



AC Ref: 01TACD2016

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Background

1. During the tax years of assessment 2009, 2010 and 2011, the Appellant claimed deductions for interest on borrowings pursuant to section 97(2)(e) TCA 1997 in respect of a site of land at **ADDRESS REDACTED**.
2. Assessments were raised on 29/7/14 re 2009, and 10/9/14 re 2010 and 2011. The assessments raised disallowed the deduction claimed and assessed the Appellant to income tax pursuant to Case V.

Legislation

3. Section 97(2) TCA 1997 (Computational rules and allowable deductions) provides:

'The deductions authorised by this subsection shall be deductions by reference to any or all of the following matters -

(a)....

....

(e) interest on borrowed money employed in the purchase, improvement or repair of the premises.'



4. Section 105 TCA 97 (Taxation of rents: restriction in respect of certain rent and interest) provides;

'(1) This section shall apply to -

(a) rent in respect of premises, or

(b) interest on borrowed money employed in the purchase, improvement or repair of premises,

payable by a person chargeable to tax in accordance with section 75 on the profits or gains arising from rent in respect of those premises for a period before the date on which the premises are first occupied by a lessee for the purpose of a trade or undertaking or for use as a residence.

(2) No deduction shall be allowed for any year of assessment under section 97(2) in respect of rent or interest to which this section applies.'

Evidence and submissions

5. During the course of Revenue enquiries, the Appellant furnished a handwritten note to the Respondent stating that; '**NAMES REDACTED** rented **ADDRESS REDACTED** from 2009 to 2011 for €600 a year. Paid. **NAME REDACTED**. At hearing, the Appellant submitted that there was no written lease between **NAMES REDACTED**. The Appellant did not contend that the note from **NAMES REDACTED** was itself a lease. The Appellant contended that the note was a document which confirmed the existence of a verbal lease. During the hearing he/she submitted that the verbal lease was entered into at some point in 2007 or 2008.
6. The Appellant did not adduce any evidence of payment of rent in relation to the agreement between himself/herself and **NAMES REDACTED**. He/she stated that the rent was agreed at €600 per annum and was paid in cash. The Appellant submitted that there were no bank statements evidencing same and that he/she did not provide written receipts re payment of same.



7. On the issue of occupation of the land by **NAMES REDACTED**, the Appellant stated that he/she was unaware of any occupation of the land by the **NAMES REDACTED**. He/she said **NAMES REDACTED** had intended to grow a vegetable garden on the land, but to his/her knowledge, had never done so. He/she stated that after he/she commenced the verbal agreement with **NAMES REDACTED** in respect of leasing the land, that he/she was never present thereafter on the land. He/she said that he/she did not inspect the land during the currency of the alleged lease over the relevant tax years of assessment and that he/she could not confirm any evidence of occupancy by **NAMES REDACTED**, in relation to the land.
8. The property was sold in 2011. At hearing, the Appellant was questioned by the Respondent as to whether, prior to the sale, the Appellant had been required to confirm that the land was not subject to any encumbrances including the rights of any lessees. The Appellant answered that he/she was not required to confirm or clarify this information for the purchaser.

Analysis

9. Section 105 TCA 1997 provides that the interest deduction will not apply where the interest is payable '*for a period before the date on which the premises are first occupied by a lessee for the purpose of a trade or undertaking or for use as a residence*'. [emphasis added]
10. Therefore, in order to establish an entitlement to the deduction pursuant to section 97(2) TCA 1997, it is incumbent on the Appellant to demonstrate, on the balance of probabilities, that the interest was payable from the date on which the lessee commenced occupation of the premises.

Occupation

11. As there was no building or structure on the land, there was no occupation of any building for use as a residence or for business purposes. During the hearing, no evidence of occupation by the lessee was tendered on behalf of the Appellant. When queried, the Appellant stated that there was no occupation of the land by the lessee as far as he/she was aware. He/she stated that **NAMES REDACTED** had intended to use the land as a vegetable garden for their kids but that to his/her knowledge, they had not done so. He/she said that



he/she did not inspect the land during the currency of the lease and that he/she could not confirm any evidence of occupancy by **NAMES REDACTED**, in relation to the land.

Lessee

12. In order to avail of the deduction pursuant to section 97(2) TCA 97, the Appellant is required to demonstrate that ‘*the premises*’ were ‘*occupied by a lessee*’ during the tax years of assessment during which the interest deduction was claimed. Section 96(1) TCA 1997 defines ‘*premises*’ as meaning “*any lands, tenements or hereditaments in the State*” and therefore ‘*premises*’ includes land.

Section 96(1) defines lease as follows;

“lease” includes an agreement for a lease and any tenancy..., and “lessee” and “lessor” shall be construed accordingly, and “lessee” and “lessor” include respectively the successors in title of a lessee or a lessor.

13. A question which arises for consideration is whether an individual can be a ‘*lessee*’ for the purposes of section 105 TCA 1997 in circumstances where there is no written lease.
14. *Section 51 of the Conveyancing Law Reform Act 2009* provides that, for a contract in respect of the disposition of land to be enforceable, it must be in writing. It provides;

(1) Subject to subsection (2), no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person’s authorised agent.

15. One must consider therefore whether an individual could be said to be a ‘*lessee*’ pursuant to section 105 TCA 1997 in circumstances where the lease is not in writing. At law, the absence of execution of a written lease is not necessarily fatal to a claim that a lease exists. For example, there is authority under the rule in *Walsh v Lonsdale (1882) 21 Ch D 9* for the assertion of equitable rights, in the absence of the execution of a formal lease, as regards a



contract in respect of the disposition of land. In some cases, where formalities are not complied with, a written note (sometimes construed as a contract to grant a lease) may be enforceable in equity, provided there is sufficient part performance of same. Also relevant for consideration in determining whether a lease exists, is the intention of the respective parties to the agreement, which is considered a matter of substance in relation to whether the agreement is a lease or a licence, where such issues arise. In effect, the matter of the existence and/or enforceability of a lease is a matter to be established at law and the absence of a formally executed lease may not necessarily be fatal to such a claim, depending on the circumstances of a given case.

16. Therefore, the issue of whether there was a 'lessee' for the purposes of section 105 TCA 1997 turns largely on the evidence presented at hearing in support of the existence of a lease. The evidence adduced at hearing was a handwritten note asserting that **NAMES REDACTED** rented the property during the appropriate years of assessment. **NAME REDACTED** was not present to give evidence and the Appellant did not adduce any documentary evidence in support of the existence of a lease other than the aforementioned handwritten note. The Appellant submitted that there was no written or documentary evidence in respect of the payment of rent. He/she submitted that the rent was paid in cash (thus, no bank records existed) and receipts were not provided. The Appellant stated that there was no occupation of the property by **NAMES REDACTED** to his knowledge and thus, there was no evidence of performance or part-performance of the alleged verbal lease.

Conclusion

17. In tax appeals before the Appeal Commissioners, the burden of proof rests on the Appellant. The Appellant must prove his/her case on the balance of probabilities and the authority for this is contained expressly in Part 40 of the TCA 1997 at section 934(3) which provides;

"Where on appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment





accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand."

18. In my view, the evidence adduced at hearing on behalf of the Appellant was insufficient to establish, on the balance of probabilities, that the premises were "*occupied by a lessee*" within the meaning of section 105 TCA 1997 for the relevant tax years of assessment.
19. As a result, the provisions of section 105 TCA 1997 apply so to disallow the interest deduction pursuant to section 97(2) (e) TCA 1997 in respect of the relevant tax years of assessment.
20. Accordingly I have determined this matter in accordance with Section 933(5) Taxes Consolidation Act 1997.

APPEAL COMMISSIONER

January 2016

