Ref: 180TACD2020

APPELLANT

BETWEEN/

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against assessments, under Chapter 5 of Part 41A Taxes Consolidation Act 1997, as amended ('TCA 1997'), to income tax for the tax years 2015 and 2016. This appeal also relates to the operation of section 997A TCA 1997.

2. This Appeal was heard by remote hearing (both Appellant and Respondent attended by remote computer link) held at the offices of the Tax Appeals Commission on 26 August 2020.

Background

3. The Appellant was jointly assessed with his spouse in the 2015 and 2016 tax years.

4. During 2015 and 2016 the Appellant and his spouse were directors and 100% shareholders' in REDACTED ('the Company').

5. The Company went into creditors' voluntary liquidation on REDACTED 2017. REDACTED was appointed as the liquidator ('the liquidator').

6. PAYE-related taxes, deducted from salaries paid, in the amount of €17,632 were not remitted by the Company to the Respondent and were outstanding at the date of liquidation. The Liquidator did not have funds available to pay this and the amount remained outstanding. These outstanding PAYE-related taxes were related to total director's emoluments paid in the amounts of €63,648 for 2015 and €52,166 for 2016.

7. Initially, on 20 November 2018, the Respondent, denied the Appellant the PAYE credit for his portion (ignoring his wife's portion) of the unpaid PAYE and raised amended income tax assessments, pursuant to the provisions of Chapter 5 Part 41A TCA1997 and S.997A TCA1997, on the Appellant in the sum of €4,137 in respect of the 2015 tax year, and in the sum of €1,825 in respect of the 2016 tax year.

8. On 22 November 2018, the Appellant notified the Respondent that he wished to appeal the initial assessments on the grounds that they were incorrect. The Appellant submitted that "following amendments to the P35's for 2015 and 2016, THE COMPANY has no liability to Revenue for PAYE/PRSI/USC for these years and therefore S.997A does not apply".

9. On 22 November 2018, REDACTED ("Agent") who acted for both the Appellant and the Company amended, using the ROS system, the P60's and P35's thereby reducing the total director's emoluments to €30,922 for 2015 and €31,268 for 2016. Both the Appellant and the Company remained on the list associated with the agent's TAIN (Tax Advisor Identification Number) up to 28 November 2018 despite the fact that the Liquidator had taken control of the Company on REDACTED 2017.

10. The Appellant submitted copies of the "Acknowledgement for P35 Details" (issued by ROS System), dated 22 November 2018 showing a decrease in the PAYE/USC amounts due by the Company of €14,279 for 2015 and €7,805 for 2016. This reduction in liability, if it were accepted by Revenue, would have the effect that no PAYE/USC relating to director's emoluments would have been unpaid at the end of 2015 and 2016. In turn this would avoid section 997A being invoked by Revenue and would allow substantially nullify the amended assessments under appeal. As we will see later, the Respondent does not accept that the issue of the receipt/acknowledgement by the ROS system fairly states the correct position.

11. Neither party provided copies or calculations of revised income tax assessments based on the amended P60's.

12. The Appellant submits that on 11 October 2018 the Respondent issued a letter to the Appellant advising that the Appellant's tax affairs had been selected for an audit and that certain PAYE credits for 2015 and 2016 were to be withdrawn. Whereupon, the Appellant's Agent contacted the Liquidator and advised him that the P35's and P60's for 2015 and 2016 had overstated the Appellant's remuneration. The Appellant submitted that during these years the Appellant had in fact lodged €51,063 into the Company from his own personal monies. These lodgements were treated as a loan by the Appellant to the Company in the Company's accounts. The Appellant submits that the amount owing to the directors at the date of liquidation was circa €140,000 and that these monies had been lodged by the Appellant in an attempt to keep the Company trading through difficult circumstances over prior years.

13. The Appellant submits that the liquidator authorised the Agent to correct/amend the P60's/P35's for those years, taking account of the fact that the directors had lodged these monies to the Company. The Agent for the Appellant submits that these amendments were made on behalf of the Liquidator.

14. The amendments made by the Agent, were not accepted by the Collector General Insolvency unit as they did not emanate from the Liquidator. Attempts were made at the time according to the Respondent to contact the Liquidator but they received no confirmation from him that the amendments were required. The Respondent also rejected the amendments on the basis that the Appellant had previously signed and filed P35's and Form 11's reflecting the original remuneration amounts for 2015 and 2016 ('Original Receipts') and that these could not be amended retrospectively merely on account of the detrimental effect of S.997A TCA1997 on the Appellant's personal tax liability.

15. On 18 December 2018, the Respondent, denied the Appellant the PAYE credit for his spouse's portion of the unpaid PAYE also and raised new amended assessments, pursuant to the provisions of Chapter 5 Part 41A TCA1997 and S.997A TCA1997, on the Appellant in the sum of €6,672 (inclusive of his wife's tax) in respect of the 2015 tax year, and in the sum of €8,981(inclusive of his wife's tax) in respect of the 2016 tax year.

16. The Appellant submits that the Respondent has no right to prevent the Agent from amending the returns as the changes have been authorised by the Liquidator and adjustments for errors/corrections of P35's can be made by filing amended or supplementary P35's. The Appellant submits that the amended assessments dated 18 December 2018 are incorrect as they do not reflect the corrected P60's.

17. The Appellant duly appealed the assessments of 18 December 2018 to the Tax Appeals Commission. The matter to be decided upon by the Tax Appeals Commission is whether the revised P60's/P35's should stand and be reflected in the Appellant's income tax assessments for 2015 and 2016.

Legislation

The following legislation is set out in **Appendix I**

Section 997A TCA 1997 – Credit in respect of tax deducted from emoluments of certain directors.

Section 959V TCA 1997 - Amendment by chargeable person of return and of self-assessment in return

Witnesss testimony

18. REDACTED, Agent for the Appellant, stated that the issue arising is whether the employer (THE COMPANY) has authority to amend the pre liquidation P35 and P60's on the basis that the employer is 'acting through its liquidator', who has reviewed the 'Statement of Affairs', and the employer has been 'authorised' by the Liquidator to amend the returns.

19. The Appellant, REDACTED, under oath by affirmation, was cross examined by his Agent:

The Appellant confirmed he was a director of THE COMPANY up to its liquidation in June 2017.

A review of his tax affairs was undertaken by the Appellant in 2018. He contacted his tax agent and the Agent issued him with amended P60's with lower salaries.

The Appellant stated that he had lodged significant monies into the company (circa €50k between 2015 and 2016). These monies came from a pension lump sum and credit union savings.

The Liquidator (REDACTED) authorised the amendment of the P60's and P35's. The tax agent was acting on the Liquidators instructions. The Appellant submitted that the revised salaries in the amended P35 returns are what REDACTED, the Liquidator, thinks the salaries should be for 2015 and 2016.

I asked the witness to clarify some facts. His Agent confirmed that the list of the lodgements made by the Appellant into the company in 2015 and 2016 amounted to circa €50k. He confirmed that these lodgements were recorded as loans from the Director to the Company.

The Respondent stated that he did not wish to cross examine the witness.

Appellant's Submissions

20. The Appellant made the following submission in his Statement of Case for this appeal.

> *"Background:*
>
> *REDACTED and his wife REDACTED founded THE COMPANY, based in REDACTED, in REDACTED. Both were "proprietary directors" of the company. The company traded very successfully for many years and from its foundation in REDACTED to its unfortunate demise in 2017 the company had a total turnover of approx. €REDACTED million. At its peak the company had annual turnover of €REDACTEDmillion and gave employment to over REDACTED people in REDACTED.*

Having struggled for four or five difficult years, the company went into creditors' voluntary liquidation in REDACTED 2017 shortly after the directors formed the view that it was insolvent and could no longer trade. At the time Revenue records showed that it owed amounts of €17,632 in PAYE/PRSI/USC and €6,475 in VAT... Revenue is now seeking to make our client personally liable for the PAYE/USC element using the provisions of s. 997A of TCA 1997…

Following receipt of Revenue's letter …our client undertook a review of his affairs and how he had managed the difficulties of his company throughout 2015 and 2016. He established that he had lodged €51,063 of his own funds throughout 2015 and 2016 to help keep the company going. These funds came from personal savings, his pension lump sum and credit union borrowings. He contacted the liquidator to review matters and agreed with him that these monies could be treated as a reduction or repayment of the directors' salaries as they were lodged throughout the two years and at the same time the salaries were being calculated and processed. The conclusion of these discussions was that the liquidator specifically authorised the filing of amended P35 declarations for 2015 and 2016 showing reduced salaries for the two directors and therefore reduced tax liabilities for the company…

Amended P35 declarations were made on 22nd November 2018. The filing of these amended P35 declarations had the effect of reducing the salaries of the two directors with a consequent reduction in the tax liabilities associated with those salaries. At the same time the company issued amended P60s to the two directors…

In an email dated 23/11/2018 Revenue denied the existence of these amended documents. Two weeks later Revenue questioned the legitimacy of those filings. Since being provided with evidence that the filings were properly authorised by the liquidator they chose to ignore our subsequent emails…

Since 1989 THE AGENT were and still are the duly appointed tax agents of the company. We have been advised by Revenue in a separate case that it is entirely the responsibility of a taxpayer and his agent to ensure that the agent is properly set up as agent with Revenue and on ROS. Despite this Revenue deliberately removed THE AGENT as agents and have failed to respond to all correspondence on this subject since. All three emails sent to the Inspector responsible for this action have been completely ignored… As a result of this

unauthorised action by Revenue we no longer have access to the company's records on ROS. In addition Revenue have prevented us from amending the Form 11 returns for 2015 and 2016 to reflect the correct salaries.

Assessments & disputed item:

The Revenue have raised amended assessments dated 19/12/2018 in respect of the years 2015 and 2016. We dispute these assessments on two specific grounds:

Firstly, the assessments indicate higher salary figures that [sic] the attached P60s and are therefore incorrect. The amended salaries were approved and agreed by the duly appointed liquidator and our clients. If the Revenue have a difficulty with how our clients' employer operated and followed the Income Tax (Employments) Regulations 2018 then they should take that up with the employer in the first instance. To our knowledge they have not done so and therefore we are entitled to rely on the presumption that the employer followed the regulations and that the P60s/salaries and the taxes shown thereon are correct. We therefore require that the assessments be amended to the correct salaries.

The second ground for our appeal is the evidence requirement in clause (3) of s. 997A of TCA: viz. "…unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector General…"

*Document 03. (*presented at the hearing*) shows the balances outstanding under employer "PREM" PAYE as of 11/10/2018 per the Revenue's records (ROS). Documents 04a. & 04b. (*presented at the hearing*) show these liabilities being reduced to nil by the filing of two amended P35 returns, 2015 and 2016. Document 07.* (presented at the hearing*) shows the company's instruction to Revenue to have the overpayments offset in accordance with normal practice.*

This is clear and indisputable documentary evidence that the tax deducted has been remitted and therefore the assessments should be amended to reflect this position."

21. The Agent for the Appellant made the following arguments at the hearing:

There are three main arguments against the actions of the Respondent:

1. Revenue's removal of REDACTED as tax agent and preventing the amendment of employers' returns.

   Revenue should not have removed REDACTED and his company (THE AGENT) from acting as agent. THE AGENT have been tax agent for the Appellant's company since 1989. Up to 28/11/18 the returns were the 100% responsibility of the company or the taxpayer.

   The Agent referred to a Revenue document entitled – "Do you need a tax agent" etc. The Agent submitted that the taxpayer has responsibility for filing returns and Revenue have no impact on this.

   The Agent referred to another document citing that Revenue do not normally remove agents in liquidation cases. The Agent provided a list of examples of companies from THE AGENT's TAIN list of other client companies that are in liquidation but THE AGENT remains as tax agent post liquidation.

   The Agent noted another document which was confirmation of agent link removal (PAYE) issued to THE AGENT by Revenue on 28/11/18. THE AGENT notified Revenue that they did not wish to be removed as agent.

2. The Agents contends that Revenue believe that the taxpayer is not entitled to amend the returns. The Agent referred to Para 19.7.1 employers' instructions as regards amending P35, which contradicts this.

3. The Agent contends that in 2018 Revenue put a lock on the Appellant's tax return so that the tax agent could not amend his return.

   The Agent stated that the liquidated company owed approx. €17,000 in PAYE etc. and €6,000 in Vat at the time of liquidation.

   The Agent confirmed that THE AGENT submitted the changes to the P35 Returns as they were still agent for the company on ROS.

   The Agent stated that powers are vested with the Liquidator from REDACTED. Sanction was given by the Liquidator to the tax Agent. The Liquidator continues to support the amendment of the returns. The Agent referred to a document in the Respondent's Book of Evidence from THE LIQUIDATOR to Revenue which reflects the thinking of the Liquidator. He

noted that these amendments to the P35 for 2015 and 2016 would in the Liquidator's view not be a fraudulent preference and the monies lodged by the director had enabled the company to survive.

The agent referred to the Respondent's outline of relevant facts.
"These amendments were not accepted by the Collector General as they did not emanate from liquidator" – the Agent says that this is wrong in that the employer made these changes based on the sanction of the Liquidator. He stated that Revenue are required to go through a process to recognise these amendments but instead they just rejected them.

The Agent referred to a document, showing the taxes outstanding from 2016 and 2015, totalling approx. €17k. After the amendments to the P35 these taxes are reduced by approx. €14k and €7k such that the personal taxes of the Appellant were overpaid and that the Agent requested that the overpayment by the Appellant be offset against 2017 income tax and then VAT.

The Agent submitted that the revised P60's for the Appellant were issued before the amended assessments were raised on 19 December 2018.

The Agent submits that the Revenue should accept the amended P35's and P60's. The Agent submits that if Revenue do not accept this then they should take that up with the employer (the company in liquidation) and issue estimates. Only after that could they and should they chase the Appellant.

The Agent argued that if section 997A applied it required documentary evidence of payment of tax. Documents presented at the hearing show the reduced tax liability, thereby obviating the need for section 997A to have application.

He submitted that the Appellant is not trying to gain a tax advantage but is seeking to avoid a tax disadvantage.

In the Appellant's final submission at the hearing, the Appellant's Agent said it was not true that Revenue remove agent's right of access to ROS when companies go into liquidation. There is no lock on pre-liquidation returns. Also, the Liquidator was in touch with Revenue in 2017.The Appellant's Agent stated that the Liquidator had authorised him to make the

amendments. The changes took place on behalf of the Liquidator. The Agent remains in place unless the Liquidator takes on the role. He also submitted that it is not true that tax returns cannot be amended and that Revenue approval is not required before a return is amended.

Respondent Submissions

22. The Respondent's submitted in their Statement of Case, the following:

Overview

This is a statement of case prepared by the respondent in response to an Appeal by the Appellant to liabilities totaling €15,653.40.

This liability refers to Income Tax with respect to the years 2015 and 2016, both relating to the assessment of salaries for THE APPELLANT and his spouse without being granted an associated PAYE credit as it remained unremitted by the company. The Appellant appealed these sums on the grounds that that any such monies received should be reclassified as repayments of a director's loan to the company and not salary subject to PAYE.

1. Statutory provisions being relied on

1.1 Statutory Provision: Section 997A TCA 1997

Section 997A of the Taxes Consolidation Act (TCA) 1997 applies to directors or employees who have a material interest in the company that pays emoluments to the director or employee. Its purpose is to deny such directors and employees a credit for tax deducted from their remuneration until such tax has been remitted to the Collector-General. The credit for tax deducted cannot exceed the tax remitted in respect of the emoluments paid to a director or employee to whom the section applies.

In addition, section 997A –

- *provides that the tax deducted from emoluments paid for a year of assessment relates to that entire year of assessment;*
- *sets out how payments made by employer companies should be brought to account when applying the provisions of the section; and*

- *gives a specific right of appeal against a Revenue decision under the section not to grant credit for tax deducted under PAYE*.*

**Note that Appellant appealed under general grounds, rather that that contained under 997A(8)*

1.2 Material Interest

Section 997A applies to any director or employee who has a material interest in the company that pays emoluments to that director or employee. A director or employee can have a material interest in a company in one of two ways. The director or employee has a material interest where,

- *in his or her own right, or*
- *with one or more "connected" persons ("connected" as defined in section 10 of the TCA 1997, see paragraph 1.2 below), he or she is the beneficial owner of, or is able to control directly or indirectly, more than 15% of the ordinary share capital of the company paying the emoluments. If any person connected with a director or employee is the beneficial owner of, or is able to control directly or indirectly, more than 15% of the ordinary share capital of the company paying the emoluments, then the director or employee has a material interest in the company. This rule applies notwithstanding the fact that the director or employee does not have any shareholding company.*

1.3 Connected Individuals

Connected individuals Section 10(3) TCA 1997 states: "A person shall be connected with an individual if that person is the individual's husband, wife or civil partner, or is a relative, or the husband, wife or civil partner of a relative, of the individual or of the individual's husband, wife or civil partner."

A relative for the purposes of Section 997A means brother, sister, ancestor or lineal descendant. See section 10(1) TCA 1997…

2. Outline of relevant facts

2.1 *THE APPELLANT and his SPOUSE were directors of the company REDACTED*

2.2 *Per company office returns, THE APPELLANT held REDACTEDA Ordinary Shares and SPOUSE REDACTEDA Ordinary Shares, the balance of the share capital being REDACTED B shares.*

2.3 *REDACTEDLtd went into REDACTEDliquidation on REDACTED, with REDACTED of REDACTED appointed as liquidator.*

2.4 *Payroll taxes totalling €17,632.32 remains unremitted in respect of 2015, 2016* (corrected)

2.5 *As THE APPELLANT owns in excess of the 15% shareholding in this company, the PAYE associated with the salaries paid to him and SPOUSE as a connected individual from THE COMPANY should be excluded from his Notice of Assessment for each of those years in accordance with S 997A TCA 1997*

2.6 *I therefore issued a S997A TCA 1997 letter on the **11th October 2018** to THE APPELLANT to his home address REDACTED and copy to his agent M/S THE AGENT.*

2.7 *Failing response, on the **20th November 2018** I amended his 2015 and 2016 Returns of Income and reduced his PAYE tax paid figures only. On the **21st November 2018** I sent a letter to THE APPELLANT and a copy of same to his personal tax agents M/S THE AGENT Accountants, REDACTED. This letter outlined that I had amended 2015 and 2016 Returns of Income and removed tax paid and attached calculation of liability due. On the 18th December 2018 I amended assessments for 2015 and 2016 withdrawing credit for SPOUSE under S997A TCA 1997.*

2.8 *On the **22nd November 2018** agent REDACTED sent email that they wished to appeal against recent amended Income Tax assessments for 2015 and 2016 on the grounds that they were incorrect. The email went on to say: following amendments to the P35s for 2015 and 2016, THE COMPANY has no liability to Revenue for PAYE/PRSI/USC for these two years and therefore S997A does not apply.*

2.9 *These amendments were not accepted by Collector General insolvency unit as they did not emanate from the liquidator of the company*

notwithstanding an assertion from agent, that he held specific written authorisation from the liquidator.

2.10 Additionally, it was not accepted the originals could be revised given these were official contemporary documents signed and filed on behalf of the directors and cannot retrospectively be amended to give a better outcome.

2.11 THE APPELLANT's personal Income Tax returns for 2015 and 2016, filed 08/11/2016 and 14/11/2017 respectively reflects the Income and Tax figures reflected in the original P35's. [More details in Table below]

2.12 Corporation Tax Returns for accounts year ended 30/4/2015 on 1/4/2016 returned Directors emoluments of €70,848

REDACTED

TABLE: Extracts from P35 & Income Tax returns

2016

P35 returned by the company, Pay €21,800 Tax €1,720 (THE APPELLANT); Pay €27,805.72 Tax €6,239.43 (SPOUSE)

Income Tax Return was filed 14/11/2017 returning Directors emoluments €21,800 (THE APPELLANT), €27,805 (SPOUSE) with the above tax deduced figures claimed, resulting in a total refund of €2,480.15 being made

2015

P35 returned by the company, Pay €31,200 Tax €2,808.00 (THE APPELLANT); Pay €32,448 Tax €7,886.95 (SPOUSE)

Income Tax Return was filed 08/11/2016 returning Directors emoluments €31,200 (THE APPELLANT), €32,448 (SPOUSE) with the above tax deduced figures claimed, resulting in a total refund of €1,719.04 being made.

2014

P35 returned by the company, Pay €45,200 Tax €6500.50 (THE APPELLANT); Pay €31,344 Tax €7,660.88 (SPOUSE)

2013

P35 returned by the company, Pay €20,702 Tax €708.58 (THE APPELLANT); Pay €30,768 Tax €7,424.72 (SPOUSE)

…Response to Grounds for Appeal

- *The burden of proof rests with the Appellant to prove on the balance of probabilities the Respondents assessment is incorrect.*
- *No evidence has been produced to support such a reclassification*
- *Six separate statutory returns, whether submitted by the company or the director reflect the position that salaries were paid to THE APPELLANT and his spouse.*
- *Neither are the salaries inconsistent with those paid by the company in earlier years not in dispute*

…Revenue contends that Appellant is attempting to relabel the salaries paid to him and his spouse as a consequence of Revenue's S997A intervention. It is not appropriate or correct to retrospectively change what were the facts at the time of these payments.

Revenue will not accept amended returns from a third party as it remains the liquidator's responsibility to aver (sic) to the assets and liabilities of the company and where the liquidator has not addressed the veracity of the changes the agents proposes.

The facts are clear, salary was paid, tax was not remitted, S997A applies…"

23. The Respondent made the following arguments at the hearing:

The Respondent submitted that the Appellant previously signed and submitted Form 11's and P35's for 2015 and 2016 and that the Appellant is attempting to "rewrite history" because of the effect of section 997A TCA1997;

The Respondent asserts that the first letter to the Appellant was issued by Revenue on 11/10/18 (stating that the Appellant's personal tax returns were being subjected to Revenue Audit) and not November as suggested by the Agent. This letter was later copied to the Agent on 21/11/18.

The initial amended assessments to income tax were raised on 20 November 2018.

The Respondent stated that Revenue do not amend P35's on company liquidation cases. He also stated that only Revenue can amend returns on ROS.

No response was received within 14 days to Revenue's letter of 11/10/18. On 21/11/18 Revenue advised THE APPELLANT that they "were going to amend" the returns and on 21/11/18 the Appellant was issued with amended and increased income tax assessments which reduced the PAYE credit at source by the S.997A restriction.

On 22/11/18 the Appellant's agent notified Revenue (through 'My Enquiries') that he wished to appeal against the amended income tax assessments for 2015 and 2016.

The Respondent stated that around this time the Liquidator was not answering calls from Revenue.

The Respondent argued that the Appellant had filed true and accurate returns and was now seeking to amend those returns to secure a tax advantage. Under self-assessment the Appellant had declared in his income tax returns for 2015 and 2016 the receipts from the company, pertinent to this appeal, as salary rather than as a reduction in directors' loans.

The Respondent also pointed out that documents, presented at the hearing, shows that the *"accountant for the company advised the liquidator that amended P35's needed to be filed by the Company".* This is contrary to what the Agent asserts. Revenue submit

that it was not the Liquidator who required the change to the 2015 and 2016 P35's but the Appellant and his Agent.

Analysis and findings

24. The key issue in this appeal relates to whether the Appellant (acting through his Agent, who was also agent for the Company controlled by the Appellant prior to liquidation) is entitled to change the salary payment figures in his original P60's ('Original Receipts') to a lower figure. In effect to re-characterise a portion of the 'Original Receipts' receipts ('Re-characterised Original Receipts') as a refund of director's loans. This re-characterisation applies to amounts paid to the Appellant by his 100% controlled company in years 2015 and 2016 amounting to the value of €32,726 (2015) and €20,898 (2016) (difference between original P60's and the revised P60's) for tax purposes. The effect of the re-characterisation, if accepted, would be to reduce the Appellant's tax liabilities in years 2015 and 2016.

25. The 'Re-characterised Original Receipts' were originally characterised as director's salary made to the Appellant and his wife by the Company. The Company (before liquidation) filed P35 returns to this effect. The Appellant also filed his joint self-assessed tax returns for himself and his wife for 2015 and the 2016 on the basis that all 'Original Receipts' were directors' remuneration.

26. Later, in 2018 when the Appellant realised that he would be unable to obtain credit for the PAYE / USC deducted from his and his wife's salary (because the operation of section 997A TCA 1997 applied due to the failure of the employer Company to remit the tax deducted to the Revenue), he sought, through his Agent, to re-characterise a portion of the 'Original Payments' as reductions in his director's loan account and not as taxable remuneration.

27. The main argument put forward by the Appellant was that his Agent, REDACTED, was also the agent of the Company, both before and after the liquidation; that the agent is entitled to amend returns on the Revenue's ROS system, where errors occur; that having amended the P35 Returns for years 2015 and 2016 in 2018, the ROS System generated revised P60's for 2015 and 2016 for the Appellant. Using these revised P60's, the Appellant argued he no longer had the income tax liabilities arising under his self-assessed income tax returns.

28. The Appellant did give evidence as to the amounts he had invested in the Company. However, the Appellant put forward no specific evidence or detail relating to his director's loan account for the relevant periods, either before liquidation, or at liquidation, which would show what was the balance on his loan account after the re-characterisation of the 'Re-characterised Original Receipts'.

29. Neither was any evidence put forward by the Appellant to explain the purported error in the original P35 returns and the purported error in the original self-assessed and signed returns for 2015 and 2016; why the re-characterisation was not identified by the Company or the Appellant when the 'Original Receipts' were paid to the Appellant. It appear obvious that the impetus for the re-characterisation was the Respondent's communicated intention, during audit, to deny the Appellant a credit for PAYE / USC deducted from the 'Recharacterised Original Receipts' because equivalent PAYE/USC in 2015 and 2016 was not paid to Revenue as required under section 997A TCA 1997.

30. It is a moot point, based on the documents presented to the hearing, whether the liquidator had any basis for believing that the re-characterisation would not amount to a fraudulent preference given that the Respondent, as a preferential creditor in the liquidation, would have received a lower amount of tax from the re-characterisation.

31. The Agent advised the Liquidator in documents submitted during the Appeal: "I *would like to amend the P35 declarations for both years to reduce THE APPELLANT'S and SPOUSE'S salaries by the amounts lodged (payments to the company by the Appellant) in each year, thereby significantly reducing the exposure to Revenue. In effect, I would like to treat the lodgements as repayments of the salaries in each year".* This suggests a preference for re-characterisation rather than an imperative driven by a clear error in the original P35 returns.

32. Although it was not argued at the appeal, Section 959V TCA 1997 (see Appendix 1) deals with 'Amendment by a chargeable person of return and of self-assessment in return'.

33. The Appellant submitted in this appeal that his self-assessed income tax returns for 2015 and 2016 should be amended to reflect the re-classification/correction of the salaries from the Company.

34. The Appellant contended that Revenue are not permitted to prevent the Agent from amending the Appellant's income tax returns for 2015 and 2016 and that Revenue approval is not required before a return is amended.

35. Although not part of either parties' submissions, S.959V TCA 1997 deals with the self-correction of tax returns by a chargeable person. The pertinent sections applying to the Appellant's self-assessed tax returns are as follows:

> *(1) Subject to the provisions of this section, a chargeable person may, by notice to the Revenue Commissioners, amend the return delivered by that person for a chargeable period.*
>
> *(2) Where a return is amended in accordance with subsection (1), the chargeable person shall as part of that notice amend the self assessment for the chargeable period at the same time.*
>
> *(2A) A return and self assessment may be amended under this section only where such an amendment—*
>
> *(a)arises from an allowance, credit, deduction or relief due under the Acts,*
>
> *(b)is necessary to correct either an error or a mistake, or*
>
> *(c)is necessary to comply with any other provision of the Acts,*
>
> *and notice of an amendment under this section shall specify which of paragraphs (a), (b) and (c) applies.*
>
> *…….*
>
> *(7) Notice under this section shall not be given in relation to a return and a self-assessment after a Revenue officer has started to make enquiries under section 959Z in relation to the return or self-assessment or after he or she has commenced an audit or other investigation which relates to the tax affairs of the person to whom the return or self-assessment relates for the chargeable period involved (*emphasis added*).*

36. These combined, state that notice to amend a return delivered by a taxpayer for a chargeable period cannot be made once a Revenue audit has commenced. The letter of 11 October 2018 clearly states that Revenue had commenced an audit and this precludes the Appellant from availing of the self-correction provision contained in S.959V (1).

Material findings of fact

37. I determine, as a material fact, that the Appellant and his wife did receive the 'Original Receipts' as taxable remuneration in 2015 and 2016.

38. The rights and wrongs as to whether the Appellant's agent is or is not entitled to continue to act for the company before and after liquidation does not alter this material fact and so I do not need to give any further consideration to that argument.

39. Having established that the 'Original Receipts" are taxable remuneration of a director who has a material interest in his company, section 997A TCA 1997 comes into play.

Section 997A (2) provides that:

'This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.'

Thus, the provision applies to proprietary directors. Section 997A(1)(b) provides as follows;

> *(1)(b) For the purposes of this section—*
>
> > *a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and*

> *the question of whether a person is connected with another person shall be determined in accordance with section 10.* (emphasis added)

Section 997A (3) provides:

> *'Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies shall be given against the amount of tax chargeable in any assessment raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.'*

Section 997A (4) provides:

> *'Where the company remits tax to the Collector-General which has been deducted from emoluments paid by the company in a year of assessment, the tax remitted for that year of assessment shall be treated as having been deducted from emoluments paid to persons other than persons to which this section applies in priority to tax deducted from persons to whom this section applies'* (emphasis added)

40. The Appellant did not dispute the fact that he was a proprietary director, Neither is it disputed that the Company failed to remit PAYE/USC in 2015 and 2016 in respect of the 'Re-characterise Original Receipts' of the Appellant and his wife.

Conclusion

41. The wording of s.997A is clear in that it provides that '*no credit … shall be given'* in the circumstances which arise in the within appeal, namely, where the tax deducted by the company in respect of the emoluments of the Appellant was not fully remitted to the Respondent.

42. The wording of section 997A (4) underlined above uses the prescriptive 'shall'.

Determination

43. While the Appellant may well feel aggrieved at this outcome, I do not consider that I have discretion to depart from the clear statutory wording of section 997A TCA 1997 and as a result, I have no alternative but to determine that the assessment dated 18 December 2018 in the sum of € 6,672 (2015) and €8,981 (2016) shall stand.

44. I direct, as part of this determination, that the Respondent review the accuracy of the amended assessment for 2016 as there is an unexplained difference of €2,561 between the Appellant' taxable salary for 2016, per the table of P35 returns submitted to the Tax Appeals Commission by the Respondent and the higher recorded salary in the amended assessment for that year.

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

APPEAL COMMISSIONER

PAUL CUMMINS

Designated Public Official

21 September 2020

Appendix I

Section 997A TCA 1997 – Credit in respect of tax deducted from emoluments of certain directors

[(1) (a) In this section—

"control" *has the same meaning as in section 432;*

"ordinary share capital"*, in* relation to a company, means all the issued share capital (by whatever name called) of the company.

(b) For the purposes of this section—

(i) a person shall have a material interest in a company if the person, either on the person's own or with any one or more connected persons, or if any person connected with the person with or without any such other connected persons, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company, and

(ii) the question of whether a person is connected with another person shall be determined in accordance with *section 10*.

(2) This section applies to a person to who, in relation to a company (hereafter in this section referred to as "the company"), has a material interest in the company.

(3) Notwithstanding any other provision of the Income Tax Acts or the regulations made under this Chapter, no credit for tax deducted from the emoluments paid by the company to a person to whom this section applies [shall be given against the amount of tax chargeable in any assessment] raised on the person or in any statement of liability sent to the person under Regulation 37 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) unless there is documentary evidence to show that the tax deducted has been remitted by the company to the Collector-General in accordance with the provisions of those regulations.

(4) Where the company remits tax to the Collector-General which has been deducted from emoluments [paid by the company in a year of assessment, the tax remitted for that year of assessment] shall be treated as having been deducted from emoluments paid to persons

other than persons to whom this section applies in priority to tax deducted from persons to whom this section applies.

(5) Where, in accordance with *subsection (4)*, tax remitted to the Collector-General by the company is to be treated as having been deducted from emoluments paid by the company to persons to whom this section applies, the tax to be so treated shall, if there is more than one such person, be treated as having been deducted from the emoluments paid to each such person in the same proportion as the emoluments paid to the person bears to the aggregate amount of emoluments paid by the company to all such persons.]

[(6) Where, in accordance with *subsection (5)*, the tax to be treated as having been deducted from the emoluments paid to each person to whom this section applies exceeds the actual amount of tax deducted from the emoluments of each person, then the amount of credit to be given for tax deducted from those emoluments shall not exceed the actual amount of tax so deducted.]

[(7) Notwithstanding *section 960G* and for the purposes of the application of this section, where a company has an obligation to remit any amount by virtue of the provisions of—

(a) the Social Welfare Consolidation Act 2005 and regulations made under that Act, as respects employment contributions,

(b)*Part 18D* and regulations made under that Part, as respects universal social charge, and

(c) this Chapter and regulations made under this Chapter, as respects income tax,

any amount remitted by the company for a year of assessment shall be set—

(i) firstly against employment contributions,

(ii) secondly against universal social charge, and

(iii) lastly against income tax.

[(8) Were any person is aggrieved by a decision of the Revenue Commissioners on a claim for credit for tax deducted from emoluments, in so far as the decision was made by reference to any provision of this section, the provisions of *section 949* shall apply to such decision as if it were a determination on a matter referred to in *section 864*.]

959V Amendment by chargeable person of return and of self assessment in return

(1) Subject to the provisions of this section, a chargeable person may, by notice to the Revenue Commissioners, amend the return delivered by that person for a chargeable period.

(2)Where a return is amended in accordance with subsection (1), the chargeable person shall as part of that notice amend the self assessment for the chargeable period at the same time.

(2A)A return and self assessment may be amended under this section only where such an amendment—

(a)arises from an allowance, credit, deduction or relief due under the Acts,

(b)is necessary to correct either an error or a mistake, or

(c)is necessary to comply with any other provision of the Acts,

and notice of an amendment under this section shall specify which of paragraphs (a), (b) and (c) applies.

(3)Subject to subsection (4), notice under this section shall be given in writing to a Revenue officer in the Revenue office dealing with the tax affairs of the chargeable person.

(4) (a)Notice under this section in relation to the amendment of a return and a self assessment shall be given by electronic means where the return was delivered by electronic means.

(b)The electronic means by which notice under this section shall be given shall be such electronic means as may be specified by the Revenue Commissioners for that purpose.

(c) This subsection shall not apply to an amendment to a return or self assessment in so far as it relates to capital gains tax.

(5)Where another person, as referred to in section 959L, is acting under the chargeable person's authority—

(a)notice under subsections (1) and (2) may be given by that other person, and

(b)where notice is so given by that other person—

(i)the Acts apply as if the return and the self assessment had been amended by the chargeable person, and

(ii)a return and a self assessment purporting to have been amended by or on behalf of any chargeable person shall for the purposes of the Acts be deemed to have been amended by that person or by that person's authority, as the case may be, unless the contrary is proved.

[(6) (a)Subject to paragraph (b) and subsection (7), notice under this section in relation to a return and a self assessment may only be given within a period of 4 years after the end of the chargeable period to which the return relates.

(b)Where a provision of the Acts provides that a claim for an exemption, allowance, credit, deduction, repayment or any other relief from tax is required to be made within a period shorter than the period of 4 years referred to in paragraph (a), then notice of an amendment under this section shall not be given after the end of that shorter period where the amendment relates to either the making or adjustment of a claim for such exemption, allowance, credit, deduction, repayment or other relief.

(7)Notice under this section shall not be given in relation to a return and a self-assessment after a Revenue officer has started to make enquiries under section 959Z in relation to the return or self-assessment or after he or she has commenced an audit or other investigation which relates to the tax affairs of the person to whom the return or self-assessment relates for the chargeable period involved.