some seven years later. The Appellant submitted that it was relying on the decision in *Revenue Commissioners v Hans Droog*

[6] Transcript, Day 2, page 13
[7] Transcript, Day 2, page 207

[2016] IESC 55 ("*Hans Droog*"), in that regard. Counsel for the Appellant also directed the Commissioner to section 990 TCA 1997. The Appellant argued that "*there is no limitation to the determination in Droog and I say that it is clear authority for 811 cases, it's not clear authority, I accept, for a 990 estimation of PAYE or PRSI, but I am saying, by extension, you should apply the principle of Hans Droog.*"[8]

47. The Respondent argued that as this is a Notice of Estimation to PREM, not a Notice of Assessment, no four year time limit applies herein. The Commissioner was directed to section 955 TCA 1997, which is within Part 41 TCA 1997 and which governs income tax and self-assessed taxes. The Respondent submitted that it is clear from the decision in *Hans Droog* and an ordinary reading of Section 990 TCA 1997, that Part 41 and Section 955 have no application to the raising of an estimate of an employer, in respect of the Schedule E liability of employees. The Respondent restated that this appeal relates to a Notice of Estimation of amounts due by the employer in respect of an emolument paid to an employee, not an assessment to tax.

48. The Commissioner notes the Appellant relies on subsection (3) wherein it states that: "*A notice given by the inspector or other officer under subsection (1) may extend to 2 or more years of assessment.*" The Commissioner is satisfied that a plain and ordinary reading of this subsection does not impose a time limit on the raising of a Notice of Estimation by the Respondent, but rather provides for an estimate being extended to a period of more than 2 years of assessment. Thus, it widens the scope of estimation, as opposed to limiting its scope.

49. Likewise, the Commissioner is satisfied that the principles enunciated in the *Hans Droog* decision do not extend to notices of estimation and Part 42 of the TCA 1997. The Commissioner is mindful of the dicta of Mr Justice Clarke in *Hans Droog* wherein he states at paragraph 6.4 of his decision that:

 "6.4 There is no doubt but that the argument in question is correct so far as it goes. However, it must also be taken into account that the application of the time limit contained in particular in s. 955 has been chosen by the Oireachtas to apply to the cases governed by Part 41 without including an identical or similar provision in respect of those taxes and persons who do not come within the ambit of Part 41. The Oireachtas has doubtless chosen to make such a distinction between certain taxes and certain tax payers for good reason. If, therefore, it should transpire that the proper construction of the combined effect of section 811 and s.955 is as the High Court found

[8] Transcript, Day 1, page 65

it to be then any uneven application of the time limit would simply be a function of the fact that the Oireachtas has chosen to impose a general time limit in some cases but not impose a similar general time limit in other cases. As I suggested there may well be good reasons for that choice. It might, for example, be felt that it was most unlikely that circumstances would arise which would require revisiting the liabilities of a PAYE tax payer unless there was some fraud or negligence in the way in which that tax payer had come to be taxed. Be that as it may the Oireachtas has made a choice in imposing a time limit in some cases and not imposing a time limit in other cases. Given that such a distinction applies across the board it does not seem to me that any great weight can be attached to the fact that the general distinction concerned might also apply differentially in the case of section 811".

50. The Appellant asserted that the comments of Clarke J. are *obiter dicta* and that the principles enunciated in the decision relating to Part 41 of the TCA, should be applied to the circumstances of the Appellant. The Commissioner notes the submission of counsel for the Appellant that the Commissioner should "*extend the principle of the Droog decision to our case and to rule in our favour, that the time limit does apply……the notice of estimation raised pursuant to Section 990 was incorrect and should be zero".*[9]

51. The Commissioner does not accept the Appellant's assertions in this regard and is satisfied that the principles enunciated in the *Hans Droog* decision are of no support to the Appellant's argument that a time limit applies to the raising of a Notice of Estimation by the Respondent for the year 2012. The Commissioner is jurisdictionally bound to apply the legislation, which does not constrain the raising of a Notice of Estimation within a particular timeframe.

Alternative assessments - Jurisdiction of an Appeals Commissioner

52. The Appellant asserted that no provision exists permitting the Respondent to engage in the exercise of raising of an alternative assessment to PREM and that the alternative assessment should not have been raised. It is important to note that technically, there are not alternative assessments herein, but a Notice of Estimation to PREM and a Notice of Assessment to DWT.

53. The Commissioner reminded counsel for the Appellant of the *Lee* decision. The Commissioner asked counsel for the Appellant to address her on her jurisdiction to consider a challenge to the validity of an assessment/notice of estimation. Counsel for the Appellant confirmed that he was challenging the *vires* of the assessment, but agreed

[9] Transcript, Day 1, page 76

with the *Lee* decision*,* as to the Commissioner's jurisdiction. However, counsel for the Appellant submitted that "*you can take into account the decisions of the courts in judicial review matters and I say you can take into account my arguments that they have exceeded their responsibility in law and you can assess the PREM assessment as zero*".[10]

54. The Respondent submitted that the Appellant is clearly challenging the validity of the assessment and reference was made to the submissions of the Appellant in that regard. The Respondent argued that "*he wants to dress it up and say this is not an attack on the validity of the PREM assessment……he has characterised it in that fashion and has used that language which relates to a challenge to the validity in the course of his submissions.*"[11]

55. The Commissioner notes the Appellant's submission that "*You cannot rule that it was illegal to raise an assessment…..I accept Kenny Lee and I accept other authorities from the Irish courts…..that say that a judicial review is the only means. But what I say to you is that you will be in the difficult situation that you will be upholding both assessments and what I will invite you to do is to reduce the PREM assessment to nil. And I say that is entirely consistent with your authority and I say that that is a way around the difficulty….I say that it's entirely within your jurisdiction to reduce the PREM estimate to zero in these circumstances*".[12]

56. The issue of the ability of the Respondent to raise alternative assessments has not been the subject of a decision by the Irish Courts. The Respondent submitted that it is long established that the raising of alternative assessments is competent. The Respondent directed the Commissioner to the decision in *McKenna,* wherein Lord Coulsfield referred to the Court of Appeal in *Bye (Inspector of Taxes) v Coren* [1986] STC 393 and the dicta of Lawton LJ., where he described the making of alternative assessments to income tax in the following terms:

   "*He was following a practice which, so far as income tax is concerned, has long been accepted as being a sensible and proper way of dealing with difficult cases".*

57. It is the case that 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, *Stanley v The Revenue Commissioners* [2017] IECA 279*, The State (Whelan) v Smidic* [1938] I.R. 626*, Menolly Homes Ltd. v The Appeal Commissioners*

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[10] Transcript, Day 1, page 57
[11] Transcript, Day 3, page 9
[12] Transcript, Day 1, page 106-107

[2010] IEHC 49 and *The State (Calcul International Ltd.) v The Appeal Commissioners* III ITR 577.

58. Most recently Murray J. in the *Lee* decision, at paragraph 64, held that:

    "*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.*"

59. The Commission is a statutory body created by the Finance (Tax Appeals) Act 2015. Section 6(2) of the Finance (Tax Appeals) Act 2015 sets out the functions of Appeal Commissioners appointed pursuant to that Act. Appeal Commissioners therefore have their jurisdiction set out in statute and do not have jurisdiction to consider or decide on the constitutionality of legislation or to set aside a decision of the Respondent based on alleged unfairness, breach of legitimate expectation or disproportionality, as such grounds of appeal do not fall within the jurisdiction of an Appeal Commissioner and thus, do not fall to be determined as part of this appeal. This comes within the jurisdiction and remit of the Courts.

60. Therefore, the role of the Commissioner is to focus on the assessment/estimate 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. There is a presumption that it is a valid estimate/assessment and the Commissioner does not have the jurisdiction to find otherwise.

61. The Commissioner is satisfied that the Appellant is not assessed to tax more than once where the Respondent makes distinct assessments/estimates in respect of the same transaction or series of transactions which are expressly stated to be in the alternative. The Commissioner is further satisfied that it is made clear by the Respondent that the Appellant is liable to pay only one of the amounts assessed in the distinct assessment/estimate and that the distinct assessments/estimate are advanced on an alternative basis.

Grounds of Appeal

62. The Appellant's appeal relates to a number of grounds as set out in its Notice of Appeal. In its outline of argument,[13] the Appellant sets out its appeal points as follows:

"*2.1 The Corporate Appellant appealed the 2012 PREM assessments on the basis, in overview, that:*

2.1.1 the estimation is out of time;

2.1.2 the estimation is not based on a reasonable belief; and

2.1.3 the payment in question is not "earnings" of any employee.

2.1.4 the Company is not subject to the amount on the basis that the appropriate payroll taxes have been withheld by the Company and remitted to Revenue in respect of all emoluments paid by the Company in the year assessment 1 January 2012 - 31 December 2012;

2.1.5 the amount specified in the Estimation does not relate to emoluments (as defined in section 983 TCA) and therefore is not properly due and owing and there is no basis upon which the Amount due can be regarded as relating to emoluments (as defined);

2.1.6 the Estimation is not in accordance with the return filed for this period; and

2.1.7 the Estimation is not validly issued in accordance with the provisions of section 990 TCA and accordingly, does not carry force of law being void ab initio.

2.2 The Corporate Appellant appealed the Corporation Tax Assessment, on the basis, in overview, that:

2.2.1 the company incurred an expense for the purpose of its trade that correctly relates to the accounting period in question (a point accepted by the independent auditors) and as such the requirements of section 76A TCA are satisfied;

2.2.2 section 81 TCA does not restrict the relief claimed in any way and the nature of the expense means section 81A TCA does not apply to deny relief; and

2.2.3 the Respondents have disallowed the expenses incurred on professional fees. The Respondent has not stated the grounds for their

[13] Index to Booklet of Documentation, page 41

decision. It is considered these costs are relevant to the trade and as such are allowable.

2.3 The Corporate Appellant appealed the 2012 DWT Assessment, on the basis, in overview, that:

2.3.1 section 436A TCA does not apply to the payments made by the Corporate Appellant, as the "settlement" as required by section 436A TCA, was not made by or on behalf of the Corporate Appellant or any party connected to it; and

2.3.2 section 436A TCA does not apply to the payments made by the Corporate Appellant, as section 436A TCA only applies where the purpose or one of the purposes of the settlement is tax avoidance.

2.3.3 No distribution was made on the date stated in the assessment."

63. Before considering the competing arguments in relation to the application of the particular provisions of the taxing statute, the Commissioner considers it appropriate to set out herein, the jurisprudence establishing the well settled principles of statutory interpretation relating to taxation statutes.

Statutory Interpretation

64. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the Judgment of Kennedy CJ. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he held that:

"*The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament….*"

65. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 ("*Dunnes Stores*") and the Judgment of O'Donnell J. in the Supreme Court in *Bookfinders Ltd. v The Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"), as helpfully set out by McDonald J. in the High Court in

Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

> "*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*
> >
> > *(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";*
> >
> > *(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;*
> >
> > *(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.*
> >
> > *(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;*
> >
> > *(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*
> >
> > *(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. 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, except 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 possible."*

66. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

67. Furthermore, the Commissioner is cognisant of the recent decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the dicta of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he states that:

> *"it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

68. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*".

69. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

70. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of McKechnie J's dictum in *Dunnes Stores* at paragraph 66, wherein he states that:

> *"each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."*

Substantive matter

71. The Commissioner will now proceed to consider the substantive matters in this appeal. The sequencing of events is such that it is contended for by the Appellant that in **December 2012** it purchased an EBT for the benefit of the employees of the Appellant.

72. The Commissioner has considered the document entitled the Deed of Settlement dated **3 December 2012**, which purports to be an EBT in the sum of £10. "The Second Schedule" of the Deed of Settlement states "The sum of Ten Pounds Sterling". The Commissioner observes that correspondence dated 14 December 2015 [14] from [redacted] to the Appellant's witness, records that it has a settlement with a trust fund in the sum of £10, which it is in "*the process of funding*" to the sum of £121,000.

[14] Appellant Book of Documentation, page 67

73. The Commissioner has considered the document dated **17 December 2012**,[15] purporting to be an offer of a loan facility from ██████████ to the Appellant, for the amount of £121,000 with a repayment date of 1 month from the advance. However, of note, the facility letter from ██████████ to the Appellant in the "Interpretation and Definitions" section under the heading "Account" states the account name "██████████ – Client Account". The facility letter is signed by the Appellant's witness as being accepted on the terms and conditions as stated therein.

74. Attached thereto, the Commissioner notes the document entitled "Schedule 2 – Form of Resolution" dated **18 December 2012**, purporting to be the minutes of the Board of Directors of the Appellant agreeing that the facility letter is on bona fide commercial terms, in the best interests of the Appellant and is approved. The document records the purpose of the facility letter being to provide short term financing for the business of the Appellant. The minute is signed by the Appellant's witness in his capacity of Director of the Appellant.

75. In addition, at "Schedule 1 – Form of Drawdown Notice",[16] also dated **18 December 2012**, the document records that *"…you make an advance to us in the amount of GBP £121,000 to the Account on 18th December…"* The "Account" is defined in the facility letter as being ██████████ – Client Account". The document bears the signature of the Appellant's witness in his capacity of Director of the Appellant.

76. The Commissioner notes that it appears from correspondence dated **21 December 2012**[17], that the Appellant's witness thereafter corresponds with ██████████ requesting that the Trustees consider making a loan to him in the sum of £121,000 from the 2012 EBT. The correspondence states that "*the purpose of the loan is to provide a personal loan to [the Appellant] to be used to repay the loan provided to them by* ██████████. Moreover, it states that "*assuming that you are happy with the request, [the Appellant] has requested that funds are paid direct to* ██████████.

77. The Commissioner notes that no documentary evidence has been adduced, in the form of a loan agreement between the Trustees of the EBT and the Appellant's witness. The Commissioner considers that there is a deficit of documentary evidence to support the existence of such a loan between the Trustees of the EBT and the Appellant's witness. The Commissioner does not accept that the computer screenshot submitted by the Appellant entitled "██████████" supports the transfer of funds on **21**

[15] Appellant Book of Documentation, page 85
[16] Appellant Book of Documentation, page 95
[17] Appellant Book of Documentation, page 96

December 2012, to "[redacted]" or any other movement.[18] There exists no name associated with the purported account or any other common features that would be expected on a financial account to identify the holder of funds in that bank account.

78. Moreover, the Respondent submitted that [redacted] is not a company or organisation controlled by the Central Bank in this jurisdiction nor is it a document that would be admissible as evidence under the Bankers' Book Evidence Acts 1879-1959 nor is it a bank account that the Appellant's witness is in a position to prove nor is there any evidence adduced as to a '[redacted] or the receipt by [redacted]. The Commissioner is in agreement that this document is of no evidential value in this appeal. The Commissioner is satisfied that all that exists is reference to two purported transfers to different entities on various dates.

79. The Commissioner has considered the document purporting to be the Instrument of Appointment[19]dated **21 December 2012**, between [redacted] ("the Settlor") and the Appellant ("the Employer") and [redacted] ("the Trustee"). The Commissioner notes that Recital A states that the Instrument is supplemental to a Settlement made on 3 December 2012 between the Settlor and the Trustee. Moreover, the Commissioner notes that at paragraph 4 of the Instrument, it purports to appoint the Appellant's witness as Protector in place of the Trustee. Of note, the First Schedule which is referenced in the Instrument of Appointment at paragraph 2 as being the "Trust Fund set out in the First Schedule" is blank.

80. Furthermore, the Commissioner has considered the document entitled "Instrument of Appointment and Retirement of Trustees" dated **21 February 2013**, between the Appellant's witness ("the Protector") [redacted] ("the retiring trustee") and [redacted] ("the new trustee"). At recital A it states that this document is supplemental to the "Instrument of Settlement" dated 3 December 2012 and the Instrument of Appointment dated 21 December 2012.

81. Of note, "The Schedule" sets out "The Trust Fund" and states "Nil cash balance Benefit of a loan to [the Appellant's witness] in the sum of £121,000…"[20] The Respondent points out that it is the Appellant's contention that the Appellant credited the Director's loan account in the name of the Appellant's witness as of 31 December 2012 in the sum of €148,923.07 and made a payment to the Appellant's witness on 13 February 2013 in the sum of €140,000, in respect of the loan the Appellant's witness is purported to have

[18] Appellant Book of Documentation, page 98
[19] Index to Booklet of Documentation, page 103
[20] Appellant Book of Documentation, page 83

received from the Trustees of the Trust Fund. Yet, the Instrument of Appointment and Retirement of Trustees" dated **21 February 2013,** refers to a nil cash balance and a benefit of a loan to the Appellant's witness.

82. In addition, the Commissioner has considered the Nominal Account[21] details submitted wherein as of 31 December 2012, there is a credit on the Director's loan account of the Appellant's witness in the sum of €148,923.07, leaving a balance of €140,397.91. It appears that on 13 February 2013, six weeks later, the Appellant paid the sum of €140,000 to the Appellant's witness from its current account.[22] Similarly, the Appellant's Report and Financial Statements for the year ended 31 December 2012, at Note 13 entitled "Directors loan" provides for a credit in the sum of €140,398 to the Director's loan account of the Appellant's witness. Of note, it was accepted by the Appellant's witness whilst giving evidence at the hearing of the appeal that "*ultimately there was a transaction done where my liability was taken over, yes*". [23] It was put to the witness that he received the sum of €140,000 tax free and the Commissioner notes that the Appellant's witness answer to the question was "*yes*".[24]

83. It is argued by the Respondent that there was no acquisition of a prefunded EBT in the sum of £121,000 and all that existed was a movement of money from [redacted] to [redacted] on 18 December 2012, and back from [redacted] to [redacted] on or after 21 December 2012, with the net result of conferring on the Appellant's witness, a credit on his Director's loan account in the Appellant on 31 December 2012. That credit was ultimately met and the loan repaid to the Appellant's witness some six weeks later, on 13 February 2013.

Section 112 TCA 1997

84. The Commissioner will now proceed to consider the Notice of Estimation to PREM and the application of the relevant legislative provisions to the facts of this appeal.

85. Schedule E is contained in section 19 TCA 1997 which provides that:

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

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21 Index to Booklet of Documentation, page 184
22 Index to Booklet of Documentation, page 200
23 Transcript, Day 2, page 122
24 Transcript, Day 2, page 158

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

87. Section 112(1) TCA 1997 states that:

> "*Income tax under Schedule E shall be charged for each year of assessment on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.*

88. The Commissioner has considered section 983 TCA 1997 which states that:

> "*"emoluments" means anything assessable to income tax under Schedule E, and references to payments of emoluments include references to payments on account of emoluments*".

89. The Commissioner is satisfied that the term "emoluments" is broadly defined, such that it covers all benefits derived from an office of employment. The Respondent argued that the credit to the Director's loan account of the Appellant in the name of the Appellant's witness was an emolument subject to tax in accordance with Schedule E. The Commissioner is satisfied that the Appellant's witness in his role with the Appellant was a person "*having or exercising an office or employment of profit*". There is nothing controversial about him satisfying that requirement, as he was a Director of the Appellant and an employee of the Appellant. In fact, the testimony of the Appellant's witness was that he was an employee.[25] In addition, section 112 TCA 1997 requires that the benefit is "*in respect of all salaries, fees, wages, perquisites or profits whatever therefrom".*

90. Counsel for the Appellant argued that the Appellant had no liability to pay any amount to the Appellant's witness as salary, bonus, or anything else. Rather, there was a request by the Appellant's witness to the Trustees of the EBT for a loan in the sum of £121,000. It is argued that the purpose of the loan was to enable the Appellant's witness to discharge its debt with [redacted] on behalf of the Appellant and nothing in that arrangement suggests therefore an emolument assessable to tax under Schedule E.

91. This leads the Commissioner to the question of whether evidence sufficient to prove, on the balance of probabilities, that the credit to the Director's loan account in the name of

[25] Transcript, Day 2, page 160

the Appellant's witness was for the purpose outlined in paragraph 90 of this Determination, such that the credit to the Director's loan account of the Appellant's witness in the sum of €148,923.07 was not an emolument assessable to tax under Schedule E.

92. Counsel for the Appellant argued that there was a loan agreement in place and a further loan agreement in place between the Appellant and [redacted]. Whilst the Commissioner has been furnished with a document purporting to be a facility letter in respect of a loan from [redacted] to the Appellant, no loan agreement between the Appellant's witness and the Trustees of the EBT has been furnished in this appeal. Therefore, the Commissioner is satisfied that there is an evidential deficit in respect of the documentation submitted in this appeal to support the contention that the Trustees of the EBT furnished a loan to the Appellant's witness in the sum of £121,000 for the purpose of discharging the debt the Appellant had to [redacted].

93. The Appellant submitted that whilst the documents are governed by non-Irish law, they have been acted upon by the Appellant, whereby a payment was made by the Appellant to acquire a prefunded EBT. The Commissioner is satisfied that there is no evidence adduced of any payment to the Settlor of the EBT. Insofar as there was any movement of funds from [redacted], the movement of funds was to the Trustee of the EBT, not to the Settlor of the EBT.

94. However, even if the Commissioner is satisfied that the documents support the Appellant's contentions in that regard, no loan documentation has been furnished to support the provision of a loan in the sum of £121,000 by the Trustees of the EBT to the Appellant's witness for the purpose described. That document is of critical evidential value to the Appellant's appeal, in circumstances where the Appellant argued that the credit to the Directors' loan account in the name of the Appellant's witness, in the sum of €148,923.07, was a credit as a consequence of the Appellant's witness discharging the Appellant's liabilities with [redacted] and hence, not subject to tax in accordance with Schedule E.

95. In accordance with the default position in tax litigation as espoused by Charleton J. in *Menolly Homes,* the Appellant is required to provide sufficient evidence to reduce or displace a tax assessment. However, in this appeal the Appellant did not provide documentation and indeed failed to adduce cogent evidence to warrant a reduction or abatement of tax payable. As such, the Appellant frustrated its own appeal and indeed any prospect that it may have had to have the estimate reduced herein.

96. Thus, the Commissioner is satisfied that the evidence adduced in this appeal does not support the contention that the credit made to the Director's loan account in the name of the Appellant's witness was as a consequence of him discharging the Appellant's debt with [redacted] in the sum of £121,000, on behalf of the Appellant and which the Appellant, subsequently repaid to the Appellant's witness on 13 February 2013. The evidence does not support the Appellant's witness being a creditor of the Appellant in this regard.

97. Accordingly, the Commissioner finds that the amount credited to the Director's loan account was an emolument paid to the Appellant's witness, who was an employee and Director of the Appellant. Consequently, the Appellant had an obligation to deduct the appropriate PAYE/PRSI and return it to the Respondent for the requisite year.

98. For completeness, the Commissioner notes that the Respondent relied on the decision in *McKeown* to support its position that it is irrelevant that the liability was not discharged until 2013, it was earned and accrued in 2012, and is therefore subject to tax for that chargeable period. The Commissioner is satisfied that this is a correct statement of the law in this regard and there were no submissions made by the Appellant to the contrary.

99. Additionally, the Commissioner notes that the Respondent submitted that there is no requirement for a Schedule E liability to tax that the emoluments be paid directly to the employee in question and that the Court has always accepted there will continue to be a liability even if they are paid indirectly or routed to a third party. The Respondent relied on the *Rangers* decision in that regard. In addition, the Respondent submitted that in any event it has long been established in this jurisdiction that a redirection of earnings does not absolve an employer from his or her liability to pay PAYE under Schedule E and reference was made to the Judgment in *Dolan v K* and *O'Coindealbhain (Inspector of Taxes) v Gannon*.

100. The Commissioner does not intend to deal with this point in great detail, as the Commissioner is satisfied that a direct payment was made by the Appellant (as opposed to an indirect payment), a company, to an employee/Director (the Appellant's witness) directly conferring a benefit on the Appellant's witness, in the form of a credit to the Appellant's Director's loan account for the Appellant's witness in 2012, which falls within the definition of an emolument which is subject to tax under Schedule E as defined by Section 112 TCA 1997. Having considered the *Rangers* decision and the submissions of the Respondent in this regard, the Commissioner is satisfied that even if she is wrong in her finding that a direct payment was made to the Appellant's witness, she is satisfied that there was an indirect payment made.

DWT/Corporation Tax

101. In circumstances where the Commissioner finds that the Respondent was correct to raise the Notice of Estimation, and the Notice of Assessment to DWT and the Notice of Amended Assessment to corporation tax are raised on an alternative basis, there is no requirement for the Commissioner to consider the arguments raised by the parties and make a determination in relation to the Notice of Assessment to DWT and Notice of Amended Assessment to corporation tax.

102. In circumstances where the Commissioner has found that the credit to the Director's loan account of the Appellant's witness was an emolument under Schedule E TCA 1997, it therefore follows that the amounts are not captured by the provisions of section 436A TCA 1997. In addition, the Commissioner finds that section 81 TCA 1997 is not applicable herein, in light of the Commissioner's findings that the credit to the Director's loan account of the Appellant's witness is an emolument pursuant to the provisions of Schedule E of the TCA 1997 and is subject to income tax pursuant to the provisions of section 112 TCA 1997.

Determination

103. As such and for the reasons set out above, the Commissioner determines that the Appellant has failed in its appeal. Therefore, the Notice of Estimation of Amounts Due raised by the Respondent, in respect of the period ending 31 December 2012, in the sum of €83,023, shall stand.

104. As a consequence of the Commissioner's findings in relation to the Notice of Estimation, the alternative assessment, the Notice of Assessment to DWT raised by the Respondent for the period ending 31 December 2012, in the sum of €29,784, shall be reduced to nil.

105. As a consequence of the Commissioner's findings in relation to the Notice of Estimation, the Notice of Amended Assessment to corporation tax raised by the Respondent for the period ending 31 December 2012, in the sum of €18,615, shall be reduced to nil.

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

Notification

107. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ(5) and section 949AJ(6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section

949AJ TCA 1997 and in particular the matters as required in section 949AJ(6) TCA 1997. This notification under section 949AJ 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

108. 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 TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Claire Millrine
Appeal Commissioner
14 May 2024

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