Ref: 92TACD2022

Between/

[redacted] LIMITED

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This appeal comes before the Tax Appeals Commission by way of an appeal against Notices of Amended Assessment to Corporation Tax for the accounting periods from 21 October 2011 to 30 September 2012 and from 1 October 2013 to 30 September 2014, issued by the Respondent on 25 January 2016.

2. The tax assessed by the said Amended Assessments was €21,895 in respect of the 2011/12 accounting period and €2,040 in respect of the 2013/14 accounting period.

3. Subsequent to the hearing of the appeal, the Appellant withdrew its appeal in relation to the 2013/14 accounting period.

4. Consequently, the core issue for determination in the appeal is whether the Appellant was entitled to start-up company relief in the 2011/2012 accounting period pursuant to the provisions of section 486C of the Taxes Consolidation Act 1997 as amended (hereinafter referred to as **"TCA 1997"**).

B. Factual Background

5. The facts material to this appeal are relatively straightforward, and are not in dispute between the parties. The facts which I find material to the determination of this appeal are set forth below.

6. Three pubs in Dublin, namely **PUB A**, **PUB B** and **PUB C** were operated by three companies, namely **COMPANY A** Limited, **COMPANY B** Limited and **COMPANY C** Limited.

7. On or about [redacted] 2011, AIB appointed Mr [redacted] of [redacted] [redacted] Insolvency (hereinafter referred to as **"the Receiver"**) as Receiver of the three companies.

8. The Receiver of the three companies asked Mr [redacted], a person with considerable experience in the pub trade, to manage and operate the three pubs on the Receiver's behalf. Mr [redacted] agreed to provide these services to the Receiver and decided that he would so through the Appellant.

9. The Appellant was a company incorporated on [redacted] 2009 with the intention of purchasing a public house. However, that purchase did not take place and the

Appellant had never traded prior to it being appointed by the Receiver to manage the three pubs.

10. The Appellant began operating and managing the three pubs on behalf of the Receiver on 21 October 2011 pursuant to a written agreement of that date. Although a copy of that agreement was not furnished to me, I am advised that it was expressed to be for a term of one month but that the Appellant continued to operate and manage the public houses on behalf of the Receiver after the expiry of that initial period.

11. I was further informed that under the terms of the agreement, the Appellant was required to submit all expenses, including wages, to the Receiver for payment (pursuant to Clause 14) and the Receiver was responsible for keeping the books and records of the businesses (pursuant to Clause 16).

12. Under the agreement, all income received by the pubs was paid into the Receiver's bank accounts. The Appellant was paid a weekly management fee of €1,500 per pub by the Receiver and invoiced the Receiver on a biweekly basis for that management fee, as well as for expenses it had incurred in operating the pubs, such as bar purchases, repairs and renewals, entertainment, waste disposal and stocktaking.

13. Each such invoice was supported by detailed weekly timelines prepared by the Appellant in respect of each pub, which recorded on a day-to-day basis the work done by the Appellant in operating and managing the pubs.

14. The staff working in the three pubs were retained following the appointment of the Receiver. They were paid weekly by the Appellant and the Appellant was then reimbursed for these payments by the Receiver.

15. **PUB C** was damaged by a fire in [redacted] 2012 and was sold by the Receiver later that year, following which the Appellant had no further role in its operation.

16. On 14 September 2012, the Receiver and the Appellant (and Mr [redacted], as Guarantor) entered into a new written agreement in relation to **PUB B**. Under this agreement, the Appellant would continue managing and operating the pub but it now took direct control of all outgoings, including payment of wages. The previous arrangement whereby the Appellant paid all takings into the Receiver's bank account and invoiced the Receiver biweekly for operating expenses and the management fee no longer pertained. Instead, the Appellant was allowed to keep any profits generated by the business as its management fee.

17. Clause 3.1 of the agreement provided that:-

> *"The Receiver appoints the Agent* [*i.e.*, the Appellant] *as its agent to run and manage the Business from the Premises and the Agent agrees to act in that capacity subject to the terms and conditions of this Agreement."*

18. Clause 3.3 of the agreement provided that:-

> *"Nothing in this Agreement shall grant or be taken to grant to the Agent exclusive possession of the Premises or any part thereof and nothing in this Agreement shall create the relationship of landlord and tenant between the Receiver and the Agent."*

19. The agreement recorded that it would continue in force until 1 January 2014. However, it was informally extended by mutual agreement of the Receiver and the Appellant and the Appellant was still operating the pub as of the date of the hearing of this appeal.

20. The Appellant and the Receiver entered into an equivalent agreement in relation to **PUB B** on 11 January 2013. The terms of this agreement were identical to those contained in the **PUB B** agreement, save that the term of the agreement was to expire on 20 June 2014.

21. The Appellant continued to manage **PUB A** pursuant to this agreement until the pub was sold by the Receiver in [redacted] 2015.

22. Both prior and subsequent to the aforesaid agreements, the publican's licences for the three pubs remained in the name of the three companies.

*C. **Grounds of Appeal***

23. The Grounds of Appeal advanced by the Appellant were stated to be as follows:-

> *"*[The Appellant] *neither owned the premises nor had a lease on the licensed premises in question.* [The Appellant] *were not trading the premises for their own profit. Furthermore they were appointed by the financial institution which had, as a result of legal proceedings, taken over the establishment. The purpose of* [the Appellant] *was to manage the commercial operations of the premises on behalf of the financial institution. In effect it was providing a management service, this was a new trade for* [the Appellant] *and under the rules of S486C TCA 1997 and I believe the company was entitled to receive relief under this provision."*

*D. **Relevant Legislation***

24. The relevant provisions of section 441(1) of TCA 1997 provide as follows:-

> *In this section, "service company" means, subject to subsection (2) –*
>
> *(a) a close company whose business consists of or includes the carrying on of a profession or the provision of professional services,*
>
> *(b) a close company having or exercising an office or employment,*
>
> *(c) a close company whose business consists of or includes the provision of services or facilities of whatever nature to or for –*
>
> *(i) a company within either of the categories referred to in paragraphs (a) and (b),*
>
> *(ii) an individual who carries on a profession,*
>
> *(iii) a partnership which carries on a profession,*
>
> *(iv) a person who has or exercises an office or employment, or*
>
> *(v) a person or partnership connected with any person or partnership referred to in subparagraphs (i) to (iv);*
>
> *but the provision by a close company of services or facilities to or for a person or partnership not connected with the company shall be disregarded for the purposes of this paragraph.*

25. Section 486C of TCA 1997 provides for relief from tax for certain start-up companies. Relief under the section is confined to companies carrying on a "*qualifying trade*" and section 486C(2)(a) provided at the relevant time that:-

> *In this section, "qualifying trade" means a trade which is set up and commenced by a new company in 2009, 2010 or 2011 other than a trade –*
>
> *(i) which was previously carried on by another person and to which the company has succeeded,*

(ii) the activities of which were previously carried on as part of another person's trade or profession,

(iii) which is an excepted trade,

(iv) the activities of which if carried on by a close company with no other source of income would result in that company being a service company for the purposes of section 441,

(v) the activities of which form part of undertaking to which subparagraphs (a) to (h) of Article 1 of Commission Regulation (EC) No. 1998/2006 apply, or

(vi) the activities of which, if carried on by an associated company of the new company, would form part of trade carried on by that associated company.

E. Evidence given on behalf of the Appellant

26. At the hearing of the appeal, I heard evidence from Mr [redacted], who was working as the Financial Comptroller of the three pubs when the Receiver was appointed in [redacted] 2011. He testified that he was immediately informed by the Receiver's staff that he and the other employees still had a job in the pubs; he understood that AIB had told the Receiver that the pubs were to continue in operation to prevent them deteriorating as assets. The witness's recollection was that the Appellant had been appointed as the Receiver's agent [redacted] after the Receiver's appointment and he said that he had been brought to the Appellant's offices where his duties and responsibilities were explained. He had been an employee of the Appellant until the week before the hearing of the appeal.

27. The witness testified that initially all income received by the pubs was paid into the Receiver's bank accounts. The Appellant sent regular invoices to the Receiver. The Appellant paid suppliers for goods and services used in the running of the pubs and were then reimbursed for this by the Receiver, who also paid the Appellant a weekly management fee.

28. The witness confirmed that pub staff were paid weekly by the Appellant, and the Receiver reimbursed the Appellant on a weekly basis for the wages paid.

29. The witness stated that **PUB C** suffered extensive damage from a fire in [redacted] 2012 and was sold by the Receiver shortly afterwards.

30. The witness gave evidence that it was cumbersome and inconvenient for the Appellant to get monies from the Receiver to pay suppliers and wages. Accordingly, in September of 2012 the Appellant entered into the management agreement with the Receiver in respect of **PUB B** which is detailed above. He said that under the agreement, the Appellant took over the turnover of the pub. It kept all of the income generated by the pub and was responsible for all expenditure and outgoings. The witness confirmed that the Appellant kept any profit generated by the pub as its management fee.

31. The witness further referred me to Clauses 3.3, 5.2 and 6.2 of the agreement and stated that he believed that these confirmed that the Appellant had no proprietary rights over the pub premises and property; it was simply providing a management service and was not operating the pub in its own right.

32. The witness confirmed that an identical arrangement was entered into between the Appellant and the Receiver in respect of **PUB A** in January of 2013. The

Appellant had managed that pub for the Receiver until its sale in June of 2015, and the Appellant was still managing **PUB B** as of the date of the hearing.

33. The witness stated that the Appellant provided the Receiver with details of the turnover generated by each of the two pubs every 3 to 6 months.

34. He further testified that the Appellant had no say whatsoever in relation to whether or when the pubs were sold by the Receiver.

35. In cross-examination, the witness accepted that the Appellant's abridged accounts accompanying its CT1 Return for 2012 did not record as a separate item the weekly management fees paid by the Receiver to the Appellant. He said he believed that the weekly management fees in respect of all three premises were instead included in the sum recorded as "*Sales & Turnover*". His evidence was that the takings of the three pubs were not included in the Sales & Turnover figure in the 2012 accounts but were included in subsequent years.

36. I further heard evidence from [redacted], who was the Financial Comptroller of the [redacted] Group. She gave evidence in relation to the agreements entered into in September 2012 and January 2013, and said that they were necessary because it was "*untenable*" to continue operating the pubs on the basis that the Receiver received all takings and then reimbursed the Appellant for expenses and purchases.

*F. **Submissions of the Appellant***

37. The Appellant submitted that, at least until the execution of the management agreements entered into with the Receiver in September 2012 and January 2013, it

did not benefit from any profit or suffer from any losses that the pubs had in their trades as public houses. It was providing management and operational services to the Receiver and was paid management fees in respect of the services it provided. Neither the Appellant nor any other company in the [redacted] Group had previously provided management services, and so the Appellant had commenced a new trade which qualified for relief under section 486C.

38. The Appellant submitted that it was not carrying on the same trade or the same activities as those previously carried on by the three companies to which the Receiver had been appointed. It was instead providing the Receiver with management and operational services, and it submitted that the fact that it did not own the pub premises and was not trading as a publican in its own right were key distinctions in this regard.

39. The Appellant further submitted that while the activities carried on by the Appellant might be similar to those formerly carried on by the three companies to which the Receiver had been appointed, the activities were nonetheless distinguishable.

40. The Appellant submitted that the distinction arose from the fact that the Appellant, as agent, was required to submit all expenses including wages to the Receiver for payment. The books of the business were the responsibility of the Receiver. In particular, the Appellant did not have control of the operations. It was required to report in considerable detail to the Receiver on its day-to-day management of the pubs. This was not the normal activity of an owner or manager of a pub trading for profit in his own right.

41. The Appellant conceded subsequent to the hearing that in light of the fact that it had taken direct control of all outgoings including payment of wages under the January 2013 agreement, it was prepared to accept that for the 2014 year of assessment there

was sufficient similarity between the activities of the company and the previous activities carried on by the owners to bring the Appellant within the exclusion in section 486C(2)(a)(ii). It was, however, adamant that the activities of the Appellant before 13 January 2013 were significantly different from the previous activities, and were therefore not subject to the exclusion.

42. In relation to the Respondent's argument that the Appellant was additionally disqualified from relief because it was a professional service company under section 441, the Appellant accepted that management consultancy was a profession and would normally involve the provision of advice on the running or management of a business to a client that was still in operational control of that business. The Appellant submitted that in the instant appeal, however, the services it provided did not constitute consultancy services but were instead more operational in nature; it argued that the running of a public house is a management service and could not properly be viewed as consultancy.

43. The Appellant further submitted that the services it provided could not be viewed in any respect as being the carrying out of a profession. The Appellant and its employees had experience in the licensed trade gained through life experience accrued over many years of owning and running public houses. However, there were no educational qualifications required, nor was there a professional standards body to which a pub operator could belong.

44. The Appellant referred me on this point to the decision in ***Commissioners of Inland Revenue –v- Maxse*** **12 TC 41**, where the Court of Appeal had held that carrying on a profession involved the idea of an occupation requiring either purely intellectual skill, or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator.

45. The Appellant submitted that the ability to run a public house can be acquired through experience gained while working in and running a pub business. The Receiver did not have that experience and was always going to have to seek a third party operator. The Appellant provided those operational abilities, but it had never before offered them as a service prior to its engagement by the Receiver.

*G. **Submissions of the Respondent***

46. Having made reference to the relevant legislation referred to above, the Respondent accepted that the Appellant was a "*new company*" within the meaning of section 486C. However, it submitted that the Appellant had not been carrying on a "*qualifying trade*" within the meaning of section 486C(2) because:-

(i) the Appellant's trade was one which was previously carried on by another person and to which the appellant had succeeded; and/or,

(ii) the activities of the Appellant's trade were previously carried on as part of another person's trade.

47. The Respondent emphasised in this regard that:-

(i) the Appellant was carrying on the same day to day activities of operating a public house;

(ii) the Appellant was operating from the same premises in which the three companies in receivership had traded;

(iii) the Appellant was selling the same goods as those companies;

(iv) the Appellant's customer base and catchment areas were essentially the same as those of the three companies; and,

(v) employees of the former owners had been employed by the Appellant to operate the premises.

48. The Respondent submitted that the only difference between 2012 and the subsequent periods was that there were changes in the administration and accounting procedures that existed as between the Appellant and the Receiver. This, it submitted, did not alter the day-to-day activities entailed in running a public house.

49. It was further submitted by the Respondent in its Outline of Arguments that the Appellant had leases from receivers on some, if not all, of the public houses that it operated on behalf of receivers. However, there was no evidence of such leases in relation to the three pubs to which this appeal relates, and the existence of such leases is expressly contradicted by the provisions of the September 2012 and January 2013 agreements. I therefore believe that the Respondent was factually incorrect in seeking to advance this particular argument in the instant appeal.

50. The Respondent further submitted that the Appellant's accounts and financial statements for the relevant periods, on which the Appellant's corporation tax returns were based, reflected the sales, purchases and expenses of running a public house trade.

51. In relation to section 441, the Respondent accepted the Appellant's submission that the services provided by the Appellant to the Receiver were more 'hands on' than a merely advisory role would normally encompass. However, the Respondent submitted that the role of a management consultant often extends beyond the simple provision of professional advice.

52. The Respondent further submitted that even if the Appellant was not carrying on a profession or providing professional services within the meaning of section

441(1)(a), it was a company whose business consisted of or included the provision of services or facilities of whatever nature to or for an individual or a partnership that carried on a profession, and was therefore a service company by virtue of section 441(1)((c)(ii) and (iii).

H. Analysis and Findings

53. It was common case between the parties that the Appellant was a "*new company*" within the meaning of section 486C and I am satisfied and find as a material fact that its trade was set up and commenced in October 2011, which was within the time frame permitted by section 486C(2)(a) during the relevant accounting period.

54. Accordingly, the first issue which requires to be decided is whether the Appellant was carrying on a trade which was previously carried on by the three companies to which the Receiver was appointed, in which case it would be ineligible for start-up relief by virtue of section 486C(2)(a)(i).

55. Having carefully considered the evidence given and the submissions made by the parties, I find as a material fact that the Appellant was not carrying on the same trade as that formerly carried on by the three companies in receivership. Those companies were carrying on the trade of operating public houses. The Appellant, in contrast, was carrying on the trade of providing management and operational services to the Receiver pursuant to the agreement made with the Receiver on 21 October 2011.

56. In reaching this finding, I believe that the relevant aspects of the evidence were that:-

(a) the Appellant was expressly engaged by the Receiver to act as his agent in the operation of the three pubs;

(b) the Appellant was subject to the control and direction of the Receiver in relation to the manner in which the three pubs were run;

(c) the Appellant was subject to detailed reporting requirements to the Receiver;

(d) the Appellant had no proprietary interest in any of the premises in which the three pubs operated;

(e) all takings from the three pubs were lodged to the Receiver's bank accounts by the Appellant;

(f) the Receiver reimbursed the Appellant for the expenses and outgoings it incurred in the running of the three pubs; and,

(g) the Appellant received a fixed weekly management fee from the Receiver in respect of each pub it managed and operated on his behalf.

57. The last of the above is perhaps the most significant. It was clear from the evidence that the Appellant could not increase the income it was receiving from its trade irrespective of how well it managed and operated the three pubs. It could not benefit from any increase in profits generated by the three pubs, nor would its earnings be reduced by any losses incurred by the pubs. This is, in my view, irreconcilable with the Respondent's submission that the Appellant was carrying on the same trade as that formerly carried on by the three companies in receivership.

58. The second issue which requires determination is whether the activities of the Appellant's trade were previously carried on as part of the trade or profession of the three companies in receivership. If they were, the Appellant would be ineligible for start-up relief by virtue of the provisions of section 486C(2)(a)(ii).

59. It is clear, in my view, from the inclusion of subparagraph 486C(2)(a)(ii) in the legislation that the legislature intended to draw a distinction between a trade on the one hand, and the activities of a trade on the other.

60. Clear contemporaneous evidence of the nature and extent of the activities of the Appellant's trade was contained in the weekly timelines which the Appellant prepared and submitted to the Receiver, examples of which were appended to its Outline of Arguments. These activities were to all intents and purposes identical to those which any entity carrying on the trade of running a public house would have to carry out.

61. The Appellant submits, however, that it was also required, as the Receiver's agent, to report to the Receiver and to submit all expenses including wages to the Receiver for payment. These were not activities of the trade which were previously carried on by the three companies in receivership. In addition, the Appellant did not exercise control of the business operations and it did not maintain books and records for the businesses. These were activities which the three companies in receivership had formerly carried on. The Appellant submitted that these differences meant that it could not be said to be carrying on the same activities of the trade.

62. Implicit in the Appellant's submission in this respect is the assertion or suggestion that in order for a company to be ineligible for start-up relief by virtue of section 486C(2)(a)(ii), the trade activities of the company seeking the relief must be identical in all respects to the trade activities carried on by its predecessor. Any additional trade activities, or any reduction in the number of trade activities, would take a new company outside of the restriction on eligibility contained in that subparagraph.

63. This is, in my view, an incorrect and illogical interpretation of the subparagraph. The purpose of section 486C(2)(a) is to limit start-up relief to companies commencing a new trade. Its purpose would be defeated if a new company taking over an existing trade could maintain eligibility for relief by ceasing to carry on one trade activity

formerly carried on by its predecessor, or by carrying on an additional trade activity not formerly carried on.

64. An illustration of this might be a hypothetical new company taking over the business of an existing manufacturer of socks, hats, scarves and gloves; the logical consequence of the Appellant's argument would be that the new company would not be carrying on the same trade activities as its predecessor if it ceased to manufacture gloves. Equally, it would follow from the Appellant's interpretation that the new company would not be carrying on the same trade activities if it was, unlike its predecessor, required to furnish monthly management accounts to its bank as a condition of availing of loan facilities. Such consequences cannot, in my view, have been what the legislature intended.

65. I believe the correct interpretation of section 486C(2)(a)(ii) is instead that a new company will not be eligible for start-up relief if its trade activities are in essence the same as the trade activities of its predecessor, even if there is some addition to or some reduction of the number of trade activities formerly carried on.

66. I am satisfied on the evidence before me that almost all of the activities carried on by the Appellant in managing and operating the three pubs as agent of the Receiver were the same in all material respects as those formerly carried on by the three companies to which the Receiver was appointed.

67. In consequence, while I have found that the Appellant was not carrying on the same trade as was carried on by the three companies in receivership, I am satisfied and find as a material fact that the activities of the trade carried on by the Appellant were previously carried by those three companies.

68. It follows therefrom that the Appellant was not carrying on a "*qualifying trade*" as defined by section 486C(2)(a), and that it was not eligible for start-up relief under section 486C.

69. For the sake of completeness, I should also consider the third issue argued before me, which was whether the Appellant was ineligible for the relief claimed by reason of its activities being those of a "*service company*" within the meaning of section 441.

70. I accept as correct the Respondent's submission that management consultancy services can be considered professional services for the purposes of section 441, and that the provision of management consultancy services can include a 'hands on' element over and above the provision of advice and guidance.

71. However, I believe that the Appellant is correct in its submission that the services it provided to the Receiver were management and operational services, and primarily operational. I am satisfied on the evidence before me and I find as a material fact that the services rendered to the Receiver were not management consultancy services, and were not otherwise professional in nature.

72. The Respondent also advanced an additional argument that, even if the Appellant was not providing professional services, it was nonetheless providing services or facilities to an individual or a partnership who carried on a profession, and therefore came within section 441(1)(c)(ii) or (iii).

73. While I accept that the Receiver was an individual carrying on a profession, and that he received services from the Appellant, the Respondent's submission appears to overlook the concluding words of section 441(1)(c), which state:-

"... but the provision by a close company of services or facilities to or for a person or partnership not connected with the company shall be disregarded for the purposes of this paragraph."

74. There was no evidence or even suggestion that the Receiver was an individual connected with the Appellant, and so I believe that the provisions of section 441(1)(c) do not apply to the Appellant.

75. Accordingly, I find that the activities of the Appellant were not those of a "*service company*" within the meaning of section 441, and it follows that the Appellant's activities do not come within the ambit of section 486C(2)(a)(iv).

*I. **Conclusion***

76. My findings above can be summarised as follows:-

(a) The Appellant did not carry on a trade which was previously carried on by another person and to which the Appellant succeeded;

(b) The Appellant did not carry on a trade the activities of which if carried on by a close company with no other source of income, would result in that company being a service company for the purposes of section 441;

(c) The Appellant did carry on a trade the activities of which were previously carried on as part of another person's trade or profession;

(d) The Appellant therefore did not carry on a qualifying trade within the meaning of section 446C(2)(a);

(e) The Appellant was therefore not entitled to start-up relief from corporation tax pursuant to section 486C for the accounting period from 21 October 2011 to 30 September 2012.

77. By reason of the foregoing findings and further by reason of the decision by the Appellant subsequent to the hearing not to pursue its appeal in relation to the accounting period from 1 October 2013 30 September 2014, I find that the Appellant has been neither overcharged nor undercharged to corporation tax by reason of the Amended Assessments issued by the Respondent on 25 January 2016 and determine pursuant to section 949AK(1)(c) that the said Amended Assessments stand.

Dated the 6th of May 2022

MARK O'MAHONY
APPEAL COMMISSIONER