AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

43TACD2025

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This Determination concerns the appeals made to the Tax Appeals Commission ("the Commission") under section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") of [redacted] ("the Appellant") of three notices of amended assessment to income tax of the Revenue Commissioners ("the Respondent") for the years 2012, 2013 and 2014, made on 19 December 2017, 14 November 2018 and 14 November 2018 respectively ("the amended assessments").

2. This appeal proceeded by way of oral hearing, held on 20 March 2024, at which both parties were represented by counsel.

3. At the outset of the hearing, the parties indicated that they had reached agreement in relation to the appeals of the amended assessments made in respect of the years 2012 and 2013.

4. In relation to the 2012 amended assessment, under which the Respondent had assessed the Appellant to have income chargeable to income tax of €187,381, and a balance payable of €73,740.27, the parties were agreed that the true amount chargeable to income tax in fact stood at €179,004.85. They requested that the Commissioner make a determination reducing the amount chargeable in accordance with their agreement.

5. In relation to the 2013 amended assessment, under which the Respondent had assessed the Appellant as having income from dealing in land of €112,000 and miscellaneous income of €203,433 (€315,433 in total), counsel for the Appellant indicated that his client was withdrawing his appeal as the Respondent had indicated that it would be withdrawing its assessment in due course.

6. This left only the amended assessment in relation to 2014, under which the Respondent had assessed the Appellant to have income chargeable to tax of €844,190, to be considered by the Commissioner. The parties indicated that of this amount, they were in agreement that €672,000 assessed as relating to the dealing in land, was not chargeable to income tax. Moreover, what remained in dispute regarding the Appellant's liability to income tax for this period was not the full balance of €172,190, described as Case IV miscellaneous income in the assessment, but rather whether three separate sums received by the Appellant in 2014 in the overall amount of €158,170.90 were chargeable to income tax. These are referred in this Determination as "the payments at issue".

7. Two of the three payments at issue for 2014 were received by the Appellant from [redacted] Limited ("the Company"), the two directors of which were the Appellant and his

spouse. These payments were received on 16 June 2014 and 19 August 2014 in the respective amounts of €17,500 and €34,500.

8. The third payment at issue was in the amount of €106,170.90 and was received by the Appellant from the account of [redacted] on 15 April 2014.

9. Prior to the hearing of this appeal, the Commissioner was furnished with two hearing booklets, and a supplemental booklet, containing the Notice of Appeal, the parties' Statements of Case, Outlines of Argument, correspondence, relevant legislation and authorities and documents.

Background

10. The Appellant is an [redacted] dealer, involved in that business since the early 1990s.

11. On or about July 2011, the Company was incorporated, with its two Directors being the Appellant and his spouse. The business of the Company was [redacted].

12. About six months before that, in January 2011, a company by the name of [redacted] Limited ("Company 2") was incorporated. The two Directors of Company 2 were also the Appellant and his spouse. The business of Company 2 was the purchase of property in [redacted], County [redacted].

13. On 15 April 2014, the Appellant received the sum of €106,179.90, paid to him by the firm [redacted], into an [redacted] Bank current account in his name and in the name of his spouse. The relevant current account statement included the narrative description '[redacted] *Dir Loan"* next to this transaction.

14. On 21 December 2011, several years prior to the aforementioned payment and not long prior to incorporation of Company 2, the amount of €106,179.90 was withdrawn by way of cheque from the same [redacted] Bank current account of the Appellant and his spouse. No narrative description was next to this transaction on the relevant bank statement.

15. On 16 June 2014, the Appellant received the sum of €17,500, paid to him by the Company. The relevant statement for the [redacted] Bank current account included the narrative description, *"Repayment of Loa"* [sic] next to this transaction.

16. On 19 August 2014, the Appellant received the sum of €34,500, also paid to him by the Company. The relevant current account statement included the narrative description, "*Loan Repay"* next to this transaction.

17. On 5 August 2016, the Respondent notified the Appellant that he had been selected for an audit, covering all taxes and duties, for the years 2012 – 2014.

18. On 6 August 2016, the Respondent notified the Company that it had been selected for an audit, covering all taxes and duties, for the years 2012 – 2014.

19. On or about the same time as the foregoing audits were notified, the Respondent notified Company 2 that it had been selected for an audit, covering all taxes and duties, for the years 2012 – 2014.

20. On 22 November 2017, an Officer of the Respondent sent the following correspondence to the Appellant:-

> "*I am writing to you, in accordance with sub section 33 of section 900 of the Taxes Consolidation Act 1997, to give you an opportunity to produce or make available to me within the next 21 days the following books, documents and information which I require to enable me to complete my audit:*
>
> - *an analysis of all bank accounts for the period under review (in the name of [the Appellant], his spouse, or both and [the Company]) including an explanation for each lodgement to these accounts.*
>
> […]"

21. On 19 December 2017, the Respondent issued a Notice of Amended Assessment to the Appellant, whereby it assessed him as having profits or gains chargeable to income tax, arising from dealing in [redacted], in the amount of €187,381 for the year 2012. The Appellant had previously returned assessable profits in the amount of €50,614 in his Form 11 income tax return. As noted in the introductory part of this Determination, the Respondent and the Appellant were agreed at hearing that the actual amount of income chargeable to tax for 2012 was €179,004.85.

22. On 14 November 2018, the Respondent issued a Notice of Amended Assessment to the Appellant, whereby it assessed him as having profits or gains chargeable to income tax in the amount of €315,433 for the year 2013. This was made up of profits or gains described as arising from dealing in land (€112,000) and miscellaneous income (€203,433). As stated in the introductory part of this Determination, the Respondent indicated at the appeal hearing that it was withdrawing this assessment.

23. On 14 November 2018, the Respondent issued a Notice of Amended Assessment for the year 2014 to the Appellant, whereby it assessed the Appellant as having profits or gains chargeable to income tax in the amount of €844,190. As stated in the introductory part of this Determination, the Respondent and the Appellant were agreed that all bar €158,170.90 of this amount was not chargeable to income tax.

24. On 9 January 2018 the Appellant appealed the Notice of Amended Assessment for 2012 to the Commission.

25. On 5 December 2018, the Appellant appealed the Notices of Amended Assessment for 2013 and 2014 to the Commission. The grounds of appeal stated in relation to the appeal made in respect of the year 2014 were:-

> *"Sch D – Dealing in land income assessed €672,000. I did not deal in land for this year therefore the Assessment was incorrectly raised, estimated and excessive.*
>
> *Sch D – Case IV Misc Income – Self, income assessed €172,190. I had no Case IV income for this year therefore the Assessment is incorrectly raised, estimated and excessive*."

26. On 15 July 2019, the Appellant and the Respondent delivered their respective Statements of Case in relation to the appeal made in respect of the amended assessment for 2014. They did so in accordance with the Commission's direction to this effect, made under section 949Q of the TCA 1997. Neither of the Statements of Case made reference to the payments of €106,179, €17,500 or €34,500.

27. On 31 October 2019, the Appellant and the Respondent both delivered consolidated Outlines of Argument relating to the appeals of the amended assessments made in respect of 2012, 2013 and 2014. While the purpose of Outlines of Argument is to set out the legal arguments of the parties (see section 949S of the TCA 1997) neither dealt in specific terms with the portion of the 2014 amended assessment relating to miscellaneous income in the amount of €172,190. However, on 8 February 2024, a little over a month before the hearing, the Respondent delivered a "*Supplemental Outline of Arguments"* in which it indicated in specific terms that part of this miscellaneous income was in its view attributable to a payment of €106,179 said to be from Company 2 and part attributable to payments said to be from the Company.

Legislation and Guidelines

28. Section 58(1) of the TCA 1997 provides:-

> "*Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made—*
>
> *(a) the source from which those profits or gains arose was not known to the inspector,*

(b) the profits or gains were not known to the inspector to have arisen wholly or partly from a lawful source or activity, or

(c) the profits or gains arose and were known to the inspector to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of those profits or gains."

29. Under section 886 of the TCA 1997 every person who —

• on his/her own behalf or on behalf of another person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable to tax under Schedule D,

• is chargeable to tax under Schedule D or F in respect of any other source of income, or

• is chargeable to capital gains tax in respect of chargeable gains,

must keep proper books and records so that correct returns of income may be made.

Evidence of Appellant

30. The Appellant gave evidence that he has been an [redacted] dealer since the early 1990s.

31. He said that in the period 2007 – 2011 he had been in partnership with another person named [redacted].

32. On or about July 2011 the Company was incorporated. The business of the company was [redacted].

33. The Appellant stated that, although the Appellant's primary involvement in the [redacted] business after July 2011 was through the Company, he also [redacted] over the years 2012, 2013 and 2014 as a sole trader.

34. The Appellant gave evidence in examination in chief that he and his spouse were the two directors of Company 2 from the point of its incorporation in January 2012. The Appellant stated that Company 2 was owned by a friend of his named [redacted] and its purpose was the acquisition of property in [redacted], County [redacted].

35. The Appellant distinguished his and his spouse's directorship of Company 2 from their directorship of the Company, describing the former as being a "nominee" directorship only. Asked in cross examination by counsel for the Respondent what he meant by this,

he replied that he and his spouse were, in acting as directors of Company 2, doing a favour for [redacted]. The Appellant said that neither he nor his spouse had a "financial interest" in Company 2.

36. The Appellant gave evidence that on 16 June 2014 he received a payment by way of bank transfer in the amount of €17,500 from the Company. This payment was made into an [redacted] Bank current account in his name and in the name of his spouse. A statement in respect of this account spanning the period 10 – 17 June 2014 contained an entry recording the receipt of this amount, alongside the description *"Repayment of Loa"*. The Appellant stated in evidence that the description of the transfer as constituting the repayment of a loan was an accurate one.

37. The Appellant likewise gave evidence at the appeal hearing that on 19 August 2014 he received a payment by way of bank transfer in the amount of €34,500 from the Company. Again, this payment was made into the [redacted] Bank current account in the name of the Appellant and his spouse. The entry on the relevant bank statement described the transfer as constituting a "*Loan Repay*", which the Appellant stated was an accurate description.

38. Lastly in examination in chief, the Appellant gave evidence that he had, on 15 April 2014, received €106,179.90 from Company 2, paid to him by [redacted] Solicitors. This was, he said, the repayment of a loan that he had made to Company 2 when its director. A statement from the [redacted] Bank current account of the Appellant and his spouse includes a description of the transfer as "[redacted] *Dir Loan"*.

39. Again, the Appellant stated that the description was an accurate representation of what the payment received constituted. The fact that it was a loan repayment was, he said, evidenced by the withdrawal on 21 December 2011 of the sum of €106,179.90 from his and his spouse's [redacted] Bank current account, which withdrawal, made by way of cheque, was recorded in a statement covering that date.

40. Under cross-examination, the Appellant stated that he and his wife were the persons who were responsible for the keeping and maintaining of the books and records of the Company. He also stated that he and his wife signed the financial statements of Company 2.

41. Regarding the activity of Company 2, counsel for the Respondent asked the Appellant when it was that it had acquired the property to which he had referred earlier in his evidence. He said that he did not know the answer to this off the top of his head. Likewise,

he said that he did not recall the amount paid for the property in question, or when it was sold by Company 2 and for what amount.

42. The Appellant was taken in cross-examination to the financial statements of Company 2 for the year 2012. Counsel for the Respondent pointed to the balance sheet, which, under "*Current Assets"* stated "*Sites and work in progress"* to be in the amount of €219,680. Counsel for the Respondent then asked the Appellant whether that was the value of the property purchased by Company 2. The Appellant's answer to this was that it was not. He said that, in fact, there was "*some sort of solicitor's charge on the property*" at the time of its purchase that reduced its value. Asserting that he didn't "*pay that amount for the property",* he then stated "*No, I forwarded the 106 as a loan which is reflected in the book".*

43. Counsel then asked why, if the Appellant advanced a loan of €106,179.90 for the purchase of a property, the part of Company 2's financial statements for 2012 relating to director's loans indicated that the amount advanced by the Appellant that year was in the amount of €219,580.00. Moreover, its financial statements for 2013 also disclosed the value of the Appellant's current assets in the form of sites and works in progress to be the same sum as the preceding year and the Appellant's director's loan to Company 2 to have increased by only a small amount to €222,378. The Appellant's answer was that:-

    "*Well, the definition of a director's loan includes a service, a charge on the property which wasn't owed to me."*

44. Counsel for the Respondent put it to the Appellant that Company 2 had no bank account. The Appellant said he did not know whether it did or didn't and again cited the fact that his true role was that of 'nominee' director of that company. He was then asked if he could provide any documentary evidence corroborating that he was only a nominee director uninvolved in the management of Company 2's affairs and had no financial interest in it. He said that he could not there and then.

45. Counsel for the Respondent put it to the Appellant that the Respondent, in the course of its audit of his affairs, had required him, pursuant to section 900 of the TCA 1997, to give a full analysis of all bank accounts in his name, in the name of the Company and lodgements thereto, but he had not disclosed the existence a personal account with [redacted] in Northern Ireland. While the Appellant agreed that he had not disclosed the existence of this account or provided the information requested, he said that this was because he did not consider it to be of any relevance to his tax affairs.

46. Counsel for the Respondent asked the Appellant how it was that he funded his loan of €106,179.90 to Company 2. In reply to this, the Appellant said that he used the funds that

were then present in his current account. This was €523,306.66. It was then put to him that, over the period 2003 – 2014, his total returned income, after tax, was €156,076.58. This was an average net income of approximately €13,000 for that period. The Appellant did not disagree that this was an accurate reflection of what he had disclosed as his income when making his returns. It should be noted at this point that it was an agreed fact that, while the Appellant's returned assessable income for 2012 was €50,614, the correct figure for this year, to be reflected in the Commissioner's Determination, was €179,004.85.

47. Asked how it was that he came to have the funds in his bank account necessary for him to make a loan of €106,149.90, the Appellant explained that he had re-mortgaged his house and had borrowed over €300,000. He could not recollect when he had done this, however. After giving evidence that his mortgage repayments came to about €800 - €1,000 per month, counsel for the Respondent again put it to the Appellant that it was difficult to see how he would have had the resources based on his own declared income to make the loan that he claimed he had made to Company 2, or indeed to meet his mortgage repayments. The Appellant then stated that he had provided the Respondent "*with back up of every single lodgement into every single bank account I had."*

48. Counsel for the Respondent asked the Appellant whether [redacted] Solicitors, the solicitors for Company 2, were acting on his and his spouse's instructions in their capacity as the two directors of that company in 2012, 2013 and 2014. The Appellant said that they had been. Counsel for the Respondent then asked whether the Appellant could produce any correspondence that might confirm what the transfer of the funds to him in April 2014 related to. The Appellant said that he suspected that such correspondence existed, but that he did not have it to hand.

49. Moving to the payments of €17,500 and €34,500, made to the Appellant by the Company in June and August 2014 respectively, counsel for the Respondent opened an extract from that part of the Company's nominal accounts, prepared by the Respondent, running from 30 June 2013 – 30 June 2014, relating to the director's loan account. She then asked the Appellant to point to where movements involving those sums were to be found. The Appellant accepted that debits from his loan account in these amounts did not seem to be recorded in these extracts. He did point out, however, that on 9 May 2014 there was a credit in the amount of €17,500 to the Appellant's director's loan account. The narrative attaching to this credit, set out in the extract, read "*transfer loan* [the Company]". The Appellant then stated that if there was an error with the Company's bookkeeping, this was

an error warranting the amendment of that part of its records relating to his director's loan account. He also said, however, that any such error "*wouldn't be a tax issue".*

50. Counsel for the Respondent observed that the balance of the loan account at the end of 2012 was in credit in the amount of €830,000. By the end 2014 he had lent the Company over €980,000. Returning to the issue of the Appellant's ostensible income over the years 2003 – 2014, she asked the Appellant how it was possible that he could fund lending to the Company on such a scale. The Appellant's answer was that it was funded by the sale of the land in [redacted] in 2012 or 2013. Counsel for the Respondent, referring to copies of the Appellant's Form 11 returns for the years 2012-2014, put it to the Appellant that all of them contained no entries under the heading "Capital Gains". While not disputing this, the Appellant insisted in evidence that he had made a capital gains tax return in respect of the funds received on foot of his sale of the property in [redacted]. Counsel for the Respondent put it to the Appellant that his evidence regarding his supposed submission of capital gains tax returns for 2012 and 2013 was untrue. He denied this.

51. This matter was canvassed by counsel for the Appellant in re-examination. The Appellant agreed with his counsel that a core part of the appeals of the amended assessments made in respect of 2012 and 2013, before their resolution, was the Respondent's insistence that the Appellant had income in the amounts of €112,00 and €672,000 derived from "*dealing in land*" that was subject to income tax. The Appellant, on the other hand, contended that he was not involved in dealing in land and the aforesaid sums were rightly subject to capital gains tax, but not income tax. Counsel for the Appellant then asked the Appellant whether he had previously provided the Respondent with computations relating to his capital gains tax liability on these sums derived from the sale of land. The Appellant said that he had.

52. Counsel for the Appellant further put it to the Appellant that the sums of €17,500 and €34,500 had been "*brought to tax*" in the Company. The Appellant said that they had.

Submissions

Appellant

53. Counsel for the Appellant accepted that the onus of proof rested with the Appellant in the appeal of the 2014 assessment, in accordance with judgment of the High Court in *Menolly Homes v Revenue Commissioners* [2010] IEHC 49. He submitted, however, that what the Commissioner had to consider in determining the appeal was the question of how one might satisfy the onus. In respect of this he said:-

"*The answer to that rhetorical question is you adduce evidence and you adduce evidence in the first instance of primary fact*."

54. He then stated in submission:-

"[If] *there were two sets of primary fact put up to you in evidence you would have to weigh between the two and that is where the balance of probabilities comes in. You then make findings of primary fact and the Tax Acts say you make determinations and they are based on the evidence and the other provisions of the Tax Acts say the evidence is of fact."*

55. Speaking along the same lines, counsel for the Appellant submitted that what should happen in a tax appeal is:-

"[…] *one side establishing primary facts, the other side establishing countervailing facts and then perhaps there being an argument before you as to the inferences that should be drawn from that."*

56. Counsel for the Appellant submitted that, in declining to go into evidence by the calling of witnesses, the Respondent had not put forward any "countervailing facts" to be balanced against the evidence of the Appellant.

57. Counsel for the Appellant submitted that the oral evidence proffered by the Appellant in relation to the Company 2 payment was corroborated by his bank statement, which indicated that €106,179.90 had left his bank account on 21 December 2011. It was further corroborated by the description given to the transfer in the Appellant's [redacted] Bank current account statement of "[redacted] *Dir Loan"*. Added to this, it was submitted, was the evidence of the Appellant that he had no "financial interest" in Company 2.

58. Counsel for the Appellant submitted that, in much the same fashion, the Appellant had satisfied the onus of proving that the sums of €17,500 and €34,500 received from the Company constituted repayments to him of loans previously given:-

"[The Appellant] *gives evidence of the money being loaned. He gives evidence of it coming back. He takes you, by way of corroboration of that, to the bank statement and points to those and the description of it."*

59. Counsel for the Appellant further submitted that the Appellant had given evidence that if the financial statements of the Company did not, in the wake of his receipt of these amounts, record a reduction in his director's loan account, this was an error made but did not alter whether they were chargeable to income tax. Counsel further emphasised that the Appellant had given oral evidence, which had not been contradicted by contrary

evidence elicited by the Respondent, that the payments in question had been "*brought to tax in the hands of* [the Company]".

60. Counsel for the Appellant submitted that the whole of the cross-examination of the Appellant had been directed toward getting the Commissioner to draw inferences in relation to, for instance, the Appellant's financial resources and his credibility as a witness. What was absent, however, was anything to challenge to the Appellant's evidence as to relevant primary facts. No propositions were put to the Appellant in cross-examination to the effect that the essence of his evidence, that the payments in question constituted the repayment of loans, was inaccurate or untrue.

61. Counsel for the Appellant further submitted that the Commissioner could and should draw inferences from what was *not* put to the Appellant in the course of cross-examination. In particular, counsel for the Appellant observed that even though Company 2 had been subjected to an audit, it had not been suggested that there was impropriety in the conduct of its business. Nor, for instance, was there any suggestion that the solicitor for that company who transferred the funds in the amount of €106,179 was anything other than a practitioner of good repute. The Respondent had, it was submitted, sought in the appeal to suggest in one way or another that aspects of the Appellant's tax affairs not related, or not related directly, to the issue arising in this appeal were such that he was a person lacking in credibility. What it had not done, however, was put forward any alternative to the facts presented by the Appellant.

Respondent

62. Counsel for the Respondent began by emphasising that, as Gilligan J made clear in his judgment in *TJ v Criminal Assets Bureau* [2008] IEHC 168*,* the reason why the burden of proof in tax appeals rests with the taxpayer is because, under the self-assessment system, it is the taxpayer who possess the information relevant to their own affairs.

63. Counsel for the Respondent argued that the Appellant's counsel, in conducting his analysis in submission on the relevance of primary and secondary fact elicited in evidence, had lost sight of the fact that a tax appeal is not a *lis inter partes* and it does not fall to the Respondent to 'make out' a case against the Appellant. Rather, what was underway was an inquiry into an assessment made by the Respondent, which constituted its best estimate of what the Appellant owed by way of income tax for 2014. The onus, she contended, rested with the Appellant to persuade the Commissioner that, on the balance of probabilities, the assessment was an overestimate and should be abated or set at nought.

64. Counsel for the Respondent further submitted that the mere giving of oral evidence by a witness did not mean that evidence had to be believed. It was the Commissioner's function to consider what was being said and assess whether it was credible. Counsel for the Respondent submitted that the oral evidence of the Appellant regarding the nature of the payments of €17,500 and €34,500, made to him by the Company on 16 June and 19 August 2014, and that of €106,179.90 made to him by Company 2 on 15 April 2014**,** was unsupported by documentary evidence and should not be believed.

65. Counsel for the Respondent submitted, moreover, that section 886 of the TCA 1997 placed the obligation on the Appellant to create and retain written records in relation to his tax affairs. The existence of this legislation, counsel for the Respondent submitted, served to underline the importance of the existence of corroborating documentary evidence when it came to the Appellant's satisfaction of the burden of proof in the appeal.

66. Regarding the payment from [redacted] Solicitors, counsel for the Respondent submitted that, though the Appellant's bank account had a debit in the amount of €106,179.90 from 21 December 2011, there was nothing to indicate that that company had been the recipient of the funds debited. It did not constitute evidence, or evidence of the requisite probative value, that what the Appellant later received into the same account in April 2014 was the repayment of a loan that he had previously given.

67. As regards the lodgements to the Appellant's account of €17,500 and €34,500, received in June and August 2014, counsel for the Respondent submitted that there was nothing in the books and records and financial statements of the Company, the Directors of which were the Appellant and his spouse, to suggest that these constituted repayments of director's loans. There was, she observed, no reduction in the balance on the Appellant's director's loan account in either 2014, 2015 or any subsequent year, a fact reflected in the Company's financial statements filed with the CRO. As the Appellant had not returned these sums as either a dividend, director's fess or remuneration, they were, counsel for the Respondent contended, rightly assessed to tax under the heading of miscellaneous income in the appealed assessment.

Material Facts

68. The facts material this appeal that were not in dispute are as follows:-

    - the Appellant is a person who has been involved in the [redacted] since the 1990s;

- since the incorporation of the Company in 2011, the Appellant's primary involvement in the [redacted] business has been through the Company;
- since 2011 the Appellant has however also [redacted] as a sole trader;
- the Appellant and his spouse are the two directors of the Company;
- in 2012 the Appellant's income chargeable to tax was 179,004.85;
- the Appellant and his spouse are the two directors of Company 2 since its incorporation in January 2012;
- the business of Company 2 was the acquisition of a property in [redacted], County [redacted];
- the acquisition of this property occurred in 2012 or 2013;
- on 21 December 2011, a withdrawal of €106,179.90 was made by way of cheque from an [redacted] Bank current account in the name of the Appellant and his spouse;
- on 15 April 2014, the Appellant received a transfer of funds to his personal account in the amount of €106,179.90;
- the transferor of this sum was [redacted] Solicitors and the description accompanying the transfer was "[redacted]";'
- [redacted] Solicitors were the solicitors for Company 2;
- in so describing the transfer of 15 April 2014, [redacted] Solicitors were acting on the instructions of the Appellant and his spouse, given in their capacity as the directors of Company 2;
- the balance sheet contained in the financial statements of Company 2 for 2012, the first year of its existence, set out current assets in the form of "*sites and work in progress*" to the value of €219,680;
- the balance sheet contained in the financial statements for 2012 also recorded creditors (amounts falling due within one year) to the value of €222,378 and called up share capital in the amount of €100;
- the notes to the financial statements of Company 2 for the year 2012 records "*Directors loan –* [redacted]" and opposite that the sum €219,580;

- the balance sheet contained in the financial statements of Company 2 for the year 2013 sets out, as in the preceding year, current assets in the form of "*sites and work in progress"* to the value of €219,680;
- the notes to the financial statements of Company 2 for the year 2013 records "*Directors loan –* [redacted]*"* and opposite that the sum €222,378;
- on 16 June 2014, the Appellant received a transfer of funds in the amount of €17,500 from the Company;
- the description accompanying this transfer, set out in the personal account of the Appellant and his spouse, was "*Repayment of Loa"* [sic]*;*
- on 19 August 2014, the Appellant received a transfer of funds in the amount of €34,500 from the Company;
- the description accompanying this transfer, set out in the [redacted] Bank current account in the name of the Appellant and his spouse, was "*Loan Repay";*
- the part of the nominal accounts of the Company for the period 30 June 2013 – 30 June 2014 do not record a debit from the Appellant's director's loan account in the amount of €17,500, either on 16 June 2014 or on any other date in that period;
- in relation to the year 2014, the parties were agreed that sums in the amount of €672,000, assessed in the amended assessment as derived from dealing in land, and in the amount of €14,019.10, assessed as miscellaneous income, were not income chargeable to income tax;

69. In addition, and for the reasons set out hereunder, the Commissioner finds the following facts material to this appeal that were not agreed:-
    - the amount of €106,179 paid to the Appellant on 15 April 2014, did not constitute a loan repayment;
    - the amounts of €17,500 and €34,500 paid to the Appellant on 16 June 2014 and 19 August 2014, did not constitute loan repayments.

Analysis

Burden of proof

70. The focus of the submissions of both parties in this case was on the question of the burden of proof, in particular how the burden might be satisfied and whether it had been satisfied.

71. Both parties were agreed that the burden of proving factual matters relevant to the question of the Appellant's correct charge to income tax lay with the Appellant. This was in accordance with the following analysis of Charleton J in *Menolly Homes v Revenue Commissioners* [2010] IEHC 49, where, quoting Gilligan J in *T.J. v. Criminal Assets Bureau* [2008] IEHC 168*,* he held:-

> "*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. "The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in T.J. v. Criminal Assets Bureau, [2008] IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue. The applicant in that case was assessed for income tax by a tax inspector assigned to the Criminal Assets Bureau. He was assessed to tax on a large amount of income from apparently mysterious sources. Invoking his statutory right of appeal in those circumstances, the applicant sought disclosure of all information on which the assessment was made. Referring to the Revenue Customer Service Charter, the court noted that there was a self-imposed obligation on the Revenue Commissioners to give all relevant information whereby the taxpayer would understand his tax obligations. This did not extend, it was held by Gilligan J., to making an order for discovery. In taking the appeal, the taxpayer was undertaking the burden of appeal within the relevant formula as to the relief which he might be granted if successful. At para. 50 Gilligan J. stated:-*
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> > *"The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person*

concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court. Any reasonable approach dictates that if the applicant, on appeal to the Appeal Commissioners or to the Circuit Court, can demonstrate some form of prejudice, then an adjournment in accordance with fair procedures would have to be granted, and if not granted, the applicant would have an entitlement to bring judicial review proceedings. There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant."

72. This statement of the law regarding the burden of proof and the reasons for it has been reaffirmed on repeated occasions by the Courts in subsequent judgments (see for example *McNamara v Revenue Commissioners* [2023] IEHC 15 and *Quigley v Revenue Commissioners* [2023] IEHC 244).

73. Counsel for the Appellant submitted that, in failing to call witnesses in this appeal and to put various propositions to the Appellant, the Respondent had put forward no "countervailing" narrative to the Appellant's own for the Commissioner to consider. There was, counsel for the Appellant submitted, nothing to weigh against the Appellant's evidence as to matters of relevant primary fact. Counsel for the Appellant made this submission while accepting, at least ostensibly, that a tax appeal is not a *lis inter partes,* but rather an inquiry held by the Commissioner for the purpose of establishing the Appellant's income chargeable to tax and, thus, whether the assessment in issue should be confirmed, increased, abated, or set at nought.

74. In so far as the submissions made on behalf of the Appellant were to be understood as meaning that it fell to the Respondent, if it wished to see the payments in issue treated as taxable income, to proffer evidence of its own in contradiction of the Appellant's version of events, this was in error as a matter of law. It is true that the Appellant gave oral evidence as to matters of primary fact relevant to the appeal, however as counsel for the Respondent correctly pointed out, having heard this evidence it still fell to the Commissioner in the conduct of the inquiry to form a view as to whether this evidence was credible. Central to the determination of any tax appeal by an Appeal Commissioner

is not just an assessment of the oral evidence given, but the documentary evidence adduced that may corroborate it.

Substantive issues

75. The question that the Commissioner is required to determine in this appeal is whether, on the balance of probabilities, the payments received by the Appellant on 15 April 2014, 16 June 2014 and 19 August 2014 constituted the repayments of loans, such that they are not, as assessed, income chargeable to income tax.

76. Counsel for the Appellant submitted that the evidence before the Commissioner was that all of the transfers to the Appellant at issue constituted repayments of loans that he had made previously to the Company and Company 2. This evidence was the Appellant's own oral account given at hearing, which was corroborated, he submitted, by the content of the Appellant's [redacted] Bank current account statements.

77. In legal submission, the Respondent put significant emphasis on the content of the Appellant's self-assessed returns for the years 2003-2014. It was not in dispute that together these disclosed an average income, after tax, in the region of €13,000 per annum. It was a reasonable question to ask of the Appellant how then, in December 2011, he could have been in a position to afford to (a) make a loan in the amount of €106,179.90 to Company 2 and (b) have lent the even greater amount of over €900,000 to the Company by the end of 2014.

78. Having had the benefit of observing the Appellant providing his answers to these questions in oral evidence, which were to the effect that he re-mortgaged his house and made use of the proceeds of the sale of the aforementioned property in [redacted], the Commissioner is not convinced that he was being candid. Mortgage repayments would still have represented a significant financial burden and the Appellant was unwilling to reveal in oral evidence exactly when the aforementioned property was sold when asked by counsel for the Respondent. It is also the case that the Appellant made no timely CGT return in respect of this sale in either 2012, 2013 or 2014 as his income tax returns relating to "*capital gains"* contained no entries. In addition, the Appellant was forced to admit under cross-examination that, despite being required by the Respondent pursuant to section 900 of the TCA 1997 to produce information relating to all bank accounts in his name, he did not disclose the existence of one in Northern Ireland. His explanation that he did not do so because it "*wasn't of relevance to my tax affairs"* was in reality characteristic of a person unprepared to be candid in his dealing with the Respondent in the context of the audit to which he was subject. All of this causes the Commissioner to

doubt the Appellant's reliability as a witness giving oral evidence on matters of fact concerning his own tax affairs.

79. It is important to emphasise, however, that the failure on the part of the Appellant to be candid in oral evidence in relation to the source of his finances, does not, as a matter of logic, mean that he did not lend the money to Company and Company 2. It does not mean that the payments in issue were not repayments of loans. This, as already noted at paragraph 75 of this Determination, is the specific question that has to be addressed by the Commissioner.

80. In this appeal the Appellant gave oral evidence that the sums received from the Company and [redacted] Solicitors in June, August and April 2014 were the repayment of loans previously advanced. In legal submission, counsel for the Respondent made the point that this oral evidence was unsupported by independent documentary corroboration.

81. In relation to the sum of €106,179.90 received from [redacted] Solicitors, it is true that the relevant [redacted] Bank current account statement of the Appellant states that the payment received by him on 15 April 2014 was the repayment of a loan from Company 2. This, however, was a description based on the Appellant's own instruction to that firm. It is not independent corroboration.

82. It is also true that that the same amount left the account of the Appellant in December 2011. As counsel for the Respondent correctly pointed out, however, there is nothing to indicate where this sum went, as it was withdrawn by cheque. It therefore proves little in itself.

83. Added to these two factors is the fact that the financial statements of the Appellant for the year 2012, its first year of existence, state in clear terms that the Appellant made a loan of €219,580 to Company 2, which was attributable to its acquisition of a property. The Appellant gave oral evidence to the effect that he had not lent this amount, but rather €106,179.90 only. Pressed by counsel for the Respondent as to why the financial statements indicated otherwise, he said that there existed a charge held by another person over the property in question at the time of its purchase. This was, in the Commissioner's view, not a logical answer to the question asked by counsel for the Respondent. Even if the evidence regarding the existence of a charge was true, and no documentation corroborating it was furnished in the appeal, why would this lead to the financial statements recording his loan to Company 2 being €219,580 and not €106,179.90? The obvious answer is that it would not.

84. The oral evidence of the Appellant was that he was only a 'nominee' director of Company 2, carrying out the role along with his wife as a favour for his friend who owned it. The Appellant said that he had no "financial interest" in Company 2 and the lending of €106,179.90 was a further favour. These were assertions that were not backed up by any documentary evidence. It was notable that the Appellant produced nothing that recorded this loan being requested. Nor was anything confirming the receipt of the funds or the terms on which repayment was to be made. These are all documents one would expect to exist and to be produced in the appeal hearing, in particular having regard to the Appellant's record making and keeping obligations arising under section 886 of the TCA 1997.

85. The sum total of the documentary evidence available that might support the Appellant's oral evidence that the income received from [redacted] Solicitors constituted a loan, is that it was self-described in the Appellant's bank statement as '[redacted] *Dir Loan"* and that there was matching debit from the Appellant's account several years before receipt. The destination of this debit is, however, undocumented and Company 2's financial statements in fact suggest that no loan in this sum was ever made by the Appellant to it.

86. Weighing the Appellant's oral evidence alongside the documentary evidence available from Company 2, the Commissioner is not satisfied that in probability the income received by the Appellant on 15 April 2014 from [redacted] Solicitors, in the amount of €106,179.90, constituted a loan repayment from Company 2. The Commissioner finds as a fact material to the determination of this appeal that it was not. The consequence of this is that it stands, in accordance with the amended assessment for 2014 under appeal, as income chargeable to income tax.

87. Nor, for similar reasons, is the Commissioner satisfied that the payments of €17,500 and €34,500 constituted, on the balance of probabilities, the payment of loans. It is true that the Appellant's bank statement covering June and August 2014 describes these amounts as being loan repayments and it was not a matter of dispute that they came from the Company. This was, however, a description in effect given by the Appellant himself as he was the Company's director. This Commissioner is not willing to accept this as sufficient corroboration of the Appellant's oral evidence on its own, in particular in circumstances where the Commissioner's experience of the Appellant in the appeal was that of a witness that was not prepared to be candid in the provision of his evidence.

88. In this appeal, the oral evidence of the Appellant relating to the payment of €17,500 and €34,500 was limited to saying, in bare terms, that they were loans. The Appellant provided no further oral evidence in relation to the circumstances in which they came to be made.

In cross-examination, it was put to the Appellant that the Company's own nominal accounts failed to disclose the payment of either the €17,500 or the €34,500. He did not dispute this proposition. As a matter of fact, however, the extract from the Company's nominal accounts that was put to the Appellant ran only up until the end of June 2014. It is thus only the €17,500 that one would expect to find in the extract put to the Appellant. The extract of the nominal accounts does nonetheless serve to cast doubt on the Appellant's evidence in relation to the purpose of that payment. As regards the €34,500, it is essential to remember that it is the Appellant who bears the burden of proof in the appeal. It is he who, in seeking to corroborate his evidence, should bring forth that part of the nominal ledger concerning the director's loan account for the period covering August 2014 and any other material that might corroborate his evidence in relation to that transfer. He did not do so. The net effect, the Commissioner finds, is that, left in essence with no independent corroboration, he is not satisfied that, in likelihood, either of these payments constituted loan repayments. It is so found as facts material to the determination of this appeal that they were not loans, with the consequence that they both stand to be assessed as income chargeable to income tax.

Conclusion

89. The overall effect, therefore, of the Commissioner's findings is that in 2014 the Appellant received three payments: €106,179.90 on 15 April 2014, €17,500 on 16 June 2014 and €34,500 on 19 August 2014, altogether amounting to €158,179.90, which constitute income, chargeable to income tax.

Determination

90. The Commissioner thus determines that the Appellant has been overcharged tax pursuant to the amended assessment of the Respondent of 14 November 2018 for the year 2014, in which he was assessed to have income chargeable to tax in the amount of €844,190. The, Commissioner finds that the amount of income chargeable to tax stands in the amount of €158,179.90. The amount of income tax assessed by the Respondent in its amended assessment of 14 November 2018, which stood at €447,735.30, is to be abated in accordance with this finding.

91. The Commissioner further determines, in accordance with the agreement of both of the parties in this appeal, that Appellant's income chargeable to tax in respect of 2012 be reduced from €187,381 to €179,004.85.

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

Notification

93. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

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

Conor O'Higgins
Appeal Commissioner
16 January 2025

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