



11TACD2023

Between

[REDACTED]

**Appellant**

and

**THE REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Introduction**

1. This matter comes before the Tax Appeals Commission (hereinafter “the Commission”) as an appeal against assessments to Income Tax, Value Added Taxation (“VAT”) and PAYE, PRSI and Universal Social Charge (hereinafter “PREM”) raised by the Revenue Commissioners (“the Respondent”) on 21<sup>st</sup> and 22<sup>nd</sup> March 2017 and 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> November 2018. The amount of tax at issue is €221,151.
2. Those assessments were appealed under reference numbers M1116/18, M1153/18, M1187/18, M1188/18 and 230/17. In line with a direction of the Commission issued in accordance with section 949E (2) (b) Taxes Consolidation Act 1997 (“TCA 1997”) those appeals were heard at the same time under the merged reference number 230/17 as similar facts are in issue.

**Background**

3. The Appellant was registered for Income Tax on 1/1/2002 as a sole trader and conducted the business of steel fabrication and erection of same. The Appellant later registered for

VAT on 28/11/2002, Relevant Contracts Tax ("RCT") on 1/12/2003 and PREM on 15/6/2004.

4. The Appellant has a workshop in [REDACTED] but most of his work is carried out on various sites using mobile welders and generators.
5. The Respondent initiated a Revenue Audit ("audit") into the Appellant's tax affairs on 13<sup>th</sup> May 2016. This audit was initially in respect of the tax year 2013 but on 16<sup>th</sup> March 2017 was extended to include the tax years 2014 and 2015.
6. During the course of the audit, the Respondent noted that the Appellant did not maintain proper books of account. Following an examination of the available records, the Respondent noted that there were numerous discrepancies between the figures returned on the Appellant's Income Tax returns and those shown on source records. In particular, the sales appeared to be understated and both the purchases of the business and the wages paid to staff appeared to be overstated.
7. The Respondent requested the Appellant to provide various documentation to enable it to prepare workings to calculate the Appellant's correct charge to tax. Despite the Respondent issuing a letter to the Appellant under section 900 TCA 1997 (this is a letter which required the Appellant to make available all tax related records to the Respondent within a stipulated timeframe), not all requisite records were produced.
8. On the basis of the incomplete information available to the Respondent, it prepared estimates to tax all of which form the basis of this appeal. Notices of assessment were issued to the Appellant seeking the combined sum of €221,151.
9. The Appellant who was not in agreement with these Notice of Assessments, lodged appeals with the Commission. The consolidated appeal hearing was held remotely on 14<sup>th</sup> September 2022 and the Appellant was represented by his agent. The Respondent was represented by two staff officials.

### **Legislation and Guidelines**

10. The following legislation is relevant to this appeal.

#### Section 382 TCA 1997

*Right to carry forward losses to future years.*

*(1)Where, in any trade or profession carried on by a person, either solely or in partnership, such person has sustained a loss (to be computed in the like manner as profits or gains under the provisions of the Income Tax Acts applicable to Cases I and*

*II of Schedule D) in respect of which relief has not been wholly given under section 381 or under any other provision of the Income Tax Acts, such person may claim that any portion of the loss for which relief has not been so given shall be carried forward and, in so far as may be, deducted from or set off against the amount of profits or gains on which such person is assessed under Schedule D in respect of that trade or profession for any subsequent year of assessment, except that, if and in so far as relief in respect of any loss has been given to any person under this section, that person shall not be entitled to claim relief in respect of that loss under any other provision of the Income Tax Acts.*

*(2)Any relief under this section shall be given as far as possible from the assessment for the first subsequent year of assessment and, in so far as it cannot be so given, from the assessment for the next year of assessment and so on.*

#### Section 886 TCA 1997

*Obligation to keep certain records.*

*(1)In this section—s886 tca 1997*

*“linking documents” means documents drawn up in the making up of accounts and showing details of the calculations linking the records to the accounts;*

*“records” includes accounts, books of account, documents and any other data maintained manually or by any electronic, photographic or other process, relating to—*

*(a)all sums of money received and expended in the course of the carrying on or exercising of a trade, profession or other activity and the matters in respect of which the receipt and expenditure take place,*

*(b)all sales and purchases of goods and services where the carrying on or exercising of a trade, profession or other activity involves the purchase or sale of goods or services,*

*(c)the assets and liabilities of the trade, profession or other activity referred to in paragraph (a) or (b), and*

*(d)all transactions which constitute an acquisition or disposal of an asset for capital gains tax purposes.*

*(2)(a)Every person who—*

*(i) on that person's own behalf or on behalf of any other person, carries on or exercises any trade, profession or other activity the profits or gains of which are chargeable under Schedule D,*

*(ii) is chargeable to tax under Schedule D or F in respect of any other source of income, or*

*(iii) is chargeable to capital gains tax in respect of chargeable gains,*

*shall keep, or cause to be kept on that person's behalf, such records as will enable true returns to be made for the purposes of income tax, corporation tax and capital gains tax of such profits or gains or chargeable gains.*

*(b) The records shall be kept on a continuous and consistent basis, that is, the entries in the records shall be made in a timely manner and be consistent from one year to the next.*

*(c) Where accounts are made up to show the profits or gains from any such trade, profession or activity, or in relation to a source of income, of any person, that person shall retain, or cause to be retained on that person's behalf, linking documents.*

*(d) Where any such trade, profession or other activity is carried on in partnership, the precedent partner (within the meaning of section 1007) shall for the purposes of this section be deemed to be the person carrying on that trade, profession or other activity.*

*(3) Records required to be kept or retained by virtue of this section shall be kept—*

*(a) in written form in an official language of the State, or*

*(b) subject to section 887(2), by means of any electronic, photographic or other process.*

*(4)(a) Notwithstanding any other law, linking documents and records kept in accordance with subsections (2) and (3) shall be retained by the person required to keep the records—*

*(i) for a period of 6 years after the completion of the transactions, acts or operations to which they relate, or*

*(ii) in the case of a person who fails to comply with Chapter 3 of Part 41A requiring the preparation and delivery of a return on or before the specified return date for a year of assessment or an accounting period,*

*as the case may be, until the expiry of a period of 6 years from the end of the year of assessment or accounting period, as the case may be, in which a return has been delivered showing the profits or gains or chargeable gains derived from those transactions, acts or operations, or*

*(iii) where the transaction, act or operation is the subject of—*

*(I) an inquiry or investigation started by the Revenue Commissioners or by a Revenue officer into any matters to which this Act relates.*

*(II) a claim under a provision of this Act,*

*(III) proceedings relating to any matter to which this Act relates,*

*linking documents and records shall be retained by the person required to keep the records for the 6 year period and until such time as—*

*(A) the enquiry or investigation has been completed or the claim has been determined, and*

*(B) any appeal to Appeal Commissioners in relation to that enquiry or the determination of that claim or to any other matter to which the Act relates, has become final and conclusive, and*

*(C) any proceedings in relation to the outcome of the inquiry or investigation or the determination of that claim or that appeal, or to any other matter to which the Act relates, has been finally determined, and*

*(D) the time limit for instituting any appeal or proceedings or any further appeal or proceedings has expired.*

*(aa) Where a person to whom this section applies ceases to be a person to whom subparagraph (i), (ii) or (iii), as appropriate, of subsection (2)(a) applies, that person (or such other person on that person's behalf) required to keep the linking documents and records shall keep or retain the linking documents and records notwithstanding that a period of 5 years has elapsed from the date of such cessation.*

*(4A) For the purposes of this section—*

*(a) where a company is wound up, the liquidator, and*

*(b)where a company is dissolved without the appointment of a liquidator, the last directors, including any person occupying the position of director by whatever name called, of the company,*

*shall keep or retain the linking documents and records of the company for the period specified in subparagraph (i), (ii) or (iii), as appropriate, of subsection (4)(a).*

*(4B)For the purposes of this section, where a person dies the executor or administrator of that deceased person shall keep or retain the linking documents and records of that deceased person for the period specified in subparagraph (i), (ii) or (iii), as appropriate, of subsection (4)(a).*

*(5)Any person who fails to comply with subsection (2), (3), (4), (4A) or (4B) in respect of any records or linking documents in relation to a return for any year of assessment or accounting period shall be liable to a penalty of €3,000; but a penalty shall not be imposed under this subsection if it is proved that no person is chargeable to tax in respect of the profits or gains for that year of assessment or accounting period, as the case may be.*

#### Section 900 TCA 1997

*Power to call for production of books, information, etc.*

*(1)In this section and in section 901—*

*“authorised officer” means an officer of the Revenue Commissioners authorised by them in writing to exercise the powers conferred by this section, or as the case may be, section 901;*

*“books, records or other documents” includes—*

*(a)accounts (including balance sheets) relating to a trade or profession and where the accounts have been audited, a copy of the auditor’s certificate,*

*(b)books, accounts, rolls, registers, papers and other documents, whether—*

*(i)comprised in bound volume, loose-leaf binders or other loose-leaf filing system, loose-leaf ledger sheets, pages, folios or cards, or*

*(ii) kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a legible form,*

*(c) every electronic or other automatic means, if any, by which any such thing in non-legible form is so capable of being reproduced, and*

*(d) documents in manuscript, documents which are typed, printed, stencilled or created by any other mechanical or partly mechanical process in use from time to time and documents which are produced by any photographic or photostatic process;*

*“judge” means a judge of the High Court;*

*“liability” in relation to a person, means any liability in relation to tax to which the person is or may be, or may have been, subject, or the amount of such liability;*

*“tax” means any tax, duty, levy or charge under the care and management of the Revenue Commissioners.*

*(2) Subject to this section, an authorised officer may serve on a person a notice in writing, requiring the person, within such period as may be specified in the notice, not being less than 21 days from the date of the service of the notice, to do either or both of the following, namely—*

*(a) to deliver to, or to make available for inspection by, the authorised officer such books, records or other documents as are in the person’s possession, power or procurement and as contain, or may (in the authorised officer’s opinion formed on reasonable grounds) contain, information relevant to a liability in relation to the person,*

*(b) to furnish to the authorised officer, in writing or otherwise, such information, explanations and particulars as the authorised officer may reasonably require, being information, explanations and particulars that are relevant to any such liability, and which are specified in the notice.*

*(3) A notice shall not be served on a person under subsection (2) unless the person has first been given a reasonable opportunity to deliver, or as the case may be, to make available to the authorised officer concerned the books, records or other documents in question, or to furnish the information, explanations and particulars in question.*

*(4)Nothing in this section shall be construed as requiring any person to disclose to an authorised officer—*

*(a)information with respect to which a claim to legal professional privilege could be maintained in legal proceedings,*

*(b)information of a confidential medical nature, or (c) professional advice of a confidential nature given to a client (other than advice given as part of a dishonest, fraudulent or criminal purpose).*

*(5)Where, in compliance with the requirements of a notice served on a person under subsection (2), the person makes available for inspection by an authorised officer, books, records or other documents, the person shall afford the authorised officer reasonable assistance, including information, explanations and particulars, in relation to the use of all the electronic or other automatic means, if any, by which the books, records or other documents, in so far as they are in a non-legible form, are capable of being reproduced in a legible form, and any data equipment or any associated apparatus or material.*

*(6)Where, under subsection (2), a person makes books, records or other documents available for inspection by the authorised officer, the authorised officer may make extracts from or copies of all or any part of the books, records or other documents.*

*(7)A person who refuses or fails to comply with a notice served on the person under subsection (2) or fails to afford the assistance referred to in subsection (5) shall be liable to a penalty of €4,000.*

#### Section 949E TCA 1997

##### *Directions*

*(1)The Appeal Commissioners may, on their own initiative or on the application of a party, give a direction at any time to a party in relation to the conduct or disposal of an appeal, including a direction amending an earlier direction or suspending or setting aside its operation.*

*(2)Without prejudice to the generality of subsection (1), the matters in relation to which the Appeal Commissioners may give a direction include—*

*(a)requiring a party to provide, to the Appeal Commissioners or to another party, documents, statements, accounts, returns, computations, explanations, particulars, records, certificates, declarations, schedules and such other items*



*or information as they consider relevant to the adjudication of the matter under appeal,*

*(b)consolidating or hearing together 2 or more appeals raising common or related issues,*

....

## **Submissions**

### *Appellant*

11. The Appellant's agent submitted that the Appellant had incurred an agricultural loss of €150,000 and that this was not allowed by the Respondent when assessing his tax liabilities. The Appellant's agent advised that the loss arose on the death of a mare who had a number of foals who won "*a few races*". The Appellant's agent advised when the mare died it was valued at €150,000 and accordingly agricultural relief was available to the Appellant for this loss.
12. The Appellant's agent advised that the nature of the Appellant's "other" business (steel erection and fabrication) was such that work could only be done in good weather and low winds. Owing to this country's climate and unpredictable weather, the Appellant's agent submitted that casual labour was required on suitable days to conduct works on behalf of the Appellant and that these individuals would only accept cash payments. He stated that as the cash was not accounted for in computing the Appellant's income that this led to inflated profits arising as the Respondent had only allowed those expenses paid from the bank account or for which receipts were available. The Appellant's agent further advised that the Appellant's motor vehicle was broken into but he was unable to provide the Commission with an inventory of the exact records stolen or provide a Garda report of the incident.
13. The Appellant's agent advised that the Respondent's calculations were flawed as the profit margin calculated on the figures prepared by them was too high. The Appellant's agent submitted that the Appellant was prepared to show the Commission photos of the structures erected by the Appellant over the years and have witnesses attend to prove that no windfall gains were made by the Appellant. This he submitted was "*the only way to resolve matters*".
14. The Appellant's agent concluded his submissions by stating that the Respondent overstated the Appellants liabilities and having regard to the agricultural loss available the

assessments forming the appeal should be reduced substantially from those calculated by the Respondent.

*Respondent*

15. The Respondent stated that the Appellant advised them during the course of the audit that a mare it owned and bred had died in 2016 and it wished to offset this loss against the assessments. The Respondent advised that as the audit related to the tax years 2013 to 2015, it was not possible to carry back losses from 2016 to those years as losses incurred can only be carried forward by a taxpayer. In addition, the Respondent stated that it had not been provided with any evidence to support that the mare in question was purchased for the amount the Appellant sought to write-off in respect of it.
16. The Respondent advised that the Appellant did not maintain proper books and records as required under the provisions of section 886 TCA 1997. The Respondent advised that despite serving a notice under section 900 TCA 1997 some but not all required records were produced by the Appellant.
17. In the absence of full records, the Respondent advised that it obtained the sales figures from the available bank statement lodgements. When these lodgements were tabulated for the various years under appeal it subsequently agreed with the Appellant that the quantum of these lodgements would be reduced by 20% to allow for short-term loans which the Appellant had advised was advanced to him from friends. To the revised lodgement figures, the Respondent subsequently adjusted those figures to accommodate RCT information which it had on file and this gave the Appellant's total gross sales for the years in question. The Respondent subsequently split the total gross sales figures between the net sales and the VAT arising on those sales using the VAT rate applicable to the activities of Appellant. These calculations formed the basis of the Appellant's VAT on sales and net sales figures for the periods under appeal.
18. In relation to purchases, the Respondent advised that it took the agent's workings, adjusted these by amounts which were unsupported by invoices and split those figures between the net amount of purchases and the VAT arising on those purchases. These calculations derived the VAT on purchases and the net purchases figures for the period under appeal.
19. In calculating the VAT payable by the Appellant for the periods under appeal, the Respondent deducted the revised purchase VAT from the revised sales VAT and this gave the total VAT payable by the Appellant. The Respondent subsequently issued revised

notices of assessment showing the revised VAT payable by the Appellant. Those assessments form the basis of the VAT assessments under this appeal.

20. The Respondent advised that no records were maintained by the Appellant for the payment of wages and no pay slips were issued to staff. In its computation of allowable wages, the Respondent advised that it firstly analysed the difference between the figures claimed in the Appellant's submitted financial statements and compared them to the amounts returned on the yearly Form P35 (employer's return of amounts paid to staff with the associated PREM).
21. When questioned on the resultant difference between the wages claimed in the Appellant's financial statements and the amount returned on the P35's, the Appellant advised that the differences "must have been for mileage allowances and miscellaneous expenses". As no records were produced by the Appellant to substantiate this claim, the Respondent subsequently disallowed the differential and raised assessments to PREM on this difference. Those assessments form the basis of the PREM assessments under this appeal.
22. Finally, when computing the additional income tax chargeable on the Appellant, the Respondent calculated the taxable profits by taking the revised sales figures which were reduced by both the revised purchases and allowable wages. The resultant figures gave rise to the income tax assessments under appeal.
23. The Respondent submitted that the calculations used in computing the various taxes which represent the taxes under appeal were computed on the best available information. The Respondent advised that it had afforded the Appellant every opportunity in advance of raising those assessments to provide documentation disputing their figures but he had failed to do so.
24. The Respondent advised that as the onus of proof was upon the appellant to prove that he did not owe the taxes forming the assessments and as he had failed to do so, then the Commission should uphold the assessments.

### **Material Facts**

25. The Commissioner finds the following material facts:-
  - 25.1. The Appellant was registered for Income Tax, VAT and PREM.
  - 25.2. The Appellant was selected for a Revenue audit in respect of the tax year 2013. This audit was subsequently extended to include the tax years 2014 and 2015.

- 25.3. The Appellant did not maintain proper records in accordance with the provisions of section 886 TCA 1997.
- 25.4. The Respondent issued the Appellant with a notice in accordance with the provisions of section 900 TCA 1997.
- 25.5. Despite issuing the section 900 letter the Respondent was not presented with satisfactory records which were required to properly ascertain the Appellant's liabilities under the various tax heads.
- 25.6. Based upon the available records, the Respondent calculated the Appellant's liabilities under the various tax heads using best efforts and estimates.
- 25.7. The Appellant was subsequently given the opportunity to present documentary evidence to dispute the Respondent's calculations but failed to do so.
- 25.8. The Appellant claimed that he incurred a loss in respect of the loss of a mare in the tax year 2016.
- 25.9. No documentary evidence was presented to the Commission to substantiate the Appellant's claim that the mare was acquired for €150,000.

### **Analysis**

26. In appeals before the Commission, the burden of proof rests with the Appellant who must prove on a balance of probabilities that the assessments or tax deductions are incorrect. In the case of *Menolly Homes v Appeal Commissioner and another* (2010) IEHC 49 (*"Menolly"*), at paragraph 22 Charleton J. stated:

*'The burden of proof in this appeals 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'*

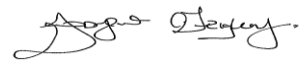
27. The decision in *Menolly* is consistent with authorities in England and Wales, such as *Hurley v Taylor (Inspector of Taxes)* ChD, 10<sup>th</sup> February 1998 which is persuasive authority that on appeal of an "in-time" assessment the burden of proof rests with the taxpayer. In *Eagerpath Limited v Edwards (Inspector of Taxes)* CA 14<sup>th</sup> December 2000, the UK Court of Appeal held:

*"On appeal to the commissioners the burden of proof is on the appellant taxpayer because the taxpayer can be expected to know all about his own financial affairs, whereas the inspector may have little or no knowledge about them apart from the taxpayer's return."*

28. The provisions of section 886 TCA 1997 further require taxpayers such as the Appellant to maintain proper records which correctly record and explain the transactions of their business.
29. It follows that the Appellant being the person with access to all of the facts and documents relating to his own tax affairs, is bound not only to retain documentation in accordance with the requisite statutory provisions but also to produce such documentation as may be required in support of his appeal so as to meet the burden of proof.
30. As the Appellant did not keep the records required under section 886 TCA 1997, it follows that the assessments issued by the Respondent should not be vacated by the Commission subject to the quantum of the assessments being determined in accordance with the provisions of the TCA 1997.
31. In relation to the quantum, the Commissioner examined the detailed workings and analysis prepared by the Respondent in calculating those assessments. Having regard to such works and noting that the Appellant did not present any evidence to the Commission which would warrant a reduction in the sums provided, the Commissioner determines that the assessments issued by the Respondent should stand without modification.
32. Section 382 TCA 1997 while permitting the carry forward of losses to future years does not allow such losses to be carried-back against previous years of assessment. For this reason, the Appellant's claim that the loss he allegedly incurred on the death of the mare, cannot be offset against the taxes due under the issued notices of assessment. Furthermore, the Commissioner was not satisfied that any such loss did in fact occur as no tangible evidence was presented to the Commission in this regard.
33. Accordingly, the Commissioner determines that the Appellant has not discharged the necessary burden of proof to vacate the assessments to Income Tax, VAT and PREM. As a result the Respondent's assessments in the sum of €221,151 are upheld.

### **Determination**

34. The Commissioner determines that the assessments to Income Tax, VAT and PREM in the sum of €221,151 stand as the Appellant has not discharged the necessary burden of proof. Therefore, the appeal is denied and the assessments are upheld.
35. The appeal is determined in accordance with section 949AK TCA 1997. This determination contains full findings of fact and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Andrew Feighery  
Appeal Commissioner  
25<sup>th</sup> October 2022

**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**