



**24TACD2019**

**BETWEEN/**

**[NAME REDACTED]**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

**DETERMINATION**

**Introduction**

1. This is an appeal against the following assessments;
  - Notice of assessment to value added tax ("VAT") in the total sum of €55,378, in relation to periods of assessment from 01 January 2010 to 30 June 2013, raised on 14 January 2015.
  - Notice of estimate of amounts due in respect of PAYE/PRSI in the total sum of €42,006 in respect of the tax years of assessment 2008 to 2012, raised on 24 September 2013.
  - Notice of amended assessment for the year ending 31 December 2009, raised on 12 March 2014, amended to include €30,000 additional trading income arising from the trade of car remodelling/car dealership.
2. The assessments are raised in accordance with section 990 of the Taxes Consolidation Act 1997 (hereafter 'TCA1997') as amended, section 111(1) of the VAT Consolidation Act 2010 (hereafter 'VATCA2010') and section 959AC TCA1997.
3. The Appellant appealed on grounds that the assessments were excessive.

## **Background**

4. For the relevant tax years of assessment and since 2005, the Appellant operated as a self-employed bread distribution agent for a large commercial bakery ('the bakery'). The Appellant registered as an employer with effect from July 2005. During the years 2008 to 2012 the Appellant employed between one and three employees and the Appellant claimed a deduction for wages paid in the calculation of his Case I profits. The Appellant was in receipt of additional income from property lettings and income as a disc jockey.
5. On 24 October 2012, the Respondent issued a notification of audit for the period from 1 January 2009 to 31 December 2010. Arising from the audit, the Respondent notified the Appellant on 19 March 2013 that the audit period would be extended to cover all years from 2005 to 2012 inclusive. This Appeal relates to assessments arising following the audit undertaken.

## **Legislation**

### Section 5 VATCA2010 – Persons who are, or who may become, accountable persons

*Subject to paragraph (c), a taxable person who engages in the supply, within the State, of taxable goods or services shall be—*

*(i) an accountable person, and*

*(ii) accountable for and liable to pay the tax charged in respect of such supply.*

### Section 66 VATCA2010 – Issue of invoices and other documents

66.(1)(a) *An accountable person—*

*(i) who supplies goods or services to—*

*(1) another accountable person,*



*(II) a public body,*

*(III) a person who carries on an exempted activity,*

*(IV) a person (other than an individual) in another Member State in such circumstances that tax is chargeable at any of the rates specified in section 46(1), or*

*(V) a person in another Member State who is liable to pay value-added tax pursuant to the VAT Directive on such supply,*

*or*

*(ii) who supplies goods to a person in another Member State in the circumstances referred to in section 30(1)(a)(ii),*

*shall issue to the person so supplied, in respect of each such supply, an invoice, in paper format or subject to subsection (2) in electronic format, and containing such particulars as may be specified by regulations.*

*Income Tax (Employments)(Consolidated) Regulations, 2001 (S.I. No. 559 of 2001)*

*22. Emergency basis of deduction.*

*(1) If the employer makes such payments of emoluments as are referred to in Regulation 7 to or on behalf of an employee in respect of whom the employer has not received either a certificate of tax credits and standard rate cut-off point, a tax deduction card or copies of a certificate made by a former employer under paragraph (2) of Regulation 20, the employer on the occasion of the first such payment, shall immediately send to the inspector, by whom certificates of tax credits and standard rate cut-off point or tax deduction cards are [ordinarily issued to the employee], a return stating the name and address of the employee, the date on which his or her employment commenced, and such other particulars as may be necessary to secure the issue to the employer of the appropriate certificate of tax credits and standard rate cut-off point or tax deduction card.*

*[(2) (a) Until a certificate of tax credits and standard rate cut-off point or a tax deduction card is received from the inspector, the employer, on making any payment of emoluments to or on behalf of an employee referred to in paragraph (1) of this Regulation, shall deduct tax from such payment in accordance with the following provisions of this paragraph.*

*(b) Subject to subparagraph (c) of this paragraph -*



*(i) during the period of 4 weeks, or in the case of an employee paid monthly, 1 month, from the day on which the employee first holds an employment with the employer in a year, or until the certificate of tax credits and standard rate cut-off point or a tax deduction card is received from the inspector, the employer shall deduct tax at the standard rate of tax and, where appropriate, the higher rate of tax and keep records on an emergency card on the basis that the amount of -*

*(I) the tax credit is an amount per week equal to one fifty-second of the basic personal tax credit specified in section 461 of the Act, as it applies for that year, or if the employee is paid monthly, an amount equal to one-twelfth of that tax credit, and*

*(II) the standard rate cut-off point is an amount per week equal to one fifty-second of the amount chargeable to tax at the standard rate specified in Part 1 of the Table to section 15 of the Act, as it applies for that year, or if the employee is paid monthly, one-twelfth of that amount,*

*and in determining the amount of any tax credits or the standard rate cut-off point under clause (I) or (II) of this subparagraph any part of a euro shall be treated as a whole euro,*

*(ii) if, within the period of 4 weeks or 1 month referred to in subparagraph (b)(i) of this paragraph, the employer has not received the certificate of tax credits and standard rate cut-off point or a tax deduction card, the employer shall, until a certificate of tax credits and standard rate cut-off point or a tax deduction card is received from the inspector, keep records on an emergency card and on the making of any payment of emoluments to or on behalf of the employee deduct tax on the basis that the employee's tax credits are nil and in accordance with the following provisions, that is to say—*

*(I) in the period of 4 weeks or, in a case where the employee is paid monthly, 1 month, commencing on the day after the end of the period mentioned in subparagraph (b)(i) of this paragraph, deduct tax at the standard rate of tax and, where appropriate, the higher rate of tax on the basis that the standard rate cut-off point is the amount referred to in subparagraph (b)(i)(II) of this paragraph, and*

*(II) thereafter deduct tax at the higher rate of tax.*

*(c) In the case of an employee who first holds an employment with an employer on or after 1 January, 2003 and for whom the employer has not been provided with the employee's personal public service number, the provisions of subparagraph (b) of this paragraph shall not apply until such time as that number is provided to the employer and the employer shall, until such time, on making any payments of emoluments to or on behalf of the employee, deduct tax at the higher rate of tax and maintain records on an emergency card on the basis that the employee's tax credits are nil.*



## **Submissions in brief**

6. The submissions of the parties are summarised as follows:

### *VAT*

7. In accordance with section 5 VATCA2010, the Respondent submitted that the Appellant was an accountable person in respect of commissions earned from his bread distribution business and that he failed to charge VAT on commission sales in accordance with s.46(1) VATCA10. In addition, the Respondent submitted that the Appellant was not in compliance with section 66 VATCA2010 with regard to the issuing of the VAT invoices.
8. The Appellant contended that sales invoices in the bread delivery business were produced by the bakery as the bakery had access to the sales system which calculated the commissions due. However, the Appellant did not contest that he was an accountable person in accordance with section 5 VATCA2010. The Appellant filed VAT returns and claimed input credits on VAT costs incurred however, he failed to return VAT on his service supplies. The Appellant contended that the failure to return VAT on commissions was an unintended error on his part. He sought to avail of the 'no loss to Revenue' concession contained in the Revenue Code of Practice for Revenue Audit and Compliance Interventions.

### *PAYE*

9. The Respondent submitted that the Appellant was obliged to deduct and pay PAYE/PRSI/USC for the years 2008 to 2012 in accordance with the *Income Tax (Employments) (Consolidated) Regulations 2001* but that no tax was in fact deducted from the employees' wages for the period 2008 - 2012. The Respondent submitted that there was a general failure to operate the tax system and the PAYE Regulations.
10. The Appellant submitted that he operated the PAYE Regulations on payments to employees and that he made returns. This included the submission of P35s and P30s to the Respondent and in providing payslips and P60s to the employees. The Appellant stated that no tax was deducted as no tax was due.



11. While the Appellant provided copies of the P35s and P60s submitted by the Appellant for the tax years 2008 to 2012, these returns did not contain the PPS numbers of the Appellant's employees, nor did the returns contain employee addresses. The Appellant furnished the employee PPS numbers to Revenue in 2012.
12. On 24 September 2013, the Respondent raised a notice of estimate to PAYE/PRSI for the years 2008 to 2012 in the total sum of €42,006 in respect of the tax years of assessment 2008 to 2012.
13. The Appellant sought to avail of the 'no loss to Revenue' concession provided for in the Code of Practice for Revenue Audit and Compliance Interventions. The Respondent submitted that the 'no loss to Revenue' concession was unavailable as the Appellant had not complied with the conditions necessary to avail of the concession.

#### *Trading Income*

14. The Respondent submitted that the Appellant had undeclared trading income of €30,000 in 2009 arising from a commercial trade of car remodelling/car dealing and in particular, in relation to the sale of a remodelled Toyota MR2 to which alterations had been made. Approximately €28,000 of the €30,000 related to the sale of the modified Toyota MR2. The Appellant contended that the modifications carried out in relation to the vehicle were for personal use and enjoyment and that he was not carrying on a trade nor an adventure in the nature of a trade.

#### **Evidence**

##### The Appellant

15. The Appellant gave evidence as follows during the hearing:
16. On the subject of the VAT assessments, he stated that because he was not paid the VAT inclusive amount by the bakery for the services provided, he believed that he did not owe any VAT. He emphasised that the bakery administered and controlled the preparation of the sales invoices and the corresponding amounts paid to him.



17. On the matter of the employer's PAYE, he confirmed that he did not operate emergency tax and that no employee tax credit certificates were issued to him between the years 2005 to 2012. He stated that in his view, there was no PAYE due because the wages paid were so low. He confirmed that he did not obtain the PPS numbers of his employees, until 2012.
18. On the matter of the Case I trading income, the Appellant stated that over a ten-year period, he changed his car regularly, buying between five and ten cars, at least one of which was purchased on finance. He stated that all cars he owned were for personal use.
19. He stated that he remodelled one vehicle, a Toyota MR2 and that he paid others to carry out these works. He put a body kit and alloy wheels on the Toyota so that it would resemble a Ferrari GT4. He listed the costs in respect of the imitation Ferrari as follows:

	€
Toyota MR2	€9,500
Body Kit and panels	€10,000
Ferrari Lights and parts	€1,800
Ferrari Alloy Wheels	€3,000
Radio and sound seats	€1,200
Ferrari Leather Upholstery	<u>€700</u>
<u>Total cost</u>	<u>€26,200</u>

20. When questioned by the Respondent as to why he did not retain the remodelled Toyota/Ferrari he stated that he retained it for personal use for nine months but sold it because his friends were aware that it was not authentic and were saying so.

## ANALYSIS

### VAT

21. In accordance with section 5 VATCA2010, the Respondent submitted that the Appellant was an accountable person in respect of commissions earned from his bread distribution business and that he failed to charge VAT on commission sales in



accordance with s.46(1) VATCA10. In addition, the Respondent submitted that the Appellant was not in compliance with section 66 VATCA2010 with regard to the issuing of VAT invoices.

22. The Appellant contended that sales invoices in the bread delivery business were produced by the bakery as the bakery had access to the sales system which calculated the commissions due. However, the Appellant did not contest that he was an accountable person in accordance with section 5 VATCA2010. While the Appellant filed VAT returns and claimed input credits on VAT costs incurred under section 59 VATCA10, he failed to return VAT on his service supplies.
23. The Respondent submitted that in accordance with section 46 VATCA10, VAT at a rate of 21% was due on the commissions received from the bakery in 2010 and 2011 while VAT of 23% was due on the commissions received in 2012 and 2013. The Appellant did not dispute these rates. On 14 January 2015, the Respondent raised VAT assessments for the period 01 January 2010 to 30 June 2013 in the aggregate sum of €55,378.
24. The Appellant contended that the failure to return VAT on commissions was an unintended error on his part. He sought to avail of the 'no loss to Revenue' concession contained in the Revenue Code of Practice for Revenue Audit and Compliance Interventions. The Respondent submitted that the conditions for the concession, had not been met. The concession is not a matter over which the Tax Appeals Commission may exercise jurisdiction and is not relevant to the determination of this appeal.
25. While the Appellant did not contest that he was an accountable person for VAT purposes, he stated that he gained no advantage from the omission of the VAT from the sales invoices.
26. A taxable person who is an accountable person and who engages in vatable supplies is liable to charge and return VAT in respect of those supplies. The accountable person must also ensure compliance with the relevant VAT legislation in relation to the issuing of invoices and the retention of books and records.
27. As the taxable person who made the vatable supplies, the Appellant was the accountable person and is liable to charge and return VAT in respect of each supply.





In this regard, the Appellant failed to comply with section 46(1) VATCA10 and section 66 VATCA10.

28. As a result, and for the reasons set out above, I determine that the VAT assessments in the sum of €55,378 for the period from 01 January 2010 to 30 June 2013, shall stand.

#### *PAYE*

29. The Appellant does not dispute the fact that he failed to apply S.I. No. 559 of 2001 (*the Income Tax (Employments)(Consolidated) Regulations, 2001*) and that he failed to operate emergency tax in relation to his employees. He accepted that he did not obtain and provide to the Respondent, the PPS numbers relating to his employees, until 2012.
30. He submitted that the PAYE due qualifies under the 'no loss to Revenue' concession provided for in the Code of Practice for Revenue Audit and Compliance Interventions however, the Tax Appeals Commission has no jurisdiction with respect to the application of this concession.
31. On 24 September 2013 the Respondent raised PAYE/PRSI assessments for the years 2008 to 2012 in the sum of €42,006. As the Appellant did not operate PAYE for the relevant tax years of assessment, I determine the PAYE/PRSI notice of estimate shall stand.

#### *Trading Income*

32. On 12 March 2014, the Respondent raised an amended assessment to Income Tax for the tax year 2009, which included the sum of €30,000 as additional Case I income. The Respondent submitted that the Appellant had undeclared trading income of €30,000 in 2009 arising from a commercial trade of car remodelling/car dealing. Approximately €28,000 of this amount relates to the sale of an imitation Ferrari. The Appellant appealed the portion of this assessment which related to the alleged undeclared trading income of €30,000, on the basis that he was not carrying on a trade of car remodelling.



33. The Appellant stated that over a ten-year period, he changed his car between five and ten times. He stated that all the cars he owned were for personal use and that at least one was bought on finance. He stated that he remodelled one vehicle during the period to resemble a Ferrari GT4 and that he paid others to carry out these works. The vehicle remodelled was a Toyota MR2 when purchased. He added a yellow body kit, alloy wheels and Ferrari parts to the Toyota. The costs were as follows:

	€
Toyota MR2	€9,500
Body Kit and panels	€10,000
Ferrari Lights and parts	€1,800
Ferrari Alloy Wheels	€3,000
Radio and sound seats	€1,200
Ferrari Leather Upholstery	<u>€700</u>
<u>Total cost</u>	<u>€26,200</u>

34. The Respondent submitted that the Appellant's activities in respect of the buying and selling of vehicles indicated that a trade was being carried on. In particular, the Respondent argued that the carrying on of supplementary work in connection with an asset with a view to subsequent disposal at a profit would be regarded as trading, based on the badges of trade.

35. A consideration of the six badges of trade is as follows;

The subject matter of the transaction.

36. The subject matter of the sale in this case is passenger motor vehicles. The Appellant was a car enthusiast who regularly attended car shows. The Appellant derived gratification from his ownership of the cars purchased. The Appellant stated in evidence that the vehicles were purchased for personal enjoyment and use.

The length of the period of ownership

37. The imitation Ferrari, the subject of the undeclared income assessment in 2009, was a remodelled Toyota MR2. The Appellant drove the remodelled vehicle for 9 months before selling it.



### The frequency of transactions

38. During the course of this appeal it has been established that the Appellant owned between five and ten vehicles over the relevant ten-year period, at least one of which was acquired on finance. The Appellant's position was that he enjoyed cars and liked to change his car regularly.

### Supplementary work

39. The Appellant stated that he bought and sold approximately five cars over a ten-year period prior to the disposal of the remodelled Ferrari. In that time the only vehicle he modified was the Toyota MR2. Excluding the cost of the Toyota (which cost €9,500) the Appellant paid €16,700 for the modifications to be carried out to the vehicle. The vehicle was used personally by the Appellant for approximately nine months and was subsequently sold for €28,000. The remodelling which took place appeared to be a personal project arising from the Appellant's enthusiasm for cars.

### The circumstances of the realisation

40. The Appellant in evidence stated that he drove and owned the remodelled Ferrari for approximately 9 months. He stated that he sold the vehicle because his friends knew it was not a real Ferrari and were saying so. Based on the evidence of the Appellant, the circumstances responsible for the realisation do not suggest that the purchase and remodelling was to secure a deal for sale.

### Motive

41. The Appellant gave evidence that he modified the vehicle for personal use and that he was not seeking to dispose of it with a view to making a profit. Given the very discrete resale market for this type of vehicle, it is difficult to conclude that the remodelling of this car was anything other than the Appellant's own personal project based upon his enthusiasm for cars.
42. If the remodelling of the Toyota MR2 was a commercial project undertaken to generate a profit, it was high risk. The likelihood of a profit on sale of this vehicle



could not be assumed, based on the very discrete market for resale. Had the Appellant been minded to generate a profit on remodelled cars, it is reasonable to assume that a medium risk strategy might have been adopted instead.

43. In conclusion, I do not take the view that the Appellant was carrying on a trade of car dealership and/or car remodelling. The Appellant changed his car frequently over a ten-year period but remodelled just one of those cars. In that instance, he paid for the work to be carried out at significant cost. Once the work was complete the vehicle was retained for personal use however, the Appellant stated that he sold the vehicle after it became known that the vehicle was not an authentic Ferrari.

### **Conclusion**

#### *VAT*

44. The Appellant failed to comply with s.46(1) VATCA10 and s.66 VATCA10 and as the taxable person who made taxable supplies, the Appellant is the accountable person and is liable to pay the VAT charged in respect of each supply. As a result, and for the reasons set out above, I determine that the VAT assessments in the sum of €55,378 for the periods of assessment from 01 January 2010 to 30 June 2013, shall stand.

#### *PAYE*

45. The Appellant failed to comply with his obligations as an employer and did not deduct PAYE at source on wages paid in accordance with S.I. No. 559 of 2001 (Income Tax (Employments)(Consolidated) Regulations, 2001). While the Appellant provided copies of the P35's and P60's submitted by the Appellant for the tax years 2008 to 2012, these returns did not contain the PPS numbers of the Appellant's employees. The Appellant's position was that no tax was deducted as no tax was due.
46. As the Appellant did not operate PAYE for the relevant tax years of assessment I determine the PAYE notice of estimate dated 24 September 2013, in the sum of €42,006, shall stand.



*Trading Income*

47. For the reasons set out above, the application of the *badges of trade* to the evidence and circumstances in this appeal do not lead to the conclusion that the Appellant was carrying on a trade of car remodelling/car dealing.

*Determination*

- i. I determine that the notice of assessment to value added tax ('VAT') in the total sum of €55,378, in respect of periods of assessment 01 January 2010 to 30 June 2013, raised on 14 January 2015, shall stand.
- ii. I determine that the notice of estimate of PAYE/PRSI amounts due, in the total sum of €42,006 in respect of the tax years of assessment 2008 to 2012, raised on 24 September 2013, shall stand.
- iii. I determine that the notice of amended assessment for the year ending 31 December 2009, raised on 12 March 2014 shall be adjusted to reduce the assessable Case I trading income from €66,873 to €36,873.

This appeal is hereby determined in accordance with s.949AK TCA 1997.

**COMMISSIONER LORNA GALLAGHER**

**June 2019**

