AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

07TACD2025

Between:-

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This Determination concerns the appeals of income tax assessments made by the Revenue Commissioners ("the Respondent") for the years 2014 and 2015, whereby it assessed [redacted] ("the Appellant") as having charges to income tax of €10,968 and €11,724 respectively. The Respondent made these assessments on foot of the Appellant's prompted voluntary disclosure of 24 June 2019 that, in filing Form 11 self-assessment returns for the years 2014 and 2015, he had under-declared his income in the amounts of €29,718 and €42,861.

2. This Determination also concerns the appeal of a VAT assessment made by the Respondent, whereby it assessed the Appellant as having an outstanding VAT liability for the period 2015 – 2017 ("the relevant period") in the amount of €35,354 (comprising €12,756 for 2015, €17,505 for 2016 and €5,093 for 2017). This VAT assessment was based on information contained in returns received by the Respondent from five [redacted] companies ("the [redacted] companies" when referred to collectively) as a consequence of the exercise of its power under section 889 of the Taxes Consolidation Act 1997 ("the TCA 1997") to require those companies to disclose payments made to the Appellant for services rendered.

3. At the outset of the appeal hearing, the agent for the Appellant stated that, in relation to the 2014 and 2015 income tax assessments, the sole ground of appeal was that the Respondent had incorrectly assessed the Appellant's previously undeclared income as being derived from self-employed activity, chargeable to tax under Schedule D of the TCA 1997. It was, he suggested, instead income derived from emoluments received while employed [redacted] as a "[redacted]", which was chargeable to tax under Schedule E of the TCA 1997.

4. As regards the VAT assessment arising from the Appellant's income from the [redacted] companies received over the relevant period, the agent for the Appellant suggested that, as an employee who entered into contracts of service with those companies, the Appellant was not a taxable person engaged in the supply of taxable services. He was therefore not required to account for or pay VAT to the Respondent.

5. Thus, at the heart of both the appeals of the income tax assessments and of the VAT assessment lies the question of the nature of the relationship between the Appellant and those for whom or which he did the work that gave rise to the income underpinning the appealed assessments.

Background

6. The Appellant is a person who has performed the role of "[redacted]" on the [redacted] of numerous different [redacted] since the year 2003.

7. The Appellant gave evidence that for the last [redacted] years he has, between jobs on [redacted], worked as a self-employed [redacted]. The Appellant has been registered for income tax since 2002.

8. For the year 2014, the Appellant, through his accountant, filed a Form 11 income tax return in which he stated his trade to be [redacted], his gross income therefrom to be €33,220 and his assessable profit to be €22,683.

9. For the year 2015, the Appellant, through the same accountant, filed a Form 11 income tax return in which he stated his trade to be [redacted] his gross income therefrom to be €41,221 and his assessable profit to be €26,445. In calculating this profit, the Appellant claimed as deductions "consultancy, professional fees" (€400), "motor, travel and subsistence" (€14,543), "depreciation, goodwill/capital write-off" (€1,792) and "other expenses (€1,651).

10. The contents of these returns reflected the information that the Appellant provided to his accountant.

11. On 21 July 2016, the Appellant was informed by [redacted] ("the officer of the Respondent") that the Respondent was commencing an audit of his affairs relating to all taxes and duties for the year 2013.

12. On 14 March 2019, the officer of the Respondent informed the Appellant that the scope of its audit was being expanded to cover the years 2014, 2015, 2016 and 2017. In this correspondence she asked that:-

> "[…] *records be made available to me covering the period 01/01/2014 to 31/12/2017. These are outlined below:*
>
> - *Bank Statements/Mortgage Statements/Credit Union/Building Society Statements (For both yourself and your spouse);*
> - *Any other relevant Financial statements (For both yourself and your spouse);*
> - *Copy of contracts with*
>
> [redacted]

- *All invoices relating to the services you carried out for these companies.*
- *All expense receipts and Invoices claimed on your Income Tax Return divided up into relevant periods.*
- *Tax – I require:*
  - *a breakdown year on year on the activity/use of* [redacted] *and detailed earnings derived from* [redacted]*.*
  - *Detailed list of any expenses for the* [redacted] *that you claimed in your Income Tax Return for each period outlined above and actual Invoices and receipts to support this.*
- *All Income Tax Workings for your Income Tax return for the years 2014, 2015, 2016 and 2017.*

I also still require records that I requested for the audit period 2013. These requests were outlined in numerous letters, the most recent ones dated 2 October 2018 and 14 November 2018.

As and from the date of this Notification of Audit letter, the opportunity to make an 'unprompted disclosure' is no longer available. However, a 'prompted qualifying disclosure' can be made before the examination of books and records begins."

13. On 24 June 2019, the Appellant made a prompted qualifying disclosure in which he revealed that he had under-declared his income for 2014 by €29,718 and 2015 by €42,861. The income tax due, excluding interest, was calculated by the Appellant's accountant to be €13,578 for 2014 and €19,037 for 2015. The Appellant did not indicate as part of this disclosure the source of the previously undeclared income.

14. On 26 June 2019, the officer of the Respondent emailed the Appellant's accountant in relation to the prompted voluntary disclosure. In the second line of this correspondence she asked that the Appellant "[…] *please confirm what business activity* […] *this income* [is] *derived from."*

15. On the same day, the officer of the Respondent emailed the Appellant's accountant in order to acknowledge the receipt of folders containing information relating to the Appellant (comprising sales invoices and bank statements) and his spouse.

16. On 4 November 2019, the officer of the Respondent sent email correspondence to the Appellant's accountant. The first line therein stated:-

> "*With regard to* [the Appellant's] *ongoing audit, could you please arrange to have Bank Statements of* [the Appellant's] *account for the years 2014, 2015 and 2017. For* [the Appellant's] *account, only 2016 was provided in the blue folder*."

17. In the same correspondence, the officer of the Respondent asked for clarification by 30 November 2019 why the Appellant was not VAT registered, despite being a self-employed taxpayer who filed Form 11 returns and whose income for 2014 and 2015 was in excess of €37,500. The officer of the Respondent then stated:-

> *"If you do not contact me by this time, I will raise an assessment for 2014 and 2015 based on your client's voluntary disclosure and will raise an assessment for VAT for all the years of audit in which I deem there was a Vatable activity."*

18. No clarification of the kind sought by the officer of the Respondent was forthcoming by 30 November 2019.

19. At some point (it was not clear whether before or after the expansion of the scope of the audit) the Respondent, having exercised its powers under section 889 of the TCA 1997, received "Form 46G" returns from the [redacted] companies indicating that they had made payments in the following amounts to the Appellant in one or more of the years 2014, 2015, 2016 and 2017:-

Period	Company	Amount
03/06/2014 – 02/06/2015	[redacted]	€33,965
29/01/2014 – 28/01/2015	[redacted]	€47,524
09/04/2014 – 08/4/2015	[redacted]	€57,092
01/01/2016 – 31/12/2016	[redacted]	€18,398

01/05/2016 – 30/04/2017	[redacted]	€79,059

20. It is clear from publicly available information on the Company Search facility on the website of the Companies Registration Office ("the CRO") that [redacted] Limited, [redacted] and [redacted] all have the same registered address, namely [redacted]. In the appeal hearing, the Commissioner heard evidence, unchallenged in cross-examination, that all of these companies were controlled by the same [redacted] and were connected to "[redacted]".[1]

21. On 11 December 2020, the Respondent raised amended assessments to income tax in respect of the Appellant for the years 2014 and 2015, which took into account the income disclosed by the Appellant in his prompted voluntary disclosure of 24 June 2019. The tax assessed as due was €10,968.32 for 2014 and €11,724 for 2015. It is not clear whether income tax assessments were made in respect of the years 2016 and 2017. None in any event formed part of the appeal hearing.[2]

22. On 16 December 2020, the Appellant raised a VAT assessment in respect of the Appellant for the years 2015, 2016 and 2017 based on the information that was obtained from the [redacted] companies in their Form 46G returns. The overall amount of VAT assessed as payable for this period was in the amount of €35,354. This was based on the Appellant having received taxable payments from the [redacted] companies of €60,931.42 in 2015, €85,377 in 2016 and €26,353 in 2017, leading to VAT payable in respect of each year of €12,756, €17,505 and €5,093.

23. The Appellant appealed the assessments to income tax by way of two Notices of Appeal dated 8 January 2021. The grounds stated in the Notices of Appeal were that the amounts assessed were "*estimated and excessive"* and that the Appellant was *"not an assessable person for Schedule D Case II income"*.

24. The Appellant also appealed the VAT assessment by way of Notice of Appeal dated 8 January 2021. The ground of appeal stated in the relevant Notice of Appeal was, aside

[1] Evidence of [redacted], transcript of hearing, page 40;
[2] It should be noted that in calculating the Appellant's taxable income for the purposes of its income tax assessment for 2015, the Respondent deducted from the gross income the VAT calculated as being chargeable for that year, namely €12,756, pursuant to the VAT assessment.

from the assertion that the amount assessed was estimated and excessive, that the Appellant was "*not a vatable person*".

25. As part of the papers submitted for the hearing of the appeal, the Appellant included a decision of a Deciding Officer in the Department of Social Protection, wherein he considered whether the Appellant was, over the period [redacted], an employee of [redacted] company "[redacted]" or, alternatively, was an independent contractor.

26. In answering this, the Deciding Officer applied a five-part test to determine the nature of the Appellant's working relationship with that entity, over that time. The five parts in question were: the existence of mutuality of obligation between the parties; the level of employer's control; the extent of the employee's integration into the employer's business; which party shouldered economic risk and the economic reality of the parties' working relationship.

27. Having applied the test to the facts before him, the Deciding Officer determined that the Appellant's relationship with that employer, over that time, was that of employee engaged to work under a contract of service. The facts that the Deciding Officer found to be of particular relevance were that the Appellant was paid a "fixed weekly amount" based on hours worked by [redacted] DAC; that he was obliged to carry out the work [redacted] himself and could not send a "substitute" to carry out work in his stead; that he could not gain or lose financially from the work performed beyond the receipt of his wage; that he was not required to have his own public liability insurance; that the evidence suggested that [redacted] DAC controlled, through a chain of command, what work was done, when it was done and how it was done; and that in providing his own vehicle for the carrying out of his duties he received compensation of €300 per week.

28. This Deciding Officer's decision was appealed to the Social Welfare Appeals Office by the employer. On [redacted], after the hearing of the within appeal, Appeals Officer [redacted] ("the Appeals Officer") issued his decision in respect of the appeal.[3] This decision was duly furnished to the Commissioner by the Appellant.

[3] [redacted]

29. On this occasion, the Appeals Officer expressly applied the five-stage test prescribed by the Supreme Court in its judgment of 20 October 2023 in *Revenue Commissioners v Karshan (Midlands Ltd) T/A Domino's Pizza* [2023] IESC 24 *("Karshan"),* which is set out hereunder in this Determination at paragraph 86. However, it is worth observing at this point that the test enumerated in *Karshan* does not in the Commissioner's view depart in any significant sense from that employed by the Deciding Officer in his decision at first instance, which pre-dated the Supreme Court's judgment.

30. On much the same grounds as identified by the Deciding Officer, the Appeals Officer, found the Appellant to have been engaged by [redacted] DAC over the period [redacted] 2017 to [redacted] 2018 under a contract of service.

Legislation

31. Pursuant to section 18 of the TCA 1997, any profits or gains accruing to a self-employed person involved in any trade and engaged in a contract for services are chargeable to tax under Schedule D, Case I.

32. Income in the form of "emoluments" arising from any position of employment, on the other hand, fall pursuant to section 19 of the TCA 1997 to be charged under Schedule E. Such income is collected, pursuant to Chapter 4 of Part 42 of the TCA 1997, under the PAYE system whereby employers deduct tax due at source from their employees and remit it to the Respondent.

33. Under section 959A of the TCA 1997, a chargeable person for income tax self-assessment purposes is a person who is chargeable to tax on that person's own account or on another person's account in respect of a chargeable period.

34. Section 959B of the TCA 1997, which contains a number of exceptions to the general rule in section 959A, provides that an individual is not a chargeable person for a tax year where, for that year, they are in receipt of:-

    (a) PAYE income only; or

    (b) PAYE income and income from non PAYE sources (e.g. trading income) where the total non PAYE income assessable to tax –

        (i) does not exceed €5,000 (€3,174 for 2015 and prior years); and

        (ii) is taken into account in determining the individual's tax credits and standard rate cut-off point, or

        (iii) is taxed at source.

35. Section 959I of the TCA 1997 is entitled "*Obligation to make a return"* and subsection (1) therein provides:-

> "*Every chargeable person shall as respects a chargeable period prepare and deliver to the Collector-General on or before the specified return date for the chargeable period a return in the prescribed form*."

36. The prescribed form for chargeable persons is a Form 11 self-assessment return.

37. Section 986 of the TCA 1997 empowers the Respondent to make regulations in respect of the assessment, charge, collection and recovery of income tax under the PAYE system. In the exercise of this power, the Respondent has made SI 559/2001 – Income Tax (Employments) (Consolidated) Regulations 2001. Regulation 35 therein provides:-

> *"Nothing in these Regulations shall prevent an assessment under Schedule E being made on a person in respect of his or her emoluments (income assessed to tax) for any year."*

38. Under section 2 of the Value-Added Tax Consolidation Act 2010 ("the VATCA 2010"), a "taxable person" means "[…] *a person who independently carries on a business in the Community or elsewhere".*

39. Also under section 2 of the VATCA 2010, "taxable services" means "[…] *services the supply of which is not an exempted activity."*

40. Also under section 2 of the VATCA 2010, "services threshold" meant, at the times material to this appeal, the amount of "*€37,500".*

41. Section 5(1)(a) of the VATCA 2010 provides:-

> "*Subject to paragraph (c), a taxable person who engages in the supply, within the State, of taxable goods or services shall be—*
>
> *(i) an accountable person, and*
>
> *(ii) accountable for and liable to pay the tax charged in respect of such supply*."

42. Section 6 of the VATCA 2010 provides, *inter alia*, that persons supplying goods or services below the registration thresholds set out therein are not "accountable persons" unless they elect to be so.

Evidence

43. The first witness called by the Appellant at the hearing of the appeal was [redacted] ("Witness 1"), a supervising [redacted] and [redacted]

[redacted]. He gave evidence regarding his experience of the working environment on the [redacted] in Ireland and his understanding of the nature of the relationship between [redacted] companies operating in Ireland and [redacted] workers, in particular [redacted].

44. Witness 1 described [redacted] as being the people [redacted] who undertake the manual tasks. As he put it in his direct evidence, they are those who "[…] *do the pushing, shoving, lifting, carrying and cleaning.*" [redacted] are "general operatives" working under the [redacted]. [redacted]

45. Witness 1 said in evidence that his function as a supervisor was to give direction to regular [redacted] as to what needed to be done [redacted] each day. He said that he, in turn, took instruction from [redacted] mentioned in the preceding paragraph of this Determination. There was, he said, a clear "chain of command" [redacted].

46. Witness 1 said that [redacted] workers [redacted], are paid at hourly rates [redacted]. Witness 1 said that on account of his supervisory function, his hourly rate of pay was 25% over that due to [redacted].

47. Witness 1 said that a typical working day [redacted] would begin at 8 o'clock in the morning and, with two tea breaks and a lunch break in between, finish at half past six or so. He said that for the duration of a [redacted] the guaranteed number of working hours for a [redacted] worker per week was 48, with 9 of those paid at an overtime rate. In his experience, the only way that a [redacted] could increase the income derived from their role beyond the pay received at the hourly rate was by the use their own vehicle in the performance of their duties. This was a common occurrence and any [redacted] who did so was paid the additional sum of € [redacted] per day.

48. Witness 1 stated in evidence that where a [redacted] fell ill during [redacted] such that they could not attend [redacted], they would be required in respect of any absence lasting over three days to produce a doctor's certificate. This, he said, was a term of the [redacted] agreement.

49. Furthermore, Witness 1 said that there was no scope for a [redacted] worker, [redacted], to arrange for someone to perform their role in their stead should they be absent from [redacted] on account of illness or for some other reason. Security protocols and the demands of insurers alone precluded any such conduct. He said that if, acting in his

capacity as supervisor, he received a call from another [redacted] indicating that they were unable to attend on a workday, he would allocate the job they would have been doing to somebody else already present [redacted]. The prevailing attitude of [redacted] workers was, he said, simply to get on with the job.

50. Witness 1 stated in direct evidence that [redacted] and other [redacted] workers did not have their own workplace insurance. He said that if there was an accident [redacted] resulting in injury, which he said he had encountered on many occasions, a [redacted] worker would make a claim to the relevant [redacted] company for the payment of their medical expenses arising therefrom.

51. Witness 1 gave evidence that, in his experience, [redacted] workers required to work outside of a 45km radius "from base" would be paid a *per diem* amount for so doing.

52. Witness 1 gave evidence that, in his experience on [redacted] on which he had worked, some [redacted] were treated by [redacted] companies as employees paid under the PAYE system with tax deducted, whereas others, such as the Appellant, were treated as being self-employed independent contractors. Witness 1 said that whatever the ostensible status of a [redacted] worker according to the [redacted] company, be it employee or independent contractor, the working conditions outlined above in this Determination did not in his experience vary from one [redacted] worker to the next.

53. What Witness 1 said did distinguish the persons treated by the [redacted] companies as independent contractors from those treated as employees was the manner of their payment. In this respect, he gave evidence regarding what he said was the practice carried out by the [redacted] companies specified in paragraph 19 of this Determination of the "cutting" of invoices. Witness 1 said that, at the end of the week, the [redacted] workers, rather than providing their own invoices for services rendered, would hand in time-sheets to the relevant [redacted] company. These would then be the basis for invoices created by that company. This practice was, he said, indicative of the fact that the treatment of some [redacted] workers as independent contractors, rather than employees, was a mere façade.

54. In cross-examination, Witness 1 was asked about [redacted]

[redacted]

55. Witness 1 also gave evidence that [redacted], the Appellant and around [redacted] other persons who had worked as [redacted] had claims before the Workplace Relations Commission ("the WRC") and/or the Labour Court in which the respondent was [redacted], a [redacted] company with the same registered address of [redacted], as [redacted], [redacted] DAC and [redacted] DAC. Witness 1 said that claims made against [redacted] Limited included those of unfair dismissal and penalisation.

56. The Appellant also gave evidence in the appeal hearing. He was first asked by his representative about his making of the prompted voluntary disclosure on 24 June 2019 and whether it was his intention, in so doing, to disclose additional Schedule D, as opposed to Schedule E, income. In answer to this, the Appellant said that he had no recollection of making the prompted disclosure whatever.[4] When cross-examined on this, the Appellant stated that the prompted disclosure would have been handled by his accountant, who did not give evidence at the hearing. He accepted, however, that the additional income disclosed on 24 June 2019, specifically €29,718 for 2014 and €42,861 for 2015 would have reflected the content of documentary information that he provided to his accountant.

57. It was put to the Appellant in cross-examination that it was implicit that the income set out in his prompted disclosure relating to the years 2014 and 2015 was, in accordance with the income originally disclosed for these years in his Form 11 returns, taxable under Schedule D of the TCA 1997. In answer to this the Appellant did not disagree that such an implication flowed from the disclosure, but said that he did not know why his accountant would have acted in the manner that he did.

58. The Appellant was also cross-examined as to why, having made the prompted voluntary disclosure of additional income, he did not inform the Respondent, despite requests that he do so, as to whether it was derived from his [redacted], acting as a [redacted], or some other source. Again, the Appellant attributed this failure to his accountant. He did, however, at last provide an answer at hearing to the substantive question when, under cross-examination, he informed counsel for the Respondent that all of the additional income disclosed on 24 June 2019 came from work as a [redacted]

[4] Transcript of hearing, page 47;

59. The Appellant was cross-examined as to why, in the course of the Respondent's audit of his affairs, he provided only bank statements for the year 2016 and not for 2014, 2015 and 2017.[5] The Appellant said that this was a matter that would have to be taken up with his accountant.

60. At the end of the Appellant's examination-in-chief, his representative asked his client whether the "*overview of the working environment*" given by Witness 1 was one that he "*would add or subtract from* […] *do you think it was a broadly fair description?"* The Appellant's reply was "*Yeah* [Witness 1] *was my supervisor, so…"*[6]

Submissions

Appellant's submissions

61. The Appellant's agent submitted that the evidence given at hearing pointed to the income received over the years 2014 – 2017 relating to [redacted] work being emoluments arising from the Appellant's employment by [redacted] companies.

62. In relation to the income tax assessments made by the Respondent for the years 2014 and 2015, the Appellant's agent accepted that the income set out therein attributable to [redacted] work was chargeable to income tax, but submitted that it fell under Schedule E, not Schedule D. He submitted that this income should therefore have had income tax deducted at source under the PAYE system by the relevant [redacted] companies acting as employer. He accepted, however, that this tax was also legally due from the Appellant by virtue of section 986 of the TCA 1997 and Regulation 35 of the Income Tax (Employments) (Consolidated) Regulations 2001.

63. In relation to the VAT assessment for relevant period, the agent for the Appellant submitted that as the income on which it was grounded was not income derived from his provision as an independent contractor of a taxable service, he did not fall within the definition of a "taxable person" required to charge and account for VAT. Accordingly, the VAT assessed under the assessment of 16 December 2020 was not due and the Appellant's liability should be reduced to nil.

Respondent's submissions

64. Counsel for the Respondent began by adopting the content of her client's written legal arguments delivered to the Commission in advance of the appeal hearing. Therein it was

[5] Indeed, as of the hearing of the appeal the Appellant had not provided bank statements for the years 2014, 2015 and 2017 to the Respondent;
[6] Transcript of hearing, page 48;

submitted that the Appellant was both a chargeable person for the purposes of income tax and an accountable person for the purposes of VAT for the periods in question. These written legal arguments further stated, in the alternative to the Appellant being an accountable person for VAT, that he should be held liable for income tax which he had not paid on the sums received from the companies.

65. Counsel for the Respondent submitted that the burden of proof in this tax appeal on the Appellant. In this regard, she relied on the following words of Charleton J at paragraph 22 of his judgment in *Menolly Homes v Appeal Commissioners & Anor* [2010] IEHC 49:-

> *"The burden of proof in this appeal 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."*

66. Counsel for the Respondent made the point that the Appellant had not provided any evidence, written or oral, in relation to his day-to-day engagement with the companies for which he had worked over the periods in question.

67. Witness 1 had given evidence regarding the general working environment . This could not be taken as a substitute for direct evidence on the Appellant's part regarding the nature of his own particular work for the companies over the relevant periods. Counsel for the Respondent pointed to the personal history of Witness 1 and submitted that his evidence was "equal part opinion and fact". Moreover, she submitted that:-

> "[…] *it isn't derived from the working day of* [the Appellant]. *He may have been familiar with* [the Appellant's] *work on one or another, but you've absolutely no idea from one to another to what extent they were working together or what their familiarity was with the working arrangements of each other – you don't have a single document from any of* [the Appellant's] *engagements on* ."[7]

68. Counsel for the Respondent then submitted:-

> *"The more concerning point perhaps is this.* […] *it's clear from* [the Appellant's] *evidence that he had two streams of income. He had his self-employed* [income] *and he had his income, but nothing has been given* to [the Respondent] *to tell us how much is how much is and whether there are other amounts due and owing from the . In order to achieve a discharge of a*

[7] Transcript of hearing, page 72 – 73;

burden of proof what you must have is direct evidence either viva voce or documentary, but you also have to have clarity, you also have to be forthcoming. You also have to be in my respectful submission an open book […]"[8]

69. Counsel for the Respondent submitted that the evidence of the Appellant did not have the foregoing quality.

70. Counsel for the Respondent submitted that no satisfactory explanation had been provided by the Appellant as to why he had made only partial disclosure in June 2019 of undeclared income. Counsel further submitted that, in making this disclosure, it was implicit that the Appellant accepted that the income declared fell to be taxed under Schedule D of the TCA 1997, in other words that it was derived from self-employed activity.

71. Counsel for the Respondent also highlighted the fact that while the Appellant had sought to rely in the appeal on the Determination of the Scope Section of the Department of Social Welfare that the Appellant was an employee of [redacted] DAC, the findings therein were limited to that company alone, for the period [redacted] 2017 – [redacted] 2018 alone, and did not concern [redacted] other [redacted] companies for which he had worked over the relevant period and received income.

Material Facts

72. The facts material to this appeal that were not in dispute were as follows:-

- for the year 2014, the Appellant filed a Form 11 income tax return in which he listed his self-employed trade as [redacted] his gross income therefrom to be €33,220 and his assessable profit to be €22,683;
- for the year 2015, the Appellant filed a Form 11 income tax return in which his listed his self-employed trade as "[redacted]" his gross income therefrom to be €41,221 and his assessable profit to be €26,445;
- in calculating this profit for 2015, the Appellant claimed as deductions "*consultancy, professional fees*" (€400), "*motor, travel and subsistence*" (€14,543), "*depreciation, goodwill/capital write-off*" (€1,792) and "*other expenses* (€1,651);
- the Appellant received payments from the [redacted] companies [redacted] Limited, [redacted] Limited, [redacted] Limited, [redacted] DAC and [redacted]

[8] Transcript of hearing, pages 73-74.

[redacted] DAC over the periods and in the amounts specified in paragraph 19 of this Determination;

- in particular, in 2015 the Appellant received payments from the [redacted] companies [redacted] Limited, [redacted] Limited and [redacted] Limited in the amount of €60,931.42;
- in 2016, the Appellant received payments from the [redacted] DAC, [redacted] Limited and [redacted] DAC in the amount of €85,377;
- in 2017, the Appellant received payments from [redacted] DAC in the amount of €26,353;
- these sums received by the Appellant did not include VAT and were not taxed at source under the PAYE system by the [redacted] companies;
- on 21 July 2016, the Respondent informed the Appellant that it was commencing an audit into his tax affairs for the year 2013;
- on 14 March 2019, the Respondent informed the Appellant that it was extending the scope of its audit to cover the years 2014, 2015, 2016 and 2017;
- on 24 June 2019, the Appellant made a prompted voluntary disclosure that he had received income that was not declared in his Form 11 returns for 2014 and 2015 in the amounts of €29,718 and €42,861 respectively;
- on 29 June 2019, the Respondent requested that the Appellant:
    - clarify what activity this undeclared income was derived from; and
    - provide bank statements for these years and the other years under audit;
- this request was repeated by the Respondent, on 4 November 2019;
- the Appellant failed to furnish the aforementioned information sought;
- on 11 December 2020, the Respondent made income tax assessments for the years 2014 and 2015, in which it assessed the Appellant as having income tax due in the amounts of €10,968 and €11,724;

- on 16 December 2020, the Respondent made a VAT assessment for the period 2015-2017, in which it assessed the Appellant as having a liability in the amount of €35,354;
- the Appellant appealed these assessments by way of the delivery to the Commission of Notices of Appeal dated 8 January 2021.

73. The submissions made on behalf of the Appellant were premised on it being found as a fact that the income disclosed by him on 24 June 2019 as part of the prompted voluntary disclosure for the years 2014 and 2015 was income attributable to payments from the [redacted] companies. The Commissioner is, with considerable hesitation, prepared to accept this as a fact on the grounds of the oral evidence, elicited in cross-examination, of the Appellant at the appeal hearing. It is so found as a fact.

Analysis

74. The key question to determine in this appeal is whether income of the Appellant for the years 2014-2017, revealed to the Respondent as part of his prompted voluntary disclosure and in Form 46G returns made by third parties, was income derived from self-employed activity or employment.

75. In the Appellant's written submissions, it was contended that, were the undisclosed income received from the [redacted] companies to be income from employment then (a) the income tax assessed by the Respondent as owing for the years 2014 and 2015 would be due from the employers that had failed to deduct it under the PAYE system, rather than from him; and (b) the VAT assessed for the period 2015-2017 would not be due as the Appellant would therefore not be a "taxable person" engaged in the supply of "taxable services".

76. However, as was observed in the part of this Determination summarising the legal submissions made in this appeal, the Appellant's agent accepted at hearing that income tax was due from his client on the amounts of income disclosed on 24 June 2019, whether that be under the self-assessed or PAYE systems. This was so on account of Regulation 35 of the Income Tax (Employments) (Consolidated) Regulations 2001. It is unclear to the Commissioner whether this submission was intended by the Appellant's agent to constitute the concession of the income tax appeals. If it did not, the Commissioner finds that, in any event, its effect is that the Appellant cannot succeed in his argument expressed in his Notice of Appeal and written legal argument that the income tax assessments should be reduced to nil. Nonetheless, the Commissioner proceeds hereunder to consider and make findings on the question of whether the Appellant's

income from the [redacted] companies was derived for the years at issue in this appeal, including 2014 and 2015, from self-employment or employment.

77. Before doing so, however, it is necessary to address one matter arising from legal submissions made by the Respondent. It submitted in closing that, were the Commissioner to find that the Appellant was an employee [redacted] over the years 2015-2017, and thus be held not to have supplied services chargeable to VAT, the Commissioner should instead hold the Appellant liable for income tax on the payments then received that he accepted he had never paid.

78. In so far as this submission concerned income from the years 2016 and 2017, this submission of the Respondent was misconceived. This was so because there were no appealed income tax assessments for those years before the Commissioner to consider. It is not within the Commissioner's jurisdiction to, in effect, raise an alternative assessment for the Respondent under one tax head, where an appeal relating to another has resulted in the sum assessed being reduced entirely or in part. As was held in *Lee v Revenue Commissioners* [2021] IECA 18*,* the powers of an Appeal Commissioner are prescribed by legislation and nowhere in the TCA 1997 does there appear to be a provision conferring any power of the kind suggested by the Respondent. None, in any event, was identified at the appeal hearing.

79. The Commissioner thus turns to the question of the relationship between the Appellant and the [redacted] companies in the years when he received payments. As noted already, counsel for the Respondent relied on the frequently quoted passage in *Menolly Homes v Appeal Commissioners & Anor,* set out in full in paragraph 65 of this Determination, as authority that it is the Appellant who bears the burden of proving factual matters at issue in the appeal. This is an uncontroversial legal proposition and has been stated on many occasions in the Determinations of the Commission. It applies in this instance.

80. The Appellant comes to this appeal in circumstances where he has made a voluntary disclosure for the years 2014 and 2015, having been prompted to do so after being notified of the commencement and then expansion of an audit covering those years and the years 2013, 2016 and 2017. The Appellant does not now dispute that this voluntary disclosure constituted a significant understatement of the true extent of his undeclared income in 2014 and 2015 and no declaration at all was made in respect of his income earned in the years 2016 and 2017. No explanation was given as to how the Appellant came to under-declare his income, other than to lay responsibility at the feet of his accountant. Moreover, the full extent of the Appellant's income, whether from [redacted]

companies or any other source, for the years under appeal other than 2016 must remain in doubt given his unexplained failure to provide bank statements for those years.

81. Given all of this, the Commissioner considers that it was incumbent on the Appellant to come forth in his appeal with cogent evidence in contradiction of the view of the Respondent, reflected in its income tax and VAT assessments, that his income received from the [redacted] companies for the years at issue constituted employment emoluments and not the proceeds of self-employment. The need for such evidence was only enhanced by the Appellant's own designation in his Form 11 return for the year 2015 of his "[redacted]" income as then being taxable under Schedule D, and thus at that time at least being the proceeds of a self-employed trade. Moreover, it was notable that in so treating himself, the Appellant claimed, in his 2015 Form 11 return, deductions that it is hard to envisage could have been available to an employed person, including, most notably, motor, travel and subsistence in the substantial amount of €14,543.

82. In the event, the Appellant gave only the briefest and most vague indication of the nature of his work with the [redacted] companies from whom he received payments in the relevant years. Indeed, the sum total of that oral evidence of the Appellant is set out at paragraph 60 of this Determination. What the Appellant in effect sought to do, rather than to give evidence himself, was to adopt wholesale the account given by Witness 1, which the Appellant's own representative described as being an "*overview of the working environment*" on [redacted] in Ireland, and from this ask the Commissioner to find that it was reflective of his own relationship with the various [redacted] companies over the relevant periods.

83. The Commissioner has given careful consideration to the evidence of Witness 1. It is first necessary to observe that the Commissioner found him to be an honest witness who gave credible evidence about matters of which he had direct knowledge. He did not, however, purport to give evidence about the core issue in this case, namely the specific relationship between the Appellant and the [redacted] companies from whom he received payment, namely [redacted] Limited, [redacted] Limited, [redacted] Limited, [redacted] DAC, and [redacted] DAC, over the periods 03/06/2014 – 02/06/2015, 29/01/2014 – 28/01/2015, 09/04/2014 – 08/4/2015, 01/01/2016 – 31/12/2016 and 01/05/2016 – 30/04/2017 respectively. This is not surprising, as it is something of which one would have thought only the Appellant and the [redacted] companies would have had a proper understanding.

84. In any appeal hearing it is the responsibility of a witness to give their own account, in their own words, of matters within their own knowledge. This information is to be adduced in direct evidence without the witness being 'led' into giving a particular account. Avoiding the prompting of witnesses is crucial to permitting any decision maker to form a considered view of the credibility of what is being said to them.

85. Most commonly, dispute at hearing involving the leading of evidence centres on the use of questions in examination-in-chief suggestive of a particular answer. Such dispute in fact arose in this appeal in the context of the examination-in-chief of Witness 1, though the Commissioner was prepared in spite of the Respondent's objection to permit the agent of the Appellant latitude in the conduct of the examination of his own witness. However, in seeking to transpose what was said by Witness 1 to his own circumstances, rather than give an account of his own, the Appellant in effect deprived the Commissioner of the opportunity not only to hear of and make findings on the nature of his relationship with the particular [redacted] companies at the relevant times, but also to form a view of his credibility and honesty.

86. This, in the view of the Commissioner, is fatal to the Appellant's appeals for the following reason. At paragraph 253 of *Karshan,* the Supreme Court set out the following test to establish whether a worker was an employee:-

> "[…] *the question of whether in any given case a worker is an employee should be resolved by reference to the following five questions:*
>
> > *(i) Does the contract involve the exchange of wage or other remuneration for work?*
> >
> > *(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?*
> >
> > *(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?*
> >
> > *(iv) If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having*

regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing."

87. It is these facts that the Appellant bore the burden of proving in order to be successful in his appeals. However, the dearth of evidence, documentary and oral, coupled with uncontested extrinsic facts, such as the Appellant's own categorisation of his earnings in 2014 and 2015 as being taxable under Schedule D and his claiming of deductions that could hardly have been available to those in employment, makes it impossible for the Commissioner to form a view as to the "*working arrangements of the parties*" as is required by the test in *Karshan*. Consequently, it is not possible to conclude that the Respondent's view of the nature of the Appellant's work, which underpins its income tax and VAT assessments, was in error. The Appellant has, in short, failed to meet the burden of proving the facts necessary to support his own case.

88. As already noted, included in the appeal papers were decisions of a Deciding Officer of the Department of Social Welfare and of an Appeals Officer of the Social Welfare Appeals Office. These decisions concerned the Appellant's employment by the [redacted] company [redacted] DAC, which was not one of the [redacted] companies at issue in the within proceedings, over the period [redacted] 2017 to [redacted] 2018. It is true that, having heard from both the Appellant and the employer in that case, as well as having as a starting point the Appellant's written contract of employment, it was held at first instance and on appeal that the Appellant was an employee in that context. The Commissioner in this appeal has had the benefit of no such evidence and is not prepared to make the presumption that the working arrangements of the Appellant in respect of one job [redacted] were the same as those in respect of another.

89. In fact, what the social welfare decisions suggest to the Commissioner is that it is probable the Appellant had the capacity to provide a far greater level of information in this tax appeal than he did but, for whatever reason, decided that he did not wish to do so. That is a decision of which the Appellant must bear the consequences in this instance. In legal submission counsel for the Respondent submitted that, in order to succeed in this appeal, the Appellant must be an "open book" in relation to his tax affairs. The Commissioner does not in fact agree with this submission in so far as it might be taken to mean that questions relating to other tax matters might disentitle the Appellant to succeed in this

appeal of a VAT assessment. As was noted by Charleton J in *Menolly Homes v Appeal Commissioners & Anor,* tax law has no equity.

90. However, the height of what the Appellant had to do in this appeal in respect of the VAT assessment, was persuade the Commissioner by way of the proffering of evidence that, on the balance of probabilities, he was an employee of the five different [redacted] companies from whom he received payment over the relevant years. Were he to have done this it would have followed as a matter of law that he was not at the relevant times a taxable person engaged in the making of taxable supplies, who was accountable for VAT. This is what he has failed to do and, as such, the VAT assessment appealed stands affirmed.

91. It was also something that, on the Appellant's own submission, he had to prove in order to succeed in his appeal of the income tax assessments for 2014 and 2015. As noted already at paragraph 76 of this Determination, this is not a submission with which the Commissioner agrees. However, even were that otherwise, the Appellant would still fail in his appeal of the income tax assessments for the years 2014 and 2015 on the grounds that the income in question was correctly treated by the Respondent as being derived from self-employed activity. Accordingly, those income tax assessments too are correct and stand affirmed.

Determination

92. For the reasons set out in the preceding part of this Determination the income tax assessments of the Respondent for the years 2014 and 2015, made on 11 December 2020 and the VAT assessment of the Respondent for the period 2015 – 2017, made on 16 December 2020, are held to be correct and stand affirmed.

93. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

94. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication

and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

95. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
21 October 2024